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## Business Associations—Business Covenant

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Appellate Division, however, took the view that for retail shoe merchants, the ordinary course of trade "was selling shoes to those who came into the store to buy from the stock in trade for wear."<sup>25</sup> That court quoted from *Jubas v. Sampsell*<sup>26</sup> where it was said that "the 'regular and usual practice and method of business of the vendor' cannot be measured by a prevalent custom of merchants which the vendor followed."<sup>27</sup>

"Ordinarily the words 'not in the ordinary course of trade' refer to a winding up of the business."<sup>28</sup> The Court of Appeals impliedly took cognizance of this by stating that New York courts limit the reach of the Bulk Sales Act to cases involving the sale of substantially an entire inventory or business.

With two judges dissenting, the court rendered judgment in the belief that the facts indicated no deviation from the ordinary course of trade in the retail shoe business.

### *Business Covenant*

Glucksterns', Inc. was a restaurant corporation owned and operated by Simon and Louis Gluckstern with the help of their respective sons, Samuel and Philip. When differences arose between the two brothers, Louis and Philip resigned their positions in the corporation and, in a written agreement, covenanted, among other things, not to engage in the restaurant business in a specified area for a period of five years. The agreement made it quite clear that the above restriction was to cease and terminate at the expiration of five years from the making. Other provisions relating to certain representations etc. were not time limited.

Approximately twelve years later, plaintiff, purchaser of Glucksterns', Inc. from Simon, sought to enjoin Philip Gluckstern from continuing to operate a restaurant recently opened in his name and located across the street from Glucksterns', Inc.

The Supreme Court, through a special referee, granted plaintiff a sweeping injunction which prohibited defendants from continuing to use their surname or a derivative thereof in connection with the restaurant business within twelve city blocks in every direction from plaintiffs' present restaurant. This geographical limitation was reduced to three city blocks by the Appellate Division.

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25. 279 App. Div. 30, 31, 108 N. Y. S. 2d 218, 220 (4th Dep't 1951).

26. 185 F. 2d 333 (9th Cir. 1950).

27. *Id.* at 334.

28. See note 2 *supra*.

## THE COURT OF APPEALS, 1952-53 TERM

The Court of Appeals, citing *Matter of Western Union Tel. Co.*<sup>29</sup> and *Friedman v. Handelman*,<sup>30</sup> unanimously declared it to be New York policy that where the intention of the parties was clearly and unambiguously expressed in a written agreement, effect should be given to the intent as indicated by the language thereof without adding to or subtracting from the stated rights and obligations.

This meant the above mentioned actions became proper after five years, and, therefore, all territorial restrictions imposed by the lower courts were abolished. The only limits which could be sustained were those set out in the agreement as not limited in time.<sup>31</sup>

### *Rehabilitation of Domestic Insurer*

Section 511 (e) of the Insurance Law allows the superintendent of insurance to apply for rehabilitation if a domestic insurer is found "to be in such condition that its further transaction of business will be *hazardous* to its policy holders, or to its creditors, or to the public." [italics added.] In *Application of Bohlinger*<sup>32</sup> the Supreme Court implied that "hazardous" meant any situation which would render further transactions of business injurious to policy holders, creditors or the public.<sup>33</sup> Although the disposition of the case remained the same, the Court of Appeals, facing such problem for the first time, made it clear that "hazardous" encompasses only dangers financial in nature.<sup>34</sup>

## III. CIVIL PRACTICE

### *Pre-trial Deposition*

Section 288 of the Civil Practice Act authorizes the taking of a deposition of a party to an action, an original owner of a claim not a party, and of *any other person*, as a witness, not a party thereto, where it is material and necessary. The issue before the Court of Appeals in a recent case<sup>1</sup> was whether the scope of the words "any other person" includes officers or agents of the State.

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29. 299 N. Y. 177, 86 N. E. 2d 162 (1949).

30. 300 N. Y. 188, 90 N. E. 2d 31 (1949).

31. *Delancey Kosher Restaurant & Caterers Corp. v. Gluckstern*, 305 N. Y. 250, 112 N. E. 2d 276 (1953).

32. 199 Misc. 941, 106 N. Y. S. 2d 953 (Sup. Ct. 1951).

33. *Id.* at 968, 106 N. Y. S. 2d at 977-78, *aff'd* unanimously 280 App. Div. 517, 113 N. Y. S. 2d 755 (1st Dep't 1952).

34. 305 N. Y. 258, 112 N. E. 2d 280 (1953).

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1. *Buffalo v. Hanna Furnace Corp.*, 305 N. Y. 369, 113 N. E. 2d 520 (1953).