16 June, 2011

MEMORANDUM

TO: Property 6

RE: The Exam Essay

The essay question was long. I knew that when I posed it, but I wanted to come up with something that covered the whole course. I like to give essays that allow people to say intelligent things about different issues, questions where there is more than one "right" way to approach the problem. Here, however, there are so many ways to approach the problem--so many issues that could turn out to vital--that many of you seem to have gotten lost. I enclose my "model" answer, something that I did not expect anyone to come close to getting, but which I used to guide my way through a whole series of partial answers. (There's even more that could be said about the problem than is said in my "model," but most people stayed within the confines of the model.) Most people were actually closer to being on target than I suspect they thought they were. The end result, however, was probably that people went away from the question feeling incompetent, whereas most of you were really quite competent. What you needed was more time and an opportunity to talk the problem over with someone else (that's why lawyers tend to practice in firms).

Here are some places where a number of you went astray: (1) We don't know whether the sublessees "ceased to farm" or whether Anglo-Saxon Acres "ceased to be a farm" (the difference in the two wordings was deliberate, and a number of you made good use of the difference). The statement of facts says that the chickens can't fly the coop because there is no coop, implying that there are still chickens. The problem is not only that there are facts that are not known (and facts that may not be knowable, granted that Grendel is not likely to be forthcoming about what is really going on the farm), the problem is also that there are many ways of interpreting the language in the leases. It's not even clear that there would be an automatic violation of the lease-wording if Ursachs were mined on the farm, so long as something was going on there that might be plausibly described as a "farm." (Think of Texas where many farms also have oil rigs on them.)

(2) The claimants to ASA are in something of a bind. If, on the one hand, they argue strongly that ASA is no longer a farm, they have lost their most powerful weapon against Piddle, that the farm must be allowed to continue as a prior non-conforming use. While they have other bargaining chips to use against the city solicitor, that one is the one that is most likely to get him to sit down to talk with them about allowing a variance for Usachs-mining, assuming that it can be extracted quickly and with no more harm to the neighbors than what is going on on ASA now. (It is not clear how strongly we are going to have to argue this because the city seems willing to grant a variance anyway.) If, on the other hand, they argue that ASA is still a farm, then the lease has not been determined, the right of entry still exists in the sublessor, and G., F. and M. are going to have to have to come to some kind of sensible agreement.

(3) Now this does not mean that Mordor has a strong claim. Mordor has been out of the picture for more than 50 years, and so far as we can tell, nobody has been paying him his quit-rent. As the model answer makes clear, I think it is likely that a court would find some kind of way to limit Mordor's interest, but there is considerable litigation risk. There is even more litigation risk in any kind of suit between F. and G. The outcome is by no means certain, and either

one of them could end up, quite literally, losing the farm. All this, again, argues for some kind of compromise.

(4) Assuming that Mordor is out of the picture, the crucial question is who has the fee. My own solution to the problem is a bit bizarre (answer, no. 6), and there are certainly other ways to deal with it. The point, however, that no one should have forgotten--and many of you did--is that someone must have the fee. It's not only that Mordor loses it but someone must acquire it, and that, granted the facts, has to be by adverse possession. The person who has got the fee has a potential action against leaseholder who commits waste, and traditionally mining has been regarded as waste unless the land was already being used for mining.

(5) I was disappointed how few of you saw how utterly crazy G.'s suit on the receivership statute is. While a number of you suggested that *Javins* might not apply to rural tenancies, no one said--what seems to me to be obvious--that the status relationship of landlord and tenant created by modern statutes and case-law simply does not apply to the situation where the "landlord" is either the holder of a fee subject to a 500-year term or a sublessor of a similar term, both arrangements having been created as part of a donative transaction--an estate plan designed to get around the Rule Against Perpetuities. For a court to apply the statute to this case would a classic example of exalting form over substance.

(6) Nobody dealt with the issue labeled "10." in the model answer. That's probably just as well. The circumstances under which it would arise are extreme, and it clearly does not go to the core of the problem under the more likely outcomes.

On the part of the question about Ursachs, again, by and large, I thought that the answers were good. People were still seeing different things in the question, even after fifty exams. As you will see from the model answer, I think that the statute is probably constitutional. You didn't have to think that, but an argument that the statute was unconstitutional has to take into account at least the major arguments presented below that it is.

There were two things about the question that no one seemed to get (a couple of people had hints of it). First, I'm inclined to think that a court would use the statute to inform its decision about which of the various common-law schemes of resources law they will apply to Sachseum. One way to do that is suggested in the model answer. Second, I was disappointed that virtually everyone thought that the court had to decide the question of constitutionality now. I had hoped that more people might try to argue that the case was not ripe for adjudication. (After all, in the facts given no one is challenging the constitutionality of the statute. We really know very little about how the statutory regulatory scheme is going to work. We know even less about the impact of the statute on the three private parties in the case.)

(For those who are interested, the question was based on what some geologists thought were the characteristics of oil at the time it was discovered in the 19th century [minus the sun spots].)

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ISSUE SHEET

I.

1. Does any private party have title to the land?

2. The determinable term of years is a valid c.l. interest, and the fee subject to it is not subject the RAP. The same applies to the sublease and the right of entry retained by the head lessor.

3. Upon A & B's death the fee passed to C.

4. Was either the condition in the head lease or that in the sublease violated?

5. Whether O has any interest at all depends on whether H died before E. If he did not, O has 1/4 of whatever F has.

6. If the conditions of the head lease are determined to have been violated more than 20 years ago, then M has no claim. The most likely result is that F (and O) have the fee and G still has a lease.

7. If the conditions of the sublease have been violated, then F (and O) probably cannot exercise their right of entry, but that's a close question. That does not, however, give G the fee without the head lease.

8. Mining by the sublessee would be waste, but not if G has the fee, but he may have to turn over 1/3 of the profits to F (and O).

9. The suit under the receivership statute is massively silly.

10. Piddle forgot about non-conforming use. [The willingness of the city to amend the ordinance makes this issue less pressing.]

11. The ordinance, if valid, may void the lease condition.
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II.

1. Common-law mineral ownership in the US. Possibly analogy to wild animals.

2. G should not be allowed to waive the tort and sue in assumpsit against Nissa.

3. Is the constitutionality of the state statute ripe?

4. If it is:

a. The state can't declare that it owns the Ursachs if it doesn't, but the stat. doesn't allow the state to take the Ursachs from the ground.

b. No question here of physical invasion. No question here of deprivation of all value of the land.

c. Deprivation of all value of the Ursachs, but no investment-based expectation. Conceptual severance? This is really price regulation.

d. State dealing on its own account.

e. Hard to see that either utilitarian or Kantian values are involved.

Working through the problem chronologically:

1. A. & B. and their descendants, each claiming title from A. & B., have been on the land for more than 100 years. They treated the land as their own, and they have clearly run out the statute of limitations against any private party. Adverse possession, however, does not normally run against the state, and the entry of A. & B. onto the land for purposes of homesteading was permissive. If they obtained a patent, of course, there is no problem; but there is no evidence that they did, and the records have been destroyed. A. & B. and their descendants are sympathetic parties. A. & B. clearly fulfilled the purposes of the homestead act, and it is hardly their fault that the records have been destroyed. One can imagine the court creating a presumption that with the passage of time and the destruction of the records we will presume that A. & B. obtained a deed (a sort of presumption of a lost grant), but we cannot be sure. So the first ambiguity is whether the title to this land is in private hands at all or whether it remains in the state, which holds the residual title.

2. A. & B. then give a determinable term of years to E. [A couple of you questioned whether a term could be made a part of a donative transaction. The answer is emphatically yes, as most of those who raised the issue saw.] E. then subleases the property to D., retaining a right of entry if D. ceases farming the land. [More people than should have questioned the characterizations. While it is true that courts manipulate the characterizations to get the result they want, it is pretty hard to imagine that a court that was willing to maintain the distinction would treat these as anything other than the determinable term of years followed by a sublease subject to a right entry.] The arrangement was made in order to ensure that the property be maintained as a farm and was done on the advice of a lawyer who told them that the arrangement was not subject to the Rule Against Perpetuities. So far as the head lease is concerned, the lawyer’s advice was sound. A. & B. retained a fee subject to the term of years, a vested interest under the Rule. The leasehold interest itself is vested, so the fact that it was to last for 500 years does not make it subject to the Rule. The fact that there was a determining condition that could occur well after lives in being plus 21 years does not make either interest invalid, because the determining condition automatically terminates the lease, leaving the underlying fee as the only interest surviving. [This is the common-law version of the story; one can imagine a modern court coming out the other way.] The right of entry retained in the sublease is more questionable. If the right was retained by E., however, it would be subject to the rule that normally interests retained by the grantor are vested. The sublease, however, says that the right of entry is in the landlord, raising the possibility that it is A. & B. who were given the right of entry (which would probably then be treated as an executory interest and not a right of entry) and the possibility that the interest is subject to the Rule. On balance, however, it seems that a court would more likely hold that by the word “landlord” the sublessor, E., was meant. Since A. & B. already had a fee that would fall in “if the land ceases to be a farm,” it would seem that E. retained the right of entry if the subtenant “ceases to farm the land” in order to protect her interest from forfeiture by the acts of her subtenant.

3. A. & B.’s death passes the fee subject to the term of years to C. Since the interest in question is a fee subject to a term of years and not a possibility of reverter, we need not get into the question of whether possibilities of reverter are devisable. Indeed, no future interest is necessary here. However the lease is determined, the fee holder stands ready to take.

4. D.’s increasing drunkenness raises a substantial factual problem. Had he breached either the condition of the sublease or of the head lease? (To the extent that the two are different, it would seem that it would be easier for him to breach the former than the latter. One can have something that is still a farm, even if it is not being maintained.) The facts suggest that there are still chickens on the land, which in turn might suggest that the land has not “ceased to be a farm.” Whether D. or his son G. ceased to farm the land or whether the land “ceased to be a farm” and at what time is crucial. If the land, ceased to be a farm some time prior to 1975, G. may have an argument that he has adversely possessed the land against his cousin Mordor. [A couple of you suggested that the land “ceased to be a farm” as a matter of law when the city passed the zoning ordinance in 2007. That, however, gets us directly into the non-conforming use problem discussed below.] Adverse possession, on the other hand, does not start to run against the holder of a right of entry until an entry is made or action brought, but the doctrine of laches applies with considerable strictness against the holders of rights of entry. Certainly, few courts would allow someone to exercise a right of entry dependent on a condition that was breached more than 30 years ago. At the mediation stage of this problem, we might say that there is a substantial litigation risk to both the holder of the right of entry and the holder of underlying fee, that a court would use some combination of interpretation, adverse possession, laches or estoppel to prevent them from forfeiting G.’s interest. On the other hand, G. cannot be sure that the action would fail, and he should be willing to settle because any trial of the action is sure to bring out his activities on the land, which may well include illegal gambling.

5. Who has what interests now? Leaving to one side the question of whether the sublease has been forfeited, it would seem that G. has the remainder of the 500 year sublease. F. has the head lease, the remainder of the 500 year term subject to the sublease and including the right of entry. Whether O. has a claim to this interest depends on whether Harthacanute survived E. If he did, her property was divided between F. and H. Upon H.’s death, his property, including one-half of the lease, passed to F. and O., giving O. one-fourth, not one-half, of the lease. Whether his claim can be barred by estoppel, laches, or adverse possession is difficult. He has made no claim, for, it would seem, close to 30 years; on the other hand, assuming that the right of entry has not yet fallen in there was not much to claim. The profits of the illegal gambling can hardly be regarded as “produce of the land” to which he is entitled to one-twelfth. O. cannot be excluded from the mediation automatically. Mordor’s claim to the fee is more problematical. No one has asserted this claim for more than fifty years. Clearly, if the land “ceased to be a farm” anytime before 1991, the fee has been adversely possessed by D. and G. (who, in turn, may be estopped from denying the validity of the claim of F. and O.--more on this below). Further, there is no evidence that E., F., and O. ever made the payment of $1 rent a year, a payment that would probably have kept the fee alive.

6. The preceding analysis would suggest that M.’s claim is weak, perhaps not so weak that we shouldn’t pay him off, but one that is unlikely to receive much sympathy by a court. That, of course, raises the problem who has the fee? Traditional adverse possession doctrine would suggest that the fee goes to the adverse possessor, and D. & G. were the ones that were doing the possessing. That, however, could lead to the bizarre result that F. and O. lost a substantial interest in the land without their being able to do anything about it. [Of course, they failed to exercise the right of entry, and that seems to have been the intention of the original arrangement.] On the other hand, it seems equally bizarre to give F. and O. the fee, when all they did to acquire it was to fail to pay C. and M. $1 a year. [One student suggested here that D. and G. were possessing as agents of E., F. and O. That’s not a bad idea.] My instinct is that a court faced with this problem

would be likely to use to the doctrine that we criticized when we discussed adverse possession but which nonetheless is sometimes stated: Since D. & G. never claimed anything more than a sublease, they will be estopped to deny the rights of the holders of the head lease. (Note that G. is suing F. as his "landlord.") Perhaps they acquired the fee, but it is still a fee subject to a term of years, and this term is held by F. and O. [As one of you saw, there are ways of working out the problem so that merger would take place, but not, in my view, under the most likely scenario. The sublease will not merge with the fee so long as the head lease is in effect.]

7. This initial sorting-out of the interests in the case is necessary in order to reach the more difficult issues. Assuming that the government and Mordor are excluded as owners of the fee, who is entitled to the Ursachs, who has to fix up the place, and what are we going to do with the city solicitor? First, as to the Ursachs. The normal rule is that the tenant cannot commit waste. Waste includes "opening unopened mines." Since no one knew anything about the Ursachs when the lease was made, the fee-holder retained the right to the Ursachs. If G. has acquired the fee by adverse possession, he has the right to mine the Ursachs. He also, however, is obliged to turn over one-third of the produce of the land to F. and O. While the word "produce" was used in a farming context, not a mining context, one can certainly imagine a court extending its meaning to apply to the Ursachs. Whether the mining of the Ursachs would also give rise to a forfeiture of the sublease is more problematical. It depends on whether one can continue to "farm" while also producing Ursachs. Since, however, mining the Ursachs is in F. and O.'s interest as much as G.'s, we have the opportunity here for a deal.

8. The suit under the Confusion receivership statute is massively silly. Leaving aside the question whether G. gave the requisite 60 days' notice, it is hard to imagine that a court of equity would hold that the statute applied to a 500-year lease that was entered into as part of a donative transaction. There is also a substantial difficulty in determining who is the "landlord" for purposes of the statute when there is head lease held by one set of parties and a sublease and a fee--if the above analysis is correct--that is held by the sublessee. The fact that the sublease calls the sublessor "landlord" (see above) is a possible argument for the proposition that F. and O. have the responsibility to bring the premises up to code, but a court would not be bound in interpreting a statute by the language that parties to a private agreement used to describe their relationship. In a mediation, G. can be told that there is substantial doubt as to the success of his suit, and that he's far better off settling with his cousins than taking the litigation risk that his suit represents. [A couple of you pointed out that the statute also relies on the rent from the land to make the repairs. It's not clear that the land is earning any rent, and it certainly isn't earning much. That's another reason why an equity court would want to hold that the statute just doesn't apply in this situation.]

9. The town of Piddle seems to have behaved much like the town of Preble. It was faced with something that was arguably a public nuisance, and it chose to use zoning law to deal with the problem. There is no question that the town can bring code-enforcement proceedings against G. Whether it can include F. and O. in the proceedings is dependent on much the same analysis as no. 8. It chose, however, to zone the land residential use only and apparently zoned it in a way that did not allow for a prior non-conforming use. In most jurisdictions this would be a violation of the zoning enabling act. F., G., and O. must, however, proceed cautiously. While it seems relatively clear that the farming can continue on Anglo-Saxon Acres, it is by no means clear that they can begin a Ursachs-mining operation. That is not a prior non-conforming use. Whether they can cut a deal with the town to allow this to happen depends on how disruptive Ursachs-mining is and how much revenue the Ursachs mine is going to bring in. [A number of you thought that the zoning

might be impugned as “spot zoning,” a charge that was another way of getting at the *Preble* argument. Unlike the town of Preble, however, the town of Piddle does seem to have an overall plan in mind in which the land will ultimately become a residential area. That makes the non-conforming use argument a better argument for F., G., and O.]

10. The final issue concerns the effect of the zoning ordinance on the conditions of the lease. We have already suggested that the ordinance may not be valid in that it does not allow a non-conforming use. Clearly, if the zoning ordinance cannot be made to apply to Anglo-Saxon Acres, the conditions may continue. Suppose, however, that the doctrine of non-conforming uses does not apply (farming has long since ceased or a court holds that the town need not protect prior non-conforming uses)? Does G. have an argument either that the ordinance constitutes a “taking” of his sublease or that the condition in the lease should be struck down on the ground of illegality? The taking argument would seem to be conceptual severance carried to the height of absurdity. *Lucas* says that the “property” must be deprived of all value, not that the ordinance cannot trigger a condition that shifts a valuable piece of property from one party to another. As to the illegality of the condition, that is a closer question. Courts have relieved parties of deed restrictions that could not be performed without violating public law. In a conflict between public law and law created by parties for themselves, public law prevails. Since the purpose of the condition was to maintain the land as the farm, enforcing the condition will not achieve the purpose for which the condition was created. Hence, on the assumption that the ordinance is valid, it probably would have the effect of voiding the lease condition.

AND NOW TO THE URSACHS

1. The Harvard suit squarely raises the question who owns the Ursachs. The statute says that the state does. This is problematical; we put it to one side for the nonce. Normally, at common law we follow the accession theory with segmented ownership. The theory is not without its problems as the remedial mess of the *Edwards* cases shows. It would be particularly difficult to apply the theory in this case, since the geologists are not sure that they can tell where the Ursachs is at any given moment, and all are agreed that it moves. It is thus like the wild animals of *Pierson v. Post* or the underground water that the state deals with on a right-to-take basis, modified by the notion of reasonable use. Hence, it might make more sense to apply the *res nullius* theory in this case. Under it we might say that G’s only remedy is to drill himself, in which case Harvard would be limited to taking a reasonable amount. (That’s not going to be easy, but we can cross that bridge when we get there.)

2. In the case of Nissa we have a conceded trespass and an agreement to remedy it. The problem is how to calculate damages in the interim. G is probably entitled to the fair market rental value of the land during the period of trespass, almost certainly a small amount. The question is whether he can waive the tort and sue in assumpsit for the profits that Nissa may earn from the Ursachs. This would seem to be a particularly inappropriate case to depart from the usual rule that you can’t waive the tort and sue in assumpsit in cases of trespass to land. (a) The trespass was expressly stated to be negligent not willful. (b) Nissa has, so far as we can tell, gained nothing from her wrong. The drill bottoms under her land. If she had put the drill on her land, she would have gotten just as much as she did by putting it where she did.

3. If we resolve the private suits as stated above, the intervention of the Atty Gen has relevance only to Harvard and Nissa. He wants a declaration that they must sell the Ursachs to Confusion, if they sell it to anyone. That raises issues as to the constitutionality of the statute. There is a

considerable question whether this suit is ripe for adjudication, and neither Harvard nor Nissa has asked for a judicial declaration that the statute is unconstitutional on its face. One can hear an argument that even if the current action by the Atty Gen were met with a constitutional defense a court might say that the defense is not ripe. The parties must go through the process of selling to the state and see what compensation is in fact paid.

4. Assuming that such an action is brought and that the court does not dismiss it on ripeness grounds, here are some considerations:

(a) Ames cannot declare that it owns the Ursachs if it doesn't. It is possible to interpret the statute as simply being a declaration similar to that in the discredited *Geer* case that the state has the power to regulate Ursachs just as it has the power to regulate wild animals. The police power is not the same thing as ownership. *Agway*. On the other hand, we are dealing here with a new resource. We have already decided that as a common-law matter one might declare Ursachs to be a *res nullius*. In this posture we might well say that Ames can confirm a result that we might reach as a common-law matter anyway. If we follow the wild animal analogy, Ames could prohibit the taking of Ursachs altogether. It has not prohibited its taking altogether but rather has said that if it is taken it may only be sold to state at a price fixed to allow the taker to recover his costs but not the rents that accrue to the Ursachs.

(b) The question, then, becomes whether the state may deprive the taker of the Ursachs from the rents that would otherwise accrue if the state had left the matter to the private market? The question is not as easy as it might seem (particularly if we deprive ourselves of the authority of such cases as *Nebbia v. New York* [obviously, I didn't expect anyone to get this]). It might be well to begin with a few things that the case does not involve.

(i) There is no question here of physical invasion. If the landowner chooses not to explore for Ursachs, nothing in the statute requires him to do so or to allow the state or others to do so.

(ii) There is no question here of deprivation of all value of the land. The land is worth just as much after the statute as it was worth before the Harvard chemist discovered Sachseum.

(c) There is, however, an issue here of deprivation of all value of the Ursachs. To this argument we might offer three answers:

(i) The landowner had no investment-based expectations (IBE) that s/he would get any value out of the Ursachs. Under the investment-based expectations test the only person who could sue would be the one who made an investment after Sachseum had been discovered and before the statute was passed. [A couple of you pointed out that Harvard and Nissa may have some IBE's. There's some truth to that, and they may need to be compensated.]

(ii) The claim of loss of all value of the Ursachs involves a claim of severance. Now we're not dealing with quite the conceptual severance problem of *Penn Central*, because here the severance is more than conceptual. It has actually happened.

(iii) On the other hand, we're also not dealing here with a deprivation of all value in any normal sense of the term. What we're dealing with here is really a form of price regulation, like that that has been sustained in the rent control cases. The taker of Ursachs is entitled to compensation, s/he's just not entitled to the rents that would otherwise accrue to the Ursachs.

(d) On the other hand, there is no question here but that the state is dealing on its own account. This is not just a regulation. This is not just nuisance prevention. The state has gotten into the act and is doing more than just regulating the market. Indeed, what the state is doing assumes an unregulated market (ultimately) for the Ursachs, and the state is trying to make a bundle out of that fact.

(e) So the question boils down to this: Can the state deprive the owners of land that contain Ursachs from the windfall that would otherwise accrue to them because of the presence of Ursachs in order to reap that benefit for itself? While this would seem to be legislation the wisdom of which is open to considerable doubt [many of you went on at some length about how the legislation would produce incentives not to produce something which it is clearly in the public interest to have produced], one would have to be a quite activist judge indeed to declare it unconstitutional. If our view of the property clauses of the constitution is utilitarian, we are far away here from the kind of expectation that deserves constitutional protection. If our view of the property clauses is Kantian or Hegelian, it is hard to see here how an individual is being used as a means to achieve a general goal, again because it is so hard to see how anyone has extended his or will to something that they didn’t know about.