PROPERTY SECTION 6

Professor Donahue

May 11, 2011

Available for download: May 11, 10:00 a.m.
Due: By 5:00 p.m., May 11

EXAM, PART II

The exam mode for this exam is TAKEHOME.

This exam is 6 pages long. Please check to see that you have all 6 pages. (If you don't, try downloading it again; if that doesn't work, get in touch with UserSupport@extegrity.com.)

There is one essay question.

This is an open-book exam. You may use your casebook, your notes, and any other material that you wish (including material that is "online"). Collaboration is not permitted. Your answer must be entirely your own work. Please do not discuss this question with anyone until 5:00 p.m. today.

There is no page or word limit, but conciseness will be rewarded and verbosity penalized. I won't tell you how to allocate your time, but I would strongly encourage you to spend at least an hour reading through the exam and making notes of issues that you see. I would also urge you to spend at least an hour at the end editing and proofreading your answers. Seven hours of non-stop writing can produce an impressive amount of paper, but the thought reflected is likely to be incoherent. Think before you write and edit what you write.

Once you have entered your exam in Exam4, copy what you wrote and paste it into a document using your word-processing program. This is the only way that you can save it, because once you send in the exam, it is available on your computer only in encrypted form.

There is nothing of relevance to this case in the parties' names, other than the fact that they lead to initials (A., B., C., etc.). If you know something about these people historically, you may see a strained joke or two, but that's something to play with after the exam.

Anglo-Saxon Acres, in the township of Piddle, in the state of Confusion, U.S.A., is a mess. That proposition is fundamental (something like the death of Marley in *A Christmas Carol*); if you don't understand that, none of the rest of the story makes sense. Now when I say it is a mess, I mean it is really a mess. The plumbing doesn't work; there are mice in the larder, roaches everywhere. The outhouse hasn't been cleaned out in years; the chickens can't fly the coop, because there is no coop (but there still are a few chickens). At one time it was an adequate family farm of forty acres – certainly nothing to write home about, but adequate. How it came to be what it is today is part, though only part, of our story.

To begin at the beginning (the only place where an historian knows how to begin), Athelstane homesteaded on the farm on in the late 1890's. He and his wife Bertha may or may not have obtained a government patent for the land. No one seems to remember, and the records of government patents for that part of the state of Confusion were destroyed in a fire at the state capital in 1920.

Athelstane and Bertha worked hard, and they were passionately devoted to the farm. They wanted to have it maintained as a farm forever. They consulted a local lawyer who told them they couldn't do that because of something called the Rule Against Perpetuities. He suggested, however, that they could go a long way in the direction of what they wanted to do if they established their estate plan with a series of long-term leases. [The advice was sound as a matter of common law; whether a modern court would rule in the same way is an open question.] After some discussion, they executed the following plan: In 1935, Athelstane and Bertha executed a lease for a term of 500 years to their daughter Etheldreda. The lease contained a clause that said that the term was for "500 years so long as the land remains a farm, but if it ceases to be a farm it shall automatically revert to the lessors." Etheldreda then subleased the farm to her younger brother, Drogheda, subject to the condition "but if the subtenant ceases to farm the land, the landlord shall have a right to re-enter and terminate the sublease." The sublease was for the entire remaining period on the head lease. The head lease reserved a rent of $1.00 a year; the sublease reserved a rent of "one-third of the value of any produce sold from the land." [This fact, coupled with the reservation of the right of entry ensures that the sublease will be regarded as a sublease and not as an assignment. See DKM 3, pp. 692–3.] Athelstane and Bertha then made mutual wills in which they left all their property to each other. Upon the death of the survivor of the two of them, all of their property was to go to their oldest son, Ceawlin, who had already moved off the land and was living on another farm in the area. They died shortly after executing this plan. The wills were duly probated, the estates were administered, and closed.

In time, Etheldreda married a local n'er-do-well named Harthacanute. Her brother Drogheda worked the farm and occasionally paid her some of the money that he earned from cash crops. As Drogheda grew older he became more and more addicted to mead (a beer-like drink favored by the Anglo-Saxons) and less and less to farming. During the Korean War, Ceawlin disappeared. Rumor had it that he went to California; others thought that he was avoiding the draft.

In the early seventies, this generation passed on. Etheldreda was the first to die, survived by her only child Flaeda. Then Drogheda died in 1975 survived by his only son, Grendel (whose mother features prominently in another story). The house was pretty much a mess by this time. Grendel has never been interested in farming. He survives; no one quite knows how, but rumor has it that he runs an illegal gambling operation in the house. Flaeda's relations with her cousin were, and are, cool. They speak to one another if they meet on the street, but that is about all.

How much longer all of this could have gone on is hard to tell. What brought matters to a head was that in 2007, the town of Piddle became interested in the property. It is an eyesore, and although it is sufficiently outside of town that it's not bothering anyone right now, the town council thinks that residential development may take place there over the next generation, and no one will want to live next to Anglo-Saxon Acres in the condition that it is in today. The town council is also convinced that development will take place there sooner rather than later, if the land is zoned residential. With this in mind they rezoned the entire tract for residential use only, excluding all other uses, including farming uses.

Nothing much was done about this legislation because shortly after it was passed events overtook it. [The writer's ignorance of matters scientific should be apparent from what follows. You should answer this question on the assumption that all the "science" given in this question is true and provable in open court and that no other relevant scientific information is available.]

It is now becoming clear that the natural resource in the first part of the twentieth-first century is going to be Sachsium. (Sachsium is named for a former dean of the Harvard Law School because the key idea for its refinement occurred to a Harvard chemistry professor as he was walking through the Law School.) Sachsium, when refined into small pellets which look like little gunny sacks, can be placed in the gas tank of any standard American automobile. (It doesn't seem to work with Japanese automobiles.) So equipped the automobile will run for as long as six months using water instead of gas for fuel.

Ursachs, from which Sachsium is refined, is found in a natural state in scattered deposits of rock, usually several thousand feet underground. When subjected to heat forced down a pipe connected to a drill bit, Ursachs becomes gaseous and will escape to the surface back up the same pipe. Until the refining process was discovered Ursachs was not much studied by geologists, but those who studied it noted that it seemed to migrate either in a liquid or gaseous state from one underground rock formation to another apparently in response to – or at least at the time of – more intense solar activity (sun spots).

Although Ursachs is relatively scarce, it is found in sufficient quantities in the United States and its extraction and refinement are sufficiently cheap that it is predicted that the use of Sachsium and water will replace the use of gasoline in all automobiles in the United States by the year 2040. Clearly, someone is going to make a bundle.

The first case involving Ursachs to come to any court in the United States was an action brought by Grendel against Harvard University, which is the owner of a tract of land adjoining Anglo-Saxon Acres. The University has maintained a small experimental drilling rig near the border of Anglo-Saxon Acres and has been taking gaseous Ursachs out of the ground. (The rig did not violate the zoning on the Harvard land.) The rig is located on and bottoms under the surface of the Harvard land, but Grendel has a respectable geologist who will testify that some, perhaps most, of the Ursachs that Harvard is getting out of the land is in fact being sucked up from under Anglo-Saxon Acres. Other geologists doubt whether this is so, and all are agreed that the present state of geological knowledge is such that the precise location of the deposits of Ursachs at any given time cannot be determined with much accuracy.

As a result of the lawsuit, Grendel's neighbor, Nissa, learned of the presence of Ursachs in the area and decided to get into the act. She hired a rig and began to drill. (The rig did not violate the zoning on her land.) Unfortunately, the rig was negligently misplaced and was in fact on Anglo-Saxon Acres. The rig began to produce Ursachs. Grendel sues Nissa. A survey reveals that although the rig is on the surface of Anglo-Saxon Acres, the drill was put in at a slant and the bit

is actually drawing up Ursachs from under Nissa's land. Nissa concedes that the drill begins its downward course from Anglo-Saxon Acres and agrees to move it. There remains, however, the issue of how damages should be calculated for the period from when the drill was placed on Anglo-Saxon Acres to the time when it was removed.

The State of Confusion, learning that there are likely to be a number of deposits of Ursachs in the state, hastily passed legislation:

The preamble to the statute recites: (1) that since Ursachs was unknown at the time that title to lands in the state passed from the state to individual landowners, the passage of title to Ursachs to individual landowners was not "part of the historical compact recorded in the Takings Clause" of either the federal or the state constitutions; (2) that it is part of the "constitutional culture" of the state that all natural resources are subject to extensive state regulation; (3) that since title to Ursachs rests in the state, it is part of the public trust and must be administered by the state in accordance with its obligations as trustees.

(While there is much that might be questioned about these statements, you may take it as given that Confusion does extensively regulate natural resources within the state. Mining, for example, is subject to both conservation and safety regulation. A large body of both statutory and judge-made state law is designed to prevent air and water pollution. The courts in Confusion have said that when the state deals with natural resources, it is acting as "trustee of the public trust." This latter holding has been particularly important because Confusion, like Texas, holds residual title to the public lands in the state. Finally, the state's common law regarding water emphasizes the "correlative rights" of those with access to the water. Persons who tap into an underground water source, for example, are permitted to use the water they find without regard to where it comes from, but they must temper their use to a "reasonable amount" if one of their neighbors drills a well into the same water source. There is no oil or gas in Confusion, and hence no state law on the topic.)

The statute goes on to establish an elaborate scheme for the exploitation and sale of Ursachs. Key to the operation of the statute is the proposition that any private landowner may drill for Ursachs on his property but must then sell the product to the state. The price of the sale will be fixed in such a way that the landowner will be compensated for the reasonable costs of extraction plus a reasonable return on the capital invested in the extraction operation. No compensation will be allowed for the Ursachs itself. The state will then refine the Ursachs and sell the resulting Sachsium on the open market, depositing any profits to the credit of the general fund of the state (where it will be used for highways, schools, welfare, etc.). It is anticipated that the state will recover considerably more than its costs in these open-market sales.

The Attorney General of Confusion has intervened in both the lawsuit brought by Grendel against Harvard and that brought by him against Nissa, claiming that whatever judgment results from them, the winner of the suit will be obliged under the statute to sell any Ursachs already produced and any Ursachs that will be produced to the state. (You may assume that the intervention is procedurally proper under state law.)

Grendel, of course, was aware that his title to Anglo-Saxon Acres is none too certain. He conceived of a plan to make his cousin Flaeda give up the sublease and brought an action in the appropriate court to have the premises declared unfit for human habitation, have them placed in receivership, and, hence, to force his cousin to bring them up to code. He hoped that his cousin would sell him the head lease rather than incurring the costs of bringing the premises up to code. Unfortunately for him, Flaeda found out about the Ursachs and filed a counterclaim to have the

sublease declared void because Grendel has failed to farm the land.

While these actions are pending, Mordor arrives in town, with conclusive proof that he is the sole heir and devisee of Ceawlin. He, of course, files a quiet title action for the land, claiming that both the head lease and the sublease are now void. In a separate action, Offa, the son of Harthacanute by a former wife, claims a half of Flaeda's interest in the land. Since both Etheldreda and Harthacanute died intestate, Offa's argument is that under the intestacy laws of Confusion, he should share with Flaeda as her half-brother

While none of the parties who has a claim to Anglo-Saxon Acres (with the possible exception of Flaeda) is particularly attractive, none of them is stupid. They realize that whatever they might be able to get out of this situation could be lost in lawyers' fees and years of litigation. They also realize that they have a common interest in Grendel's actions against Harvard and Nissa and against the Attorney General's claim in intervention. With this in mind, they agree to consult SP the senior partner of your law firm with an eye to seeing if something can't be worked out by way of a settlement. They also agree to allow your firm to take on the litigation involving Harvard, Nissa, and the state.

Although the town has not yet filed an action (or had one filed against it), the city solicitor of Piddle realizes that there is a potential here for an expensive lawsuit that he would just as soon avoid. He realizes that the city could obtain considerable tax revenues if development of Ursachs proves to be a winner. He therefore would also like to see the state Ursachs statute invalidated. The town council will support a zoning change if that is necessary, but it is not clear that it will be. Once the initial drilling is done, the amount of surface works necessary to mine the Ursachs is quite minimal and not totally incompatible with residential development. (Think of the oil rigs in Texas that are sometimes found in what is, for all practical purposes, someone's back yard.) He therefore joins with the claimants to Anglo-Saxon Acres in the visit to your law firm.

SP immediately realizes that there are aspects of this case that the firm cannot handle without conflict of interest. He determines that there is enough commonality of interest among the parties that the firm, with their consent, can handle the suits involving Ursachs, but the question of title to Anglo-Saxon Acres must be given to an outside mediator. SP needs, however, a memo that helps him and the parties, as he puts it, "to sort this mess out." In the case of the ownership of Anglo-Saxon Acres, the memo needs to define the issues, to tell the parties something about what facts need to be developed, and what their chances of success are on the merits if it goes to litigation. It is hoped that all the cases and potential cases about the ownership of Anglo-Saxon Acres can be settled without the necessity of expensive litigation.

In the case of the suits regarded Ursachs, SP needs, once more, a memo that defines the issues, tells what further facts need to be developed (remembering that no more 'science' can be developed at this stage of the game), and predicts on the basis of what we know the chances of success of both the private and the public parties. Thus, with regard to the Ursachs SP wants to know what is reasonably clear under the Anglo-American common law that prevails in Confusion. Since we are dealing with a new resource and no in-state precedent that might be directly relevant, SP wants to know what issues of "new law" the court is going to have to rule on in order to resolve these suits, and he wants a prediction on how a court might rule. With regard to the state Ursachs statute, there may be issues raised with regard to the commerce clause (and perhaps other clauses) of the United States Constitution. SP does not want you to spend any time on these issues even if you "spot" them. The only constitutional issues that need be discussed (and then only if they are relevant to the lawsuits in question) are those that arise under the fifth and fourteenth amendments to the United States Constitution and under the

corresponding provisions of the Ames Constitution, which you may assume have the same wording.

In addition to the statutes described above and the assumptions about the law that are given in the General Instructions to the exam, you may assume that the state of the law in Confusion is as follows (though all that is said here may not be relevant) The following statutes are in effect.

(1) A twenty-year statute of limitations on actions to recover real property (1858 [when Confusion became a state]).

(2) A race-notice recording statute. (1858)

(3) An intestacy statute, most recently amended in 1990, which provides that property of an intestate decedent, passes one-third to his/her surviving spouse and two-thirds to his/her children as tenants in common, if more than one survives, one-half if only one child survives, and all to the surviving spouse if no child survives. The property of an intestate who is not survived by his or her spouse goes to his or her surviving children as tenants in common. If there is a surviving spouse but no surviving children, the property is divided one-half to the surviving spouse and one-half to the intestate's next of kin.

(4) A statute authorizing a court – at the petition of either the tenants or a code enforcement agency – to appoint a receiver to collect the rents and make repairs on a building when "the premises are seriously below code and the landlord has failed to make repairs after 60 days' written notice."

[This list should have contained the Standard State Zoning Enabling Act. Most people, quite correctly, assumed it.]

As a general matter, the state has taken a middle-of-the road course both in the private law of property and in the public law. Quotations from the most recent *Restatements of Property* are frequently found in opinions of the Confusion Supreme Court, but the court has as not yet taken a position on whether it will follow the *Restatement Third* on servitudes or the *Restatement Second* on perpetuities. There is no statute about perpetuities. The court's attitude toward "regulatory takings" is neither as permissive as that of the California courts nor as restrictive as the courts in New York sometimes are.

Procedure in Confusion is free and easy, and none of the suits are at a stage where additional parties can't be joined or actions consolidated if it makes sense.

Write a memo answering these questions. While there are various ways to organize such a memo, one way that might make sense would be to begin with M's quiet title action.

THE END