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REGULATION OF BUSINESS-TRADE RESTRAINTS-BUSINESS PRICE AND USE RESTRICTIONS ACCOMPANYING SALE OF LAND

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REGULATION OF BUSINESS—TRADE RESTRAINTS—BUSINESS PRICE AND USE RESTRICTIONS ACCOMPANYING SALE OF LAND—Plaintiff, a wholesale and retail dealer in "Marathon" products, and the smallest wholesale distributor of gasoline in Ann Arbor, sought to enjoin defendant from selling Marathon gasoline at less than the price set under the provisions of the standard dealer's contract. Defendant had acquired his station by a deed containing a covenant expressly intended to run with the land, providing for the operation of a filling station on the land, and a ten-year agreement that all petroleum products sold on the premises were to be supplied by plaintiff "at such prices and on such terms as are customarily furnished to other dealers in like products in the Ann Arbor, Michigan, area." The customary dealer's contract contained a provision for setting resale prices, the dealer to follow the price set at plaintiff's retail station, which in turn was set to meet competitors' lowest price. Relying on defendant's promise to sign such a contract, plaintiff installed equipment to be loaned under its terms and delivered an initial order of gasoline. Defendant refused to sign the contract, objecting to the uniform price clause, and started to sell gasoline at less than the going price. *Held,* decree for injunction affirmed. The price-fixing clause was a part of a covenant running with the land and was not a violation of the Michigan anti-trust act of 1899[1] since it constituted a reasonable restraint of trade. *Staebler Kempf Oil Co. v. Mac's Auto Mart, Inc.*, (Mich. 1951) 45 N.W. (2d) 316.

[1] Mich. Comp. Laws (1948) §445.701, Mich. Stat. Ann. §28.31.

Both at common law and under the Michigan equivalent of the Sherman Anti-Trust Act, the Michigan Supreme Court has taken the position that contracts fixing prices are per se unreasonable and therefore void.[2] The principal case seems to be a departure from this view insofar as it holds that an agreement controlling resale prices may be sustained as a reasonable restraint of trade. Apparently the court finds justification for its holding in the fact that the agreement was not an ordinary contract, but rather a covenant running with the land.[3] The court reasons that the agreement was not primarily designed to control prices, but was an agreement for the sale of land containing incidental restrictions on the use of the land dictated by a "fair and compelling" business purpose. The distinction, particularly in the face of a contrary decision on almost identical facts in *Mulliken v. Naph-Sol Refining Company*,[4] is hard to grasp,[5] and the decision completely ignores the problems involved in deciding whether or not a covenant runs with the land.[6] Real covenants are created only when the traditional re-

[2] Richardson v. Buhl, 77 Mich. 632, 43 N.W. 1102 (1899); Hunt v. Riverside Co-operative Club, 140 Mich. 538, 104 N.W. 40 (1905); W. H. Hill Co. v. Grey and Worchester, 163 Mich. 12, 127 N.W. 803, 30 A.L.R. 10 (1910); Mulliken v. Naph-Sol Refining Co., 302 Mich. 410, 4 N.W. (2d) 707 (1942). But see Peppen, "Price-Fixing Agreements," 28 CALIF. L. REV. 297 (1940) in which it is asserted that no common law authority exists for the proposition that agreements directly fixing prices are per se unlawful. Professor Peppen indicates that the Richardson case was dependent on a finding of control of the match market and distinguished the Hunt case by showing that it was decided after and influenced by Judge Taft's erroneous analysis of the common law set forth in United States v. Addyston Pipe and Steel Co., (6th Cir. 1898) 85 F. 271, to the effect that all non-ancillary restraints of trade were illegal per se at common law. This reasoning was accepted by the Michigan court in areas other than price fixing, Clark v. Needham, 125 Mich. 84, 83 N.W. 1027 (1900) (non-ancillary agreement not to compete held void as illegal restraint of trade). The state courts are split on the question of resale price setting: 7 A.L.R. 449; 19 A.L.R. 449; 32 A.L.R. 1087, 103 A.L.R. 1342, 125 A.L.R. 1335. The general rule under the federal law is in accord with the Michigan cases; see Peppen, "Price Fixing Agreements under the Sherman Anti-Trust Law," 28 CALIF. L. REV. 667 (1940); Clay, "Resale Price Maintenance," 16 KY. L.J. 28 (1927).

[3] This note will not deal with the problems of construction inherent in terming this agreement a covenant running with the land.

[4] 302 Mich. 410, 4 N.W. (2d) 707 (1942). The case involved an oral agreement between lessor and lessee permitting the lessee a stipulated gross margin of profit on gasoline sold by lessee; action was brought by the lessee when lessor raised wholesale prices but refused to allow the full margin agreed upon for the retail price. The court assumed that the agreement was void under the doctrine of Hunt v. Riverside Club, supra note 2, holding resale price fixing illegal per se under the Michigan act, but said that even if the arrangement was a part of the lease, a lease is only a contract that would be void if contrary to public policy.

[5] Some justification for this is found in the traditional distinction between ancillary and non-ancillary contracts set forth in United States v. Addyston Pipe and Steel Company, supra note 2. The same distinction is made by the Montana court in a case cited in the principal opinion, Quinlivan v. Brown Oil Co., 96 Mont. 147, 29 P. (2d) 374 (1934), involving an exactly parallel fact situation except that the agreement was part of a lease arrangement: the court said that the object of the agreement was the leasing of a gas station and that the price fix was merely incidental.

[6] It is fairly clear from the facts that the court did not have to call the agreement a covenant running with the land in order to find that defendant was bound by it; although it was understood that the agreement was to be put in writing, there had already been partial performance by the plaintiff induced intentionally by defendant.

quirements of language, intent, privity, and nature (the covenant must "touch and concern" the land) are met.[7] Moreover, it has often been asserted that affirmative covenants cannot run with the land,[8] although the exceptions to this rule have grown so numerous that it is generally recognized that affirmative covenants do run in many instances and that some other explanation of the cases is needed.[9] One distinction has been made between covenants which benefit and those which burden the land; it is said that the benefit will run with the land but the burden will not unless the grantor owns other land in the vicinity which will be benefited by the enforcement of the covenant.[10] The writers also distinguish real covenants enforceable at law, which must meet the requirement of privity, and equitable servitudes, which run with respect to any person having notice.[11] The principal covenant is both affirmative and burdensome, but the facts indicate that plaintiff owned land which could be found to be benefitted by the execution of the agreement and that defendant had notice of the restriction. Agreements classified as equitable servitudes are usually in the nature of restrictions on the use of the land, such as private building and zoning agreements,[12] and it is into this category that the agreement in the principal case fits. But the courts have made it clear that even these restrictions will not run without meeting the condition that the agreement must affect the land.[13] Nor will they be enforced when their provisions are contrary to the public policy as conceived at common law or expressed by the legislature.[14] Thus the decision in the principal case depends

[7] See CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 92-143 (1947).

[8] This distinction originated in Tulk v. Moxhay, 2 Phil. 774, 41 Eng. Rep. 1143 (1848). See 41 A.L.R. 1363; 51 A.L.R. 1326. The history of the doctrine is traced in Sims, "The Law of Real Covenants; Exceptions to the Restatement of the American Law Institute," 30 CORN. L.Q. 1 (1944).

[9] Affirmative covenants can run in Michigan: Mueller v. Bankers Trust Co. of Muskegon, 262 Mich. 53, 247 N.W. 103 (1933). See 102 A.L.R. 781, 118 A.L.R. 982; 47 YALE L.J. 821 (1938); Lloyd, "Enforcement of Affirmative Agreements Respecting the Use of Land," 14 VA. L. REV. 419 (1928).

[10] 5 PROPERTY RESTATEMENT §§537, 542, 543, 548 (1940); Rundell, "Judge Clark on the American Law Institute's Law of Real Covenants," 53 YALE L.J. 312 (1944); WALSH, EQUITY 465 (1930). The reason for the rule is that a provision operating as a burden on the land violates the policy against restraints on alienation, Walsh, "Covenants Running with the Land," 21 N.Y. UNIV. L.Q. REV. 28 (1946). The *Restatement* position has been severely criticized by writers who believe that burdens should run regardless of the existence of dominant and subservient tenements: Sims, "The Law of Real Covenants: Exception to the Restatement of the Subject by the American Law Institute," 30 CORN. L.Q. 1 (1944); CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 137-143 (1947); Clark, "The American Law Institute's Law of Real Covenants," 52 YALE L.J. 699 (1943); Clark, "A Note on Professor Rundell's Comment," 53 YALE L.J. 327 (1944).

[11] CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 170-186 (1947); Reno, "The Enforcement of Equitable Servitudes in Land," 28 VA. L. REV. 951, 1067 (1942).

[12] Agreements restricting certain groups from using residential property are typical; such agreements are valid in Michigan, 42 MICH. L. REV. 923 (1944).

[13] Reno, "The Enforcement of Equitable Servitudes in Land," 28 VA. L. REV. 951, 1067 (1942); Gavit, "Covenants Running with the Land," 24 ILL. L. REV. 786 (1930).

[14] Judge Clark points out that the problem with respect to business arrangements is not one of the validity of the covenant as such, but of public policy against monopolies, COVENANTS AND INTERESTS RUNNING WITH LAND 105, n. 38 (1947).

on two questionable assumptions: first, that the agreement, including the fixing of resale prices, concerns the land in a manner sufficient to cause it to run with the land,[15] and second, that it does not impose an illegal restraint of trade under the Michigan statute and interpretive cases.[16] A first estimate would indicate that these difficulties could have been avoided merely by applying the Michigan Fair Trade Act,[17] which, under authority applicable at the time the principal case was decided, sanctioned the control of the resale price of trademarked articles whenever sold by anyone having notice of the stipulated price and using the brand name.[18] It has been contended that these acts may not be applicable to price-fixing agreements in an industry, such as the gasoline industry, in which it is argued that a "monopoly" price is obtained by a price leadership system, because they require that the article must be in "fair and open competition with commodities of a like class produced by others";[19] in any case, the courts did not consider the Fair Trade Act. Conflicting policy considerations placed the court in the unenviable position of deciding between protecting a small wholesaler who can, alone, do nothing to affect prices, but who could conceivably meet financial disaster as a result of a price war, and giving legal sanction to a device which can be used to aid the maintenance of an oligopolistic system and a monopoly price. The decision to apply a "rule of reason" to price fixing is likely to produce serious problems for the court, and obviously makes the Michigan law highly unpredictable.

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[15] Agreements were held to be personal in Wiggons v. Ferry Co. v. O. and M. Ry. Co., 94 Ill. 83 (1879) (agreement to use grantor's ferry to transport cars) and Dickey v. Kansas Ry., 122 Mo. 223, 26 S.W. 685 (1894) (agreement to provide grantor with a perpetual free pass on the railroad to be built on the land), but in Smith v. Gulf Refining Co., 162 Ga. 191, 134 S.E. 446, 51 A.L.R. 1323 (1923) an agreement to buy all gasoline used on the premises from grantor was held to be a covenant running with the land. This result was criticized in a note on the case in 4 WIS. L. REV. 125 (1927); the principal case can be distinguished in that no uniform price clause was involved in the Gulf case. Professor Gavit points out that the real issue is whether or not the "parties interest in the real estate is one of the operative facts necessary to give validity of lawful performability to the contract," "Covenants Running with the Land," 24 ILL. L. REV. 786 (1930); his analysis indicates that the fact that the contract in the principal case could and does in some instances operate independently of any transfer of land is evidence that the agreement is personal; *contra,* Quinlivan v. Brown Oil Co., supra note 5.

[16] *Accord,* Quinlivan v. Brown Oil Co., supra note 5; State ex rel. Hamilton v. Standard Oil Co., 190 Wash. 493, 68 P. (2d) 1031 (1937); *contra,* Marathon Oil Co. v. Hadly, (Tex. Civ. App. 1935) 107 S.W. (2d) 883.

[17] Mich. Comp. Laws (1948) §445.151, Mich. Stat. Ann. §19.321.

[18] 49 HARV. L. REV. 811 (1936); 50 HARV. L. REV. 667 (1937); Callman, "Fair Trade and Anti-Trust Law," 10 UNIV. PITT. L. REV. 443 (1949); 103 A.L.R. 1342; 125 A.L.R. 1338. But this authority has been superseded by Schwegmann Brothers v. Calvert Distillers Corp., (U.S. 1951) 71 S.Ct. 745, decided after the final decision in the principal case, and holding that the Fair Trade Acts can be applied only to those who are parties to resale price contracts.

[19] Callman, "Fair Trade and Anti-Trust Law," 10 UNIV. PITT. L. REV. 443 (1949). On the mechanics of the maintenance of monopoly prices in this manner see Comer, "Price Leadership," 7 LAW AND CONTEM. PROB. 61 (1940); CHAMBERLIN, THEORY OF MONOPOLISTIC COMPETITION 50n (1948).