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Equitable Servitudes On Chattels

withdrawn for reasons which would not be legally sufficient to justify the cancellation of a contract involving other rights or different relationships."[28] This indicates an advantage over both the majority and minority theories in that under the intermediate theory, once the initial petition is filed, the judge is not restricted by any contract or written agreement made by the respective parties and—if it is in the best interest of the child[29]—can return the child to the mother. The case further points out that by allowing the mother to withdraw consent at her discretion, the majority view makes it possible for the natural parent to extort money from the adoptive parents by threatening to revoke her consent. If, instead, the withdrawal of consent is made discretionary, this greatly lessens the opportunity to perpetrate fraud of this nature.[30]

The majority in the *Hendrix* case based its decision on the fact that it would better serve the welfare of the child to have the adoption petition granted, which essentially constituted an exercise of discretion after consideration of all the evidence in the case. Thus, among the three commonly used theories, it would seem that the discretionary theory is the best suited to serve the interests of society. Once the natural mother has given her free and voluntary consent, the court should have jurisdiction over the entire matter. The court can then consider all the facts and circumstances of the particular case and make the disposition which is best for the child and fairest to the respective parties. The Uniform Adoption Act of 1953[31] takes a position tantamount to the discretionary trend, thereby lending substantial support to its validity.

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EQUITABLE SERVITUDES ON CHATTELS

Since the middle of the nineteenth century owners of land have been allowed to restrict its use in the hands of remote transferees in order to protect certain interests therein. Producers of chattels have sought to develop a similar, though more flexible device,[1] which will

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[28]Id. at 94.

[29]See Ellis v. McCoy, 332 Mass. 254, 124 N.E.2d 266 (1955); Adoption of McKenzie, 275 S.W.2d 365 (Mo. App. 1955).

[30]See In re Adoption of a Minor, 144 F.2d 644 (D.C. Cir. 1944).

[31]Uniform Adoption Act § 6 (1953).

[1]This device has generally taken the shape of one of five kinds of restrictions: restrictions on the resale price, restrictions on the form of the chattel's container,

allow them to control their goods in the hands of intervening dealers so as to insure that the product reaches the public as advertised. Such restrictions of servitudes have generally proved to be unenforceable in the courts. However, in the recent case of *Nadell & Co. v. Grasso*,[2] an equitable servitude on a chattel was enforced.

The plaintiff, Nadell & Co., was a dealer in damaged goods who purchased a quantity of damaged Kraft brand fruit salad from the Southern Pacific railroad. In order to avoid involvement with Kraft, whose name appeared on the lids of the container, Southern Pacific required plaintiff to agree not to sell, or allow others to sell, the damaged merchandise under the Kraft label. It was understood that a violation of this provision would end business relations between plaintiff and Southern Pacific. Plaintiff sold the entire shipment to one Vizcarra who agreed to use his own containers and return Kraft's to the plaintiff.[3]

Ross, an employee of Nadell, participated in both transactions. He assisted Nadell's vice-president in the sale to Vizcarra, and knew of both the restriction placed on the sale by Nadell, and the private agreement between Nadell and Southern Pacific. Soon after the sale Ross left Nadell's employ, bought the goods from Vizcarra, and sold some in the Kraft containers, disregarding the restrictions. This suit was brought by Nadell to enjoin Ross and his associates from future sales. In affirming the injunction granted by the lower court, the California District Court of Appeals decided the restriction was analogous to a restriction on the use of land, and held that an enforceable equitable servitude on the goods had been created by the contract between Nadell and Vizcarra, and that the restriction was valid against subsequent purchasers who knew its provisions.

The leading case in the field of equitable servitudes on land is *Tulk v. Moxhay*.[4] The English Court of Chancery laid down the principle that equity will enforce an agreement to use or abstain from using land in a particular manner against any purchaser or other person with notice of the restriction who attempts to use the land in violation of its terms, regardless of whether the agreement was a valid covenant running with the land. Since this early decision, the doctrine

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restrictions on the chattel itself, tying restrictions, and territorial restrictions. For a discussion of these five types of restrictions see Chafee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945, 948-50 (1928).

[2]346 P.2d 505 (Dist. Ct. Calif. 1959).

[3]The invoice signed by Vizcarra in accepting the goods read as follows: "To be removed from jars, Caps, jars, and cases to be returned to Nadell & Co., Inc." Id. at 508.

[4]Phill. ch. 744, 41 Eng. Rep. 1143 (1848).

of equitable servitudes upon land has been accepted and greatly expanded by both English and American courts.[5]

The subjection of chattels to equitable servitudes did not meet with such spontaneous approval. In 1928, Professor Chafee pointed out that judges looked with disfavor on practically all attempts to impose obligations upon successive owners of personal property because such restrictions are in restraint of trade, and they violate the public policy favoring free alienability of chattels.[6] By 1928, price maintenance[7] and tying restrictions,[8] the two chief methods of creating equitable servitudes, had been declared invalid; and only a few stray decisions based on other grounds could be found in which courts had enforced such restrictions on chattels.[9] Therefore, at that time support for upholding the validity of an equitable servitude had to rest on principle rather than authority. Chafee said in conclusion:

> "At the close of my inquiry ... I am much less convinced of the desirability of equitable servitude than when I began. Against the persuasive effect of analogous property interests and the advantages of such restrictions to manufacturers and to the marketing process must be offset not only the economic claims of consumers and independent wholesalers and retailers, but also the immense judicial labor required for a satisfactory development of the operation and limits of the proposed device.... There is no such gap in general welfare as would be occasioned by the rejection of equitable servitudes on land. Until the need for similar servitudes on chattels becomes more certain, they are not likely to acquire assured validity."[10]

Soon after this appeared, there was a surprising about-face, aided by Congress,[11] in the field of price maintenance. Powerful lobbies

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[5]See 3 Tiffany, Real Property 858-75 (3d ed. 1939), for a general discussion of the subject of equitable servitudes showing their general acceptance as well as the expansion of the original doctrine expressed in Tulk v. Moxhay.

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

[7]In John D. Park & Sons Co. v. Hartman, 153 Fed. 24 (6th Cir. 1907), Judge Lurton declared that restrictions placed by a manufacturer on the resale price of his product were unenforceable since they were in restraint of trade. This case was subsequently followed by Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). For a discussion of price maintenance cases before the passage of the Fair Trade Laws, see Annot., 7 A.L.R. 449 (1920).

[8]In United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922), this type of restriction was condemned for the same reason as price maintenance.

[9]Chafee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945, 1007-13 (1928).

[10]Id. at 1013.

[11]The Miller Tydings Act, ch. 690 tit. VIII, 50 Stat. 693 (1937), 15 U.S.C. § 1 (1959), provides that nothing in the Sherman Anti-trust Act, ch. 647, 26 Stat. 209 (1890), or the Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914), 15 U.S.C. § 41 (1935), shall render illegal contracts or agreements prescribing minimum prices for the resale of a commodity, when contracts or agreements of that

in almost every state secured the passage of fair trade laws which legalized this type of restriction.[12] But outside of this well-managed field, the cases concerning other types of equitable servitudes on chattels are in hopeless conflict.

After 1928 and before *Nadell,* there had been nine known attempts to bind personal property by the use of equitable restrictions other than those created by Congress. Five of these attempts were successful, but only three of these cases actually turned on the legality of the attempted restriction. Some of the courts, when faced with questions relating to equitable servitudes on chattels, apparently ignored the matter and rested their decision on other grounds.[13] On the other hand, some restrictions have been upheld because both the property and the interests involved were unique,[14] such as the restrictions

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description are lawful as applied to intrastate transactions under the law of the state in which such resale is to be made, or to which the commodity is to be transported for resale.

[12]See Annot., 19 A.L.R.2d 1139 (1951), for a discussion and cases concerning price maintenance under state Fair Trade Laws. See also Shulman, The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels, 49 Yale L.J. 607 (1940), and Lackskein, Refusal to Sell: A means of Achieving Resale Price Maintenance in Non-Fair Trade Law States, 36 Texas L. Rev. 799 (1958).

[13]In Barron G. Collier, Inc. v. Paddock, 37 Ariz. 194, 291 Pac. 1000 (1930), the agreement by a traction company to let plaintiff control all advertising in its cars was held not to bind the city, which acquired the property and was running a municipal street railway. The court based its decision on technical considerations concerning how and what kind of contract a municipality could enter into and never considered the validity of the plaintiff's servitude. A lower Texas court refused to enforce a tying restriction which would require owners of a certain filling station to purchase only from a particular dealer. Montgomery v. Creager, 22 S.W.2d 463 (Tex. Civ. App. 1929). The holding is based upon the principle that the restriction was a personal contract between the plaintiff and the defendant's vendor and not one that attaches to the property itself.

[14]In Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937), on facts identical to the Whiteman case in the text below, the Supreme Court of Pennsylvania upheld the validity of an equitable servitude on a record stating that it was not in restraint of trade and not so unreasonable as to be unenforceable in equity. The court held that although in most cases the common law rules against such restrictions on chattels would apply, this ancient distinction should not be followed blindly in a modern era, but judges should use intelligent discretion in deciding whether to enforce such a covenant. For a discussion of the Waring and Whiteman decisions, see 2 Wash. & Lee L. Rev. 85 (1940). In Capital Records, Inc. v. Mercury Record Corp., 221 F.2d 657 (2d Cir. 1955), the plaintiff was allowed to enforce a territorial restriction giving him the exclusive right to make certain records. The court, in upholding the servitude, simply stated that, under the New York law, the owner of a literary property may, by negative covenant, subject its use to certain restrictions when in the hands of remote assigns. In the third case, In re Waterson, Berlin & Snyder Co., 36 F.2d 94 (S.D.N.Y. 1929), modified in 48 F.2d 704 (2d Cir. 1931), a publisher's trustee in bankruptcy was not allowed to sell copyrights to other publishers free and clear of royalty agreements with the authors.

imposed by an author or composer upon the use of his creation or "literary property."[15]

In two cases in which the decision turned squarely upon the validity of an equitable servitude, the courts refused to enforce such a restriction. In *National Skee-Ball Co. v. Seyfried*,[16] the purchaser of an amusement device was allowed to disregard his vendor's promise, which purported to bind his assigns, that the device would not be used in any place where other Skee-ball alleys were in operation. The decision was based upon the traditional proposition that public policy is opposed to any limitation and restriction upon the alienability of personal property. In dictum, the court also said that a covenant, which would be valid and run with land, will not run with or attach to a mere chattel. In *RCA Mfg. Co. v. Whiteman*,[17] a printed notice on a phonograph record did not prevent a purchaser from using it on radio broadcasts. Judge Learned Hand, speaking for the court, stated that "restrictions upon the uses of chattels once absolutely sold are at least prima facie invalid; they must be justified for some exceptional reason, normally they are 'repugnant' to the transfer of title."[18]

In a few recent decisions, however, equitable servitudes on chattels have been upheld and enforced by the use of an analogy to real property principles. An equitable servitude on a juke box was accepted without qualification in *Pratte v. Balatsos*,[19] which is probably the

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The restriction apparently was upheld as a matter of course, the decision being based on contract principles. Though this case concerns literary property, it has been cited for the proposition that equitable servitudes on all kinds of chattels are enforceable. See 45 Harv. L. Rev. 586 (1932), which says that this decision extended the doctrine of equitable servitudes on chattels beyond any previous authority.

[15]"Literary property," as the term is used here, refers to the right to exclude others from making some use of the expressed thoughts of the author. "Literary property means either the interest of an author in his words or the corporeal property in which an intellectual production is embodied." Desny v. Wilder, 46 Cal. 2d 715, 299 P.2d 257, 271 (1956). For other definitions of the phrase "literary property," see 25 Words & Phrases 398 (1940).

[16]110 N.J. Eq. 18, 158 Atl. 736 (1932).

[17]114 F.2d 86 (2d Cir. 1940). See note 4 supra, and the discussion of the Waring case. The courts here stated that the Waring decision would not be followed.

[18]114 F.2d at 89.

[19]113 A.2d 492 (N.H. 1955). For discussion of the Pratte case, see Chafee, The Music Goes Round and Round: Equitable Servitudes and Chattels, 69 Harv. L. Rev. 1250 (1956). See also In re Waterson, Berlin & Snyder Co., supra note 14, and Tri-Continental Financial Corp. v. Tropical Marine Enterprises, Inc., 265 F.2d 619 (5th Cir. 1959). In the latter, defendant West India Company sold a vessel to one Owens, restricting its use for 10 years with a $10,000 penalty for noncompliance. Owens later sold the vessel to Tropical Marine Enterprises with a similar provision. The plaintiff financed the sale and took a mortgage on the vessel. Tropical Marine Enterprises went bankrupt and the plaintiff attempted to sell the mortgaged vessel

outstanding example of enforcing such a restriction. There contracts between plaintiff and defendant's vendor, binding upon assigns, gave Pratte the right to supply and service juke boxes in Larochelle's property. The defendant knew of the covenant when he purchased. In allowing this restriction, the New Hampshire Supreme Court stated: "Equitable restrictions are recognized in this jurisdiction and held to be binding upon the purchaser of the servient tenement with notice."[20] Every case or other authority relied on by the court involved an equitable servitude on land.

In *Nadell* the California court, though it discussed at some length decisions directly concerning equitable servitudes on chattels, followed the decision of *Pratte v. Balatsos* and based its result on an analogy to real property principles. It is submitted, however, that by the use of this analogy the California court, like many others dealing with this subject, has avoided facing the real problem presented.

Courts have found equitable servitudes upon land desirable, and the policy considerations behind their acceptance have often been stated.[21] These considerations, however, do not suffice to support the validity of similar restrictions on chattels since the latter type of restrictions produces an entirely different effect on the public. As stated by Professor Chafee, in a comment on the *Pratte* case:

> "The big point is that the imposition of a novel burden, either on land or a chattel or both, ought not to depend solely on the

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free of restriction. The court upheld the restriction stating that the plaintiff, in order to get relief under the circumstances shown, had to produce more than the dry as dust technical distinction between restrictions on chattels and realty. The court held that under this situation where the mortgagee with knowledge of the covenant now undertakes to deprive the beneficiary of its benefits and at the same time tries to impose upon a third party, with whom it arranged to make the mortgage, the burden of the heavy loss which follows the breach, "equity will prevent [plaintiff] from taking this plainly inequitable, if not unconscionable, course by holding it estopped or otherwise bound by it in equity." Id. at 620. This decision, however, as the dissent points out, appears to turn more upon the fact situation presented than the validity of equitable servitudes on chattels in general.

[20]113 A.2d at 494-5.

[21]Though equitable restrictions are in marked contrast with the strong legal rules against restraint on alienability, equity courts in the nineteenth century began to enforce such restrictions because they resembled easements and covenants running with the land, already proven desirable, and because in many instances this new kind of restriction, though unrecognized by the law courts, appeared to be an aid in developing neighborhoods in a fair and satisfactory manner. Thus, these restrictions aided public policy since there was a lack in both England and America of systematic town planning or rational schemes for the development and control of real property. See Lloyd, Enforcement of Affirmative Agreements Respecting the Use of Land, 14 Va. L. Rev. 419 (1928); Stone, The Equitable Rights and Liabilities of Strangers to a Contract, 18 Colum. L. Rev. 291 (1918).

> will of the parties. The validity or invalidity of the burden they want to create ought to depend on considerations of public policy. Do business needs make it desirable to create this novel burden? Does its enforcement involve such grave possibilities of annoyance, inconvenience and useless expenditures of money that it should not be allowed? In other words, is the game worth the candle?"[22]

By applying real property principles to chattels, the California court has set a precedent for upholding the validity of equitable servitudes on chattels without even considering the effect on the general economy.[23] Just because equitable restrictions on land are desirable, it does not necessarily follow that similar restrictions on chattels will be beneficial. The policy considerations are entirely different and should be judged according to their respective merits.

Having decided that the equitable servitude in *Nadell* was valid, the court was still faced with another issue: whether only the producers of the goods can create such a servitude.[24] The court held that Nadell could create such a servitude since he had a "good will"[25] interest in

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[22]Chafee, The Music Goes Round and Round: Equitable Servitudes And Chattels, 69 Harv. L. Rev. 1250, 1258 (1956).

[23]The court apparently chose to ignore several of the fundamental differences between personal and real property by its analogy. Probably the outstanding one, and certainly a relevant consideration, is that land remains in the same hands for comparatively long periods of time and is transferred only after an elaborate title investigation. Chattels, on the other hand, are sold so rapidly that such restrictions interfering with quick transfers are undesirable. Notice of restrictions on land are easily proved because of recording, but to prove such notice in the case of chattels would lead to frequent litigation since this question will usually be a matter of proof for the jury.

[24]"As to the final point, that a restrictive covenant on the use of personal property may only be created by the producer of the goods, such claim overlooks the fact that the good will of a business, declared to be "property," is not limited to the field of Manufacturing .... In the present case there was indirect, if not direct, evidence that respondent would be irreparably injured in the expectation of continued public patronage ..., specifically as it concerned the Southern Pacific, if the restriction was not enforced. Where, by nonperformance of a contract a person will be greatly embarrassed and impeded in his business plans, or involved in a loss of profits which a jury cannot estimate with any degree of certainty, equity will intervene." 346 P.2d 505, 512 (1959).

[25]The term "good will" has many different meanings. Good will is property and is recognized and protected by the law as such. Mann v. Fisher, 51 F. Supp. 550 (W.D. Mo. 1943). The term, as used here, may be defined as the probability that old customers will resort to the same place or buy the same product. " 'Good Will' is said to be the favor which the management of a business wins from the public and the probability that old customers will continue their patronage and resort to the old place." Liquidators of Nicholson Pub. Co. v. E. S. Upton Printing Co. 152 La. 270, 93 So. 91, 93 (1922). For other definitions of the term "good will," see 18A Words and Phrases 210 (1956).