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Injunction -- Employee's Agreement Not to Compete -- Partial Performance

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Injunction—Employee's Agreement Not to Compete—Partial Performance

Defendant agreed at the time of employment as route salesman for plaintiff's beauty parlor supply company in North and South Carolina, that for a period of five years from any termination thereof, he would not own or operate any business selling the same type of merchandise, or contact any account handling such merchandise, in either North or South Carolina. Upon defendant's termination of employment he immediately accepted employment with a competitor of plaintiff and approached customers in eastern North Carolina that he had previously called on for plaintiff. On appeal by plaintiff from a judgment dissolving a temporary restraining order, *held:* affirmed. Since plaintiff had operated a business only in eastern North Carolina, the contract restriction against competition in North and South Carolina was unreasonable and void as against public policy.[1]

Where the interest of the employer sought to be protected is an appropriate one, North Carolina will enforce employees' restrictive covenants not to compete if founded on "valuable considerations and . . . necessary to protect the interests of the party in whose favor they are imposed, and do not unduly prejudice the public interest."[2] "To this must be added the condition that they do not impose unreasonable hardship on the covenantor. . . ."[3] Except for the territorial aspect, the instant case seems to be one where injunction normally would issue. The employee's promise was given in consideration of an original contract of employment.[4] The employee had a personal association with plaintiff's customers which, when his employment terminated, would enable him to injure the business of plaintiff if employed by a competitor.[5] And the five year term of the restriction has been held reasonable.[6]

In the light of other North Carolina decisions, if the covenant in the instant case had covered only the named cities or counties within which plaintiff did business, an injunction probably would have been granted.[7] The court's justification for denying injunction in the princi-

[1] Noe v. McDevitt, 228 N. C. 242, 45 S. E. 2d 121 (1947).

[2] Kadis v. Britt, 224 N. C. 154, 160, 29 S. E. 2d 543, 547 (1944) (while this case states the general rule followed in North Carolina in previous cases, the court held that the facts of the case did not justify enforcement of the restriction).

[3] Kadis v. Britt, 224 N. C. 154, 161, 29 S. E. 2d 543, 547 (1944) (this seems to be the first case in which the North Carolina court expressly adds this condition to the general rule).

[4] *Id.* at 163, 29 S. E. 2d at 548.

[5] Moskin Bros. v. Swartzberg, 199 N. C. 539, 545, 155 S. E. 154, 157 (1930).

[6] Beam v. Rutledge, 217 N. C. 670, 93 S. E. 2d 476 (1940).

[7] Sonotone Corp. v. Baldwin, 227 N. C. 387, 42 S. E. 2d 352 (1947) (forty-nine counties); Orkin Exterminating Co. v. Wilson, 227 N. C. 96, 40 S. E. 2d 696 (1946) (city of Winston-Salem and thirteen counties); Beam v. Rutledge, 217 N. C. 670, 9 S. E. 2d 476 (1940) (city of Lumberton and 100 miles therefrom); Moskin Bros. v. Swartzberg, 199 N. C. 539, 155 S. E. 154 (1930) (city of High Point and a fifteen mile radius).

pal case was that "The Court cannot by splitting up the territory make a new contract for the parties—it must stand or fall integrally."[8]

Where the territory embraced in restrictive covenants is unreasonable, but is expressed in divisible terms, *i.e.*, in terms of local geographical or governmental units, the majority of the courts enforce the covenant in as many of the units as are reasonable and disregard the remainder.[9] To some extent, the North Carolina case of *Sonotone Corp. v. Baldwin*[10] takes this view. There, the employee's territory included forty-nine counties, but the restricted territory included the same counties plus an area fifty miles wide on every side of those counties. The injunction included only the forty-nine counties, but with no mention of the fifty mile strip.

Where the territory is unreasonable but is not described in separable local units, the majority view has been that the entire territorial restriction is void.[11] The minority view, however, favors enforcement of the restriction in as much of the territory as is shown to be reasonable, even at the administrative cost of newly defining the smaller area, and the tendency of the American cases is toward this view.[12] A case adopting this view is *New England Tree Expert Co. v. Russell.*[13] Defendant was a salesman of arboricultural services, including tree surgery and landscaping, under an express covenant not to compete in the New England states after the termination of employment. Plaintiff's business was concentrated in Rhode Island, and in parts of Connecticut and Massachusetts; defendant's sales territory was confined to a part of Massachusetts. Upon defendant's resignation, he established a competitive business in his original sales territory. The court granted an injunction as to the original sales territory and the remainder of the territory intensively covered by plaintiff's solicitors. In affirming the injunction the court said, "The defendant is bound by his covenant to the extent necessary for the protection of the good will of the plaintiff's business."[14] Another illustration is a Texas case where defendant was given sixty-six counties, including the city of Fort Worth, as his territory for the sale of adding machines, with a covenant not to compete in this territory for a period of one year from the termination of his employment. Defendant actually sold only in Fort Worth, and upon termination of his employment, he undertook to

[8] Noe v. McDevitt, 228 N. C. 242, 245, 45 S. E. 2d 121, 123 (1947).

[9] 5 WILLISTON, CONTRACTS §1659 (Rev. ed. 1937 and 1947 cum. supp.).

[10] 227 N. C. 387, 42 S. E. 2d 352 (1947).

[11] 5 WILLISTON, CONTRACTS §1660 (Rev. ed. 1937 and 1947 cum. supp.), and cases cited; Automobile Club v. Zubrin, 127 N. J. Eq. 202, 12 A. 2d 369 (Ch. 1940).

[12] 5 WILLISTON, CONTRACTS §1660 (Rev. ed. 1937 and 1947 cum. supp.).

[13] 306 Mass. 504, 28 N. E. 2d 997 (1940).

[14] Edgecomb v. Edmonston, 257 Mass. 12, 153 N. E. 99 (1926) (covenant as to state of Massachusetts unreasonable, but reasonable and enforceable in city of Boston).

sell a competitive line in Fort Worth. The Texas court in granting an injunction for Fort Worth only said, "An injunction on these facts for all sixty-six counties would be unreasonable, . . . the court may limit an injunction to the territory within which defendant's employment has given him an aquaintance with plaintiff's business."[15]

This view seems to reach much the better result. It has the merit of protecting the employer's interest without an undue burden on the employee. This is not the making of a new contract by the court, but is an equitable limitation on the extent to which the remedy of injunction will be used to enforce the contract as written. See *Sonotone Corp. v. Baldwin, supra.*

The differences between the courts' decisions in these cases seem to depend more upon the form than upon the substance of the restrictive agreement. The reason most often advanced against partial enforcement of indivisible employee covenants is that it encourages employers with superior bargaining power to insist on unreasonable and excessive restrictions knowing that they will get at least a part if not all of what they seek.[16] This argument loses most if not all of its validity when it is considered that the employer by skilful wording of a covenant can obtain the same result by describing the same territory in terms of separable local units.

At least six state courts today grant partial performance of employee agreements not to compete, even though the territory was described in the agreement as an apparently indivisible area.[17] Two Federal courts are in accord.[18]

[15] Burroughs Adding Machine Co. v. Chollar, 79 S. W. 2d 344 (Tex. Civ. App. 1935).

[16] 5 WILLISTON, CONTRACTS 4685 (Rev. ed. 1937).

[17] New England Tree Expert Co. v. Russell, 306 Mass. 504, 28 N. E. 2d 997 (1940); Burroughs Adding Machine Co. v. Chollar, 79 S. W. 2d 344 (Tex. Civ. App. 1935); Edwards v. Mullin, 220 Cal. 379, 30 P. 2d 997 (1934) (where statute limits restriction to one county or part thereof); Davey Tree Expert Co. v. Ackelbein, 233 Ky. 115, 25 S. W. 2d 62 (1930); Edgecomb v. Edmonston, 257 Mass. 12, 153 N. E. 99 (1926); *cf.* American Weekly v. Patterson, 179 Md. 109, 16 A. 2d 912 (1940); General Paint Co. v. Seymour, 124 Cal. App. 611, 12 P. 2d 990 (1932); Hill v. Central West Public Service Co., 37 F. 2d 451 (C. C. A. 5th 1930); J. L. Davis, Inc. v. Christopher, 219 Ala. 346, 122 So. 406 (1929); Moore & Handley v. Towers, 87 Ala. 207, 6 So. 41 (1889) (both Alabama cases involve restrictions on vendors with no limitations as to territory set out. The court construed the territory as the previous area of competition and held this to be reasonable.).

[18] Cropper v. Davis, 243 F. 310 (C. C. A. 8th 1917) (a Nebraska case holding where the territory is unlimited but the territory where a similar business would be in competition with plaintiff can be ascertained, the contract will be limited to that territory); *cf.* Stanley Co. v. Lagomarsino, 53 F. 2d 112 (N. Y. 1931) ("Full effect may be given to the restrictive covenant by construing it as covering the same places where the defendant was then carrying on his business in New Jersey and New York. This construction has the merit that it makes the agreement valid, and as between two possible constructions, one rendering it valid and the other rendering it void, the courts will adopt the one rendering it valid.").

It is submitted that in the instant case the court would have adopted the better view and followed the modern trend had it upheld the covenant as far as it was shown to be reasonable, namely, eastern North Carolina, and thus given the employer the protection needed.

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Mortgages—Absolute Deeds—Binding as Against the Grantor (Mortgagor); Void as Against Creditors

Courts throughout the United States recognize that a deed, although absolute in form, upon proper proof will be considered a mortgage.[1] Courts differ, however, in determining what constitutes proper proof. Apparently North Carolina is the only state requiring proof of some general ground of equitable relief before parol evidence will be admitted to show that the deed, although absolute in form, was in fact intended as a mortgage.[2] All other states seem to have abandoned this strict view and will permit reformation if there is sufficient parol proof of the intent to establish a security.[3] The standard statement of the North Carolina court is that two things must be proved, "1. It must appear that the clause of redemption was omitted through ignorance, mistake, fraud, or undue advantage. 2. The intention [to create a security] must be established, not by simple declarations of the parties, but by proof of facts and circumstances *dehors* the deed, inconsistent with the idea of an absolute purchase. . . ."[4] It is also a general requirement that the proof be clear, cogent, strong, and convincing.

The most recent statement of this proposition is in *Posten v. Bowen*[5] where the relation of employer-employee was not considered sufficient in itself to constitute undue advantage[6] in the ommission of the clause of redemption. As a result the grantor was non-suited.

This conservative view would seem to be based upon our court's almost unswerving adherence to the parol evidence rule and the land contract section of the Statute of Frauds.[7] The court feels that to allow parol proof of the security intent without first finding general

[1] See Note, L.R.A. 1916B 18 for an extensive analysis of the broad proposition and applicable cases from all jurisdictions; Note, 16 N. C. L REV. 416 (1938) discusses the North Carolina view.

[2] Note, L.R.A. 1916B 18, 47; 1 JONES, MORTGAGES §375 (8th ed. 1928).

[3] Notes, 155 A.L.R. 1104 (1945); 79 A.L.R. 937 (1932).

[4] *E.g.*, Davenport v. Phelps, 215 N. C. 326, 1 S.E. 2d 824 (1939); Newbern v. Newbern, 178 N. C. 3, 100 S.E. 77 (1919); Frazier v. Frazier, 129 N. C. 30, 39 S.E. 634 (1901); Watkins v. Williams, 123 N. C. 170, 31 S. E. 388 (1898); Sprague v. Bond, 115 N. C. 530, 20 S.E. 709 (1894); Kelly v. Bryan, 41 N. C. 283 (1849); Streator v. Jones, 10 N. C. 433 (1824) (dissent). For a more exhaustive list see Note, 16 N. C. L. REV. 416 (1938).

[5] 228 N. C. 202, 44 S.E. 2d 881 (1947).

[6] Variously referred to as undue influence, oppression, or advantage taken of grantor's necessities.

[7] N. C. GEN. STAT. §22-2 (1943).