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A COVENANT NOT TO COMPETE: A VALID RESTRICTION ON SALE OF VESSEL

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The question of how far contractual obligations can be made to run with property other than land is of great and wide interest. It has been the subject of many judicial decisions and law review articles.

Here we are concerned with a rather narrow facet of the general problem, that is, how far a restrictive covenant — a covenant not to compete — may validly run with the sale of a vessel, or be enforced in equity as a personal covenant, and bind parties having notice but not expressly agreeing thereto.

The Supreme Court of the United States in an early case[1] upheld as valid a stipulation by the vendor of a vessel that the vessel should not be used within a reasonable region or distance so as not to interfere with vendor's business or trade. There the Supreme Court flatly upheld as valid a provision in a contract for the sale of a vessel, that the vessel should not be used for ten years in the waters of California where the vendor operated. A later decision of the Supreme Court to the same general effect is *Cincinnati Packet Co. v. Bay*.[2] In this case the Supreme Court held that whatever difference of opinion there might be with regard to the scope of the Sherman anti-trust law, there had been no intimation from anyone that such a contract, made as part of the sale of a business, and not as a device to control commerce, would fall within the act.

Such provisions are regarded as an ancillary restriction and thus outside the anti-trust laws. They are governed by state law, which universally recognizes them as valid.[3]

Assuming, then, the seller of a vessel can properly bind the purchaser by such a restrictive covenant, reasonable in time and extent, we come to the fundamental question of whether such a restriction is binding upon a subsequent purchaser or mortgagee who has knowledge of it but does not specifically agree to it.

Restrictions on the use of *land*, binding in equity on successors in interest who have notice, have been universally upheld by the courts since *Tulk v. Moxhay*.[4] The question narrows itself as to whether personal

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1. Oregon Steam Nav. Co. v. Winsor, 87 U.S. (20 Wall.) 64 (1874).
2. 200 U.S. 179 (1906).
3. Recognition of this principle in Florida is illustrated by recent decisions. *E.g.*, Tri-Continental Financial Corp. v. Tropical Marine Enterprises, Inc. 265 F.2d 619 (5th Cir. 1959), West Shore Restaurant Corp. v. Turk, 101 So.2d 123 (Fla. 1958); Janet Realty Corp. v. Hoffman's Inc., 154 Fla. 144, 17 So.2d 114 (1944).
4. 2 Phil. Ch. 774, 41 Eng. Rep. 1143 (Ch. 1848).

property is sufficiently different from real estate so that there should be a different rule of law.

Lord Coke gives the classic statement of the rule that covenants do not run with chattels as follows:

> "*** [I]f a man be possessed of . . . a horse, or any other chattell reall or personall, and give or sell his whole interest or propertie therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of reverter, and it is against trade and traffique, and bargaining and contracting between man and man. . . .[5]

Numerous decisions seem to support this general principle as to restrictions on real and personal property being treated differently.[6] But there is good authority to the contrary. As to ships the authorities are definitely to the contrary, as hereinafter discussed.

The fundamental question from the point of view of their enforceability is whether the real purpose of such restrictions — *a business purpose* — is important enough to outweigh the property owner's interest in the unrestricted use of his chattels.[7] Commercial exigencies have permitted the courts to enforce, as against purchasers with notice, a restriction that a juke box should be maintained in the place of business of the defendant's assignor;[8] restriction that a film of a prize fight could be exhibited exclusively by the plaintiff;[9] a restriction that printing plates for a prayer book could be used exclusively by the plaintiff for printing the book;[10] a restriction that the plaintiff was entitled to exclusive use of a special printing press attachment;[11] a restriction against resale of export cigarettes in the United States;[12] and a restriction that reduced rate excursion railroad tickets would not be transferred.[13]

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5. COKE ON LITTLETON, § 369 (Small 1853).

6. *E.g.*, Straus v. Victor Talking Mach. Co., 243 U.S. 490, 500-01 (1917); Hartford Charga-Plate Associates v. Youth Centre-Cinderella Stores, 215 F.2d 668 (2d Cir. 1954); RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940); Universal Film Mfg. Co. v. Copperman, 218 Fed. 577 (2d Cir. 1914); John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 39 (6th Cir. 1907); *In re* Consolidated Factors Corp., 46 F.2d 561, 563 (S.D.N.Y. 1931); National Skee-Ball Co. v. Seyfried, 110 N. J. Eq. 18, 158 Atl. 736 (1932).

7. See Chafee, *Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250, 1262 (1956).

8. Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 492 (1955); *cf.* Melodies, Inc. v. Mirabile, 4 Misc. 2d 1062, 163 N.Y.S.2d 131 (Albany City Ct. 1957) (juke box covenant: action for damages against promisor).

9. Gillingham v. Ray, 157 Mich. 488, 122 N.W. 111 (1909).

10. Murphy v. Christian Press Ass'n. Publishing Co., 38 App. Div. 426, 56 N.Y.Supp. 597 (1899); *cf. In re* Rider, 16 R.I. 271, 15 Atl. 72 (1888).

11. New York Bank-Note Co. v. Hamilton Bank-Note Engraving & Printing Co., 83 Hun. 593, 31 N.Y.Supp. 1060 (Sup. Ct. 1895).

12. P. Lorillard Co. v. Weingarden, 280 Fed. 238 (W.D.N.Y. 1922).

13. Bitterman v. Louisville & Nashville Ry. Co., 207 U.S. 205 (1907).

Of similar effect are the decisions wherein such restrictions are enforced against the purchaser with notice by injunction,[14] no distinction being made between those restrictions upon personal as opposed to real property.[15] "The reason for this is not because (the purchaser) has covenanted not to use it but because he cannot trespass on the special rights which he knew another had in the property when he bought it."[16]

One of the leading cases involving a ship is *Lord Strathcona S.S. Co. v. Dominion Coal Co.*[17] in which the owner of a ship agreed to charter the vessel to the plaintiff for operation on the St. Lawrence River for a number of years. The vessel was sold to several successive owners, one of whom attempted to repudiate the charter party. The Privy Council (the court of last resort for British Commonwealth nations beyond the seas) held the covenant good, stating that the vessel was not bought as a free ship and that a buyer could not extinguish a right in a vessel of which he had notice.[18]

A recent article[19] discussing the *Strathcona* case under the heading "Contract-Ship-Purchase with Notice of Contract of Charter" points out that the wide doctrine which was approved and applied as a principle of equity in the Strathcona case had its origin in the famous statement by Knight Bruce L.J. in the case of *De Mattos v. Gibson.*[20]

> 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 . . . use and employ the property in a manner not allowable to the giver or seller.

The article discusses *Tulk v. Moxhay*[21] and the other English cases and then points out that the nisi prius court in *Port Line Ltd. v. Ben Line Steamers, Ltd.*[22] had refused to follow the *Strathcona* case.

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14. Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955); *In re* Waterson, Berlin & Snyder Co. v. Irving Trust Co., 48 F.2d 704 (2d Cir. 1931); P. Lorillard Co. v. Weingarden, 280 Fed. 238, (W.D.N.Y. 1922); Vetzel v. Brown, 86 So.2d 138 (Fla. 1956); Weissman v. Lincoln Corp., 76 So.2d 478 (Fla. 1954); Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631 (1937); Oliver v. Hewitt, 191 Va. 163, 60 S.E.2d 1 (1950); see also cases cited in Annot., 23 A.L.R.2d 516 (1950).

15. The American encyclopedias, Corpus Juris and Corpus Juris Secundum, make no distinction as to restrictions on real and personal property, including both under the same heading, 32 C.J. *Injunctions* § 315 (1923), 43 C.J.S. *Injunctions* 387 (1945).

16. New York Phonograph Co. v. Davega, 127 App. Div. 222, 111 N.Y.Supp. 363 (1908).

17. [1926] A.C. 108 (P.C.).

18. *Id.* at 117; *accord*, Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 Fed. 603 (7th Cir. 1917).

19. [Nov. 1958] Camb. L.J. 169.

20. 4 De G. & J. 276, 45 Eng. Rep. 108 (Ch. 1859).

21. 2 Phil Ch. 774, 41 Eng. Rep. 1143 (Ch. 1848).

22. [1958] 2 Q.B.D. 146.

It appears that since the Privy Council has appellate jurisdiction of British Commonwealth cases only, technically the other English Courts are not bound by its decision. However, irrespective of the views of the nisi prius court in the *Port Line* case, the English Court of Appeal (which has immediate appellate jurisdiction over the Court which decided the *Port Line* case,) has said in *Bendall v. McWhirter*:[23]

> I know that some people have looked askance at the principles laid down in the *Strathcona* case, but there were on the Board of the Privy Council, three of the most distinguished equity lawyers of the day, and I fail to see why we should not follow the principles there laid down . . . , *especially as they are so eminently just and reasonable.* (Emphasis added.)

Moreover, the *Strathcona* decision was cited and quoted with approval by Judge Augustus N. Hand in his opinion for the court in *In Re Waterson, Berlin & Snyder Co.*[24]

Before the United States District Court for the Southern District of Florida in the case of *Tri-Continental v. Tropical Marine*[25] the question was squarely presented as to whether a mortgagee, which had notice of a restrictive covenant of this kind when it advanced the money for the purchase of a vessel, the ABACO QUEEN, was bound by the restrictive covenant under which the vessel was not to be used for certain purposes for ten years between certain southeastern states and Cuba. The District Court flatly held "that not only was this a valid covenant as between the original parties, but that it is an *equitable servitude, valid and binding on subsequent purchasers with notice.*"[26] (Emphasis added.) The court cited the *Tulk*,[27] *Capitol Records*,[28] *Lord Strathcona*[29] *and Great Lakes & St. Lawrence Transportation*[30] cases. On appeal, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the proposition that the restrictive covenant was valid even under the anti-trust laws, and by a 2-1 decision held that the mortgagee was bound by the covenant even though its mortgage contained no express reference thereto.[31] The court indicated by dictum that were it necessary, it would have upheld the principle that an equitable servitude of this kind on a chattel is binding on a subsequent purchaser or mortgagee with notice, stating that "appellant makes too much of early and *over-technical common law considerations* distinguishing between covenants with respect to chattels

23. [19521 2 Q.B.D. 466, 482 (C.A.).
24. 48 F.2d 704, 708 (2d Cir. 1931).
25. 164 F.Supp. 1 (S.D. Fla. 1958), *aff'd*, 265 F.2d 619 (5th Cir. 1959).
26. *Id.* at 2.
27. Tulk v. Moxhay, 2 Phil. Ch. 774, 41 Eng. Rep. 1143 (Ch. 1848).
28. Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955).
29. Lord Strathcona S.S. Co. v. Dominion Coal Co., [19261 A.C. 108 (P.C.).
30. Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co., 239 Fed. 603 (7th Cir. 1917).
31. Tri-Continental Financial Corp. v. Tropical Marine Enterprises, Inc., 265 F.2d 619 (5th Cir. 1959).

and those with respect to land, too little of equitable considerations in dealing with both."[32] (Emphasis added.) However, the majority rested its decision on the ground that under the facts of the *Tri-Continental* case the mortgagee having furnished the funds with which to make the purchase, with full notice of the covenant, it was bound by equitable considerations, and that under the circumstances a great deal more would have to be put forward by the mortgagee "to rid the vessel and the parties dealing with it of the covenant, than the *dry as dust and technical common law distinction between chattels and realty*."[33] (Emphasis added.) One judge dissented on the ground that "there is a rational basis of continuing validity for the traditional difference between the principle of law which permits the burdening of real estate with restrictive covenants and that which favors the sale of tangible personal property unencumbered by even known restrictive covenants. . . ."[34]

But there is sound reason for holding that ships are particularly susceptible to the imposition of restrictive covenants. Ships differ sharply from some other kinds of chattels (such as radios, television sets, furniture, and the myriad of items that are purchased by sample, from catalog, or from the retailer's shelf) to which title passes by delivery. Transfer of title by delivery would be difficult if such goods were subjected to equitable servitudes.[35] But ships generally are not sold in this way. The method of dealing with ships closely resembles that with real property. The ownership and registry of a vessel as well as mortgages, liens, and other encumbrances are recorded at the customs house at the ship's home port. The parties enter into a contract looking to the purchase and sale of a specific vessel, a title search is then made and the bill of sale and other documents of title are delivered at a pre-arranged date. The bill of sale is recorded and filed at the home port, or lodged with the appropriate government official. An equitable servitude or restriction on the use or operation of the vessel would merely be one of a great many possible encumbrances for the ascertainment of which the title search would be made.

The proposition that equitable servitudes should not be permitted to impede the free transfer of title is thus plainly inapplicable to ships. Indeed, ships are subject to a wide variety of maritime liens that are binding even upon purchasers for value without notice.[36] Moreover, by the Ship Mortgage Act[37] "the preferred mortgage lien shall have priority

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32. *Id.* at 625.
33. *Id.* at 626.
34. *Id.* at 626-27.
35. See John D. Park & Sons v. Hartman, 153 Fed. 24, 39 (6th Cir. 1907); National Skee-Ball Co. v. Seyfried, 110 N.J. Eq. 18, 158 Atl. 736 (1932).
36. W. A. Marshall & Co. v. S.S. "President Arthur," 279 U.S. 564, 568 (1928); Plamals v. S.S. "Pinar Del Rio," 277 U.S. 151, 156 (1928); 1 BENEDICT, ADMIRALTY § 26 (6th ed. 1940), "The maritime lien is often secret and unrecorded and the bulk of these liens operate adversely to the rights of mortgagees and purchasers without notice."
37. 41 Stat. 1000 (1920), 46 U.S.C. § 911 (1958).

over all claims against the vessel, except (1) preferred maritime liens. . . ."[38] And the Act defines a preferred maritime lien as, inter alia:

> a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.[39]

In light of the maritime law's many impediments to the free transfer of title to ships, the objection interposed in a limited class of cases to equitable servitudes plainly has no validity when applied to a ship.

From a very careful consideration of the authorities therefore it would appear safe to assert that (1) there is no real doubt as to the validity under the anti-trust laws, or otherwise, of a restrictive covenant, reasonable in time and extent, embodied in the sale of a vessel, and (2) a purchaser or mortgagee who takes with notice of such a covenant is bound thereby.

38. 41 Stat. 1004 (1920), 46 U.S.C. § 953(b)(1) (1958).
39. 41 Stat. 1004 (1920), 46 U.S.C. § 953(a)(2) (1958).