

84663

84663-S.-15-1

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Institution **University of Missouri - Columbia School of Law**

Course / Session **S11 Property - Crouch**

Control Code **N/A**

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Instructor **NA**

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Count (s)	Word (s)	Char (s)	Char (s) (WS)
Section 1	1790	8437	10216
Section 2	1513	6945	8448
Section 3	1696	8496	10181
Section 4	911	4418	5326
Section 5	323	1532	1851
Total	6233	29828	36022

Answer-to-Question- _1a_

First, we know that Desseem owned Blackacre in fee simple absolute. As a result, Desseem has complete rights of alienability and can sell Blackacre to anyone.

The major question is what rights Oliveeri and Leeton have.

Leeton has rights in fee simple absolute over black acre. He owns Blackacre as a freehold estate because Desseem transferred a valid title to Leeton. Even though he agreed that Desseem could live there for five years, Leeton still retains his valid title over Blackacre, perhaps allowing Desseem to remain on the land as a tenant. It's not clear whether or not Leeton charged Desseem rent, but that is not totally important to the analysis.

Desseem gave Oliveeri Blackacre as a testamentary gift, and we'll assume all the requirements were met for that little bit of fun. HOWEVER, Desseem cannot transfer property over which he has no rights, due to the derivative title rule. As such, when Desseem gave his property to Leeton, he also gave away any claim he has to that property. He cannot, therefore, transfer a claim he does not have. Oliveeri, never discouraged, may still have superior title to Blackacre, however, because of adverse possession. Oliveeri maintains adverse possession if she meets several requirements.

First, her possession must be actual. Possession is actual if she was using the land as the true owner would, and was using it in such a way that would give the true owner notice that the land was being adversely possessed. In this case, she was. Oliveeri had built a house on Blackacre. If Leeton had been taking care of his property, undoubtedly he would have noticed that she was there. Leeton may try to claim that her use was not actual because there was a large, unused area. However, it does not matter whether or not Oliveeri used the whole parcel of land, only that she used a portion of it in a way that meets actuality. Leeton may also try to claim that the view from Blackacre is blocked by the forested unused area. It may be that Leeton had driven by Blackacre quite a bit, and was simply unable to see the house from the public road. If so, Leeton may claim that Oliveeri had not used the property in a way that would give actual notice. This argument may succeed in court, but will likely fail. Adverse possession is allowed because courts want property to be used, and they want the property to be used by people who will use it for the most viable purpose. Leeton let the property sit, and he let it sit for a while. It is likely that the court will say that Leeton should have taken better care of the property, especially since the used

portion is so large. Further, the ~~driveway~~ to the property has to go somewhere. In some states, use can only be actual if the possessor is paying taxes on the property. Here it is not clear whether or not Oliveeri has been paying taxes. If she is, then in those states her use can be considered actual. If she is not, then in those states, her possession cannot be considered actual. Property taxes will come up again.

Next, her used of Blackacre must be exclusive. It is generally considered exclusive if no one is ~~trying to~~ ^{actually trying} throw you off the property. In this case, her use is exclusive. Although Leeton is suing her for the property now, no case was ever brought against her before. He did not charge her with trespassing or anything of the like. We can conclude her use was exclusive.

Next, Oliveeri's use of the property must be continuous. It is continuous if Oliveeri is continuously using the property in the same way that the true owner would. Oliveeri lived on the property. She built a house there and continuously maintained possession o Blackacre. Therefore, it is likely that the court will find Oliveeri's use continuous.

Oliveeri's possession of the land must also be hostile. It is hostile if possession is without the true owner's permission, and it is under a claim of right. In this case, Oliveeri did not have the true owner's permission to be on the land. Desseem did have the true owners permission, but we will consider that later. Leeton had no idea Oliveeri was on the land, and could not have given her permission. Oliveeri also obtained possession of the land under a claim of right. As far as she knew, Desseem owned full title of the land in fee simple absolute, and when she inherited it she also assumed title (what kind of title she assumed is not clear, but court's generally assume it is fee simple absolute, so we will too). As such, Oliveeri's possession was "under a claim of right". She did not possess the property in bad faith; she was not trying to create an adverse possession claim. Instead, she truly believed her claim was a claim of right. However, the claim of right rule is only true in some jursidctions. In fact, a majority. They look at adverse possession objectively: if the occupier was using the land appropriately (as Oliveeri was) and was mistaken about her belief of her claim of right (as Oliveeri was again), that is enough. Her intention does not matter in these jurisdictions. In other jurisdictions, one can only be an adverse possessor if one intentionally takes the land; a mistaken belief does not show hostility. In the narrowest of jurisdictions, there must be intent to take the land AND you must show good faith. Oliveeri likely meets all of these rules. She intentionally took the land. She built a house, she was using the land, she built a driveway, etc. Also, Oliveeri's claim was made in good faith. She believed Desseem had given her the property. As such, Oliveeri's possession is likely to be hostile.

Next, her use must be open and notorious. It is open and notorious if the use of the land is so obvious that

the owner knows someone else is making a claim. To meet this requirement, Oliveeri will have to claim that her notice was constructive. She did not know Leeton had a claim to the property, and could not have given actual notice. Actual notice is not required, however, and courts have allowed constructive notice. Her notice would have been constructive because she was living there. If Leeton had visited the property he would have known she was there. In this case, Leeton may be able to claim that her use was not open and notorious as the forested area next to the main road may defeat this requirement. Oliveeri used a driveway that was on whiteacre, and her house was on blackacre, behind a forested, unused area. If Oliveeri was paying taxes on the property, however, courts would likely find her use open and notorious. Also, if she was on friendly terms with the neighbors, or they were at least aware she was there, her use might be considered open and notorious. She may be able to defeat Leeton's claim, but Leeton's claim may be successful. If Leeton can show that he HAD driven by the property occasionally, and had maintained an active watch for tricky adverse possessors, it is likely that Leeton's case will win. Courts want people to take care of their property. Letting a property sit for a long period of time does not necessarily mean that one cannot defeat an adverse possession claim. Not ever visiting your property likely means that an adverse possession claim has merit.

If Oliveeri shows all the requirements of adverse possession, she must also show that all of the requirements were met for the allocated statutory period. The allocated statutory period will depend on jurisdiction. In Missouri, for instance, the time necessary is ten years. In others, it may be more or less. Oliveeri obtained the property in 1993. Leeton brought his claim in 2004. Further, statutory periods may be shortened for various reasons. If Oliveeri was paying taxes, it is likely that it will be shorted. Because Oliveeri was also operating under "color of title", in that she held a title to Blackacre, even though it was not the right one, it could be that the statutory period is shorted for that reason as well.

Not to be discouraged, Leeton may claim that the statutory period WAS NOT met. He could claim that the title given to him was not in fee simple absolute, but instead was a future interest, that he instead held a reversion interest in that after a condition is met (the passage of five yeras), the property automatically reverts to Leeton. Because of their contract, Deseems interest in the land was no longer fee simple absolute but instead some sort of fee simple defeasible estate that terminates once the condition (in this case, the passage of five years) is met. If Leeton can show this in court, Desseem could not transfer the property to Oliveeri in fee simple absolute (because of "derivative title", i.e. one cannot pass along more rights than one has), but could only transfer the property for the two years remaining before Leeton could take possession of the estate. IF Leeton held a future interest, that interest would be vested in that Leeton or his heirs would undoubtedly take possession of the estate. The statutory period for vested future interest holders does not begin running until the future interest holder obtains possession; it is "tolled".

Because it is a vested future interest, the statute of limitations does not begin running until 1995. Oliveeri would then have only had possession of Blackacre for 9 years, which is less than the requisite number for adverse possession.

[Handwritten scribble]

Oliveeri is not completely out of luck, however. Because the agreement between Leeton and Deseem was oral it may fall under the parol evidence rule and not be admissible as evidence. But that's for another class.

[Handwritten circle around "parol evidence rule" with "Stole the frames" written below it]

If Leeton wins the case, Oliveer could use the "good faith improver rule" to obtain monetary damages from Leeton. This rule forces the true owner to pay for improvements made in good faith by an innocent party. Because Oliveeri was an innocent party (she obtained possession in good faith, she held color of title), she may be able to claim the Leeton must reimburse her for the building of the house. This will only apply to "fixed" property, however. If the house was actually a trailer that she had hitched to a beat up pick up truck, she would not be able to use the good faith improver rule, and instead would be forced to drive her truck to Whiteacre, possibly using the driveway she had built.

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Answer-to-Question- 1b

To answer this question we first must ascertain ^{*why*} the nature and scope of the easement. In this case, Whiteacre would be considered the servient estate, as the easement burdens Whiteacre. Blackacre would be the dominant estate, as the easment benefits Blackacre. The driveway would act as an affirmative easement; as such, it would give Leeton the right to use the driveway owned by Oliveeri. It is not clear from the facts whether the easement is an easement in gross, or an easement appurtenant, but because the easment was not transferred to anyone, that analysis is not as important.

The person with the most superior title to the ring would be whoever Johnseen stole the ring from. They are the true owner, and under the hierarchy of rights, they maintain the most superior claim against all others. Johnseen's rights are limited because Johnseen is a thief. Thieves generally hold fewer rights than other people. However, because the ring was "found" by others, Johnseen may hold superior rights over

the finder. In fact, the finder would never have more rights than the true owner, as under "derivative title" one cannot obtain more rights than the previous owner had. As such, the most rights Johnseen could transfer (in a manner of speaking) to the finder would still be less rights than are had by the original owner. That's not all, however. The rest of the crew may also have a claim for the ring, depending on the rings status.

The ring clearly was not lost. In order for the ring to be lost, the owner would have to unintentionally part with possession. As terrible a job digging a hole as Johnseen did, it can absolutely not be claimed that Johnseen lost the ring. He dug a hole and placed it there. It didn't fall out of his pocket or anything. If the ring were "lost", Gelee would have a right to the ring, but the true owner and Johnseen would have superior rights. Further, Gelee's rights would be even less because he did not follow the statutory rules for finding of lost property. When one finds lost property, generally one must post notices in the paper for a certain amount of time. Gelee did not do that. He did not notify anyone of his finding of the ring.

It could be that the ring is mislaid. Property is mislaid when the owner purposefully puts the property in a specific place and then forgets where it is. This is the most likely category. Johnseen purposefully dug a hole and put the ring under the driveway. However, it is unlikely that Johnseen forgot where it is. After all, if one steals a ring and stashes it somewhere, especially if it was only 3 years ago, one is likely to remember where it is. If the property is classified as mislaid, as it likely will be as no other categories are good matches, then Gelee's rights are actually less than that of Leeton (and arguably Oliveeri). Mislaid property does not belong to the finder, but instead belongs to the owner of the property on (or in) which the mislaid property is found (like in that airplane case we read). This is where things get interesting, because it is not clear who owns the property under which the ring was found. It will depend on the type of easement between Leeton and Oliveeri. Normally, we would look to the contract between Leetona nd Oliveeri to determine the scope of the easement, but because the facts are not clear, we will have to make assumptions. A likely focus of the court will be on the exclusivity of the easment. If Leeton has exclusive use of the easement, then it is most likely that Leeton would be found to be the true owner. The facts are not clear, however. It is unlikely that Leeton is the exclusive owner of the easement. Courts generally don't find for exclusivity, but it is possible that Oliveeri, in order to bargain for more money from Leeton, allowed Leeton exclusive use of the private driveway. This is especially likely because Oliveeri does not have a house on Whiteacre. However, it could be that Oliveeri was planning on building a house on Whiteacre and needed to use the driveway for herself. In that case, Oliveeri would not likely have given Leeton exclusive use of the driveway. I honestly do not know who would have superior rights. My best guess is that Blackacre would, as the dominant estate. The court may say that it is Whiteacre, because Oliveeri has owned the property longer, and the easement is on her land. I would have to do more

research.

ANYWAY. If the ring is mislaid it would belong to either ^{what} Leeton or Oliveeri. It would also have to be given to Leeton or Oliveeri if Gelee was a trespasser. The exact nature of his visit isn't clear from the fact pattern, but there are scenarios in which Gelee could be found a trespasser. If Gelee was a trespasser, he would likely have to give the ring to either Leeton or Oliveeri no matter which category the ring is in.

It could be however that the ring is abandoned. If the ring is abandoned, Gelee has superior title over the thief, but likely does not have superior title over the true owner (after all, the thief cannot pass along more rights than he has, and he didn't have many, so its likely that a court could find that a true owner has more rights). In order for property to be abandoned there are two requirements: an act of abandonment and the intent to abandon. Although people don't often abandon rings, people also aren't often thieves. It could be that Johnseen was torn with guilt and wanted to be rid of the ring, or Johnseen was fleeing the police and abandoned the ring in order to mount a better defense. If the ring was abandoned, Gelee would have superior title.

It is not likely that the ring is a treasure trove. It was only buried 3 years. It's not like it was a bunch of doubloons or anything, either. And the true owner is not probably dead (although, who knows, really).

At any rate, Gelee passed on his rights to the jewelry store owner who passed them on Conkleen, who further passed on rights to Esbeek. But under derivative title, he cannot pass on more rights than he already had. In this case, Gelee's rights were less than the thieves and the true owners (and, perhaps, less than that of Leeton and Oliveeri). The true owner, Johnseen, (perhaps leeton and oliveeri), may have higher rights than that of Gelee and Leeton.

Conkleen (and, by extension, Esbeek) may have higher rights than everyone, however, because of equitable estoppel and the Bona Fide Purchaser Rule. Under equitable estoppel, the true owner may be estopped from reclaiming the property. This is usually only applied when the true owner is blameworthy. In this case, Johnseen is certainly blameworthy although perhaps the true owner is not. Conkleen may be able to use the Bona Fide Purchaser Rule to maintain possession of the ring. He would likely use UCC § 2-304, which codified the common law Bona Fide Purchaser rule. Under the UCC, and because the sale of a ring is the sale for goods and therefore the UCC applies, Conkleen would have "voidable title".

Conkleen likely purchased the ring believing that the jewelry store owner had actual title over the ring. Of course, he would have to show that he relied on it, but maybe having the ring cleaned (it must have been dirty after being buried so long) or sized would be adequate. Of course, this does not protect Esbeek from

Who relied on what?

the true owner of the ring, as stolen property statutes would permit the rightful owner of stolen property to recover the property. Naturally, it is unlikely that the true owner would find the ring, but I suppose it is possible.

It could be that the court finds that Esbeek does not have voidable title, but instead had void title. The Bona Fide Purchaser Rule may not apply to him because he was given the ring as a gift and did not buy it. However, it is likely that it does, as Conkleen merely passed along her voidable title to Esbeek. Thus giving him higher rights to the ring than Conkleen. The court could also find there to be a void title because of the derivative title rule. The ring was stolen (given it void title) and that void title was passed along to subsequent owners of the ring. Esbeek may try to use the case we read about the car, but this is slightly different. In that case, the car would procured by criminal fraud. Although the facts are not totally clear, the ring in this case was stolen. As stolen property, it is not covered by the UCC.

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In conclusion, the person with the highest rights is the true owner. After that, well, who knows.

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Answer-to-Question- 2_

I'm running short on time so I'm going to hurry through this guy.

The first question are the rights of Collins and Levsen. Collins and Levsen owned the building as joint tenants with rights of survivorship. As such, if either of them died, the other would obtain possession of the entire property. This is subject to the "four unitites". There is no reason not to assume that these unities are not in effect. However! Because Levsen sold his portion of the lease to Tanner, the joint tenancy with right of survivorship was broken. As a rule, JTwRoS are broken when one co-owner sells their property, as the four unitites no longer apply. Levsen sold his share, likely to be 50%, of the tenancy in common to Tanner, who knows owns part of the building.

As such, Tanner and Collins have a tenancy in common. This means they have an undivided yet sperate

interest in the property. At this point, either can transfer their property at any time to anyone. A further benefit of tenancy in common is that the property ~~cannot~~ be unilaterally partitioned. In this case, Tanner would be ~~unable~~ to force a partition of the property. Tanner COULD partition the property if Collins likewise agreed to a partition, but because there is a suit involved, it seems like Tanner did not take that step.

The next question of between Powell and the co-owners of the building. Powell rented the building as a dual commercial/residential lease as a tenancy for years. This is because Powell signed the lease for five years. It is likely that the court will lean towards the commercial aspects of the lease rather than the residential. After all, it was a percentage lease, in that 5% of Powell's annual profits went to the co-owners. Residential leases are not typically percentage leases. With one year remaining, Powell abandoned the property. As a lawyer, he should have known better. If Powell's lease were not a tenancy for years, but instead a tenancy at will, Powell could have abandoned the property without notice. However, under a tenancy for years, one cannot simply abandon the property, and it is likely that you cannot abandon the property even without notice (unless, say, the other party agrees to it). As such, the co-owners have several recourse options: The co-owners could enforce the lease and do nothing. At this point, Powell would be forced to continue making rent payments for the rest of his lease. OR the co-owners could accept surrender and sue Powell for damages. The damages could be the lost profit from the time Powell abandoned the property to the time they found a new owner. If this is the case, the co-owners would have a duty to mitigate the damages. They could do this by finding a new tenant as quickly as possible. Powell may also be forced to continue operating his business there. This is due to the "Dark Store Rule", in which commercial leases (such as, arguably, this one) that are percentage leases have a duty to continue operating the store on the premises. This is only true in a few jurisdictions. And even those jurisdictions don't enforce it all the time, after all, if Powell's percentage of the lease accounted for only a small portion of the rental fee (like, say, if Powell made \$100,000 per year it would only be \$5,000), the courts could decide not to enforce it.

Powell may argue that his contract was between Collins and Levson, and not between Collins and Tanner, and therefore he is entitled to breach the contract. This argument is likely to fail. When a landlord sells property in which there is a lease, the lease transfers to the new landlord as a delegation. The landlord is therefore required to honor the lease, and Tanner must honor Powell's lease. Powell will likely also be required to honor the lease. His living situation has not much changed, and abandonment places a high burden on the landlords (and his poor sublessee!). Powell's argument will likely fail.

The next question would be Walker's liability to Powell. In this case, Walker had a "sublease" with

Powell. Walker is the sublessee and Powell is the sublessor. This is a sublease because Powell did not assign his total rights to the property to Walker, but instead only gave her a portion, namely, the apartment above. As such, there is a privity of contract between Walker and Powell, but no privity of contract between Walker and the co-owners. What is created with a sublease is an essentially entirely new landlord-tenant relationship between the sublessor and the sublessee. It is clear that Walker and Powell had a tenancy for years, as Walker abandoned the property with a full year left on her lease. Normally, Walker would be held liable to Powell for abandoning the property. However, Walker may fall under several exceptions because Powell is an spectacularly bad landlord. Of course, these exceptions may be defeated (perhaps in Walker's favor) because Walker is an exceptionally bad tenant.

One exception Walker may qualify for is that Powell had breached the implied warranty of habitability. Under the implied warranty of habitability, a landlord must maintain the premises in a habitable condition throughout the lease. As such, the Powell would be forced to maintain proper ventilation throughout the apartment. This is assuming, of course, that the court would find that improper ventilation is a breach of the implied warranty of habitability. It may be that improper ventilation is a violation of the housing code. In some jurisdictions, a housing code violation is a per se violation. In others, the warranty may be violated even though there WAS an adherence to the housing code. Improper ventilation does sound pretty bad, especially if Walker was having health problems. Walker did the right thing in notifying Powell of the breach of implied warranty, and Powell did the wrong thing in not fixing it.

Because she notified him and because he did not fix it, Walker was constructively evicted from her lease. Constructive eviction occurs when several requirements are met. Under early doctrines, eviction extended to include conduct by which the landlord interfered with a tenant's ability to enjoy its bargained for rights of possession. In this case, Walker meets this burden because Powell interfered with her rights of possession by not adhering to the implied warranty of habitability. Modern views on constructive eviction take a different tack. The interference must be active or must result from the landlord's inaction. In this case, it is Powell's refusal to supply Walker with proper ventilation that acts as an active interference. The interference must be attributable to the landlord. In this case, yes. Because Walker notified Powell of the defects, the interference can be attributable to him. The interference must be sufficiently serious. Walker is having health problems due to the poor ventilation; I believe the court would find this sufficiently serious. Of course, Powell could argue that Walker should simply not burn so much incense, but this argument will likely fail as Walker has absolute possession over the property (although, not ownership). The last requirement is that the tenant departs within a reasonable time frame. In this case, she did. Walker is therefore entitled to terminate the lease.

HOWEVER! The lease a residential lease. NOT a commercial lease, even though Walker used the apartment for her fortune telling business (you'd think she would have seen this coming NYUK NYUK NYUK). Generally, a tenant may used the leased space for any lawful purpose. However, this lease contains an express prohibitory use restriction, in that the premises were supposed to be used for residential purposes only. Powell could argue that her using the apartment for commercial purposes was in direct violation of the lease, and could sue her for damages for breach of contract. However, given the weight of the arguments against him, it is unlikely that Powell's damages will be very high, if they are found to exist at all. Powell's claim will be boosted, however, in that he was able to mitigate damages to the contract by finding a new tenant relatively quickly.

The next question is Spieler's interest. Spieler, like Walker, has a sublease with Powell, and is therefore subject to the rights and limitations of the sublease. Because the sublease is for 4 years, and Powell only had three years, ten months remaining on his lease, the court may find the sublease to be invalid. Under derivative title, one can only transfer as many rights as one has. Thus, Powell could only transfer 3 years, ten months to Spieler. The court may simply amend the contract, however, and find that contract void for the period that Powell could assign his rights.

However, Powell leaves, abandoning his lease. At such a point, Spieler's sublease transfers over to the co-owners. The co-owners held a reversionary future interest in the property. The allowed Powell use of the building, but held a vested future interest in that the building would eventually revert back to the co-owners. As such, when the property reverted to them, it is likely that the sublease also reverted. Further, in some jurisdictions, there is a privity between the owner and a sublesser. This is not true in Missouri, however, although the landlord may join sublessee in an action to recover rent. It is likely that Powell's breach will require the co-owners to honor Spieler's lease. This is especially true given the policy considerations at hand. Class issues (rich property owners vs. poor Spieler), the dual nature of leases, all will come into play. And the co-owners are not necessarily heavily burdened: Spieler will have to continue to pay rent for the remaining year. Of course, courts could see Spieler's continuation of her tenancy as a restriction of the property's alienation. The co-owners could argue that Spieler's continued tenancy restricts the property's resale value and is therefore unnecessarily burdensome.

The court could also find that Powell must maintain the lease. If this is the case, the situation between Spieler and the co-owners is resolved. Powell will maintain the overall lease, Spieler will continue to make payments to Powell.

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Answer-to-Question- _3a_

Grant of determinable estates and grants of rights subject to a promissory servitude have much in common. They both all for conditions that burden property. The key difference between determinable estates and rights subject to a promissory servitude are what happens when one violations the condition.

Under determinable estates, a violation of the condition results in forfeiture. What would then happen? The original owner would sign a contract with Apple (or, more likely, would sign a contract with the carrier that would assign third party rights to Apple or some such), such that their phone was encumbered with a "no-jail breaking" clause. As such, even if the second owner were to purchase the phone from the original owner, the phone would still be encumbered by that clause due to the fact that the seller cannot transfer greater rights than he has. If the second (or original, I guess) owner jailbreaks his phone, the phone would either 1: immediately revert to Apple's possession or 2: Apple would have to find the owner and reclaim the property. This presents a variety of difficulties. First, if the phone reverted to Apple's possession, would the jail breaker be guilty of stealing? If Apple did not regain possession of the phone within statutory periods, could the jail breaker claim adverse possession? With the second option, a key hardship would be enforcement. Apple would have to hire personnel to enforce their no jail breaking policy by running around reclaiming jail broken phones. This sets up a lot of difficulties for everyone.

A better option for apple would be to burden the phone with a promissory servitude. They would likely go with a real covenant as opposed to an equitable servitude. Equitable servitudes have some elements, but they are the same as the real covenant elements so I will talk about them below. Of course, they are subject to the same problems as real covenant elements are. I'm just running short on time! In an equitable servitude, if the covenant is breached, Apple would be able to go to court an obtain an injunction that stops the jail breaker from using the phone (or forces the jail breaker to rever the phone to its previous state, if possible). This sounds expensive. Apple would be forced to file seperate documents in in the respective states of each defendant, and courts would be unlikely to enforce these injunctions, as they require constant supervision by the court.

Apple is more likely to go with a real covenant promissory servitude. Real covenants have several elements. First, the original parties must have intended to bind the successors. In this case, it would have to be the intention of the original owner to bind the successor to this covenant. It seems unlikely that a

person would do that, but I'm in law school. Real people don't read Terms of Use Agreements, and the iPhone is wildly popular. I imagine Apple would have no problem obtaining consent for this. ("You mean I'm not bound by this but if I sell it to someone else, they are bound? Yeah, I don't care. Where do I sign?") There are also problems with the contract "touching and concerning" the phone. Under the restatement of property, servitudes are eliminated if they impose unreasonable restraints on alienation or impose unreasonable restraints on trade or competition. There are good arguments for why both apply here. It may be an unreasonable restraint on alienation because no one would want to buy an iPhone second hand if they cannot jail break it. And it could also impose unreasonable restraints on trade and competition because other services would not be able to secretly allow their customers to use the phone. It's not a great argument, but it's an argument!

Lastly, it would have to be the case the resalers would inform the second owners of the limitation. This could get tricky. All craigslist ads would have to say "Buy this iPhone, but you cannot jail break it". It would be hard to enforce this last provision, especially because iPhones have been on sale for so long without this real covenant. One could simply claim they did not receive notice and assumed it was an older model iPhone. There would also be issues with the statute of frauds; each time someone wanted to sell their iPhone, they would be forced to sign a contract with the subsequent owner. The privity of estate would run vertically, too, so there would be extra problems. Although the entire iPhone would be sold, and the second owner would be a successor in interest to original parties, there may be problems with adverse possession. After all, what if someone finds the phone, or simply uses it for 5 years and then jail breaks it? An adverse possessor does not share vertical privity of estate, and would own the phone in "fee simple absolute".

A violation of a real covenant means that Apple could sue for damages in case of a violation. From a business stand point, this allows for the most profit for the least amount of financial upkeep. Far from employing their own police force, or requiring courts to supervise iPhone users, Apple could simply file claims for damages against each party and reap the rewards. This seems to be the method that music labels have taken, and they have had great success with it. But there are also lots of problems. Too many to make it worthwhile, likely.

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Answer-to-Question- _3b_

From a policy perspective, the law should not allow Apple to enforce a jail breaking restriction against the original purchaser for violations by subsequent purchasers.

The main contention, I feel, is that the original purchaser may not know subsequent purchasers from Adam. Sure, the original purchaser sells his iPhone to a friend, who then sells it to a friend, who sells it on craigslist. The craigslist buyer could literally be anyone. The original owner would be under an obligation, then, of ensuring that the iPhone ended up in good hands. This is too great a restraint on alienation, and I doubt any court would allow it. What would happen, in effect, is that no one would sell the iPhones for fear of being sued. This isn't just *a* restraint on alienation, this is *the* restraint on alienation. Absolutely no sales of it whatsoever.

Another argument is that the original purchasers interest in the property has ceased. Presumably, if I'm selling my iPhone I don't want to think about it anymore. I can't obtain enjoyment from and iPhone I've sold, and I cannot use it to make money. As such, I am still burdened by the iPhone, and yet acquire absolutely no benefits from it.

What would end up happening, perhaps, is that Apple would sue the original purchaser, and the original purchaser would be forced to join the subsequent purchasers in the suit until it was all sorted out. Actually, that doesn't sound so bad for us lawyers! We would probably make a lot of money doing discovery and the like. It does sound bad, however, for everyone else. Courts would be burdened with lots of suits that have lots of parties.

It is my contention, that Apple should in no way be allowed to enforce a jail-breaking restriction against the original purchaser. I cannot think of a single reason why they should -- but then again, I'm not an Apple stock holder.

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