

17 January, 2010

MEMORANDUM

TO: Property 1

RE: The Exam

The essay question was harder than I thought it was going to be. I thought that the problem of the title to the property was going to be relatively straightforward and that the things that would separate people would be the constitutionality of the land-court statute and the covenant of Agamemnon that appears on the plaque in the market square. What I didn't count on was that many people would go looking for issues that might appear in the title problem if we add facts that were not there, but that were not expressly precluded by the problem. What this meant was that many people did not spend anything like as much time as they should have on either the statute or the covenant.

A lot of this came at the beginning, and was probably the result of the fact that you didn't have much experience with law school exams. If the problem says that it is reasonably clear that in 1955 the house belonged to a man named Eurystheus, you don't have to ask the question where is the root of the title. And if the deed by which he took title is quoted, you don't have to ask if the deed complied with the statute of frauds. Similarly, if the problem says that Eurystheus "lent" the house to Atreus and Thyestes, you don't have to ask what would happen if he had conveyed his fee simple to them, because he didn't. Similarly, when it says that E. went off to war and did not come back, you don't have to ask if he may still be alive, because the next sentence says that all of his sons were *also* killed in the war. Those who went down these rabbit holes did not lose points by doing so, but they had a tendency to miss, or not spend enough time on, the key issues with regard to the title: (a) whether there's any possibility that the possibility of reverter is still in existence (I don't think that there is because it would merge with the fee in Admete, if not earlier), and (b) who was the first person to maintain the requisite continuity under the statute of limitations (my answer is Agamemnon in 2005, but you can make an argument for Agamemnon some time in the late 1980's, and it's also possible to argue for Aga and Cly together).

The end results were, however, for the most part and considering the difficulty of the question, quite good. Most of the exams that were full of irrelevancies or with things that were only marginally relevant also managed to say things that were right on point. In the real world, it would be a rare situation in which you had only seven hours to come up with an answer to a question as complicated as this one, and we all have different styles of working. Some people prefer to write only when they are pretty sure that they've found the core; some people like to put everything down in a kind of stream of consciousness and then edit to find the core. It was just that many of those who took the second approach ended up by not having enough time to edit.

Having said that I thought that the answers were quite good, let me mention a couple of things that disappointed me. I knew that you had taken courses in contracts, civil procedure, and legislation and regulation in addition to property. I was hoping that more people would ask whether the marble plaque was enforceable as a matter of contract before they got to the question of whether the obligations of that contract might run with the land. I was particularly disappointed that many people did not see that what was on the marble plaque is clearly a contractual promise, not a conveyance, so the provision of the statute

of frauds that is at stake is the one that concerns contracts about land not conveyances. I was also hoping that more of you would see that the real problem with the land-court statute was whether it met the minimum standard of procedural due process. All that the statute says is that someone can file a claim to the land on the basis of 7 years possession and paying taxes. If no one complains, this claim is "unassailable" after a year. How is someone who has an adverse claim supposed to find out? This provision seems to be quite deficient in the due process basics of notice and opportunity to be heard.

There was another thing that I found a bit disappointing that many of you missed, which is pure property: Someone who is in possession has a right to possession good as against the whole world except the true owner. That right can be conveyed. Atreus did it by will in 1974. Agamemnon make a contract about it in 1999. The fact that neither had (arguably in Aga's case) not run out the statute of limitations does not mean that the instrument was not effective to convey (or promise to convey) the interest that he had. In the case of Aga, it also means that when it comes to enforcing the contract it will apply to what is now, at least in my view, his fee ownership interest. Hence, the issue is whether that promise also runs to his successors in title or to those who are not his successors in title (Cly and Aeg) who have notice of the promise. (There are problems with this argument that have to do with the Rule Against Perpetuities and options, but we didn't get into this in class, and I didn't expect anyone to see them.)

The "model answer" that I offer below contains in square brackets arguments that you came up with and I did not think of when I wrote my answer and a few arguments (also in square brackets) that some people thought of when they probably should not have. The "model answer" is on the long side even without the insertions in square brackets, but that is because I wanted to exclude arguments that I thought that some of you might make, even if I regarded them as quite implausible.

Our new grading system puts even more pressure than did the old one the distinction between Honors and Pass (formerly A-/B+), and it's no more easy to draw it than it was previously. When the grades are out, I'm perfectly willing to talk to you about how you did, but I'm unlikely to satisfy you about why you fell on one side of that line or the other, particularly if you were close to the line.

When the grades are released, I'll send out a memo as to what the best way might be to do this.

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"Model Answer" for Property Section 1, 2009

Time line:

before 1955 - Sthenolos conveys to Eurystheus a fee simple determinable on the property being used for residence purposes followed by an x.i. in Admete, which is void under the RAP. This leaves Sth with a p/rvtr.

1955 - Eurystheus leaves for the war, and "lends" the house to Atreus and Thyestes. This is permissive.

c.1955 - Eurystheus is killed in the war, as are all his sons. One can argue that A and T went into ap at this point. The house belongs to Admete (assuming, as I think we must, that E. died intestate and that he had no living spouse).

Under S's conveyance, Admete also has a possibility of reverter. It probably merges with her fee.

1956 - Atreus expels T, and so is in possession adverse to him so far as half the property is concerned. [Many of you struggled with this, perhaps more than was necessary. If E's "lending" of the property to Atr and Thy created any interest at all, it was a tenancy at will. That would expire when E died. That Atr was claiming the property as his own can be seen not only by the fact that expelled Thy but also by the fact that the property was, and is, called "the house of Atreus." We don't know quite when this happened, but it was common enough that by the time that Atr died he could use it as a description of the property in his will.]

1974 - Aegisthus kills Atreus, and he and T expel Atreus's sons. Question: Can this possession be used to establish continuity with the brief possession that T had in 1955? Probably not, though the statute has not quite run on it. To say, however, that a suit by T against Atr would not be barred is not to say that reestablishing possession after 18 years puts T in continuous possession against Adm. Hellas does not seem to have a statute, like that which exists in a number of states, which requires that right of entry be exercised within a year, but one could certainly look to such statutes to get a sense of what the "reasonable time" is for the dispossessed adverse possessor to act in order to maintain continuity.

1974 - Atreus's will is certainly sufficient to pass his possessory claim to the house on to Agamemnon and Menelaus. The problem is what do the words mean, and what happens to the inheritance? We'll deal with this later if it turns out to be relevant.

c.1975 - The 20 yrs under the ap statute is up for Admete if anyone can establish continuity against her, but it doesn't look as if anyone can. Admete is still TO.

[A few of you thought that perhaps Aeg might have established sufficient continuity, but I think this is highly unlikely. Aeg was a foundling (a word that you could have looked up on a open-book exam). Babies are not normally adverse possessors, nor are teenagers who are living with their guardians. As a number of you pointed out, there can be no tacking between Atr and Aeg and Thy in 1974.]

1985 - Agamemnon and Menelaus expel Aegisthus and Thyestes. Menelaus returns to Sparta, leaving Agamemnon to fulfill the condition under the will of Atreus. Once more the question is whether this possession can be tied into the 1956-1974 possession of Atreus and used to bar Admete. In the absence of statute, it seems like a fairly close question, certainly a closer question

than that raised in 1974. Nonetheless, ten years is a long time, even if one can hear an argument that what is "reasonable" must take into account the fact that those who were in possession of the house would certainly have resisted any attempt any sooner by force.

1999 - Agamemnon goes off to war, leaving Clytemnestra behind. The arrival of Aegisthus almost certainly does not revive his possession and break Agamemnon's. Cly will be deemed as possessing on behalf of Aga.

2005 - the statute runs out against Admete. This argument is dependent on the argument made above that her possibility of reverter merged with her fee, but this seems most likely. Alternatively, we can point to the fact that possibilities of reverter are not favored. Adm has sat on her duff for 50 years and has not showed the slightest interest in exercising her present possessory interest. It would be bizarre to hold that she could claim an interest in the land if it ceased to be used for residential purposes.

2009 - Agamemnon returns. He is at common law the sole owner of the house, except for the problem of the land-court statute. If the statute is valid and if it applies to this situation, then Cly and Aeg are owners of the house and land.

2009 - Agamemnon is killed by Clytemnestra and Aegisthus. Under the intestacy statute Clytemnestra owns half the house; Orestes, Electra, and Chrysothemis own the other half. Even if C and A aren't prosecuted for the murder, the fact is that C and A killed Agamemnon. One can certainly imagine a court saying that you can't inherit from someone whom you have murdered.

If, on the other hand, Cly and Aeg, are owners of the house under the land-court statute, the death of Aga is irrelevant. They were, and still are, the owners of the house.

2017 - O and E kill C and A. Orestes, Electra, and Chrysothemis now own the whole house. Their exoneration by the court for the murder probably precludes the application of the judge-made doctrine that you can't inherit from someone whom you have killed, but if it does not Chrysothemis owns the whole thing.

If Cly and Aeg are the owners of the house under the land-court statute, then Ore, Ele, and Chr get her share (or just Chr, as above) and the heirs of Aeg get the other half. On the basis of what we are given, the heirs of Aeg are Men, Ana, and the representatives of Aga (Ore, Ele, and Chr). You can work out the fractions.

With this in mind, we can look at three things that might make us change our minds (or might make a court to change its mind).

1a. Atreus's will gave his possessory interest in the house, which has now become a fee title, to Aga and Men, excluding his only other child Anaxibia. She was given "a substantial pecuniary legacy" that was never paid. The fact that it was not paid is no reason to upset the gift to Aga and Men, but it may give Ana a claim against the estate, which could be satisfied out of the property that Aga and Men got. That, however, was more than 35 years ago. We are not told what provisions Hellas has for cutting off claims against estates, but it is hard to imagine that this one is still alive after 35 years.

1b. Atreus's will gave his possessory interest in the house to "Aga and Men, or whichever of them shall live in the house of Atreus." This is not a masterpiece of drafting. A grant to two people who are not husband and wife creates a tenancy in common in Hellas, and the fact that Aga lived on the

property and Men did not would not normally be enough to exclude Men's interest. One could interpret this language as imposing a continuous condition of personal residence on Aga and Men, but courts are reluctant to read conditions into grants where they are not expressed. One could imagine the will being drafted in such a way that Aga and Men's successors would also be bound by the condition of residence, but the courts would be extremely reluctant to impose such a condition in the absence of more explicit language. If, however, we look to what did happen as opposed to what might have happened, we can give effect to the language in a minimal sort of way and go some way toward clearing the title. Atr imagined that his sons were going to have to figure out whether either or both of them were going to live in the house after his death. What he was saying was that if only one of them did live in the house, the house would be his. (Presumably it would belong to both of them if both of them lived in the house or neither of them did.) It took them ten years before they were able to make the decision, but when they did Aga stayed in the house and Men went back to Sparta. We can thus interpret the language as if it said: "to Aga and Men, but if one of them lives in the house and the other does not, then all to the one who lives in the house." That's precisely what happened in 1985, and there's no reason not to implement the testator's intent by cutting off Men's interest. Penelope and her bank will probably want a court judgment to this effect, but we can be reasonably confident that that's what the judgment will be.

[Some of you who saw this issue thought that the preference for early vesting might lead to a court's holding that since Aga and Men were both living in the house in 1974, they both would have fulfilled the condition. That's certainly not impossible. But Men's departure in 1985 almost certainly means that he cannot be regarded as having completed the necessary year or two on the statute of limitations, even if the court holds that the break in continuity is excused. If the court holds that the break is not excused, the will is still important because it almost certainly shows us the terms under which Aga and Men entered in 1985. That cuts against any notion that Aga and Cly were adversely possessing as co-tenants. Cly would almost certainly be regarded as continuing Aga's possession while he was away at war, but as his agent, not as his co-tenant. There is no indication that she was holding adversely to him until 2006 and by that time the statute had run in Aga's favor even if we do not regard his possession as having begun until 1985.]

2. That brings us to the title-clearing statute of 2005. We need not consider the constitutionality of its provisions about escheat, because the triggering event did not happen here. Nor need we consider the provision dealing with property that has been sold within the seven year period because that also did not happen here. The question here is whether the legislature may constitutionally pass a statute that allows someone who is not the owner of real property to become the owner by presenting to a body that is called a court evidence that s/he has paid taxes on the property for seven years and has been in possession of it?

The answer to that question would pretty clearly be "no," if there were nothing that the true owner could do about it. It is, for example, fairly common for tenants in long-term leases to pay the taxes on the property, and such tenants are, of course, in possession of the property, but any tenant who met those conditions could exclude the fee owner under the statute if the fee owner had no opportunity to object. Such a fee owner would almost certainly have a claim that his/her property had been taken without due process.

But the owner here does have an opportunity to object. The owner may present to the court within a year of the filing of the possessory claim with payment of taxes or within two years of the date of the statute if no possessory claim is filed, "evidence of his claim." Agadid not do that in this case, so

the question is whether he has a constitutional claim that his property has been taken without due process.

The question is certainly not open and shut. There is a long tradition that no one has a constitutional right to a particular procedure, so long as the procedures that the legislature establishes meet the basic requirements of procedural due process. One-year statutes of limitation are not at all uncommon. (They are, for example, quite frequent in the area of torts.) So one cannot say that a one-year limitation period is automatically a denial of due process.

Also cutting in favor of the constitutionality of the statute is the fact that the legislature was faced with an emergency situation. The records of land transactions had been destroyed, and in their absence, commerce in land in Argos was likely to grind to a halt. Clearing titles has been used as a justification for changing procedures and establishing quite short statutes of limitations in other areas involving land, most notably the marketable title acts and statutes dealing with outstanding rights of entry and possibilities of reverter. (There is also, however, authority cutting the other way.)

Further, in many jurisdictions, possession of land and payment of taxes for periods as short as seven years is sufficient to bar outstanding claims to the land. The Attorney General of Hellas will almost certainly argue on the basis of the undoubted constitutionality of such statutes.

Despite these considerations, however, a court is likely to have considerable doubt about the constitutionality of this legislation. The analogy to the short statutes of limitations in the case of torts is not particularly apt. If I'm in an auto accident, I know that I was in an auto accident, and it does not seem unreasonable to say that I need to do something about it within a year. Similarly, the shortened statutes of limitation for those who are possessed and pay taxes are for the benefit of those who are in adverse possession. The owner of the land has had seven years to do something about the fact that someone is possessed of the land who ought not to be there. This is in marked contrast to the situation here where the owner of land subject to a long-term lease may have no idea that his/her lessee is not acknowledging his title until the lessee files the claim on the basis of his/her payment of taxes and possession. Similarly, Aga, in this case, had no way of knowing that Cly and Aeg were pulling a fast one on him until they filed their claim. Further, the statute has no provisions for notification of those who have potential outstanding claims. Land cannot be taken for unpaid taxes until efforts are made to notify those who may have a claim to the land. Actions to quiet title require notification of all known potential outstanding claimants (and attempts to notify the unknown ones).

The analogy to the marketable title acts is not particularly apt. Most of the cases involving those acts deal with claims that have not yet accrued and may never accrue: possibilities of reverter that have not fallen in, covenants that have not yet been breached. Here, many, though not all cases, hold that the legislature may provide that the holders of such claims file a notice of intention to maintain the claim within a short period or periodically rerecord such claims. Here we are dealing with someone who has, at least arguably, a present possessory interest in fee in the land.

Finally, the reason, at least arguably, why Aga did not file the claim was because he was off at war. There is a long tradition of tolling statutes of limitation for those who are in military service. We are not told that Hellas has such a statute [and I did not expect you to know about the Federal statute], but one can certainly imagine a court holding that the legislature

could not *change* a statute of limitations to the detriment of those who are already in active military service.

So far we have been considering the statute solely from the point of view of its limitations period. There is another feature of the statute that seems equally bizarre, if not more so: the requirement of an exact copy of any written evidence of a claim. It is possible that a court would not allow Aga to raise this issue because he did not attempt to file the digital record of the prior transactions with the land court, but it might accept an argument that there would have been no point in doing so granted the plain language of the statute. The effect, of course, of the provision is to bar any claims based on written evidence more than 30 years old. That seems quite arbitrary. A life tenant who had met the statutory requirements could bar the remainderman if the instrument evidencing the arrangement was a will written 31 years ago. That situation is not at all uncommon. Trusts could be broken if the trust instrument were more than 30 years old. That situation, also, is not at all uncommon.

Thinking about this provision might lead a court, particularly a court like the Supreme Court of Hellas which has a tendency to interpret its way around potentially unconstitutional statutes, to ask why the legislature put this odd provision in the statute. That, in turn, might lead it to ask whether the land court really was a court, in the sense that we normally mean it when we speak of a court. If we think of the land court as being a kind of administrative body, the function of which was to take a first pass on outstanding titles but not really to get into the hard questions, then the provision make some sense. We limit the evidence that the "court" will look at: tax records, affidavits of possession, documents that look like the type of document that registry clerks accept. The body goes into business and out of business in three years. At the end of the period the vast majority of titles have been established with little or no controversy. Claims established before this body were supposed to be "unassailable" after a year. But what does "unassailable" mean in this context? If all it means is that the administrative proceedings cannot continue on beyond a year, that seems unobjectionable so long as serious and more complicated claims can be brought before a regularly and permanently sitting court. Findings of the administrative body are, of course, entitled to some weight. Presumptively, the titles declared by the body are good. But if someone has a viable claim evidenced by the digital abstracts maintained by the title company, we (i.e., the regular courts of Hellas) will hear it. One is reminded of U.S. Supreme Court's holding in *United States v. Percheman*.

[Many of you took the statement in the problem about the tendency of the Hellas courts to interpret their way around possibly unconstitutional statutes as meaning that they would hold such statutes constitutional. But that's not what interpreting around the statute to avoid a constitutional issue means. In *State v. Shack*, for example, the New Jersey suggested that the application of the state's criminal trespass statute to the facts of the case might be unconstitutional, so it interpreted the statute not to apply to the case. Similarly here, a court might think that the application of the statute to these facts could raise due process problems, and so interpret that statute as not to apply. The following paragraph gives a couple ways in which they might do it. A number of you saw other ways: for example, holding that the filing of claim by Cly and Aeg was fraudulent, or holding that where the person who knew of an outstanding claim (as Cly and Aeg clearly did) they were obliged to notify the holder of the outstanding claim.]

As the previous discussion makes clear, the ultimate outcome of the challenge to the statute is by no means clear. As the timeline of the title shows, it makes a big difference. There is one more possibility if a court really wanted to avoid the constitutional issue: interpret the statute as not to

apply to this case. There are (at least) two possible ways of doing it: (a) hold that the limitations period in the statute simply does not apply to those who are out of the jurisdiction in military service. Hence, upon his return Aga (or after his death his heirs) could claim the land under the normal statute of limitations. (It would make no sense to apply the one-year statute upon the return, since the land court no longer exists.) (b) hold that the claim that Cly and Aeg filed under the statute does not qualify under the statute. The argument for doing this is that neither Aeg's nor Cly's possession was the type of possession contemplated by the statute. Cly's possession was permissive and hence not adverse to Aga; Aeg's possession was doubly permissive, dependent on Cly's which was dependent on Aga's. One could even imagine a court getting really fancy and saying that Cly's payment of the taxes qualified but Aeg's did not. This, of course, means that the statute would be interpreted as meaning that "possession" means possession as fee owner.

From Penelope's point of view, however, none of this is good news. The statute raises obvious issues as to who owns the property, and I can't imagine that any bank would be willing to lend on her title unless Aeg, Cly, and Aga (or his children after his death) all signed off on the transaction, or unless it had the judgment of a regularly constituted court as to who in this cast of characters had the title.

3. When he was running for mayor of Argos Aga promised the citizens of Argos that he would convey a portion of his property to them to be used as a subway station if such a subway was put in. The promise was evidenced by a marble plaque that he had erected in the town square. The plaque also says: "If I'm not around, my successors will do the same." The question is whether this promise is enforceable, because if it is, it's going to affect Penelope's plans considerably.

We can start off by saying that the city's current plans to build a subway seem to be quite unobjectionable. The fact that a private company is going to build the line does not come even close the issue presented in *Kelo* (whether condemnation for private development was constitutional), and the court in *Kelo* (not without controversy) said that even that was ok.

The issue that the plaque raises is whether the promise is enforceable: (a) against Agamemnon and (b) if against Agamemnon, also against his successors.

Whether the promise is enforceable against Agamemnon is basically a question of contract. Despite its somewhat unusual method of communication (from a modern point of view), it would seem to fit the classic form of offer and acceptance: "if you do X, I will do Y." The offer was accepted by performance. Rather than saying, "we've got a deal," the citizens of Argos accepted by electing Aga mayor. Aga is now obliged to perform his side of the bargain. [This may not be as open-and-shut as this paragraph makes it out to be, but I'm pretty sure that it's right in this context.]

This particular promise, however, raises two issues: one of which seems to be fairly straightforward, the other of which much less so. The straightforward issue is that the citizen-electors of Argos are not a legal person. They are a collection of legal persons, not all of whom voted for Aga (unless the election was unanimous and 100% of eligible voters showed up). On a straight contract basis, therefore, Aga is bound to those citizens of who voted for him and not to those who did not. I'm inclined to think that this issue is more academic than real. A court, without thinking much about it, is likely to say either that the city of Argos, a legal person, is the third-party beneficiary of the bargain between the citizens and Aga, or, perhaps more likely, that the majority of the citizen-electors of Argos is represented by

the city. The city has the capacity to enforce promises made to the citizen-electors in their capacity as citizen-electors.

The less straightforward issue has to do with the nature of the consideration. Bribery in elections is illegal. A contract to purchase a vote is not enforceable, even if the voter performs as requested. Is this any different? Well, yes. Aga promised a collective benefit to the city, not an individual benefit to those who voted for him. One can still, however, imagine a court being quite uncomfortable with enforcing this promise.

There's a third issue about the enforceability of this promise that gets closer to the property aspect of the problem. Contracts concerning land are subject to the statute of Frauds. This is a contract about land not a deed; hence, what is required is a "sufficient memorandum" of the contract signed by the party being charged. That there is a writing is clear enough. We know what property we're talking about ("the house of Atreus"). That the description of the portion of the property is not precise would probably preclude this from qualifying as a conveyance of that portion of the property (what portion?), but this is not a conveyance it's a contract: "a portion ... to be used as a subway station" is probably precise enough. The only remaining issue is whether a signature carved in stone (particularly when Aga almost certainly did not do the carving) qualifies as a signature for purposes of the statute. It may not, particularly if there is no signed original. One can certainly imagine a court that was uncomfortable with the whole deal denying its enforceability on statute of Frauds grounds. It is true that the modern tendency is to be relatively loose about formal requirements, and much has been done, and continues to be done, to expand the notion of "signature" to accommodate the digital age, but marble plaques, like printed signatures, have been around for a long time, and the latter normally do not qualify under the statute. [A number of people went on to ask whether we might get past the statute on the ground of reliance. This is certainly not open and shut either. There has been reliance, but no real change of position. This has to be balanced against the fact that from a functional point of view, the plaque comes very close to fulfilling the requirements of the statute, and there doesn't seem to be much doubt that Aga authorized it.]

If we can get past the statute of Frauds, the remaining issue is whether the promise binds Aga's successors. The instrument clearly suggests that he intended that it should. A promise to convey a portion of the land touches and concerns the land as much as anything can. Horizontal privity is lacking but that would only be an issue in enforcement at law. Vertical privity is present if enforcement is sought against Aga's heirs. It may not be present if it turns out, though we thought this unlikely, that Cly and Aeg own the property under the land-court statute. It is hard to imagine that a court would hold that an instrument contained on a marble plaque in the town square did not give notice to anyone in the town. This would apply to Cly and Aeg, as well as to Aga's heirs, and would make the covenant enforceable in equity even if it were not enforceable at law for lack of privity. The only thing that would likely bar the running of this covenant assuming that it is enforceable against Aga would be if a court took a strict view of affirmative covenants or if it decided as a matter of policy that it would not allow a covenant to run when there was no benefited land. Both doctrines has been held in the past, but there is decided trend against them. One can also imagine a court holding that it would not allow this covenant to run as a matter of public policy because to the dubious legality of the consideration for it.

Again, this is not good news for Penelope. She is almost certainly going to need a court judgment to make sure that she will not be bound to make the conveyance to the city if she buys the land and the subway goes through.