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Recent Cases

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RECENT CASES

CRIMINAL LAW: New Trial for Negligence or Incompetency of Defense Counsel. — The defendant appeals from a conviction of rape and kidnapping on the ground that he was not adequately represented by counsel. On appeal, HELD: Affirmed. Where allegedly improper decisions made in conducting defense were, at most, honest errors in judgment on the part of counsel for defense, defendant's rights to a fair trial were not violated. *Hendrickson v. State,* 118 N.E. 2d 493 (Ind. 1954).

The incompetence of an attorney does not ordinarily constitute a ground for a new trial. *State v. Dangelo,* 182 Iowa 1253, 166 N.W. 587 (1918); *Farmers' L. & T. Co. v. Bank,* 23 Wis. 249 (1868). In civil cases the rule may be regarded as almost invariable. *Burton v. Hynson,* 14 Ark. 32 (1853); *Burton v. Wiley,* 26 Vt. 430 (1854). In criminal cases, and especially those involving the life of the defendant, the court would be justified in adhering to the rule somewhat less strictly. *State v. Jones,* 12 Mo. App. 93 (1882). But in any case, to justify a reversal upon this ground, there should be a strong showing both of incompetency and prejudice. *State v. Benge,* 61 Iowa 658, 17 N.W. 100 (1883). The omissions, incompetency, or neglect of counsel assigned by the court for defendant in a capital case will be viewed more favorably by the court than if he had been employed by the prisoner. *State v. Williams,* 18 Del. 508, 18 Atl. 949 (1890). The Constitution of the United States guarantees the basic right of assistance of counsel in criminal proceedings, *State v. Farrell,* 223 N.C. 321, 26 S.E. 2d 322 (1943), and along with this constitutional guaranty, the law demands that the accused have the stout and unswerving loyalty of his chosen or appointed counsel. *Scott v. District of Columbia,* 99 A. 2d 641 (Mun. Ct. App., D.C. 1953). However, the constitutional guaranty of assistance of counsel does not provide that the defendant shall have the best or most efficient counsel available; and a reversal is not in order merely because some other attorney might have pursued in a different manner or presented the case more effectively. *People v. Barnes,* 270 Ill. 574, 110 N.E. 881 (1915). Hence, a mere error of judgment or tactical blunder by counsel for the defense in a criminal case is not a ground for a new trial. *State v. Holden,* 42 Minn. 350, 44 N.W. 123 (1890); *State v. Fontenot,* 48 La. Ann. 220, 19 So. 112 (1896). Fraud or betrayal by defense counsel gives equal or greater cause for granting a new trial than incompetence, ignorance,

or negligence. *State v. Gleeman,* 170 Minn. 197, 212 N.W. 203 (1927). A new trial will not be granted solely on the ground that defendant's counsel was sick, *Woolsey v. People,* 98 Colo. 62, 53 P. 2d 596 (1935); or intoxicated, *State v. Thompson,* 56 N.D. 716, 219 N.W. 218 (1928); or suffering from fatigue, *Tiller v. State,* 110 Ga. 250, 34 S.E. 204 (1899); or of unsound mind, *State v. Bethune,* 93 S.C. 195, 75 S. E. 281 (1912). But where defendant is prejudiced by his counsel's inebriation or incapacity and does not thereby receive a fair trial, a new trial will be granted. *State v. Keller,* 57 N.D. 645, 223 N.W. 698 (1929).

A survey of both recent and old cases discloses that the rule in regard to the instant case may be stated almost universally as follows: A new trial will not be in order because of incompetency, neglect, or mismanagement by the defense counsel, unless it is of such a nature and magnitude that the defendant is prejudiced and thereby prevented from receiving a fair trial. In some jurisdictions the rule seems to have been applied more rigidly than in others, and the essence of a reversal is founded on a manifest miscarriage of justice. In any event, prejudice must be shown. The courts have placed little or no emphasis on the kind of incompetency, neglect or mismanagement; nor have they made any attempt to distinguish or define these terms, with the exception of fraud. Thus, the determining factors are the degree and circumstances of incompetency (rather than species) and its effect on the litigation. These factors are clearly distinguished in South Carolina's leading authority, *State v. Bethune, supra.* Without such a distinction it would appear that the South Carolina Supreme Court's application of the rule was somewhat harsh. Yet in deciding against the objection of counsel's prejudicial mismanagement of the defense in the *Bethune* case, the court said: "The mental condition of the appellant's former attorney is not ground for a new trial, because it has not been made to appear that it caused prejudice to his case. It does not appear that he did or left undone anything which would probably have affected the result." Apparently this rule in the *Bethune* case is well founded in law, as it has been cited in various jurisdictions as being both a leading and a correct ruling.

EDWARD C. ROWE.

CRIMINAL LAW — EVIDENCE: The Sufficiency of the Evidence to Establish the Corpus Delicti as a Basis for the Introduction of Confessions. — The court, holding that the details of this

case are too sordid, does not report all the facts but only those pertaining to this question of law. Appeal is from adverse judgment of the circuit court questioning the sufficiency of the evidence to establish the corpus delicti as a basis for the introduction of the confessions. The State, in its evidence, showed the position of the men when discovered by the police, the condition of their bodies, the nature of their clothing, and their location in a secluded spot at one or two o'clock in the morning. On appeal, HELD: Affirmed. The commission by someone of the crime charged need not be proved beyond a reasonable doubt to make the confession admissible, but it is enough if the evidence tends to show that the crime was committed. *McElveen et al. v. State,* 72 So. 2d 785 (Fla. 1954).

It is elementary that before a confession of guilt may be introduced in evidence the State must first prove the corpus delicti, that is, it must prove that the crime charged has been committed. *Adams v. State,* 153 Fla. 68, 13 So. 2d 610 (1943); *People v. Patton et al.,* 284 Mich. 427, 279 N.W. 888 (1938); *Spears v. State,* 92 Miss. 613, 46 So. 166 (1908). In the different jurisdictions there have been varying degrees of proof required and it is interesting to note the words used by the different courts. The State must produce evidence of the corpus delicti sufficient to convince a jury "beyond a reasonable doubt," *Commonwealth v. Lettrich,* 346 Pa. 497, 31 A. 2d 155 (1943); *State v. Blocker,* 205 S.C. 303, 31 S.E. 2d 908 (1944); "beyond any question," *State v. Benham,* 58 Ariz. 129, 118 P. 2d 91 (1941); "proved not beyond a reasonable doubt but beyond all possible doubt," *State v. Fouquette,* 67 Nev. 505, 221 P. 2d 404 (1950); "having been fully proven, confessions were admissible," *Moreland et al. v. State,* 24 Ala. App. 160, 132 So. 60 (1931); and in *People v. Mohr,* 24 Cal. App. 2d 580, 75 P. 2d 616 (1938), the words used were "legally proved." An extra-judicial confession should not be admitted in evidence unless the corpus delicti is established by prima facie evidence independent of said confession. *Pate v. State,* 36 Ala. App. 688, 63 So. 2d 223 (1953); *Smith v. State,* 135 Fla. 835, 186 So. 203 (1939). In *Keir v. State,* 152 Fla. 389, 11 So. 2d 886 (1943), the court ruled that confessions could not be admitted until there was "at least some prima facie proof of the corpus delicti." The California rule appears to be that the corpus delicti need be proved prima facie or by slight evidence to allow confessions admitted. *People v. Smith,* 72 Cal. App. 2d 875, 164 P. 2d 857 (1946); *People v. Kaye,* 43 Cal. App. 2d 802, 111 P. 2d 679 (1941). In South Carolina the court makes this statement: "The rule . . . forbids introduction as to a confession of guilt on part of one charged

until there has been sufficient evidence . . . on the matter of corpus delicti." *State v. Edwards,* 173 S.C. 161, 175 S.E. 277 (1934). In *State v. Brown,* 103 S.C. 437, 88 S.E. 21 (1916), it was held that confessions could not be admitted until some evidence of corpus delicti was established. Two Alabama cases support the view that if any facts are proved from which a jury may reasonably infer that the crime charged has been committed, the confession is admissible. *Rutland v. State,* 31 Ala. App. 43, 11 So. 2d 768 (1943); *Ratliff v. State,* 212 Ala. 410, 102 So. 621 (1924). On a motion for direction of verdict of not guilty, evidence to establish the corpus delicti must be viewed in light most favorable to State. *State v. Thomas,* 222 S.C. 484, 73 S.E. 2d 722 (1952). The ruling in the instant case, that there must only be some evidence tending to show the commission of the crime charged, finds support in the two cases cited herewith. Ex Parte *Schuber,* 68 Cal. App. 424, 156 P. 2d 944 (1945); *Holland v. State,* 39 Fla. 178, 22 So. 298 (1897).

The purpose of the rule of law that the State must prove the corpus delicti before allowing a confession to be introduced is, of course, to preclude the possibility of a person being punished for a crime which has not been committed, but to which he has confessed for reasons better known to himself. In order to accomplish this, it would seem that the best rule to avoid such happenings would be to require, as some jurisdictions do, that the corpus delicti must be proved beyond all reasonable doubt. This would avoid any possibility of conviction of a person on his confession alone. No doubt some courts have felt that to require this degree of proof is too great a burden on the State and therefore have modified the degree of proof required to such descriptive levels as "beyond any question," "beyond any possible doubt," "fully proven," "legally proven," etc. Other degrees of evidence vary from "some" to "sufficient" to "slight." It appears that the majority rule today is that the State must make out a prima facie case as to the corpus delicti before allowing confessions. This seems to be sound in that a prima facie case is rebuttable and this procedure sets up safeguards to prevent a miscarriage of justice and still does not make the burden too great on the part of the State. The rule in the instant case, where there need only be enough evidence which tends to show that the crime was committed, requires of the State a degree of proof so slight that the dangers of adherence to such a rule are obvious.

A. RAY HINNANT.

REAL PROPERTY — COVENANTS: Whether Covenant in Deed to Pay Improvement Costs Runs With the Land. — Plaintiff development company conveyed unimproved lots to defendant's grantors, the deeds of conveyance containing identical covenants that the conveyed property should bear its part of the cost of the improvements of paving adjacent streets and/or putting in water or sewage lines, in the event the grantor, "or its successors or assigns, owner or owners of a major portion" of the lots in the subdivision, should decide to improve the streets or plumbing facilities of the subdivision. However, there was no covenant on the part of the grantor to make the said improvements. It was further expressly provided that this was to be a covenant running with the land, to be a charge upon the land in whatever hands it should be at the time the improvements were made. Subsequent to conveyance to the defendant, the plaintiff made certain improvements, and this action was brought for the proportionate part due under the terms of the covenant. The lower court gave judgment for the plaintiff, and defendant appeals. On appeal, HELD: Affirmed. The intention of the original parties expressly was that the covenant should run and bind the grantee, his heirs and assigns, and the intention of the parties shall govern. Further, the acceptance of a deed containing a covenant binding the grantee is equivalent to the granting of an easement, and runs with the land. *Stevens Co. v. Lisk, et al.,* 82 S.E. 2d 99 (N.C. 1954).

One of the essential requirements for a covenant to run with the land is that it touch and concern the land. *Epting v. Lexington Water Power Co.,* 177 S.C. 308, 181 S.E. 66, 102 A.L.R. 773 (1935); *Morse v. Garner,* 1 Strob. 514, 47 Am. Dec. 565 (1847). "If a covenant is such that its performance or non-performance must affect the nature, quality, value or mode of enjoyment of the demised premises, it is not a mere personal covenant but one that runs with the land and binds assignees of the covenantor . . . ." *Rosen v. Wolff,* 152 Ga. 578, 110 S.E. 877 (1922), as cited in the *Epting* case, *supra.* It is not necessary, for it to touch and concern, that the covenant is to be performed on the land itself, so long as it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is occupied. *Cheves v. City Council of Charleston,* 140 S.C. 423, 138 S.E. 867 (1927); *Morehouse et al. v. Woodruff et al.,* 218 N.Y. 494, 113 N.E. 512 (1916); *Ricketts v. Enfield Church Wardens,* [1909] 1 Ch. 544. Negative or restrictive covenants, binding the grantee to refrain from doing an act, or to refrain from using his land in a certain way,

have uniformly been held to run in equity, if not at law. *McDonald v. Welborn,* 220 S.C. 10, 66 S.E. 2d 327 (1951); *Tulk v. Moxhay,* 2 Ph. 774, 41 Eng. Rep. 1143 (1848). However, there is some authority to the effect that affirmative covenants, binding the covenantor to do a positive act, will not run with the land, either at law or in equity. *Miller v. Clary,* 210 N.Y. 127, 103 N.E. 1114, L.R.A. 1918E 222, Ann. Cas. 1915B 872, (1913). The basis for this view rests upon the English decisions, which have held that restrictive covenants will be enforceable in equity, *Tulk v. Moxhay, supra,* but that affirmative covenants will not run. *Haywood v. The Brunswick Permanent Benefit Building Society,* 8 Q.B.D. 403 (1881). The reasoning of the English courts has been rather vague. Aside from the naked assertions that an assignee should not be bound to make expenditures of money, and that the court has no reason to create a new equity, no reasons have been assigned for the rule. *Haywood v. The Brunswick Permanent Benefit Building Society, supra.* However, the American jurisdictions which follow this rule have recognized several exceptions, one of which is that a deed covenant to pay improvement costs will be enforced against grantees and their assigns. *165 Broadway Building, Inc. v. City Investing Co., et al.,* 120 F. 2d 813, 818 (2nd Cir. 1941); *Neponsit Property Owners' Ass'n, Inc. v. Emigrant Industrial Savings Bank,* 278 N.Y. 248, 15 N.E. 2d 793, 118 A.L.R. 973, *rehearing denied,* 278 N.Y. 704, 16 N.E. 2d 852 (1938). *Lawrence Park Realty Co. v. Crichton,* 218 App. Div. 374, 218 N.Y. Supp. 278 (1926). The majority of the American jurisdictions make no distinction between affirmative covenants and restrictive covenants, and require only that the covenant touch and concern the land. *Walker v. City of Richmond,* 173 Ky. 26, 189 S.W. 1122, Ann. Cas. 1918 E, 1084 (1916); *Smith v. Gulf Refining Co., et al.,* 162 Ga. 191, 134 S.E. 446, 51 A.L.R. 1323 (1926). There has been little litigation in South Carolina concerning affirmative covenants. However, from the cases which have appeared, it may be inferred that the court has drawn no essential distinction between affirmative and restrictive covenants, insofar as whether or not they will run is concerned. *Epting v. Lexington Water Power Co., supra.* The court has mentioned only the requirement that the covenant touch and concern. *Epting v. Lexington Water Power Co., supra; Pitts v. Brown, et al.,* 215 S.C. 122, 54 S.E. 2d 538 (1949). An early case indicated the court would enforce covenants for future acts, or against future evils. *Jeter v. Glenn,* 9 Rich. 374 (S.C. 1856). A covenant by a municipality to pave streets was held to run, insofar as the benefit was concerned. *Cheves v. City Coun-*

cil of Charleston, supra. In North Carolina, affirmative covenants have been held to run; however, the law has developed in a different channel. That jurisdiction has held that the acceptance of a deed with a covenant binding the grantee is the equivalent of the granting of an easement, and so runs with the land. *Ring v. Mayberry,* 168 N.C. 563, 84 S.E. 846 (1915). However, the likening of a covenant to an easement was originally conceived to circumvent a requirement in that state that there be such privity of estate as to establish mutual and simultaneous interest in the same land, and the analogy has since been so expanded that all deed covenants are likened to easements. *Norfleet v. Cromwell,* 64 N.C. 1 (1870); *Mayberry* case, *supra.* Although the present North Carolina view, as expressed in the instant case, may in most instances achieve a result in accord with the majority ruling, it has been criticized on the ground that an easement is but a claim upon the land, whereas a covenant is a personal undertaking to act, or to refrain from acting, in a certain manner. *Lingle Water Users' Ass'n. v. Occidental Building & Loan Ass'n.,* 43 Wyo. 41, 297 Pac. 385 (1931). In *United States v. Florea,* 68 F. Supp. 367 (D. Ore. 1945), it was held that the power of a quasi-public utility to collect assessments for benefits conferred on lands was not an easement, but was analogous or equivalent to and adjudged as a covenant running with the land.

The judgment of the court in the instant case is in accord with the great weight of authority, but the reasoning which the court applies in reaching its decision is decidedly in the minority. It would be capricious and erroneous to say that the law in North Carolina is that covenants will in every instance be construed as easements. The illogical result of such an assertion would be that no reliable distinction could be drawn between real and personal covenants, and that the requisites as established in *Spencer's Case,* 5 Coke 16a (1583), would in all respects be disregarded. However, this is the inference to be drawn from the instant case. The tendency of the courts to liken a covenant to an easement probably has developed as a method of circumventing the necessity of privity of estate for the running of a covenant. However, the result is an anomaly in the law, in the form of the so-called spurious, or false, easement, burdening the holder of the servient estate with a duty to act, or to refrain from acting. An easement by its very nature is a right of one with regard to the land of another. It is a claim only upon the land, and burdens the holder of the fee only to the extent that he must refrain from acts inconsistent with the continuance of the right. It is inconsistent with the whole body of the law of easements to so

expand the field as to include rights of one to demand performance of an act by another. The fluidity of the law, and the readiness of the courts to accept a fictional line of reasoning in order to avoid an unpopular though established rule, where that rule would, if applied as intended, prevent a desired result, is both laudable and appalling — laudable, for it recognizes that the law must fit the needs of a people in a particular age; appalling, for it creates inconsistencies in the law which cannot be reconciled, except by acknowledging that, in the final analysis, each case must be judged upon its own merits. In the instant case, the court, relying upon older authority, feels bound to follow a rule that acceptance of a deed with a covenant burdening the grantee is equivalent to the granting of an easement. The basis for that rule rests upon a rule that assignees in fee are not in sufficient privity of estate to be bound by a covenant. And so the court has elected to deny that a covenant is a covenant, and has come to call it an easement. It would appear less to confuse the law to overrule previous decisions more freely, or to construe them more liberally, rather than to develop an expansion of a separate field which by logic should not be so broadened as to include both covenants and easements under a single classification.

ROBERT F. PLAXCO, JR.

REAL PROPERTY — RESTRICTIVE COVENANTS: Requiring Submission of Building Plans to Grantor for Approval — Validity, Construction, and Effect. — This was a proceeding under the Uniform Declaratory Judgment Act for a declaration that the covenant in plaintiffs' deed ended with the death of the original grantor. Original grantor conveyed a subsection of a restricted residential area to the plaintiffs' vendors, the deed containing, *inter alia,* a covenant as follows: "*. . . and that no dwelling house or other building shall be erected on the tract until the type and exterior lines of the building to be erected shall have been approved by* [grantor] *or by an architect selected by him . . . .*" Conveyance to the plaintiffs was subject to the covenant contained in the original deed. Original grantor selected the architect to pass upon and approve or disapprove plans for the dwelling houses to be erected in this restricted residential area. Subsequently, the original grantor died. Plaintiffs submitted plans for their proposed dwelling house to the named architect, conforming to all the specific restrictions spelled out in tangible form in the covenant, but said architect declined to approve

the type and exterior lines of the contemplated structure. Plaintiff brought this proceeding to obtain relief from the above covenant and judgment was entered declaring that plaintiffs are entitled to erect a dwelling house "without obtaining the approval of [architect selected by original grantor] or any other architect as to the type and exterior lines of the building." On appeal, HELD: Affirmed. The covenant was personal to the grantor and ended at his death. *Julian v. Lawton,* 82 S.E. 2d 210 (N.C. 1954).

There is an increasing demand by home owners, with the crowded conditions of modern life in the cities, to have real estate limited entirely to development for residential purposes. Clark, *Covenants and Interests Running with Land* 170 (2d Ed. 1947). The problem of technical requirements of a covenant running with the land is not presented here, since ". . . the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased." *Tulk v. Moxhay,* 2 Ph. 774, 41 Eng. Rep. 1143, 15 Eng. Ru. Cas. 254 (1848). Covenants in deeds should be interpreted in favor of the free use of property and against any restrictions upon use thereof, *Pehlert v. Neff,* 152 Pa. Super. 84, 31 A. 2d 446 (1943); *Edney v. Powers,* 224 N.C. 441, 31 S.E. 2d 372 (1944), and construed so as to carry into effect the intention of the parties, which is to be collected from the whole instrument and circumstances surrounding its execution. *Cheves v. City Council of Charleston,* 140 S.C. 423, 138 S.E. 867 (1927); *Dooley v. Savannah Bank & Trust Co.,* 199 Ga. 353, 34 S.E. 2d 522 (1945). A building restriction will not be inferred to be personal when it can be construed to be appurtenant to land. *Baker v. Lunde,* 96 Conn. 530, 114 Atl. 673 (1921). And restrictive building covenants are personal to the grantor if no building scheme is found. *Jennings v. Baroff,* 104 N.J. Eq. 132, 144 Atl. 717, 60 A.L.R. 1219 (1929). General building schemes will be upheld if not against public policy. *Dixon v. Van Sweringen Co.,* 121 Ohio St. 56, 166 N.E. 887 (1929). If building restrictions contained in a deed are within reasonable bounds and the intention of the parties is clear, such restrictions will be upheld as not against public policy. *Jones v. Northwest Real Estate Co.,* 149 Md. 271, 131 Atl. 446 (1925). Power to approve plans must be reasonably and not arbitrarily exercised. *Hannula v. Hacienda Homes,* 34 Cal. 2d 442, 211 P. 2d 302, 19 A.L.R. 2d 1268 (1949). Covenants restricting land to commercial use with power given to committee to approve or disapprove plans for the proposed business are valid. *Hoffman*

v. Balka, 104 A. 2d 188 (Pa. 1954). A covenant to erect no building on land conveyed without approval of the grantor, except a filling station, is personal and does not run with the land retained. *Chappell v. Winslow,* 144 F. 2d 160 (4th Cir. 1944). Restrictive covenants not to use realty conveyed for purpose of conducting a mercantile business thereon without written consent of grantors, their children or grandchildren, have been held to be personal and terminated when the grantor sold the business they sought to protect. *Allison v. Greear,* 188 Va. 64, 49 S.E. 2d 279 (1948). Plans for a proposed dwelling cannot be disapproved so as to leave the grantee subject to the mere whim of the grantor. *Exchange Realty Co. v. Bird,* 16 Ohio L. Abs. 391 (1933) as cited in *Hannula v. Hacienda Homes, supra.* A covenant in a deed not to erect any structure without the approval of the grantor or his legal representative has been construed as a lawful contract and inured to the benefit of other lot owners in the plan including the plaintiffs (grantor and others). *Harmon v. Burow,* 263 Pa. 188, 106 Atl. 310 (1919).

Since *Tulk v. Moxhay, supra,* restrictive covenants have been enforced in courts of equity. With the increased demand for restricted residential developments, the courts have gone far in upholding restrictions which require that: the land be used only for residential purposes; only single dwelling houses at a certain minimum cost be built; dwellings be only one story high with certain setback lines from street and side lines. Pennsylvania indicated in *Harmon v. Burow, supra,* that a covenant in a deed calling for approval by the grantor or his legal representative of plans for any structure to be erected on the land conveyed, was valid and ran with the land. The court paid particular attention to the phrase, "The grantor or his legal representatives," and construed it to mean heirs, executors, administrators or assigns. The North Carolina Supreme Court in considering the instant case construed ". . . [grantor] or an architect selected by him . . ." to mean grantor or his agent, and that the death of the principal terminated the authority of the agent. It would seem that the courts should choose some point and declare that they would go no further in enforcing restrictive covenants. To say that plans must be submitted to the grantor for his approval and that they must harmonize with his aesthetic sense is going rather far. Ohio, in the *Exchange Realty* case, *supra,* said that the grantee would not be held to the mere whim of the grantor. The Virginia Supreme Court in *Allison v. Greear, supra,* said, "From the language in the restriction itself read in the light of its purpose as testified to by the [grantors], the con-

clusion is inescapable that, *if valid,* it is not a covenant running with the land." [Emphasis added] In the instant case the North Carolina Supreme Court left the door open to declare such covenants invalid if it is ever squarely presented before it as was said by Justice Ervin, when he made the statement, "We take it for granted *without so deciding* for the purpose of this particular case that the covenant in question was valid in law at the time of its insertion in the deed to the plaintiffs' grantors." [Emphasis added] Of the very limited authority found on this question, one case, *Harmon v. Burow, supra,* definitely held that the covenant was valid; other cases were decided on different questions of law, but there were indications that some of the courts had some doubt as to the validity of the covenant. It appears that the better view would be to declare such covenants invalid by reason of their vagueness.

MELVIN L. ROBERTS.