

EXAM ID: _____

Civil Procedure I
Fall 2015

Professor Stephen E. Sachs
December 11, 2015
9 a.m. – 12 p.m.

This exam is **11 pages** long, including these instructions. (Please check to see that you have all 11 pages.) You have **three hours** to complete the exam.

The examination consists of **three questions**. To assist in grading, please use the “*answer separator*” function to separate your answers to different questions. Brevity is appreciated, but there are **no word limits**.

The exam mode is **open**. You may access your hard drive, but you will not be able to cut and paste text from external documents, to exit the exam software during the exam, or to read or edit your exam files once they have been submitted.

All additional digital and paper materials are approved for use on the exam. (I strongly advise you to bring a copy of the Federal Rules.) You are not permitted to consult with anyone or to access the Internet during the exam. Your exam must be entirely your own work.

The Exam4 software automatically includes your Anonymous ID. To preserve anonymity, do not include your name or other identifying information, except to record your ID on the line above. Students may not communicate with faculty members about an exam in any way, including through email, during or after the exam until grades for the course have been released.

In general, please review and follow the advice given in John H. Langbein’s *Writing Law Examinations*. A few specific recommendations:

1. *Make sure that you read the questions carefully.* Each question is accompanied by a point value and a recommended time allocation. These allocations assume that you will take fifteen minutes at the beginning to read the whole thing, as well as ten minutes at the end for proofreading. Separately, you are encouraged to spend up to twenty minutes sketching out answers to all three questions with pencil and paper before actually starting to write. If you just dive in, you'll get lost halfway.

2. *Organize your answers clearly.* You don't need to follow any particular format with rigor, but it helps greatly to identify an applicable legal standard before applying it. Stating your conclusions clearly will also be helpful to me when grading. Mentioning individual rules or statutes can be useful, but chapter-and-verse citations aren't necessary; it's more important to state the substance correctly. The same goes for relevant cases. In the words of the now-repealed Rule 84, the model exams available on the course website "illustrate the simplicity and brevity that these [instructions] contemplate."

3. *Unless you're given specific details to the contrary, you may assume:* that every party is properly served, that every pleading is properly pleaded, that all filings are timely, that every motion or brief presents the best arguments available, and so on. Don't try to invent new and helpful facts or law not mentioned in the exam. If there are issues that you're not sure of or that require more information, you should say so; some of them are intentional. If a particular legal standard hasn't received any substantial attention either in the book or in my lectures, it's unlikely to be tested. That said, the exam is open-book and could require close parsing of a particular rule or statute.

4. *Apply the law as it stands today.* As noted on the syllabus, the exam doesn't ask things like "how would this case have been decided in 1872?" It only tests on the law as it stands on

the date of the exam, including recent amendments to the Federal Rules of Civil Procedure.

5. *When listing reasons why a particular result would be legally correct, don't give just one; give as many as are correct, even if just one of them would be enough to win or lose on that issue. Don't assume that I'll know you know the basics; show me that you do!*

* * *

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Individual questions will be curved, to reward those who do well on harder questions, and then the exam as a whole will be curved. Final grades will be calculated in compliance with the Law School's grading policies.

Good luck!

(DO NOT TURN PAGE UNTIL INSTRUCTED TO DO SO)

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Q.1: “The Mask of Ka-Nefer-Nefer” (60 pts, 1 hr 40 min)¹

In 1952, the archaeologist Mohamed Zakaria Goneim, working for the Egyptian Antiquities Service, excavated a gravesite at Saqqara above the unfinished pyramid of the Third Dynasty king Sekhemkhet (r. 2648–2640 B.C.). Goneim discovered the tomb of the Nineteenth Dynasty noblewoman Ka-Nefer-Nefer, buried between 1279 and 1213 B.C. in an impressive funerary mask. The Mask of Ka-Nefer-Nefer, as the object later became known, measures approximately 21 inches by 14.5 inches by 10 inches; is constructed of plaster, linen, wood, and resin; and has been painted, gilded, and inlaid with colored glass. (See fig. 1.) It also bears numerous inscriptions placing it under the protection of Khepri, the scarab-headed god of sunrise and rebirth. (See fig. 2.) Goneim removed the Mask from the gravesite and prepared it for museum display.



Fig. 1. The Mask of Ka-Nefer-Nefer.

¹ The facts in this hypothetical are drawn somewhat loosely from *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014). But knowing that won't help.

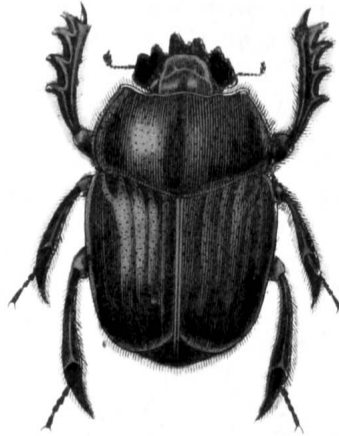


Fig. 2. *Scarabaeus sacer*, the best known of the scarab beetles.

The Mask was registered as the property of the Egyptian Antiquities Service and stored at Saqqara. In 1966, after a damaging infestation of scarab beetles in the Saqqara storage facility, the Mask was removed from its packaging and sent to the Egyptian Antiquities Organization Restoration Lab in Cairo. The Mask is recorded as having been placed in Box 54 of the Cairo shipment.

In 1973, pursuant to an internal audit, the Egyptian Museum in Cairo reopened Box 54. It was discovered at that time that the Mask was missing, and that the box was instead filled with live scarab beetles. The register did not document that the Mask was sold or given to any private party between 1966 and 1973.

In 1998, representatives of the St. Louis Art Museum saw the Mask in the collection of the Swiss antiquities firm Phoenix Ancient Art S.A. They agreed to purchase the Mask for \$499,000, in exchange for warranties that Phoenix held good title to the Mask under both Swiss and Egyptian law. The provenance documents included with the agreement stated that a Phoenix representative had been given the Mask in July 1971 by a terrified junior employee of the Antiquities Service,

who repeatedly urged its removal “before the scarabs return.” The Museum’s agreement with Phoenix also required that the Mask be available to the public, with title reverting to Phoenix should it ever be removed from display.

In 2006, the Egyptian Supreme Council of Antiquities became aware that the Mask had been purchased and was on display in St. Louis. The Council sent letters demanding the Mask be returned to Egypt and began to lobby the State Department for the Mask’s return. Three brothers, grandchildren of Mohamed Goneim, are also known to assert a property interest in the Mask. They claim to be Goneim’s sole heirs, after his other descendants were eaten by scarab beetles.

In 2011, the United States sued the Museum in the U.S. District Court for the Eastern District of Missouri, where the Museum is located. The action sought the transfer of the Mask to the U.S. Government under the National Stolen Property Act (NSPA), 18 U.S.C. § 2314, which criminalizes the sale or importation into the United States of goods known to have been stolen or unlawfully transferred. The action was dismissed without prejudice on the Museum’s Rule 12(b)(4) motion based on technical defects in the complaint and summons served, most of which had been rendered illegible by the fire-blackened image of a scarab beetle. The Assistant United States Attorney immediately resigned and fled her office, and the United States did not subsequently attempt to perfect service, to appeal, or to refile its suit.

In 2015, the Museum decided to remove the Mask from public display. This followed years of patron complaints concerning nighttime wailings, hieroglyphic inscriptions appearing on walls, and disturbing flame-like reflections in the glass eyes of the Mask. After the Museum’s assistant director for marketing and public affairs was carried screaming into the night by a giant scarab beetle, the Museum’s board of directors voted to

abandon any claim to the Mask, to remove the object from display, and to initiate an interpleader action in the Eastern District of Missouri against the various parties who might claim title. These included the Supreme Council of Antiquities (an instrumentality of the Egyptian government), the United States, the three Goneim brothers, and Phoenix Ancient Art S.A.

The Mask was duly deposited in the office of the Clerk of Court. The Goneim brothers were served by a licensed process server in New York City while they attended a conference on the recovery of stolen antiquities. All other parties were properly served under Rule 4, and the government parties have duly waived any applicable sovereign immunity.

A flurry of motions followed. (For ease of reference, pending motions are indicated by bolded Roman numerals.)

The Goneim brothers timely moved to dismiss the complaint against them for lack of personal jurisdiction, arguing that they have no contacts with Missouri and that the Eastern District's exercise of jurisdiction would violate the Fifth and Fourteenth Amendments (**i**).

Phoenix, the Council, and the United States answered the interpleader complaint. The United States' answer asserted a counterclaim against the Museum for forfeiture of the Mask and punitive damages under the NSPA, reciting the facts substantially as they appear above and adding that, "on information and belief, the Museum knew that the Mask had been stolen or unlawfully transferred." The Museum moved to dismiss the counterclaim for failure to state a claim, arguing that it was improperly pled (**ii**). While that was pending, the Museum also moved for summary judgment on the counterclaim, based on the preclusive effect of the prior suit (**iii**).

The district court has chosen to consolidate this case with the putative class action *Fishburne v. St. Louis Art Museum*.

This suit was filed by St. Louis resident Lisa Fishburne on behalf of “all other persons temporarily or permanently living in St. Louis as of August 1, 2015.” It seeks \$6 million in damages under Missouri nuisance law for the recent plague of scarab beetles, each marked with the baleful image of an unfeeling sun, which have remained remarkably confined within the precise municipal boundaries of the City of St. Louis. Fishburne is an avid gardener, and many of her prize gardenias were chewed away, leaving unsightly skull-shaped patches in her yard. Through counsel, she has subpoenaed Theresa Entwistle, an entomologist who lives and works at the University of Missouri—Kansas City (roughly 240 miles from St. Louis), to appear at a deposition at the Art Museum and again at trial. Fishburne expects Entwistle to testify that the beetle plague lacks any reasonable scientific explanation and must instead be due to supernatural causes. Despite her life’s study of the *Scarabidae* family, Entwistle has no desire to learn more about the unusual beetles; she has moved to quash the subpoena (iv) and is currently believed to be in hiding. The Museum has moved to deny certification to the class (v) and in any case to dismiss the class action for lack of subject-matter jurisdiction (vi).

Finally, the court has received a timely petition to intervene from Henry Jones, Jr., a retired archaeologist who argues that the Mask “belongs in a museum” (vii).

How should the district court rule on these motions?
Decide quickly; already the beetles draw near.

Q.2: What's the Point? (*15 pts, 20 min*)

Below are three provisions of the Federal Rules that you might not recognize at first. (Feel free to look them up.) **In a paragraph or so for each, explain what you see as the point of each rule.** For example, what does it do? Why do we have it? Why does it say what it says, and not something else? Etc.

- i. Rule 15(c)(1)(C).
- ii. Rule 37(e)(2).
- iii. Rule 50(c).

Q.3: The Repeal of Rule 56 (*25 pts, 35 min*)

Against the clear recommendations of the Judicial Conference, the Supreme Court yesterday announced the repeal of Federal Rule of Civil Procedure 56, and its replacement with a provision that “summary judgment is hereby prohibited.” Under 28 U.S.C. § 2074, this repeal will take effect on December 1, 2016, unless Congress acts beforehand to bar the change.

For your excellent legal advice in the past, you have been hired as an aide to the newly elected Senator Rosalind “Roz” Pudlowski (I-Fla.). She is considering how to vote on a bill barring the repeal. Florida Rule of Civil Procedure 1.510 largely recaptulates, for Florida state courts, the current requirements of Rule 56. Florida’s rules are expected to remain in place no matter what happens to the federal ones.

“Is this something the Supreme Court can even do?” Senator Pudlowski asks you. “Does it matter that Florida’s rules won’t change? What difference would repeal make to legal practice in Florida, and how would it affect my constituents? Should I vote to block this thing or not?”

What do you tell her?

— END OF EXAM —