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Contracts—Agreements Not to Compete—Powers of Equity to Scale Down Unreasonable Terms

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50 (1939); Harper, Torts, 294 (1933), only two other jurisdictions have also cast aside the bonds of stare decisis, and have declared the policy overruled, charities henceforth being fully liable for the torts of their employees, like any other corporation. *Porto Rico Gas and Coke Co. v. Frank Rullan and Assoc., Rullen v. U. S., U. S. v. Foard et al,* (3 cases), 189 F. 2nd 397 (1st Cir. 1951). *Malloy v. Fong,* 37 A. C. 356, 232 P. 2nd 241 (1951). See also, Cal. Code Civ. Proc., sec. 1714; Puerto Rico Civil Code, sec. 1802-3; 39 Cal. L. Rev. 455 (1951).

It is submitted that the principal case not only takes proper cognizance of the changing social and economic conditions, and thus better enables the law to keep "abreast of the times," but also that the *Ray* case may well be a foretelling of a nation wide overthrow of the Charities' Tort Immunity Doctrine.

Robert Alan Thompson

CONTRACTS—AGREEMENTS NOT TO COMPETE—POWERS OF EQUITY TO SCALE DOWN UNREASONABLE TERMS

Defendant sold his bakery located in Boston, Mass. to plaintiff. Defendant agreed in the bill of sale that he would "not engage in the bakery business directly or indirectly for a period of seven years within a radius of seven miles of Boston." The following year defendant entered the employ of another baker in the city at a weekly salary. Plaintiff sought to enjoin defendant from engaging in the bakery business according to the terms of the bill of sale. The lower court found the limitations of seven years and seven miles unreasonable. The judge found it reasonable however, to restrain defendant from engaging in the bakery business "directly or indirectly" within a radius of four miles from plaintiff's bakery, and for a period of four years. The court then held that defendant had violated the new "reasonable" restrictions, and issued an order restraining defendant from continuing in such business. On appeal the Supreme Judicial Court of Massachusetts affirmed. *Thomas et al* v. *Paker* — Mass —, 98 N. E. 640 (1951).

Early English and American decisions evince a strong tendency to strike down covenants not to compete. *Mitchell* v. *Reynolds* 1 Pere Williams 181 (1711). *Noble* v. *Bates,* 7 Cow. 307 (N. Y. 1827). For history of restrictive convenants see *Hall Mfg. Co.* v. *Western Steel,* 227 Fed. 588, at 592 (6th circuit 1915). *Diamond Match Co.* v. *Roeber* 106 N. Y. 463, 13 N. E. 419, (1887). Also see Restatement, Contracts, sec. 513, (1932), 5 Williston, Contracts sec. 1633, 1636, (Revised Edition, 1937). 6 Corbin, Contracts, sec. 1379 (First Edition 1951). However, modern authority upholds such covenants when two requirements are satisfied. The covenant must be (1) ancillary or subordinate to the main purpose of the contract and (2) reasonably necessary for the protection of the business and goodwill. See Justice Taft's noted dictum in *Addyston Pipe and Steel Co.* v. *U. S.*

85 Fed. 271 (6th Circuit 1898), 6 Corbin, Contracts sec. 1386, Restatement, Contracts, sec. 513 (e), 515, 516 (a) (b) (c), illust. 2. (1932), 46 Harvard L. R. 1188 (1933); and see the following state statutory provisions, Ala. Code title 9, sec. 22, 24) 1940). Okla. title 15, sec. 217, 218, 219, (1941).

The general rule that courts will not alter unreasonable terms of a contract has been held to apply to restrictive covenants. *Interstate Finance Corp.* v. *Wood,* 69 F. Supp. 278 (E. D. Illinois 1946), where restraint was for one year and three states, it was stated that the court cannot by "judicial decision create a new and different contract." *In re American Motor Products Corp.* 98 F. 2nd 774 (2nd circuit 1938) held that a court may not "substitute its ideas" for those in the contract. See also 4 Pomeroy, Equity Jurisprudence sec. 1378 (5th edition, 1941), McClintock, Equity, sec. 26, (2nd edition 1948). Restatement, Contracts, sec. 518 comment (b) (1932). But see 6 Corbin, Contracts sec. 1389, p. 501, 5 Williston, Contracts, sec. 1666. An exception to this general rule has been made in contracts where terms were considered "divisible." Originally, a term was divisible if the unreasonable portion could be "blue pencilled" out, leaving only a reasonable restriction. *Attwood* v. *Lamon* 2 K. B. 146 (1920), *Central N. Y. Tel. and Tel. Co.* v. *Averill* 199 N. Y. 128, 92 N. E. 206, (1910), 6 Corbin, Contracts, sec. 1390, 5 Williston, Contracts sec. 1659. Divisibility no longer is limited by the "blue pencilling" criterion. Courts by paying mere lip service to this fictional "test" found a means of rewriting unreasonable terms of contracts. Thus where the seller agreed not to compete in the states of New York and New Jersey, the court ruled the terms "divisible" and barred the seller from New York City and Jersey City. *Stanley Co.* v. *Lagomarsino* 53 F. 2nd 112 (S. D. N. Y. 1931). Corbin sec. 1389, 22 Virginia L. Rev. 94 (1935-1936). As Professor Corbin says, "divisibility" no longer has any definition. 6 Corbin, Contracts sec. 1389-1390. Courts merely used "divisibility" to safeguard the reasonable expectations of the contracting parties.

The principal case represents the culmination of a recent line of Massachusetts decisions allowing courts of equity to scale down unreasonable provisions of restrictive covenants without resort to the divisibility fiction. Thus in *Edgecomb* v. *Edmonston* 257 Mass. 12, 153 N. E. 99 (1926) and *Whiting Milk Co.* v. *O'Connell* 277 Mass. 570, 179 N. E. 169 (1932) the court reduced the size of the territory restricted by the covenant. Similarly the court in *Metropolitan Ice Co.* v. *Ducas* 291 Mass. 403 , 196 N. E. 856 (1935) reduced the time limitation. Also see *Chase Laboratories Inc. v. Hennessey et al*—Mass.—, 97 N. E. 2nd 397 (1951) and 46 Harvard L. Rev. 1188 (1933), and for a critical examination of the evolution of the Massachusetts rule see 15 Boston U. L. Rev. 834 (1935). Professors Williston and Corbin in their respective works approve the Massachusetts practice of outright revision. 5 Williston, Contracts sec. 1660, 6 Corbin, Contracts, sec. 1389, although Professor Williston warns that flagrantly oppressive cov-

enants obviously designed to take advantage of the "outright revisions" rule should be stricken in *toto.*

A tendency may be observed in some states to follow the Massachusetts rule in both statute and decisions. See Ala. code, title 9 sec. 22, 24, (1940), Okla. title 15 sec. 217, 218, 219, (1941), *Yost* v. *Patrick* 245 Ala. 275, 17 So. 2nd 240 (1943). *Edward* v. *Mullin* 220 Cal. 379, 30 P. 2nd 997 (1934). *Hartman* v. *Everett* 158 Okla. 29, 12 P. 2nd 543 (1932).

New York appears to be slowly accepting the Massachusetts rule. An isolated Court of Appeals decision indicated tacit agreement with the recent Massachusetts holdings. Thus in *Interstate Tea Co. v. Alt,* 271 N. Y. 76, 2 N. E. 2nd 51, (1936) the court after looking for and failing to find divisibility, proceeded to alter an unreasonable provision of a restrictive covenant. In that opinion Judge Loughran changed the definition of the term "customer" as contained in the original contract. Two Appellate Division decisions show a similar acceptance of the Massachusetts rule. Thus in *Widder Dye and Chem. Co.* v. *United States Marking Tag Co.,* 241 App. Div. 703, 269 N. Y. S. 802 (2nd Dep't. 1934) the court stated a covenant may be "enforced as far as is necessary to protect plaintiffs from competition." Similarly in *Goldstein* v. *Maisel,* 271 App. Div. 971, 67 N. Y. S. 2nd 410 (2nd Dep't. 1947) the court scaled down an unlimited restricted area to read New York City. The Court of Appeals has yet to go further than the cautious approach of the *Alt* case.

The purpose of such covenants, restricting competition, is to secure to the buyer the business and good will which he has purchased. The employer who has entrusted his employee with trade secrets or customer lists is also entitled to reasonable protection. *Interstate Tea Co.* v. *Alt,* supra. The entire covenant should not be stricken down because of an unreasonable or excessive restraint which may be altered by the court. Nor should Courts be forced to hide behind a test of divisibility which has come to be in fact, no test. 6 Corbin, Contracts, sec. 1389. The reasonable expectations of the parties should not be made to depend on the readiness of the Court to find a fictitious "divisibility." The principal case and the line of decisions permitting courts of equity to scale down covenants not to compete, assures employers and purchasers safety while barring unreasonable limitations.

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