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Equity--Subjecting Corporate Stocks to an Equitable Servitude

James A. McWhorter
West Virginia University College of Law

taking the sick friend to the doctor, was identical with that he should have taken in pursuing his principal's business, the character of the trip was equivocal, until the purpose of the agent definitely indicated that the trip was a departure from the master's business; that, hence, the act was outside the course of the agent's employment.

It is the writer's opinion that the act of the agent for which the principal is to be held liable should bear some relation to the principal's business, factually and not merely fictionally.[16] It is by putting such a broad interpretation upon the term "course of employment", as the court has in *Cochran v. Michaels,* that all the meaning is taken out of it. The tendency of the decision approaches that of the early English case of *Sleath v. Wilson.*[17] And, in short, a little further extension of such a decision will make the principal an insurer to any third party against the torts of his agent, incurred by the agent in the operation of any instrumentality of the principal. The writer is not prepared to say definitely that this result would be wholly undesirable, but should not such a stride be taken legislatively, rather than judicially?[18]

—HENRY P. SNYDER.

EQUITY—SUBJECTING CORPORATE STOCKS TO AN EQUITABLE SERVITUDE.—F & Co. exchanged with G 4000 shares of H & Co. and a check for $17,000 for 3000 shares of P & Co. Inc., agreeing that the respective stocks would not be sold until they reached the prices of $32 and $45, or the equivalent of that price in the event of recapitalization. This agreement was to remain in effect for two years and be binding upon any person or persons in whose name either of the above stocks might be registered. Subsequently 3000 shares of C Corp. were substituted for the stock of P & Co. Pending an executory agreement to rescind, G transferred for valuable consideration to C Corp., of which he was president, his 4000 shares of H Co. F & Co. now seeks to make the C Corp. trustee of the stock in question by virtue of G's restrictive

[16] The court in Cochran v. Michaels, *supra* n. 1, at page 175: "a friend picked up became an eager informant as well as a partisan of the driver, and the interest of the defendant was thus promoted."

[17] *Supra* n. 2.

[18] See Judge Poffenbarger's dissent against the extension of an agency doctrine in another instance: "New laws should be made by the legislatures, not the courts." Jones v. Cook, 90 W. Va. 710, 719, 11 S. E. 828 (1922). See also, Kidd v. Dewitt, 128 Va. 438, 443, 105 S. E. 124, 125 (1920).

covenant. *Held*: Mutual covenants restricting sale of corporate stock exchanged pursuant to contract are not binding on third parties acquiring the stock for valuable consideration with notice. *In re Consolidated Factors Corporation.*[1]

As a general rule equity does not aid purchasers of chattels, because the remedy at law is adequate,[2] saying, that the right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have generally been regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. If, however, the remedy at law is inadequate because of the unique character of the chattel or for other reasons, specific performance will be granted not only against the seller but also against a person who takes from him with notice.[3] It is well settled that equity will grant specific performance in the sale of stocks when they are of a unique character, as where they have no market value, and are not readily obtainable.[4] It is likewise well known that once a stock is listed upon the exchange it loses all traces of uniqueness, and it is then a chattel which passes hands quickly, in many instances many times a day, and it would be highly impractical and inconsistent to have a servitude upon it.

While the courts are reluctant to place an equitable servitude upon chattels, and contracts to that effect have been discouraged in this country, the question still remains whether or not this doctrine might serve as a useful tool in the case of a closed corporation to effectuate the intent of the parties and serve the purpose desired by them at the time the contract was made. The stockholders of a closed corporation may exercise a sort of *delectus personarum* by clauses in the stock certificates giving them an option to repurchase, or by by-laws to that effect. Although some courts have held that an option to repurchase is void as a restraint upon alienation, the better view is to the contrary.[5] Limiting this inquiry to *delectus personarum*, if it is economically desirable

[1] 46 F. (2d) 561 (D. C., S. D., N. Y. 1931).

[2] See cellection of cases 36 CYC. 555 n.

[3] Great Lakes & St. Lawrence Trans. Co. v. Scranton Coal Co., 239 Fed. 603 (C. C. A. 7th, 1917); Detroit Lubricator Co. v. Lavigne, 151 Mich. 650, 115 N. W. 988 (1908); North Cent. Ry. v. Walworth, 193 Pa. 569, 82 Atl. 935 (1912).

[4] Hubbard v. George, 81 W. Va. 538, 94 S. E. 974 (1918).

[5] 4 THOMPSON ON CORPORATIONS (2d ed. 1909) § 4135; Scruggs v. Cotterill, 67 App. Div. 583, 73 N. Y. S. 882 (1902); Barrett v. King, 181 Mass. 476, 63 N. E. 934 (1902).

that closed corporations should be allowed such, the courts will give effect to their option to repurchase. On the other hand, if they would refuse to give effect to the option as being a restraint upon alienation, they would likewise hold void a covenant between the stockholders made for the same purpose.

—JAMES A. MCWHORTER.

EXECUTORS AND ADMINISTRATORS — RIGHT OF CONSOLIDATED BANK TO QUALIFY AS EXECUTOR.—In *Mueller v. First National Bank of Atlanta*[1] the testatrix, *A*, named the *X* National Bank as her executor. About three month's prior to *A's* death, the *X* National Bank effected a legal consolidation with the *Y* National Bank under the latter's charter. *A* knew of the consolidation, but her heirs at law now challenge the right of the consolidated bank to qualify as her executor. The Act of Congress authorizing the consolidation of national banks did not expressly cover the situation. *Held, A* either knew or was chargeable with knowing that the act authorized such consolidation, and it is broad enough to pass the executorship as a right or interest in property to the *Y* National Bank.[2]

There has been a split of authority on this question.[3] The Massachusetts court in *Petition of Commonwealth-Atlantic National Bank of Boston*[4] takes a precisely contrary view of construing the same Act of Congress on the ground that the selection

[1] 156 S. E. 662 (Ga. 1931).

[2] 40 Stat. 1043, 12 U. S. C. A. § 34 (1926).

[3] First National Bank v. Chapman, 160 Tenn. 72, 22 S. W. (2d) 245 (1929) (trustee in deed of trust, consolidation of state bank with national bank under federal law); Iowa Light Co. v. First National Bank, 250 Mass. 353, 145 N. E. 433 (1924) (trustee in deed of trust, consolidation of state bank with national bank); Chicago Title & Trust Co. v. Zinser, 264 Ill. 31, 105 N. E. 718 (1914) (executor, consolidation of two state banks under state law prior to testatrix' death); In re Bergdorf's Will, 206 N. Y. 309, 99 N. E. 714 (1912) (executor, consolidation of state banks under state law prior to testator's death). *Contra*: Hofheimer v. Seaboard Citizens National Bank, 153 S. E. 656 (Va. 1930) (executor, consolidation of state bank with national bank under federal law prior to testator's death); Petition of Worcester County National Bank, 263 Mass. 444, 162 N. E. 217 (1928), *aff'd.*, 279 U. S. 347, 49 S. Ct. 368 (1929) (executor, consolidation of state bank with national bank under federal law after testator's death); Petition of Commonwealth-Atlantic National Bank, 261 Mass. 217, 158 N. E. 780 (1927) (trustee in will, consolidation of state bank with national bank after testator's death); Petition of Commonwealth-Atlantic National Bank, 249 Mass. 440, 144 N. E. 443 (1924) (executor, consolidation of national banks under federal law prior to testator's death).

[4] 249 Mass. 440, 144 N. E. 443 (1924).