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Charles M. Whedbee

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The scope of the cruel and unusual punishments provision has undergone considerable expansion since the eighth amendment was adopted in 1791. The *Weems*<sup>56</sup> decision extended its protection to punishments disproportionate to the offense. *Trop v. Dulles*<sup>57</sup> recognized that mental anxiety must be considered. Now *Robinson v. California*<sup>58</sup> 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.<sup>59</sup> 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*<sup>1</sup> marks the first clear application of the "blue pencil" rule<sup>2</sup> in employment con-

<sup>56</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>57</sup> 356 U.S. 86 (1958).

<sup>58</sup> 370 U.S. 660 (1962).

<sup>59</sup> 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).

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

<sup>2</sup> 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. Schmiling*, 208 Wis. 565, 243 N.W. 469 (1932); RESTATEMENT, CONTRACTS § 518 (1932); 6A CORBIN, CONTRACTS § 1390 (1962); 5 WILLISTON, CONTRACTS § 1659 (rev. ed. 1937).

tracts in North Carolina. In *Welcome Wagon* the defendant, a former employee of the plaintiff, had covenanted not to engage in a similar business during employment or thereafter for a period of five years, (1) in Fayetteville, N. C., (2) in any other city or town in North Carolina where plaintiff was engaged in such business, (3) in any city or town in the United States in which plaintiff was engaged in such business, or (4) in any city or town in the United States in which plaintiff has been or signified its intention to engage in such business. Shortly after termination of her employment defendant set up a similar business in Fayetteville and plaintiff sought to enjoin such competition. Defendant demurred, claiming among other grounds, that the restrictions contained in the covenant were unreasonable as to the extent of territory. In overruling the demurrer, the court applied the "blue pencil" rule, saying that if the parties made divisions of the territory, some reasonable and some unreasonable, a court of equity will enforce the territorial divisions deemed reasonable and refuse to enforce those deemed unreasonable. Restriction (1) (as to Fayetteville) was reasonable and enforceable; restriction (2) might be reasonable or unreasonable, raising a question for the chancellor; and restrictions (3) and (4) were clearly unreasonable and thus unenforceable. This is in accord with the majority.<sup>3</sup>

There is little North Carolina authority prior to the principal case dealing with divisible covenants not to compete in employment contracts. North Carolina has clearly applied the "blue pencil" rule to covenants not to compete in contracts for the sale of a business.<sup>4</sup> However, the prevailing tendency, followed in North Carolina, is to distinguish covenants ancillary to the sale of a business from those in an employment contract.<sup>5</sup>

There are two previous North Carolina cases involving employment contracts which seemingly deal with separable territorial

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Hauser v. Harding*, 126 N.C. 295, 35 S.E. 586 (1900), where the restriction ancillary to the sale of a medical practice covered "Yadkinville and the surrounding territory." The court severed the indefinite "surrounding territory" restriction and upheld an injunction as to the definite area of Yadkinville. *Accord*, *Wooten v. Harris*, 153 N.C. 43, 68 S.E. 898 (1910).

<sup>5</sup> *E.g.*, *Arthur Murray Dance Studios v. Witter*, 62 Ohio L. Abs. 17, 45-46, 105 N.E.2d 685, 703-04 (C.P. 1952), citing among numerous other authorities, *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944). That they have been distinguished in regard to application of the "blue pencil" rule see notes 24, 25 *infra* and accompanying text.

covenants, but neither is clear authority for an application of the rule. In *Sonotone Corp. v. Baldwin*<sup>6</sup> the covenant restricted a former employee from competing in a forty-nine county area and a fifty mile strip on either side. The lower court injunction covered only the forty-nine counties. In upholding the lower court's injunction the opinion made no reference to severability, saying only that the covenant was "reasonably limited both in respect of time and territory."<sup>7</sup> Whether the court referred to the separated or the original covenant cannot be determined.

In *Moskin Bros. v. Swartzberg*<sup>8</sup> the court upheld a municipal court injunction covering only the city of High Point even though the covenant was much broader in its scope. But the court's only reference to territory was "we think the covenant is reasonable in its terms, and not unreasonable in time or territory."<sup>9</sup> In neither case is there a clear cut application of the "blue pencil" rule.<sup>10</sup>

On the other hand, the North Carolina court has held that it will not give partial effect to an "indivisible" promise, *i.e.* one not grammatically severable, by granting an injunction to cover only a reasonable area of a larger territory. In *Noe v. McDevitt*<sup>11</sup> the covenant was not to compete in North and South Carolina. The plaintiff's business covered only eastern North Carolina, and the court refused to grant an injunction covering this smaller area, saying, "the court cannot by splitting up the territory make a new contract for the parties—it must stand or fall integrally."<sup>12</sup> This view is not in accord with the more modern approach in which courts do not depend on grammatical severability, but issue an injunction to cover the reasonable part of an excessive restraint.<sup>13</sup>

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<sup>6</sup> 227 N.C. 387, 42 S.E.2d 352 (1947).

<sup>7</sup> *Id.* at 391, 42 S.E.2d at 355.

<sup>8</sup> 199 N.C. 539, 155 S.E. 154 (1930).

<sup>9</sup> *Id.* at 545, 155 S.E. at 157.

<sup>10</sup> In *Welcome Wagon v. Morris*, 224 F.2d 693 (4th Cir. 1955) the court of appeals considered a contract from Gastonia, North Carolina almost identical to that in the principal case. The court of appeals refused to apply the "blue pencil" rule saying, "we find nothing in the authorities cited by counsel for *Welcome Wagon* that militates against this view. See *Moskin Bros. v. Swartzberg . . . Wooten v. Harris . . . Hauser v. Harding.*"

<sup>11</sup> 228 N.C. 242, 45 S.E.2d 121 (1947).

<sup>12</sup> *Id.* at 245, 45 S.E.2d at 123.

<sup>13</sup> *E.g.*, *Hill v. Central West Pub. Service Co.*, 37 F.2d 451 (5th Cir. 1930) (restraint throughout Texas, enforced as to city of Dallas); *New England Tree Expert Co. v. Russell*, 306 Mass. 504, 28 N.E.2d 997 (1940) (restraint as to all New England states, enforced as to one state and parts of two others); 6A CORBIN, *op. cit. supra* note 2, § 1390; *Williston & Corbin*,

In *Henley Paper Co. v. McAllister*<sup>14</sup> the court seemingly refused to apply the rule to a separable list of activities.<sup>15</sup> Here the court considered a covenant which bound the defendant for three years after termination of employment not to "either directly or indirectly engage in the manufacture, sale, or distribution of paper or paper products within a radius of 300 miles of any office or branch of the Henley Paper Co. or its subsidiary divisions."<sup>16</sup> The court held that the contract excluded the defendant from too much territory and too many activities and was therefore void and unreasonable.<sup>17</sup> The court did not see fit to sever the activity restrictions which were phrased in the alternative.<sup>18</sup> Thus it seems that the court has been faced with two covenants where severability was applicable; one concerning activity restrictions (*Henley Paper Co. v. McAllister*), the other territory restrictions (*Welcome Wagon Int'l, Inc. v. Pender*). The court apparently denied severance in relation to activities and allowed it in relation to territory. As pointed out by the dissent in *Welcome Wagon*, the holdings are clearly inconsistent in that the rule was applicable in both cases, yet applied only in the second. This inconsistency raises the question of what the court will do when faced with a covenant not to compete, otherwise reasonable except for restrictions as to time<sup>19</sup> or as to persons with

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*On the Doctrine of Beit v. Beit*, 23 CONN. B.J. 40 (1949); Note, 26 N.C.L. REV. 402 (1948).

<sup>14</sup> 253 N.C. 529, 117 S.E.2d 431 (1960).

<sup>15</sup> Generally the "blue pencil" rule is applied to separate covenants covering too many businesses or activities, too much time or too broad a class of persons, as well as excessive territory. *John T. Stanley Co. v. Lagomarsino*, 53 F.2d 112 (S.D.N.Y. 1931); 5 WILLISTON, *op. cit. supra* note 2, § 1659 RESTATEMENT, CONTRACTS, § 518 (1932).

<sup>16</sup> 253 N.C. at 531, 117 S.E.2d at 432.

<sup>17</sup> *Id.* at 534-35, 117 S.E.2d at 434.

<sup>18</sup> The court seems to base its holding on *Noe v. McDevitt*, 228 N.C. 242, 45 S.E.2d 121 (1947) in which the court, faced with a covenant not grammatically severable, refused to grant an injunction to a lesser reasonable area. This is applicable to the 300 mile restraint in the present case, and this alone would make the covenant invalid. However, the court specifically includes the activities as being unreasonable. The prayer for relief asks the defendant be enjoined from the "manufacture, sale or distribution" of paper products, and the plaintiff's brief raises the question of severability.

<sup>19</sup> *Guth v. Minnesota Mining & Mfg. Co.*, 72 F.2d 385 (7th Cir. 1934) dealt with a covenant by an employee to assign invention rights, and the court severed the unreasonable time period. See also 5 WILLISTON, *op. cit. supra*, note 2, § 1659. "No example has been found of comparable draftsmanship as to the time element, although someday a draftsman may summon up the courage to try 'for 6 months plus 6 months plus . . . for a total of . . . years.'" Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 682 n.193 (1960).

whom the covenantee will not do business,<sup>20</sup> such covenants being grammatically divisible into valid and invalid units.

At present there is no clear answer to this question. The decision in *Welcome Wagon* makes no mention of overruling *Henley Paper Co. v. McAllister* and contains no dicta to indicate extensions of the rule. In applying the rule the court refers only to territorial restraints<sup>21</sup> since this was the only "divisible" issue before the court.

The language in *Henley Paper Co. v. McAllister* is the broader of the two,<sup>22</sup> but in the light of the subsequent *Welcome Wagon* decision this language must now be taken as limited. Thus authority can be found both for extending the rule to new factual situations, or refusing to do so. An extension would be in accord with leading authorities.<sup>23</sup>

By choosing the traditional "blue pencil" rule in the principal case, the court refused to follow a trend<sup>24</sup> toward the more conservative English view<sup>25</sup> which generally denies the doctrine of severance in employer-employee contracts when the covenant is harsh or oppressive. Under this view if the restraint is excessive, though grammatically severable, the court will reject the whole covenant. In *Welcome Wagon v. Morris*<sup>26</sup> the contract was almost identical to that in the principal case and the court of appeals refused severance saying, "we think the restrictive covenant must be judged as a whole and must stand or fall when so judged." The North Carolina court's comment in the principal case was that this case did not follow the general rule and was not based on the sounder reasoning.

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<sup>20</sup> *Dubowski & Sons v. Goldstein* [1896] 1 Q.B. 478 allowed severance as regards classes of customers. See also 5 *WILLISTON*, *op. cit. supra* note 2, § 1659.

<sup>21</sup> 255 N.C. at 248, 120 S.E.2d at 742.

<sup>22</sup> "Whether part of the contract might be deemed reasonable and enforceable is not the question. It comes to us as a single document. We must construe it as the parties made it. 'The court cannot by splitting up the territory make a new contract for the parties. It must stand or fall integrally.'" *Noe v. McDevitt*, 253 N.C. at 535, 117 S.E.2d at 434-35.

<sup>23</sup> See authorities cited note 15 *supra*.

<sup>24</sup> "In addition courts are increasingly subscribing to, or at least acting in accordance with the Mason [English] rule in distinguishing employee restraint cases . . ." *Blake*, *supra* note 19, at 682 n.193; 5 *DUKE B.J.* 115 (1956).

<sup>25</sup> 5 *WILLISTON*, *op. cit. supra* note 2; *Farwell, Covenants in Restraint of Trade as Between Employer and Employee*, 44 L.Q. REV. 66 (1928). This approach finds its basis in *Mason v. Provident Clothing & Supply Co.*, [1913] A.C. 724.

<sup>26</sup> 224 F.2d 693 (4th Cir. 1955).

The question of which of these views follows the sounder reasoning has been the subject of extensive argument and comment.<sup>27</sup> The chief argument against the rule is that it gives the employer, who normally has superior bargaining power, an undue advantage in that he can draft a wide and oppressive covenant in the alternative, confident that the court will enforce the reasonable part.<sup>28</sup> Also, as pointed out by the *Pender* dissent, the covenant in its entirety hangs over the employee. It is he who must ascertain where the court will draw the line.<sup>29</sup> Thus, the unreasonable covenant may well be enforced by intimidation or fear of litigation.<sup>30</sup> Also, by severance, the court in effect makes a new contract for the parties.<sup>31</sup>

Under the "blue pencil" rule the emphasis is on form rather than substance.<sup>32</sup> "Questions involving legality of contracts should not depend on form. Public policy surely is not concerned to distinguish differences of wording in agreements of identical meaning."<sup>33</sup> It is not really a matter of what the covenant contains, but how it is drafted. The crucial factor in determining enforcement is whether or not the covenant is worded in the alternative. This conclusion is criticized by writers who favor partial enforcement of indivisible promises, rather than the traditional "blue pencil" rule.<sup>34</sup>

On the other hand the employer certainly has an interest to protect. He is not solely interested in oppressing a former employee, but he has trade secrets, good will, and the like to retain. "[T]his requires us to recognize that there is such a thing as unfair competition by an ex-employee as well as unreasonable oppression by an

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<sup>27</sup> Blake, *supra* note 19, at 682-84; 5 DUKE B.J. 115 (1956).

<sup>28</sup> See Mason v. Provident Clothing & Supply Co., [1913] A.C. 724, 745; WILLISTON, *op. cit. supra* note 2, § 1660.

<sup>29</sup> Corbin points out that in the principal case the ex-employee should have known that competition in Fayetteville was unreasonable, irregardless of "blue pencil" application. 6A CORBIN, *op. cit. supra* note 2, § 1390 n. 51.5.

<sup>30</sup> "It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage, in view of the longer purse of his master." Mason v. Provident Clothing & Supply Co., [1913] A.C. 724, 745 quoted by the dissent in the principal case.

<sup>31</sup> "By some occult process, the courts adopting this rule convinced themselves that partial enforcement without the aid of a 'blue pencil' would be making a new contract for the parties, while partial enforcement in the wake of a 'blue pencil' would not." 6A CORBIN, *op. cit. supra* note 2, § 1390.

<sup>32</sup> Welcome Wagon Int'l, Inc. v. Pender, 255 N.C. 244, 256, 120 S.E.2d 739, 747 (1961) (dissent); Note, 26 N.C.L. REV. 402, 404 (1948).

<sup>33</sup> 5 WILLISTON, *op. cit. supra* note 2, § 1660.

<sup>34</sup> *Ibid.*; CORBIN, *op. cit. supra* note 2, § 1390.

employer."<sup>35</sup> The court must balance these two interests. Also the defendant "should not object to a lawful restraint which is less than he voluntarily agreed to and for which he has been paid."<sup>36</sup> Usually restrictive covenants are made with employees with executive or sales ability who fully understand the covenant; not with a workingman who has nothing to sell but his labor and who must take what he is offered.

It has been suggested that courts should refuse severance when it is clear that the employer has exacted an unduly harsh covenant, and allow severance where the employer acts fairly in trying to reasonably protect his interests and not impose an undue burden on the employee.<sup>37</sup> This would combine the best features of the English view and the "blue pencil."<sup>38</sup>

But whether or not it has selected the best rule, in *Welcome Wagon Int'l, Inc. v. Pender* the North Carolina court has taken a clear stand on the territorial aspect of covenants not to compete. With respect to territorial restraints, the court has rejected both the liberal view which upholds the reasonable part of a grammatically inseparable covenant and, the English view which denies severance even where it is grammatically possible. It is clearly established that North Carolina will apply the "blue pencil" rule to appropriate territorial restrictions, both in contracts for the sale of a business and, by the principal case, employment contracts.

CHARLES M. WHEEDBEE

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<sup>35</sup> 6A CORBIN, *op. cit. supra* note 2, § 1394.

<sup>36</sup> Breckenridge, *Restraint of Trade in North Carolina*, 7 N.C.L. REV. 249, 258 (1929).

<sup>37</sup> Blake, *supra* note 19, at 683-84.

<sup>38</sup> The application of this proposed rule will, of course, depend on the particular facts of each case. It would seem that if this rule had been applied in the principal case, the court would have refused severance, for it seems that the restrictions here (extending to any city or town in the United States where employer has signified his intention to operate such business) are an unduly harsh and unjustified burden. Perhaps if the covenant had contained only the provisions regarding (1) Fayetteville and (2) North Carolina, this would not have been deemed unduly harsh and the court could, under the proposed rule, allow severance. Also the type of covenant in *Hauser v. Harding*, 126 N.C. 295, 35 S.E. 586 (1900), covering "Yadkinville and the surrounding territory" may be one which falls into the latter class and would not be denied severance. This covenant, on its face, does not seem excessively harsh and is a good example of a covenant which is not an undue burden and is also severable. Blake, *ibid.*, suggests that the burden should be on the employer to show that he acted fairly towards the employee and did not impose an unjust burden on him.