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Restrictions on Resale of Chattels

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RESTRICTIONS ON RESALE OF CHATTELS

In modern times when manufacturers must use more diligence and exercise more ingenuity to stimulate sales and increase business, they attempt, by many and various methods unknown at common law, to insure the continuity of sales of their products on the market. This they endeavor to do by imposing restrictions on the chattels when sold to respective buyers as to how, where and at what price the buyer may dispose of the chattel. Where the manufacturers' or distributors' efforts by one device have been frustrated, the same purpose has been sought by different means under different theories. Counsel, in the courts, have contrived highly novel theories behind which they have attempted to accomplish indirectly what they could not accomplish directly.

At common law any restriction on alienation was held in great disfavor.[1] Restrictions on alienation were upheld in cases where the restraint was reasonable. But the doctrine of *Spencer's Case*[2] clearly shows the conservative attitude of those courts in upholding any condition or restriction following the land into hands of persons having no contractual relations with the original promisee. In that case it was held that covenants to run with the land must (1) touch and concern the land and (2) be in *esse* at the time of the demise or the assigns to be bound expressly mentioned.[3] The similar, if not greater, conservatism at common law on restrictions on the alienation of chattels is likewise illustrated by the much-quoted words of Lord Coke[4] where he says, "If a man be possessed of a horse or any other chattel real or personal and give his whole interest or property therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is is against trade

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[1]Gray, Restraints on Alienation (2nd edition, 1895) sects. 27, 28.
[2]3 Co. 29 (1583).
[3]Tiffany on Real Property (1903 edition) p. 115.
[4]Coke on Littleton, sect. 360.

and traffic and bargaining and contracting between man and man."

In a very elucidating article by Professor Chafee[5] there is enumerated a list of the types of restrictions employed by distributors and manufacturers on their products. These are:

(a) Restrictions on resale prices[6]—imposed mainly to prevent price cutting.

(b) Territorial restrictions[7]—imposed to assure dealers in one territory of freedom from invasion by other dealers.

(c) Restrictions on use[8]—imposed to increase profits of the manufacturer by the sale of more new articles.

(d) Tying restrictions[9]—imposed also to increase profits by stipulations that the buyer will use the manufacturer's articles auxiliary to product sold.

Likewise Professor Chafee sets forth the methods of attempting to bind sub-purchasers by restrictions. The first method under this class is the sub-contract device. That is when the seller requires the buyer to promise to make an agreement on resale with the buyer's purchaser of the same nature that seller makes with the purchaser that the condition imposed by the original seller will be performed. The original seller attempts to enforce such agreements by suing a sub-purchaser as a third party beneficiary.

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[5]41Harvard Law Review 945.

[6]Bobbs-Merrill Co. v. Straus, 210 U. S. 339 (1908); Dr. Miles Medical Co. v. Park, 220 U. S. 373 (1911); Bauer v. O'Donnell, 229 U. S. 1, 50 L. R. A. (N.S.) 1185 (1913); Straus v. Victor Talking Machine Co., 243 U. S. 490 (1917); U. S. v. Schrader's Son, 252 U. S. 85 (1920), indictment under Sherman Anti-Trust Act. A principal may of course fix the price at which goods may be sold by his agent for sale on commission. Walsh v. Dwight, 58 N. Y. S. 91 (1899); Whitney v. Biggs, 156 N. Y. S. 1107 (1915).

[7]158 A. (N. J.) 736 (1932); 25 Ill. App. 516, 520.

[8]Elijah v. Mottinger, 161 Iowa 371, 142 N. W. 1038 (1913); Garst v. Hall, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631 (1901).

[9]Straus v. Victor Talking Machine Co., 243 U. S. 490 (1917).

This method is rarely successful, however, since many jurisdictions do not permit beneficiaries to maintain suits.[10] Professor Chafee quite justly criticizes the technicality of the rule that beneficiaries of contracts ordinarily cannot sue to enforce them. However this may be, in many instances the defense of the sub-purchaser that there is no consideration moving from the promisee in an action by the original seller to enforce the restriction against him is upheld. Furthermore it seems the courts will determine the true status of the middleman despite the fact he is described in the contract as an agent.[11]

The second is the notice or equitable servitude device. The seller imposing the restriction places a notice on the chattel specifying that the restriction is to bind all later owners. By this method any subsequent purchaser is one with notice. Professor Chafee says of this method, "After *Tulk v. Moxhay*[12] a broad principle, amply sufficient to give the desired enforcement of restrictions on chattels, was announced by Lord Justice Knight Bruce in *De Mattos v. Gibson*[13]:—'Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. This rule, applicable alike in general, as I conceive, to movable and immovable property, and recognized and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances'."

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[10]13 C. J. 703, note 88.

[11]Dunlop Pneumatic Tire Co. v. Selfridge (1915) A. C. 847, II Stephen's Comment on Laws of Eng. 212.

[12]2 Ph. 774 (1848).

[13]4 DeG. H. & J. 276, 282 (1858).

In *Werderman v. Societe Generale d' Electrecite,*[14] Sir George Jessel permitted the enforcement of a restriction against a sub-purchaser who took with notice. "The new conception suggested by these two cases was simple and practical. The analogy of restrictions on the use of land after its sale could be extended to personal property so as to enable the manufacturer or original seller to assert an interest in the chattel, patent, or other personalty as against any subsequent owner other that a bona fide purchaser for value without notice."[15]

Clark, however, in his treatise on Equity, says,— "Where neither statutory nor natural monopoly is involved the public interest in free trade in chattels would *a fortiori* prevent the upholding of such restrictions."[16]

Other means to enforce legally these restrictions have been attempted.[17] The doctrine of *Lumley v. Gye*[18] has also been invoked by sellers to enforce these restrictive agreements. The doctrine of equitable servitudes on land was first announced in the case of *Tulk v. Moxhay*[19] and from this arose the doctrine of equitable servitudes on chattels. *Lumley v. Gye,* which created the tort of inducing a party to a contract to breach it was decided about five years after *Tulk v. Moxhay.*[20] On the theory of *Lumley v. Gye,* where A sells a chattel to B with the agreement that the chattel is not to be resold under a certain price and C is about to become the beneficiary of B's breach, "the receipt of the chattel by C would be regarded as a tort to A, the promisee, and it would not be necessary to create an equitable servitude in the chattel in order to bind C, for he would be liable to an injunction by the victim of his wrong on tort principles, the remedy at law being inadequate. Where later sub-purchasers are involved, the only way to reach them under *Lumley v. Gye* would be to work out a

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[14]19 Ch. D. 246 (1881).
[15]Chafee, 41 H. L. R. 945, 954.
[16]Clark on Equity 135.
[17]204 Ala. 566, 86 So. 880 (1920).
[18]2 E. and B. 216 (1853).
[19]2Ph. 774 (1848).
[20]See Sayre, Inducing Breach of Contract (1923).

still more artificial system of implied promises by B that he would bind C to exact from D a similar promise to maintain the restrictions, and so on down the line."[21] Such a theory as set forth here is hardly likely to receive support by the courts because it assumes too much and courts are generally loathe to imply stipulations where they could have been expressed.

Many states require more than mere knowledge by the defendant of the existing contract before they will enjoin him. Some courts require in addition to knowledge, malice, force, threat of force or fraud.[22]

In a very recent Pennsylvania case[23] a buyer contracted to sell the plaintiff's ice cream exclusively. The plaintiff provided a storage cabinet and containers for the buyer in which to preserve the ice cream. The defendant, knowing of the buyer's contract with the plaintiff, sold him ice cream at a lower price which the buyer resold. The Supreme Court refused to enjoin the defendant from selling the ice cream to the buyer although it enjoined the defendant from using the plaintiff's equipment.

The decision in this case has been commented on in a student note in a recent volume of the Harvard Law Review.[24] In that note it is suggested that an injunction by the court could have been supported by invoking the doctrine of *Lumley v. Gye*. Nowhere in the opinion is there any mention of *Lumley v. Gye* but the case is a complete repudiation of the doctrine for the court refused to enjoin the defendant from inducing or causing the plaintiff's buyer to breach his contract with the plaintiff without some other circumstances being present, such as fraud, duress or intimidation. The original holding in *Lumley v. Gye* was that the court will enjoin a defendant from inducing a

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[21]Chafee, 41 H. L. R. 945, 970, 974.

[22]See 41 H. L. R. 764—768. O'Neil v. Behanna, 182 Pa. 236 (1897) intimidation; Flaccus v. Smith, 199 Pa. 128 (1900) enticement; Kraemer Hosiery Co. v. Am. Fed. of F. F. H. W. 305 Pa, 206 (1931); Jonas Co. v. Glass Bottle Blowers Ass'n., 77 N. J. E. 219, 79 A. 262 (1911) coercion.

[23]159 A. 3 (1932).

[24]45 H. L. R. 940.

party to a contract with the plaintiff to breach his contract with the plaintiff regardless of these other circumstances.

This is an additional reason for believing that equitable servitudes on chattels would not be sustained in Pennsylvania on the *Lumley v. Gye* theory.

In *Dr. Miles Medical Co. v. Park, Etc.*,[25] where a price restriction agreement directed toward the maintenance of the price of certain proprietary medicines was held invalid, Mr. Justice Holmes, characteristically regarding economic ratiocinations, said in a dissenting opinion, "What then is the ground upon which we interfere in the present cause? Of course it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public****. I think that we greatly exaggerate the value and the importance to the public of competition in the production or distribution of an article****as fixing a fair price****. The Dr. Miles Medical Co. knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair if not destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

With all the foregoing authorities in mind and especially the very comprehensive work of Professor Chafee[26] a very late case in New Jersey decided that equitable servitudes do not run with chattels on any theory.[27] There the

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[25]220 U. S. 373, 31 S. Ct. Rep. 376, 55 L. Ed. 502 (1911).

[26]41 H. L. R. 945.

[27]National Skee-Ball Co. v. Seyfried, 158 A. 736 (1932).

complainant, a manufacturer of an amusement device known as a skee-ball alley sold two of them to Philps, who agreed in writing to use them in "Trenton, New Jersey, or in any other part of the United States, providing there are no skee-ball alleys in operation or licensed for use at said place at time of removal." The contract described Philps as a licensee and provided that if the terms of the contract were violated the licensor could revoke and terminate on written notice "to the licensee or assignee thereof, their heirs, executors, administrators, successor or assigns." Philps did not himself violate any terms of the contract. Later he sold the alleys to the defendant who had notice of the agreement. The defendant removed the alleys to a certain territory and began business there a few days after he had been informed that the complainant had sold six alleys to another party under an agreement that the other party should have the exclusive right to operate in that territory. The complainant at first charged violation of patent rights, but later this charge was withdrawn. The court held, "There was no privity of contract either direct or by way of assignment between the complainant and the defendant****."

"Counsel have not cited, and my own 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. The absence of precedent alone, however, would not deter me from granting relief if I were convinced that relief should be granted."

"While an agreement between the seller and the purchaser of personalty limiting its use to a certain locality may be valid as between the immediate parties, I am not ready to hold that such a covenant runs with the property. The trend of judicial action is opposed to limitations and restrictions on the alienability of personal property."

The court cites two instances where the rule has been relaxed in New Jersey and in other jurisdictions. (1) In connection with a sale of a business where covenants of the vender to refrain from competing with his vendee and

his assigns have been held to run with the business to a subsequent purchaser thereof.[28] Such restraints must meet the test of reasonableness.[29] (2) Contract made by an employee not to solicit orders within a specified time after the termination of his employment, passes without specific reference thereto, with a sale of the business by the employer.[30] This exception is also subject to the test of reasonableness.[31]

The courts seem to be unwilling to uphold restrictions on chattels even though patented,[32] copyrighted,[33] or trade-marked.[34]

In New Jersey restrictions as to price cutting on chattels bearing trade-marks are upheld by statute.[35] The fact that such a statute has been enacted in New Jersey tends to strengthen the decision in the *Skee-Ball Case*. This statute shows the policy of New Jersey to favor protecting manufacturers and distributors so far as permitting them to regulate price more than most jurisdictions. Despite the policy as show by this statute the court in the *Skee-Ball Case* refused to allow the seller to impose any territorial restrictions on the chattel.

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[28]Langberg v. Wagner, 101 N. J. E. 383, 139 A. 518 (1927).

[29]13 C. J. 473 and cases cited in note 73; Monongahela Co. v. Jutte, 210 Pa. 288 (1904); Norris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173 (1871); Kieler v. Taylor, 53 Pa. 467 (1866).

[30]A. Fink & Sons v. Goldberg, 101 N. J. E. 644, 139 A. 408 (1927).

[31]1 Legal Gaz. (Pa.) 79; Taylor Iron & Steel Co. v. Nichols, 73 N. J. E. 684, 69 A. 186 (1908); Kieler v. Taylor, 53 Pa. 467 (1866); Mandeman v. Hartman, 42 N. J. E. 185, 7 A. 37 (1886). Held these contracts must be ancillary and incidental to another contract or sale. Gompers v. Rochester, 56 Pa. 194 (1867).

[32]Straus v. Victor Talking Mach .Co., 243 U. S. 490, L. R. A. 1917 E, 1196 (1917); Boston Store v. American Gramophone Co., 246 U. S. 8 (1918); U. S. v. Schrader's Son, 252 U. S. 85 (1920).

[33]Bobbs-Merrill Co. v. Straus, 210 U. S. 339 (1908); Erskine McDonald v. Eyles, 1 K. B. 121 (1921).

[34]Appollinaris Co. v. Scherer, 27 Fed. 18 (1886). But see Bourjois v. Katzel, 269 U. S. 689 (1923) as to territorial restrictions. 7 A. L. R. 449.

[35]P. L. 1816, c. 107. Ingersoll Bros. v. Haline, 88 N. J. E. 222, 101 A. 1030 (1917).

Apparently the Pennsylvania courts have not had occasion to take a definite stand in interpreting the policy of this state toward the attachment of equitable servitudes to chattels. However in the case of *Garst v. Wissler*[36] it appeared that the plaintiff, a manufacturer of pills, printed upon the boxes containing the pills, the following notice: "Important notice—This box of Phenyo-Caffein is sold to be consumed only, and the title continues in the Phenyo-Caffein Co. to prohibit a sale thereof by any purchaser at retail, except that it may be resold for not less than twenty-five cents per box or five boxes for one dollar. The acceptance of this box by any person is assent to this condition of, and a direct agreement with the Phenyo-Caffein Co. that for each violation, the possession of the box may be recovered and the party selling will pay the said Company twenty-one dollars as liquidated damages the said Company will suffer by said violation." The plaintiff required his customers to sign a contract to the effect that in consideration of a deduction from the full retail price, they would not sell for less than the price named in the notice. The defendant refused to negotiate with the plaintiff, and purchased plaintiff's pills from another druggist with whom he made no agreement and from whom he received no notice of the matters contained in the contract. Defendant, however, knew the terms of the contract. The plaintiff sued to recover from the defendant twenty-one dollars as liquidated damages as set forth in the contract. The theory of the plaintiff was that there was an implied contract which arose when defendant bought the pills.

The court denied that any contract arose between the parties and refused to permit the plaintiff to recover. The court said by way of dicta,[37] "The plaintiff has the undoubted right to control the selling price of his proprietary article by a contract with him, but to hold that the individual purchaser is bound by the terms printed on the box of pills, and is liable for liquidated damages the amount being determined by the plaintiff while at the same

[36] 21 Pa. Super. Ct. 532 (1902).

[37] Id. p. 536.

time the title continues in the plaintiff, is a longer step than we are willing to take."

The court cites and quotes from *Garst v. Hall and Lyon Co.*, a Massachusetts case similar in facts,[38] "the plaintiff's right was founded on personal contract alone, and can be enforced only against the contracting party. To say that the contract is attached to the property and follows it through successive sales which severally pass the title, is a very different proposition."[39]

According to Professor Chafee[40] although numerous eminent authorities and courts have held that such restrictions on chattels are inconsistent with the right of free alienation, not one has promulgated a really convincing reason for holding them inconsistent. It is not the intention of the writer herein to express his opinion as to the propriety of the general rule and its exceptions but merely to state as a conclusion that whatever may be its merits, the general rule throughout the United States and England is that equitable servitudes do not attach to chattels as they do to land.

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RIGHT TO RECLAIM DELIVERED GOODS IN A CASH SALE

The term "cash sale" as applied to a sale of specific goods has been used by the courts in two different senses. It is sometimes used to denote a sale where title is not to pass until the cash is paid and sometimes to denote a sale where title has passed but possession is not to be delivered until payment is made. When used in the latter sense, the title passes at once upon the completion of the contract by the force of it, so as to cast the risk upon the buyer and entitle the seller to the price. However, the buyer, though he has title, is not entitled to possession until he pays the

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[38] 61 N. E. 219, 179 Mass. 588, 55 L. R. A. 631 (1901).

[39] See 7 A. L. R. 443 and note.

[40] 41 H. L. R. 945, at p. 982.