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Constitutional Law -- Cruel and Unusual Punishment -- Criminality of a Status

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allowed the insurer to defeat the insured's action for substantial damages by settling even a small claim against the insured arising out of the same cause of action. Thus the court held that the insured *could* prevent the insurer from pleading the release as a defense.

The principal case would seem to deny the insurer the right of settlement and the right to control litigation—rights which were given to it by the policy. However, since the insurer is chargeable with knowledge that an insurer cannot bind its insured by making settlement without his knowledge and consent,²⁰ it should know that the effect of the provisions in the contract would not give it those rights. If it wanted a final settlement of the claim against its insured, the insurer would be forced to get the insured's permission.²¹ When compared to the alternatives,²² it would seem that the court made the preferred choice.

COWLES LIIPFERT

Constitutional Law—Cruel and Unusual Punishment— Criminality of a Status

The eighth amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The origin of this provision of the Bill of Rights can be traced to the Magna

would be bound by the settlement. When he learned otherwise, the releasor could repudiate the settlement by returning the consideration to the insurer. To so hold would qualify the holding of *Cochran* and lend support to the contention of the law review note where the releasor executed the release for money consideration only. In such a case, ratification by the insured should not release him, since the release was not part of the settlement.

The concurring judge probably assumed that by making a settlement with the releasor, the insured impliedly held itself out to be an agent of the insurer. *But* see Note, 38 N.C.L. Rev. 81, 83 (1959), where it was suggested that the releasor would be chargeable with knowledge that an insurer cannot bind the insured without his consent and, therefore, could not be misled by the insurer's making the settlement.

²⁰ See *Parham v. Robins*, 197 Ga. 386, 29 S.E.2d 608 (1944).

²¹ Unless a release is held to be conclusive evidence of the intent to settle all claims of both parties arising from the same cause of action, the insurer could also make a final settlement of the claim against the insured by first notifying the releasor that it was not an agent of the insured. Of course the insurer could still get authority from the insured to make such settlement.

²² Other alternatives would be to allow: (1) a release to bar only the claims of the releasor; (2) an insurer to bind its insured by settling without his knowledge and consent; (3) the insurer to plead the release without it being considered a ratification by the insured.

Carta¹ and the English Declaration of Rights of 1688.² It was adopted in 1791 as an admonition to all departments of the national government against such violent proceedings as had taken place in England during the reign of the Stuarts.³ Most states have also adopted constitutional provisions which in some form prohibit cruel and unusual punishments.⁴

In a recent decision, *Robinson v. California*,⁵ the Supreme Court took a new approach to the eighth amendment. The petitioner was convicted under a California statute⁶ which makes it a misdemeanor, punishable by imprisonment, for any person to "be addicted to the use of narcotics." In sustaining the petitioner's conviction, the California court construed the statute as making the "status" of narcotic addiction a criminal offense.⁷ The California

¹ See ch. 14 of the Magna Carta, printed as confirmed by King Edward I in 1297, 4 HALSBURY, STATUTES OF ENGLAND 24 (2d ed. 1948). "A freeman shall not be amerced for a small fault; but after the manner of the fault, and for a great fault, after the greatness thereof; saving to him his contenance; and a merchant likewise, saving to him his merchandise; and any other's villain than ours shall likewise be amerced, saving his wainage."

² 1 W. & M., c. 2, § I, 10. "Excessive bail *ought not* to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

³ 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 610 (2d ed. 1851).

⁴ The constitutions of 48 states have express prohibitions of excessive punishment. Wording of the provisions varies from "cruel" to "cruel or unusual" and "cruel and unusual," while constitutions of a few states only provide that all punishments shall be proportioned to the offense. Connecticut and Vermont have no constitutional prohibition against cruel punishment, but Connecticut provides against excessive fines, CONN. CONST. art. 1, § 13, and CONN. GEN. STAT. § 53-20 (1958) makes cruel and unusual punishment a crime. VT. STAT. ANN. tit. 1, § 271 (1950) provides that the common law of England, which prohibits cruel and unusual punishment, applies. See *State v. O'Brien*, 106 Vt. 97, 170 Atl. 98 (1933).

⁵ 370 U.S. 660 (1962).

⁶ CAL. HEALTH & SAFETY CODE § 11721: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

⁷ *People v. Robinson*, Super. Ct. No. CR A-4425, App. Dep't Super. Ct. of Los Angeles, March 31, 1961. The opinion was unreported, but may be found in Record, p. 102, *Robinson v. California*, 370 U.S. 660 (1962). Due

court further held that the offender may be prosecuted even though he has never used or possessed any narcotics within the state. The United States Supreme Court reversed, holding that narcotics addiction is a sickness and that to make a sickness a crime is to inflict a cruel and unusual punishment in violation of the fourteenth amendment.

It has been consistently held that the first eight amendments restrict only the federal government and do not apply to the governments of the individual states.⁸ However, the due process clause of the fourteenth amendment protects many rights from state infringement which are similarly protected from federal encroachment by the first eight amendments.⁹ The test of whether any right is included within the protection of the due process clause is whether that right is "inherent in the fundamental principles of justice and liberty which lie at the base of our civil and political institutions."¹⁰ In the *Robinson* case the Supreme Court for the first time definitely stated that the due process clause of the fourteenth amendment proscribes cruel and unusual punishment, although it had strongly indicated such in an earlier case,¹¹ and several lower courts had so stated.¹²

Mr. Justice McKenna's observation that "a principle to be vital must be capable of wider application than the mischief which gave it birth,"¹³ has certainly been followed by the courts in applying the cruel and unusual punishments provision. No longer is this prohibition limited to the physical brutality and torturous punishment contemplated by its framers. A review of the cases which have dealt with this clause will illustrate how the meaning of cruel and unusual

to California procedure, after affirmance by the appellate department of the California superior court, no further review in the state courts was available, and the case was brought to the Supreme Court on direct appeal.

⁸ *E.g.*, *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Collins v. Johnston*, 237 U.S. 502 (1915); *Ohio v. Dollison*, 194 U.S. 445 (1904); *McElvaine v. Brush*, 142 U.S. 155 (1891); *Barron v. Baltimore*, 32 U.S. 243 (1833).

⁹ *Cf.* *Moore v. Dempsey*, 261 U.S. 86 (1923).

¹⁰ *E.g.*, *Powell v. Alabama*, 287 U.S. 45, 67 (1932), quoting from *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926).

¹¹ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

¹² Application of *Middlebrooks*, 88 F. Supp. 943, 951-52 (S.D. Cal. 1950), *rev'd on other grounds sub nom. Ross v. Middlebrooks*, 188 F.2d 308 (9th Cir.), *cert. denied*, 342 U.S. 862 (1951); *Johnson v. Dye*, 175 F.2d 250, 256 (3rd Cir.), *rev'd per curiam on other grounds*, 338 U.S. 864 (1949).

¹³ *Weems v. United States*, 217 U.S. 349, 373 (1910).

punishment has been expanded as society's concepts of decency and humanity have changed.

The first significant consideration of cruel and unusual punishment by the Supreme Court was in an 1878 case from the Territory of Utah.¹⁴ The defendant was convicted of first degree murder and sentenced to be shot. A territorial statute provided that every person guilty of murder should suffer death, but did not state the mode of execution. Since the territory derived its authority from the federal government, it was therefore subject to the limitations of the eighth amendment. It was held that death by shooting was not a cruel and unusual punishment, as it involved no terror¹⁵ and was regularly imposed under the Articles of War.¹⁶ The Court stated that even though it could not formulate an exact definition of cruel and unusual punishment, it was axiomatic that torture and unnecessary cruelty were forbidden by the eighth amendment.¹⁷

The next important decision was *In re Kemmler*,¹⁸ in which the petitioner had been sentenced to death pursuant to a state statute "by then and there causing to pass through the body of him . . . a current of electricity of sufficient intensity to cause death."¹⁹ It was contended that electrocution violated the eighth amendment and the due process and privileges and immunities guarantees of the fourteenth amendment. The Supreme Court rejected this argument, repeating the principle that the first eight amendments restricted only the federal government. However, the Court indicated that electrocution would violate no constitutional right if used by the federal government, stating that punishments are cruel "only when they involve torture or lingering death."²⁰ The eighth amendment "implies . . . something inhuman and barbarous, something more than the mere extinguishment of life."²¹

¹⁴ *Wilkerson v. Utah*, 99 U.S. 130 (1878).

¹⁵ Such as the common-law punishments of dragging to the place of execution for treason, emboweling alive, beheading and quartering for high treason, public dissection for murder, and burning alive for treason by a female. *Id.* at 135.

¹⁶ The articles did not prescribe the method of inflicting death, but custom had determined that capital punishment may be inflicted by shooting and hanging. *Id.* at 133-34.

¹⁷ *Id.* at 136.

¹⁸ 136 U.S. 436 (1890).

¹⁹ *Id.* at 441.

²⁰ *Id.* at 447.

²¹ *Ibid.*

In a 1910 decision²² the defendant was convicted in a Philippine court, which was under United States authority, of falsifying a public document recording certain wage payments. He was sentenced to fifteen years at hard labor in chains, a fine of four thousand pesatas, loss of civil rights during imprisonment and political rights thereafter, and subjection to surveillance by the authorities for life. The statute under which the sentence was imposed was declared void and the conviction was reversed. The Supreme Court there established the principle that punishment is unconstitutionally cruel and unusual when it is not graduated and proportional to the offense committed. The Court's decision was largely influenced by the result of its comparison of the defendant's sentence with penalties imposed in other jurisdictions. It found that the defendant's punishment not only greatly exceeded those which were usually inflicted for similar offenses, but that more serious crimes such as robbery, larceny, and some degrees of homicide were not punished so severely. The Court also pointed out that other Philippine statutes did not provide for such harsh punishment for much more atrocious crimes.

Other attacks on the severity of fines or terms of imprisonment have generally failed.²³ Large aggregate sentences, arrived at by treating a single act or series of acts as distinct offenses and imposing separate sentences for each, have been held not to constitute cruel and unusual punishment.²⁴ The standard against which the courts have measured the sentence or fine is not the total penalty, but rather the penalty for each individual offense.²⁵

Habitual criminal statutes under which repeated offenders are punished more severely for the same offense than are persons with shorter records have been upheld as not providing cruel and unusual punishment.²⁶ Nor does it matter that the stricter sentence is

²² *Weems v. United States*, 217 U.S. 349 (1910).

²³ *E.g.*, *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909) (\$1,623,500 in penalties for violation of state anti-trust laws assessed against corporation with over forty million dollars in assets).

²⁴ *Badders v. United States*, 240 U.S. 391 (1916) (conviction on seven counts of using the mails to defraud, concurrent five-year sentences and \$1000 fines on each count); *Smith v. United States*, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960) (conviction on fourteen separate counts resulting from one sale of marihuana, two sales of heroin, and possession of both, sentence of fifty-two years in jail).

²⁵ *E.g.*, *Manley v. Fisher*, 63 F.2d 256 (4th Cir. 1933); *Scala v. United States*, 54 F.2d 608 (7th Cir. 1931).

²⁶ *E.g.*, *MacDonald v. Massachusetts*, 180 U.S. 311 (1901); *Beland v. United States*, 128 F.2d 795 (5th Cir.), *cert. denied*, 317 U.S. 676 (1942).

imposed in a special proceeding commenced by information after conviction of a substantive offense.²⁷

Shortening or remitting of a sentence is purely a matter of legislative or executive grace, so that none of the prisoner's constitutional rights are infringed if he is denied these privileges.²⁸ The federal statute prohibiting probation of first-time narcotics offenders²⁹ does not violate the eighth amendment,³⁰ nor does commutation of a death sentence to life imprisonment without the opportunity of parole.³¹ In *United States ex rel. Bongiorno v. Ragen*³² the petitioner was convicted of first degree murder and sentenced to 199 years in prison. Under Illinois parole law, a prisoner serving a life term becomes eligible for parole after twenty years, but a person serving a term of years becomes eligible only after he has completed one third of his term. The petitioner sought habeas corpus claiming that his punishment was cruel and unusual because, as the parole laws were framed, he would not live long enough to apply for parole. The writ was denied, even though the 199 year sentence was a device specifically used to avoid the parole of murderers after twenty years.

It has been held that a prison sentence does not become cruel and unusual merely because the defendant is so old that he is unlikely to survive it.³³ Nor is a long sentence objectionable because equally guilty co-defendants have been dealt with more leniently,³⁴ or because the jurisdiction imposes lighter penalties on crimes generally thought to be more grievous.³⁵ Imprisonment at hard labor is not objectionable.³⁶ Solitary confinement for convicts condemned to death,³⁷ and for a prisoner whose death sentence for

²⁷ *Graham v. West Virginia*, 224 U.S. 616 (1912).

²⁸ *E.g.*, *Latham v. United States*, 259 F.2d 393 (5th Cir. 1958).

²⁹ INT. REV. CODE OF 1954, § 7237(d).

³⁰ *Latham v. United States*, 259 F.2d 393 (5th Cir. 1958).

³¹ *Green v. Teets*, 249 F.2d 401 (9th Cir. 1957).

³² 54 F. Supp. 973, (N.D. Ill. 1944), *aff'd*, 146 F.2d 349 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945).

³³ *E.g.*, *Black v. United States*, 269 F.2d 38 (9th Cir. 1959), *cert. denied*, 361 U.S. 938 (1960) (30-year sentence for narcotics violations on a 51-year old defendant).

³⁴ *United States v. Sorcery*, 151 F.2d 899 (7th Cir. 1945), *cert. denied*, 327 U.S. 794 (1946).

³⁵ *Howard v. Fleming*, 191 U.S. 126, 135-36 (1903).

³⁶ *Pervear v. Commonwealth*, 72 U.S. 475 (1866) (Court regarded problem as one of proportional sentence rather than of humaneness of punishment).

³⁷ *McElvaine v. Brush*, 142 U.S. 155 (1891).

murder of a prison guard was commuted to life and who was considered dangerous as an inmate,³⁸ were upheld against cruel and unusual punishment objections.

Electrocution came up again in 1946 in *Louisiana ex rel. Francis v. Resweber*.³⁹ Willie Francis, having been convicted of murder and sentenced to death by a Louisiana court, was placed in the electric chair and subjected to an electrical current which was not of sufficient intensity to cause his death, presumably because of some mechanical defect. He was returned to prison and a warrant for his subsequent execution was issued. Francis contended that "two electrocutions" would be a cruel and unusual punishment barred by the eighth amendment. Mr. Justice Reed, speaking for the Court, stated that the petitioner's claim would be considered "under the assumption, but without so deciding, that violation of principles of . . . the Eighth Amendment . . . as to . . . cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment."⁴⁰ The Court expressly rejected the contention by the petitioner that the manifold psychological factors involved in two executions was cognizable under the eighth amendment.⁴¹

The concurring opinion of Mr. Justice Frankfurter was based upon the continued freedom of a state to administer criminal justice unless it should offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."⁴²

Four members of the Court dissented,⁴³ urging that the case be remanded for further proceedings to determine whether current was actually applied to the petitioner, and, if so, how much.⁴⁴ They

³⁸ *Stroud v. Johnston*, 139 F.2d 171 (9th Cir. 1943).

³⁹ 329 U.S. 459 (1947).

⁴⁰ *Id.* at 462.

⁴¹ "Even the fact that the petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain involved in the proposed execution." *Id.* at 464.

⁴² *Id.* at 469, quoting Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

⁴³ Justices Burton, Douglas, Murphy, and Rutledge. *Id.* at 472.

⁴⁴ There were conflicting affidavits in the briefs as to whether current had

argued that the due process clause of the fourteenth amendment incorporates the cruel and unusual punishment provisions of the eighth amendment. If electric current had passed through Francis' body during the first attempt, a second attempt would be a "cruel and unusual punishment violative of due process of law," as this would not be an instantaneous execution, which had been upheld by the Court in the *Kemmler*⁴⁵ case.

The 1958 case of *Trop v. Dulles*⁴⁶ represents the second time the Supreme Court has held a punishment to be cruel and unusual. Trop had been convicted by a court martial of wartime desertion. The Nationality Act of 1940 provided that a person so convicted shall lose his citizenship.⁴⁷ Trop brought action for a declaratory judgment that he was an American citizen. The Supreme Court declared the statute unconstitutional, four justices holding that it was penal in nature,⁴⁸ and that loss of citizenship as a punishment

reached Francis at all. These are set out in a footnote in the dissenting opinion. *Id.* at 480-81 n.2.

"Then the electrocutioner turned on the switch and when he did Willie Francis' lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: 'Take it off. Let me breath.'" Affidavit of official witness Harold Resweber.

"I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one outside yelled back he was giving him all he had. Then Willie Francis cried out 'Take it off. Let me breath.'" Affidavit of official witness Ignace Doucet.

Attached to respondents' brief was a transcript of testimony, taken before the Louisiana Pardon Board, of those who were in charge of the equipment at the attempted execution that no electric current reached Francis' body and that his flesh did not show electrical burns. Also included was a statement by the sheriff of a neighboring parish that Francis told him on leaving the chair that the electric current had "tickled him."

An interesting discussion of this case can be found in PRETTYMAN, DEATH AND THE SUPREME COURT 90 (1961).

⁴⁵ *In re Kemmler*, 136 U.S. 436 (1890).

⁴⁶ 356 U.S. 86 (1958).

⁴⁷ 66 Stat. 163, 268 (1952), 8 U.S.C. § 1481(a) (8) (1958).

⁴⁸ The courts have held that deportation of an alien for the commission of a crime involving moral turpitude is a civil proceeding so that the eighth amendment does not apply. *United States ex rel. Circella v. Sahli*, 216 F.2d 33 (7th Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); *Costanzo v. Tillinghast*, 56 F.2d 566 (1st Cir.), *aff'd on other grounds*, 287 U.S. 341 (1932). In *United States ex rel. Ulrich v. Kellog*, 30 F.2d 984 (D.C. Cir. 1929), it was held that exclusion of an alien convicted of crime involving moral turpitude before her marriage to a native-born American citizen did not inflict a cruel and unusual punishment.

for crime was cruel and unusual.⁴⁹ "There may be involved no physical mistreatment, no primitive torture," the opinion remarks, but "there is instead the total destruction of the individual's status in organized society."⁵⁰ The part of the decision that may have the most far-reaching effects was the recognition that the mental as well as the physical element must be considered in determining what punishments are cruel and unusual.⁵¹

In the principal case the Court was not concerned with the method of punishment or with a punishment disproportionate to the offense as in previous cases. Rather, it was the *purpose* of the confinement that was measured against the constitutional prohibition of cruel and unusual punishments.⁵² "[I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."⁵³ The Court recognizes the authority of a state in the exercise of its police power to regulate the administration, sale, prescription, and use of habit-forming drugs,⁵⁴ or to establish a program of involuntary confinement.⁵⁵ While evidence of past narcotics use is necessary to prove addiction, under the California statute involved in this case no proof of any specific instance of use or possession within the jurisdiction was necessary. The state only had to show that the defendant had the "status" of addiction, for which he was to be punished.

⁴⁹ Chief Justice Warren, Justices Black, Douglas, and Whittaker. Concurring, Mr. Justice Brennan stated that there was no relevant connection between the act in question and any power granted to Congress by the constitution.

In a companion case, the Court upheld another section of the Nationality Act, which provided for automatic denationalization by voting in a foreign election, as a valid exercise of congressional power to regulate foreign affairs. *Perez v. Brownell*, 356 U.S. 44 (1958).

⁵⁰ 356 U.S. at 101.

⁵¹ "It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." *Id.* at 102.

⁵² *Id.* at 677 n. 5 (concurring opinion of Justice Douglas).

⁵³ *Id.* at 667.

⁵⁴ *Id.* at 664.

⁵⁵ *Id.* at 665. California has established such a program. *Cal. Welfare & Inst'ns Code* §§ 5350-361.

The scope of the cruel and unusual punishments provision has undergone considerable expansion since the eighth amendment was adopted in 1791. The *Weems*⁵⁶ decision extended its protection to punishments disproportionate to the offense. *Trop v. Dulles*⁵⁷ recognized that mental anxiety must be considered. Now *Robinson v. California*⁵⁸ has put the legislatures on notice that the Court will also apply the cruel and unusual punishments clause to the purpose of a statutory penalty in deciding upon its constitutionality. This case is an exception to the general rule that constitutional limitations in the area of criminal law do not restrict the power of the states to define crime, but only restrict the manner in which the states may enforce their penal codes.

Whether the principle of the *Robinson* decision will be extended to strike down other statutes which define offenses in terms of personal condition must await future litigation.⁵⁹ By applying the cruel and unusual punishments provision to the states through the fourteenth amendment and establishing limitations on the power of states to define crime, the Supreme Court has significantly enlarged its area of supervision of state penal legislation.

RALPH A. WHITE, JR.

Contracts—Employee Covenants Not to Compete—"Blue Pencil" Rule

The case of *Welcome Wagon Int'l, Inc. v. Pender*¹ marks the first clear application of the "blue pencil" rule² in employment con-

⁵⁶ *Weems v. United States*, 217 U.S. 349 (1910).

⁵⁷ 356 U.S. 86 (1958).

⁵⁸ 370 U.S. 660 (1962).

⁵⁹ In *Stoutenburgh v. Frazier*, 16 App. D.C. 229, 236 (1900), the court stated that conviction under a statute which provided that "all suspicious persons" could be arrested and prosecuted as criminals, without anything more, would impose a cruel and unusual punishment. See generally Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Note, 37 N.Y.U.L. REV. 102 (1962).

¹ 255 N.C. 244, 120 S.E.2d 739 (1961).

² Where a contract not to compete contains both lawful and unlawful restrictions, if the restrictions are stated separately or in the alternative the court will enforce the valid restrictions and disregard the invalid. In effect the test is whether the court could take a "blue pencil" and mark out the invalid restrictions, leaving the valid ones to be enforced. *E.g.*, *Roane Inc. v. Tweed*, 33 Del. Ch. 4, 89 A.2d 548 (Sup. Ct. 1952); *General Bronze Corp. v. Schmilting*, 208 Wis. 565, 243 N.W. 469 (1932); RESTATEMENT, CONTRACTS § 518 (1932); 6A CORBIN, CONTRACTS § 1390 (1962); 5 WILLISTON, CONTRACTS § 1659 (rev. ed. 1937).