North Dakota Law Review

Volume 36 | Number 2 Article 10

1960

Sales - Contracts Relating to Personal Property - Equitable Servitudes on Chattels

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The author of an article in the *Michigan Law Review*,[8] after noting that some jurisdictions require only the consent of the accused, said: "the latter procedure is more in accord with the underlying conception of the waiver plan. If trial by jury, as we have been contending, is a protection for the benefit of the individual, then it is hardly consistent to require also the consent of the court, or the prosecuting attorney, or both, as a condition precedent to a trial without a jury. The act of the legislature is itself consent by the state; and there is a curious contrariety in calling a jury trial a privilege and then making its surrender subject to the control of the court."

ALAN WARCUP.

SALES — CONTRACTS RELATING TO PERSONAL PROPERTY — EQUITABLE SERVITUDES ON CHATTELS. — Plaintiff, in purchasing from carrier a quantity of fruit salad which had been frozen in transit, contracted not to permit the goods to enter retail outlets under the shipper-manufacturer's label. Later, plaintiff, with the assistance of its' employee Ross, sold the goods to Vizcarra with the invoice reciting the restriction. Subsequently, Ross terminated his employment with plaintiff, purchased part of the goods from Vizcarra, sold part of the salad to a retailer, and indicated an intention to dispose of the remainder without regard to the restriction imposed by the plaintiff. Plaintiff's suit for injunctive relief in lower court was granted and the District Court of Appeal in affirming *held*, the contract requirement was not in restraint of trade, and that an equitable servitude on chattels was created thereby which was enforceable against a person who subsequently acquired the chattels with notice of the restriction, notwithstanding lack of privity between such person and the dealer. *Nadell & Co. v. Grasso*, 346 P.2d 505 (Cal. 1959).

The rule is well settled that restrictive agreements relating to real property, classed as equitable servitudes, are enforceable against subsequent purchasers who take with notice of the restriction.[1] In *De Mattos v. Gibson*,[2] broad equitable principles were enunciated which seemed sufficient to allow the desired enforcement to restrictions on chattels. There the court said: "Reason and justice seem to prescribe that . . . where a man . . . acquires property from another, with knowledge of a previous contract . . . the acquirer shall not . . . use and employ the property in a manner not allowable to the giver or seller . . . . " It was thought that these servitudes would receive judicial approval, but in England, such restrictions were held binding on subsequent purchasers with notice only when imposed on patented articles.[3] This view became more entrenched in England with one noteworthy exception decided on equitable servitude principles.[4]

8. Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 Mich. L. Rev. 695, 736 (1927).

1. Tulk v. Moxhay, 2 Phillips 774, 1 H. & Tw. 105, 18 L.J. Ch. 83, 13 L.T. (O.S.) 21, 13 Jur. 89, 41 Eng. Rep. 1143 (1848); 2 Pomeroy, Equity Jurisprudence 5th ed. 1941) 954; McClintock, Equity 213 (1936). See also, Schmidt, *Equitable Servitudes in Colorado*, 33 Dicta 236, 237 (1956).

2. 4 De G. & J. 276, 45 Eng. Rep. 108, 110 (C.A. 1858).

3. Werderman v. Societe' Generale d'Electricite', 19 Ch.Div. 246 (1881); National Phonograph Co. of Australia v. Menck, A.C. 336 (1911).

4. Lord Strathcona Steamship Co. v. Dominion Coal Co., A.C. 108 (1926) (The purchaser with notice was enjoined from using a ship in a manner inconsistent with the charter contract entered into by the original owner and the charter party).

Early Federal Court decisions agreed with the English view.[5] Professor Chafee, in a 1928 law review article,[6] in tracing the development of the doctrine, discussed two methods for binding the subsequent purchaser of chattels. He noted that the first method, the sub-contract device, was held ineffective in England on the grounds that no consideration flowed from the promisee to the sub-purchaser.[7] In advocating the second method, he said, the "notice, or equitable servitude device . . . bears a close resemblance to the imposition of restrictions on land in the original recorded deed, of which later purchasers are bound to take notice . . . ."[8] He concluded by saying, "Servitudes on chattels still seem possible and reasonable, although . . . long investigation has not disclosed a single square decision establishing such a conception in a court of last resort."[9] This last statement exemplifies the state of the law on such restrictions up to 1928.

Advocates of the doctrine thought they had support in the decisions sustaining price restrictions on resale where a manufacturer produces and sells under a special brand a commodity in general use and which others manufacture and sell,[10] as distinguished from the patent medicine, copyright, and patent cases.[11] However, in 1932, in the case of *National Skee-Ball Co.* v. *Seyfried*,[12] a heavy blow was struck at the advocates of enforcing servitudes on chattels when the court, in denying relief, said, " . . . research has not revealed a single case in this state or elsewhere in which the courts have favored the attachment of equitable servitudes on chattels, title to which passes with delivery."[13]

The impact of Federal and State legislation in the form of "fair trade acts," copyright and patent laws, and the restraint of trade and unfair competition sections of the Sherman Act of 1890,[14] further limited the doctrine,

5. Mitchell v. Hawley, 83 U.S. (16 Wall.) 544 (1872); Hatch v. Adams, 22 Fed. 434 (C.C.E.D.Pa. 1884); Park v. Hartman, 153 Fed. 24, 39 (6th Cir. 1907). See Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U.S. 502 (1917); Bauer v. O'Donnell, 229 U.S. 1 (1913); Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373 (1911); Bobbs- Merrill Co. v. Straus, 210 U.S. 339 (1908); Apollinaris Co. v. Scherer, 27 Fed. 18 (C.C.S.D.N.Y. 1886); Garst v. Hall and Lyon Co., 179 Mass. 588, 590, 61 N.E. 219 (1901).

6. Chafee, *Equitable Servitudes on Chattels*, 41 Harv L. Rev. 945 (1928).

7. *Id.* at 952. The author cites Dunlop Pneumatic Tyre Co. v. Selfridge, A.C. 847, 84 L.J.K.B. 1680 (1915). See, Elliman v. Carrington, 2 Ch. 275 (1901).

8. *Supra* note 6, at 953.

9. *Supra* note 6, at 1013.

10. D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041 (1912); Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745 (1909); Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144 (1913). See Murphy v. Christian Press Ass'n Publishing Co., 38 App. Div. 426, 56 N.Y. Supp. 597 (1899) (Where injunction was granted to restrain use of electrotype plates by purchaser with notice in violation of the agreement); New York Bank Note Co. v. Hamilton Bank-Note Co., 83 Hun. 593, 31 N.Y. Supp. 1060 (1895), aff'd 28 App.Div. 411, 50 N.Y. Supp. 1093 (1898) (Where use of printing presses was restricted).

11. *Supra*, Note 5.

12. 110 N.J. Eq. 18, 158 Atl. 736 (1932) (Where agreement between manufacturer and buyer of skee-ball alleys, restricting use to specific locality, was held not binding on subsequent buyer with notice). *Contra*, P. Lorillard Co. v. Weingarden, 280 Fed. 238 (1922) (Where P sold stale cigarettes to X with restriction they were not to be sold in U.S., and X re-sold to D who had notice, injunction granted to restrain D from violating restriction).

13. Nat'l. Skee-Ball Co. v. Seyfried, 110 N.J. Eq. 18, 158 Atl. 736, 738 (1932). See Kelly v. Central Hanover Bank and Trust Co., 11 F. Supp. 497, 508 (S.D. N.Y. 1935) (Where court said: "While the scope of this doctrine remains as yet undefined it is clear that the vast gap between. . .Tulk v. Moxhay. . .and. . .the case at bar has not been bridged.")

14. 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

by taking potentially applicable situations involving goods and products, out of the un-regulated and placing them under statutory regulation. Thus, the trend of the courts in curtailing the doctrine as to chattels became more crystallized. This view was further exemplified by the 1940 United States Supreme Court decision in *Ethyl Gasoline Corporation v. United States.*[15] Since this case involved a patented product, and resulted in prohibiting the patentee from restricting his licensee, by analogy, the case for enforcing servitudes on non-patented articles would appear to be considerably weakened, if not destroyed.

Finally, in 1956, Professor Chafee, in a second law review article,[16] soundly criticized the decision in *Pratte v. Balatsos,*[17] in which the court enforced an equitable servitude on a juke box. He further stated that from 1928 to 1956, he had found only "seven cases of attempts to bind personal property by restrictions unsanctioned by legislation, and only three of these were successful."[18] In a re-evaluation of his earlier opinions in the light of present developments, he concluded that, "Where chattels are involved and not just land or a business, the policy in favor of mobility creates even stronger cause for courts to hesitate and scrutinize carefully factors of social desirability before imposing novel burdens on property, in the hands of transferees."[19]

The court in the instant case disposed of the problem by applying broad, equitable principles based on the enforcement of servitudes on land. By analogy then, these principles were applied to chattels. It is clear that the plaintiff had an inadequate remedy at law, and the court made an honest attempt to do justice between the parties by the application of equitable principles.[20] However, one question remains, and that is, whether or not the doctrine of equitable servitudes on chattels should have been dredged up out of the past and applied to the facts in this case? It is submitted that there was an alternative method of arriving at the same conclusion. Since by statute California has determined that, "the good will[21] of a business is property . . . ,"[22] it would seem that the acts of the defendant in interfering with "the expectation of continued public patronage," would be the basis for

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15. 309 U.S. 436 (1940).

16. Chafee, *The Music Goes Round and Round: Equitable Servitudes and Chattels,* 69 Harv. L. Rev. 1250 (1956).

17. 99 N.H. 430, 113 A.2d 492 (1955).

18. Chafee, *supra* note 16, at 1255. Restriction upheld in *In Re* Waterson, Berlin & Snyder Co. v. Irving Trust Co., 36 F.2d 94 (S.D.N.Y. 1929), modified in 48 F.2d 704 (2d Cir. 1931); Metropolitan Opera Ass'n. Inc. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), aff'd mem., 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dep't 1951); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937). See also, 51 Harv. L. Rev. 171 (1937); 64 Harv. L. Rev. 682 (1951). *Contra*: RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir.), *cert. denied,* 311 U.S. 712 (1940); Barron G. Collier, Inc. v. Paddock, 37 Ariz. 194, 291 Pac. 1000 (1930); Nat'l. Skee-Ball Co. v. Seyfried, 110 N.J. Eq. 18, 158 Atl. 736 (1932); Montgomery v. Creager, 22 S.W.2d 463 (Tex. Civ. App. 1929). See, Chafee,*Unfair Competition,* 53 Harv. L. Rev. 1289, 1319-20 (1940).

19. Chafee, *supra* note 16, at 1261.

20. In the instant case, the court did justify itself by quoting a familiar equitable rule: "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention."

21. West's Ann. Bus. & Prof. Code, § 14100 (1959) ("the good will of a business is the expectation of continued public patronage").

22. West's Ann. Bus. & Prof. Code § 14102 (1959).

injunctive relief as being an unfair trade practice.[23] This approach would give relief in a situation where equity demands justice, and would not result in uncertain law, as a reliance on the doctrine of equitable servitudes as applied to chattels has caused in the past.

WESLEY N. HARRY.

TRIAL — INSTRUCTIONS TO JURY — DUTY OF COURT TO INSTRUCT ON ITS OWN MOTION. — Plaintiff, a track laborer, brought an action to recover damages for personal injuries sustained in a collision between the hand car on which he was riding, and a pick-up truck driven by the defendant. The latter's defense consisted of a general denial followed by a plea of contributory negligence. There were no instructions given nor requested concerning the issue of contributory negligence. The jury returned a verdict for the plaintiff. The Supreme Court of Oklahoma *held,* two justices dissenting, that while the instructions standing alone could be subject to criticism, when considered together they fairly submitted the issues to the jury and no reversible error existed. *Moddy v. Childers,* 344 P.2d 262 (Okl. 1959). The dissent stated that contributory negligence is a fundamental issue of law, and as such it was the court's duty, on its own motion, to instruct correctly on it.

The Oklahoma Supreme Court has repeatedly maintained, in negligence actions, that it is the duty of the court, on its own motion, to give instructions which fairly state the law applicable to the fact situation, and that failure to do so is reversible error.[1]

Contributory negligence should be considered a fundamental issue in all cases in which it is involved.[2] In the instant case the defendant failed to request instructions on contributory negligence. The majority holding makes no mention of such an instruction, but from the facts given it could well have been a determinative factor. Giving proper instructions on the issue in a case, according to one legal writer, is a judicial duty as the judge is charged with knowledge of the law, and the parties have an absolute right to an instruction on the applicable rules of law.[3]

It has been held, that a failure of the court to give a certain instruction cannot be raised on appeal if no request was made for it at the trial.[4] In at least one jurisdiction the rule seems to be that the court has no right to instruct on its own initiative, nor are the parties required to ask for instruc-

23. West's Ann. Bus. & Prof. Code, § 17000 (1959) (Unfair Trade Practices); West's Ann. Bus. & Prof. Code, § 16900 (1959) (Fair Trade Contracts). See also, 24 Ops. Atty. Gen 278 (Cal. 1959).

1. Oklahoma Transportation Company v. Green, 344 P.2d 660 (Okl. 1959). (This case was decided seven days after a rehearing was denied the instant case. It was held, that negligence on the part of either driver was a fundamental issue in the case, and since it was specifically pleaded, and evidence introduced in support of that defense, the defendant was entitled to have the jury properly instructed thereon, even without such a request.); Garner v. Myers, 318 P.2d 410 (Okl. 1957) (Ct. cites Tit. 12 O.S. 1951 § 577 subd. 3); Roadway Express, Inc. v. Baty, 189 Okl. 180, 114 P.2d 935 (1941) (Ct. cites 12 Okl. Stat. Ann. § 577 subd. 5); Beams v. Young, 92 Okl. 294 222 Pac. 952 (1923); First National Bank of Mounds v. Cox, 83 Okl. 1, 200 Pac. 238 (1921).

2. Roadway Express, Inc., v. Baty, *supra,* note 1.

3. 1 REID, BRANSON INSTRUCTIONS TO JURIES § 5 (3rd ed. 1960).

4. Wallace v. Riales, 218 Ark. 70, 234 S.W.2d 199 (1950); Cobb v. Marshall Field & Co., 22 Ill. App.2d 143, 159 N.E.2d 520 (1959) (Statutory requirement).