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## Contracts - Restraint on Employee's Rights to Enter Competing Business - Partial Enforcement of Restraint Indivisible by Its Own Terms

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CONTRACTS—RESTRAINT ON EMPLOYEE'S RIGHT TO ENTER COMPETING BUSINESS—PARTIAL ENFORCEMENT OF RESTRAINT INDIVISIBLE BY ITS OWN TERMS—A provision in defendant's employment contract stated that if he ceased to be employed by plaintiff for any reason, he would not "for a period of ten years thereafter" enter into a competing business. The trial court denied plaintiff's request for injunctive relief against defendant's violation of this restriction. On appeal, *held*, reversed, one justice dissenting. An employer can obtain partial enforcement for a reasonable time of an employee's agreement not to enter into a competing business, even though the restraint as agreed upon by the parties is unreasonable and is not made divisible by its own terms. *Fullerton Lumber Co. v. Torborg*, (Wis. 1955) 70 N.W. (2d) 585.

In determining whether partial enforcement will be given to a restraint which is unreasonable in its entirety,<sup>1</sup> the majority of courts distinguish between restraints which are "divisible" and those which are not. The common practice is to reduce restraints of the former type to reasonable proportions by striking out the excessive part.<sup>2</sup> This distinction is based on the premise that giving partial effect to an "indivisible" restraint would be enforcing an agreement the parties did not make.<sup>3</sup> However, if this argument implies that the parties' agreement is being carried out by partial enforcement of a "divisible" restraint, then the distinction should be abandoned. When parties state, for example, that an employee shall not enter into a competing enterprise within "the states of California, Oregon, and

<sup>15</sup> "In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a 'trial,' the grand jury became a judge. . . ." In re Oliver, note 6 supra, at 272.

<sup>16</sup> No other case involving this same "accusatorial" interest in a judge was cited as precedent by petitioners or found by the writer. But to the effect that a judge's financial interest in securing conviction violates due process, see *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927).

<sup>1</sup> The following analysis applies to restraints as to area as well as duration. Although there are different considerations as to the "reasonableness" of the restraints when included in sale of a business as opposed to employment agreements, the considerations as to partial enforcement are identical. 6 CORBIN, CONTRACTS §1394 (1951).

<sup>2</sup> See 2 CONTRACTS RESTATEMENT §518 (1932); 5 WILLISTON, CONTRACTS §1659 (1937), for a statement of the rule and a citation of cases. The principal case, however, reflects a growing disagreement with this rule among recent decisions. See, e.g., *John Roane, Inc. v. Tweed*, (Del. 1952) 89 A. (2d) 548; *Burroughs Adding Machine Co. v. Chollar*, (Tex. Civ. App. 1935) 79 S.W. (2d) 344; *Thomas v. Parker*, 327 Mass. 339, 98 N.E. (2d) 640 (1951). But see 15 BOST. UNIV. L. REV. 834 (1935).

<sup>3</sup> *Donahue v. Permacel Tape Corp.*, (Ind. 1955) 127 N.E. (2d) 235. It is interesting to contrast the traditional rationale employed by the Indiana court with that of the principal case. The two decisions reach opposite results on very similar facts.

Washington during 1956, 1957, and 1958" they do not intend a different result than if they had said "the states on the Pacific Coast from 1956 through 1958."<sup>4</sup> It is also apparent that such a distinction is formalistic and offers an undue reward to the artful employer who drafts a divisible restraint. If the courts reject "divisibility" as a basis for determining whether partial enforcement should or should not be given, they still are confronted with the problem of determining what a proper basis should be. It is possible that such a basis may be found in the accepted principle of contract law that the courts should carry out the expressed intent of the parties. But what intent as to partial enforcement did the parties make explicit? It is arguable that the parties intended no partial enforcement, for by agreeing upon the restraint incorporated in the contract they rejected any other. On the other hand, it may be contended that they did intend partial enforcement, since when they agreed to a restraint of a given scope they desired to impose any restriction of lesser extent should the full restriction prove unenforceable. Both of these conclusions suffer from the same objection; there is usually no expression of either intent and the conclusions arise only as an inference from what the parties actually stated. There are rational bases for both inferences, but the "inferred intent of the parties," which many courts purport to find, is often predetermined by the result desired.<sup>5</sup> The soundest conclusion is an admission that the parties did not express any intent as to partial enforcement and that they probably did not even consider the possibility that their agreement would not be fully enforced.

Accepting this conclusion, the courts may still adopt the position that they can enforce only a restraint agreed to by the parties. Such a view is founded either upon the assumption that the courts cannot impose narrower obligations than those to which the parties have expressly agreed, or upon the assumption that the most equitable result will always be reached by enforcing only the agreed upon obligations. The first assumption is clearly erroneous since there are instances where the courts will require a performance only approximating the actual agreement.<sup>6</sup> The second assumption is

<sup>4</sup> 5 WILLISTON, CONTRACTS §1660 (1937). For an example of the importance of phraseology, compare *Pancake Realty Co. v. Harber*, 137 W. Va. 605, 73 S.E. (2d) 438 (1952), with *Hommel Co. v. Fink*, 115 W. Va. 686, 177 S.E. 619 (1934). Objection should also be made to the tortuous reasoning of those courts which rephrase a restraint indivisible by its own terms into an equivalent divisible agreement in order to apply the "divisibility test." *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N.J.L. 613, 71 A. 265 (1908). See 32 ORE. L. REV. 260 (1953). In *Schmidl v. Central Laundry and Supply Co.*, (Sup. Ct. 1939) 13 N.Y.S. (2d) 817, the court struck down the indivisible restraint and then "implied" a restraint reasonable in scope.

<sup>5</sup> Compare *Ceresia v. Mitchell*, (Ky. 1951) 242 S.W. (2d) 359, with *Beit v. Beit*, 135 Conn. 195, 63 A. (2d) 161 (1948).

<sup>6</sup> E.g., cases of partial enforcement of agreements to convey land made by a husband when the wife refuses to join in the conveyance [*Feldman v. Lisansky*, 239 N.Y. 81, 145 N.E. 746 (1924)] or made by a vendor when the tract actually contains less acreage than agreed upon [*Binder v. Hejhal*, 347 Ill. 11, 178 N.E. 901 (1931)]. See, generally, 2 CONTRACTS RESTATEMENT §365 (1932).

doubtful. The employer usually has a legitimate claim to a reasonable restraint, and one may question whether he is not being penalized by a complete denial of its enforcement.<sup>7</sup> The employee, on the other hand, is prejudiced only by the unreasonable part of an excessive restraint, and the court can adequately protect him without relieving him of all obligations under his agreement.<sup>8</sup> Objection has been made to partial enforcement on the grounds that the employer may knowingly impose a broad restraint and then let the courts cut it down to reasonable proportions.<sup>9</sup> But if such is the case, the solution is to deny relief in the particular instance.<sup>10</sup> In the ordinary case, the courts should impose a restraint which will be reasonable in scope and ignore any reference to a fictional "intent of the parties."

*William R. Jentes, S.Ed.*

<sup>7</sup> The facts of the principal case are particularly illustrative of a situation where the employee is personally responsible for building up and maintaining the employer's business and where his departure and attendant competition have a material and adverse effect on that business. Williston and Corbin also note that while the restraint is viewed as socially and economically undesirable there is nothing criminal in its formation. Williston and Corbin, "On the Doctrine of *Beit v. Beit*," 23 CONN. B. J. 40 (1949).

Generally, the employer is most interested in injunctive relief. But even a damage remedy is confronted with difficulties of proof and the possibility that the entire restraint will be deemed "void." But see *Hartman v. Everett*, 158 Okla. 29, 12 P. (2d) 543 (1932). For a discussion of the possibilities of obtaining both types of relief, see 5 CORBIN, CONTRACTS §1071 (1951).

<sup>8</sup> *Accord*, *Hill v. Central West Public Service Co.*, (5th Cir. 1930) 37 F. (2d) 451.

<sup>9</sup> For an excellent expression of this view, see *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724 at 745; 45 HARV. L. REV. 751 (1932).

<sup>10</sup> Principal case at 592; 26 N.C. L. REV. 402 (1948).