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Equity - Restrictive Covenant on Chattel Binding on Third Party with Notice - Nadell & Co. v. Grasso, 346 P.2d 505 (Cal. App., 1959)

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test is still undecided. However, Maryland has indicated that it will follow the *Mace* case and give conclusive weight to blood tests in paternity cases. The court of appeals commented in *Shanks v. State*,[37] that in bastardy prosecutions: "[T]he non-scientific evidence is often quite unreliable and scientific evidence may be conclusive as to non-paternity."[38] Similarly, there was dicta in *Beach v. Beach*[39] that the District of Columbia will make the tests conclusive. The rule also was recognized in *United States v. Shaughnessy*.[40]

In view of the stature of the states adopting the rule that the blood tests are conclusive to establish non-paternity if properly made, it seems to follow that the rest of the states likewise will follow this rule. But the question remains, will these states wait for decisions like the *Chaplin*, *Johnson* and *Prochnow* decisions before, either through their courts or their legislature, they adopt this rule.

[37] 185 Md. 437, 45 A.2d 85 (1945).

[38] Ibid., at 449, 90.

[39] 114 F.2d 479 (C.A.D.C., 1940).

[40] 115 F.Supp. 302 (S.D.N.Y., 1953).

EQUITY–RESTRICTIVE COVENANT ON CHATTEL BINDING ON THIRD PARTY WITH NOTICE

Plaintiff, a dealer in damaged goods, agreed with a carrier not to permit fruit salad which had become frozen in transit to enter retail outlets under the original brand name label. The carrier notified the plaintiff that a violation of their agreement would result in a severance of further business relations with the carrier, one of its principal customers. The plaintiff then resold the goods to a third party. Subsequently, the defendant, a former employee of the plaintiff, who had participated in the transactions, purchased the goods from the third party and began their sale under the original brand name label without regard to the sales restriction imposed by the plaintiff. In affirming the decree granting an injunction, the court held that, having acquired the goods with the knowledge of the restriction on their resale in the containers with the original label, defendant was bound thereby. *Nadell & Co. v. Grasso*, 346 P.2d 505 (Cal. App., 1959).

Originally at common law, restraints on the alienation of property were considered void.[1] Equitable servitudes on realty binding subsequent purchasers with notice of the restrictions were first upheld in *Tulk v. Mox-*

[1] Coke's Institutes, Vol. 2, p. 21 (1836).

hay,[2] but servitudes on personalty did not fare as well. This difficulty was apparently due to the struggle to find a dominant tenement to which the benefit of the servitude could attach.[3]

About ten years after *Tulk v. Moxhay*, Lord Justice Knight Bruce in *De Mattos v. Gibson*,[4] relied on by the principal case, announced the broad principle that where property, *either movable or immovable*, is disposed of *with notice* of a prior contract entered into by the transferor for its use in a particular manner, the transferee taking it with such notice may be restrained from using it otherwise.[5] This principle has generally been repudiated in the United States where the rule appears to be that equity is reluctant to enforce equitable servitudes on personalty against subsequent transferees either with or without notice[6] because ". . . they offend against the ordinary and usual freedom of traffic in chattels . . . which pass by mere delivery."[7] Moreover, the courts feel that the right to alienate is an essential incident of the property right in chattels,[8] and that ". . . a covenant which may be valid and run with land will not run with or attach itself to a mere chattel."[9] Consequently, Professor Chafee has summarized the doctrine as "at best it remains a struggling equitable conception which may disappear altogether."[10]

Overcoming this lack of precedent, the principal case found that the plaintiff had a *proprietary* interest in the chattels for the benefit of his business and that this should be regarded as the dominant tenement of an equitable servitude.[11] This result coincides with the true nature of the rule in *Tulk v. Moxhay* that "*any* interest of a proprietary nature in the beneficial enjoyment of the covenant suffices to support its enforcement. . . ."[12]

[2] 2 Phil. Ch. 774, 41 Eng. Rep. 1143 (1848).

[3] Lord Strathcona Steamship Co. v. Dominion Coal Co., [1926] A.C. 108, 121, 122; Kelly v. Central Hanover Bank & Trust Co., 11 F. Supp. 497 (S.D.N.Y. 1935).

[4] 4 De. G. & J. 276, 45 Eng. Rep. 108 (1859).

[5] De Mattos v. Gibson, 4 De. G. & J. 276, 45 Eng. Rep. 108 (1858); In re Waterson, Berlin & Snyder Co., 48 F.2d 704 (C.C.A.2d, 1931).

[6] Miles Co. v. Park & Sons Co., 220 U.S. 373 (1911); In re Consolidated Factors Corp., 46 F.2d 561 (1931); Park & Sons Co. v. Hartman, 153 Fed. 24 (C.C.A. 6th, 1907); National Skee-Ball Co. v. Seyfried, 110 N.J.Eq. 18, 158 Atl. 736 (1932).

[7] Park & Sons Co. v. Hartman, 153 Fed. 24, 39 (C.C.A. 6th, 1907).

[8] Consult Chafee, Equitable Servitudes On Chattels, 41 Harv. L. Rev. 945 (1928).

[9] Park & Sons Co. v. Hartman, 153 Fed. 24, 39 (C.C.A. 6th, 1907).

[10] Chafee, Equitable Servitudes On Chattels, 41 Harv. L. Rev. 945, 956 (1928).

[11] Nadell & Co. v. Grasso, 346 P.2d 505 (Cal. App., 1959).

[12] Wade, Restrictions On User, 44 L. Q. Rev. 51, 65 (1928) (emphasis supplied).

Generally, five classes of restrictions have been utilized.[13] While restrictions on territory and resale price may be objected to on the ground that they are chiefly aimed at increasing the covenantee's profits,[14] restrictions on the form in which the article may be resold are beneficial to the public. Essentially the covenantee is not directly motivated by the dollar sign here, but is aware that:

> The public has been familiarized through pictorial advertising and personal observation with a standardized type and size of package, and the appearance of the article on a retailer's counter in a different form will have a demoralizing effect on its selling powers. The public will begin to think that the manufacturer has authorized the resale of his goods in a manner which facilitates uncleanliness or adulteration with inferior materials. . . . A serious loss of good will is bound to follow.[15]

A similar agreement in *P. Lorillard v. Weingarden*,[16] followed by the *Nadell* case, was enforced. There, the covenant prohibited the sale of a lot of stale cigarettes in this country since good cigarettes of the same brand were being sold here. The court, without citing a single case in support of its decision, granted an injunction against a subsequent purchaser with notice on the ground that equity will enforce a restrictive covenant if reasonable.

Inasmuch as previous cases upholding restrictions on chattels have primarily involved the infringement of copyrights,[17] and Fair Trade Laws,[18] the *Nadell* and *Lorillard* decisions indicate that equity, which has recognized that the owner of a business has a proprietary interest therein,[19] will enforce equitable servitudes on chattels binding subsequent purchasers with notice where the only effect of the covenant is to keep a particular mass of damaged, adulterated, or inferior goods off a market in which standard quality goods of the same brand are being offered for sale without restrictions.[20] Thus where a plaintiff is faced with a serious loss of

[13] United Shoe Mach. Corp. v. United States, 258 U.S. 451 (1922) (tying clauses); Park & Sons Co. v. Hartman, 153 Fed. 24 (C.C.A. 6th, 1907) (restriction on resale price); P. Lorillard Co. v. Weingarden, 280 Fed. 238 (W.D.N.Y., 1922) (restriction on use of the chattel itself); National Skee-Ball Co. v. Seyfried, 110 N.J.Eq. 18, 158 Atl. 736 (1932) (restriction on territory); Nadell & Co. v. Grasso, 346 P.2d 505 (Cal. App., 1959) (restriction on form in which chattel may be resold).

[14] Chafee, Equitable Servitudes On Chattels, 41 Harv. L. Rev. 945 (1928).

[15] Ibid., at 949.

[16] 280 Fed. 238 (W.D.N.Y., 1922).

[17] In re Waterson, Berlin & Snyder Co., 48 F.2d 704 (C.C.A.2d, 1931).

[18] Max Factor Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177 (1936).

[19] John Brothers Abergarw Brewery Co. v. Holmes, 1 Ch. 188 (1900).

[20] P. Lorillard Co. v. Weingarden, 280 Fed. 238 (W.D.N.Y., 1922). Consult 36 Harv. L. Rev. 107 (1922).

good will to his business if the goods are sold in a form or way which is contrary to his restriction, equitable machinery will enjoin the offender.

Just as modern needs have brought about servitudes on land unknown to the common law, they may also call for a limited departure from the free alienation of personalty for the purpose of promoting desirable business practices completely foreign to the common law.

FEDERAL ARBITRATION ACT–STATE LAW NOT BINDING ON FEDERAL COURT IN DIVERSITY SUIT

The plaintiff, a Massachusetts corporation, ordered thirty-six pieces of a certain style of wool from the defendant, a New York corporation. The final written contract contained a clause providing that "any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration. . . ." Delivery of the goods was made from New York to Boston, and the plaintiff found latent defects in the goods which did not prove to be the quality called for by the contract (plaintiff's version of fraud). In an action for damages for alleged fraudulent misrepresentations made by the defendant inducing the plaintiff to purchase the woolen fabric, the district court denied a stay of proceedings pending arbitration. The court of appeals reversed with a direction to grant the stay. The court of appeals found that the Federal Arbitration Act[1] was a declaration of national law binding upon federal courts when jurisdiction is based solely upon diversity of citizenship. *Lawrence v. Devonshire,* 271 F.2d 402 (C.A.2d, 1959).

"Maritime transactions" and transactions affecting "commerce," with the exception of employment contracts, come within the operation of the Federal Arbitration Act.[2] Written provisions for arbitration in maritime transactions and transactions affecting commerce are made valid, irrevocable and enforceable.[3] However, such arbitration agreements are not grounds to make the transaction a federal question.[4] Therefore, the question of arbitration will not be raised in a federal court unless jurisdiction is predicated on the judicial code. If a federal court has jurisdiction separate and apart from the arbitration agreement, and if the arbitration agreement otherwise comes within the scope of the Act, then a stay of the proceedings for purposes of arbitration will be granted upon application of one of the parties.[5] In substance, these are the provisions of the

[1] 9 U.S.C.A. §§ 1 to 14 (Supp., 1959).

[2] 9 U.S.C.A. § 1 (Supp., 1959).

[3] 9 U.S.C.A. § 2 (Supp., 1959).

[4] 9 U.S.C.A. §§ 4, 8 (Supp., 1959).

[5] 9 U.S.C.A. § 3 (Supp., 1959).