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Contracts--Restrictive Covenants--Restraint of Trade (Irving Investment Corporation v. Gordon, 66 A.2d 54 (N.J. Eq. 1949))

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CONTRACTS—RESTRICTIVE COVENANTS—RESTRAINT OF TRADE. —This was a suit for an injunction brought by the lessor of certain premises against the lessee to enforce restrictive covenants contained in the lease. The covenants were made for the benefit of a third party, a supply company, which had joined as party plaintiff. By the terms of the lease the defendant agreed not to enter into competition with the business of the supply company. *Held,* where restrictive covenants of a lease require the lessee to abstain from carrying on a business within a given radius of the demised premises, and neither the lessor nor beneficiary of the covenant owned any capital stock of the other, and their relationship consisted merely in having several common stockholders, the covenant was unenforceable as to any area extraneous to the demised premises, but enforceable by the lessor as to the premises themselves. *Irving Investment Corporation v. Gordon,* — N. J. Eq. —, 66 A. 2d 54 (1949).

Although at common law all agreements in general restraint of trade were void on the ground that they were contrary to public policy,[1] the tendency of recent decisions is marked in the direction of relaxing such a doctrine [2] and gauging the validity of the contracts by the reasonableness of the restraint imposed as necessary to the protection of the covenantee and as compatible with the public interest.[3] Illustrative of this point is the leading case of *United States v. Addyston Pipe and Supply Company,*[4] wherein the court declared that the main purpose of the contract is the criterion by which the extent of the restraint (its reasonableness) is to be measured. This test of reasonableness extends not only to the exigency of the peculiar facts under consideration but must also be related *to some other lawful transaction* in the sense that it must be pertinently ancillary to that agreement and reasonably required as a protective measure for the covenantee.[5] Moreover, the courts, in applying this test of reasonableness, determine the territorial scope of its effectiveness by the extent of the covenantor's business.[6]

Five categories of covenants in partial restraint of trade have generally been upheld as valid. These are agreements (1) by the seller of property or of a business not to compete with the buyer in such a way as to derogate from the value of the property or business sold;[7] (2) by a retiring partner not to compete with the firm;[8]

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[1] Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Ch. 1711).

[2] Tode v. Gross, 127 N. Y. 480, 28 N. E. 469 (1891); Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335 (1887); Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419 (1887).

[3] Automobile Club v. Zubrin, 127 N. J. Eq. 202, 12 A. 2d 369 (1940).

[4] 85 Fed. 271 (C. C. A. 6th 1898), *modified,* 175 U. S. 211 (1899).

[5] *Ibid.*

[6] Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723 (1899). See Note, 78 A. L. R. 1038 (1932).

[7] Fowle v. Parke, 131 U. S. 88 (1889); Diamond Match Co. v. Roeber, *supra* note 2.

[8] Tallis v. Tallis, 1 El. & Bl. 391, 118 Eng. Rep. 482 (Q. B. 1853).

(3) by a partner not to do anything to interfere, by competition or otherwise, with the business of the firm;[9] (4) by the buyer of property not to use the same in competition with the business retained by the seller;[10] and (5) by an agent, assistant, or servant not to compete with his master or employer after the expiration of his time of service.[11] However, these categories will be upheld only when they conform to the tests stated above.[12]

The covenant now under discussion is to be tested, then, on the basis of whether or not it is only such as is necessary to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interests of the public.[13] The manifest purpose of the lease under discussion is to transfer possession to the tenant and rent to the lessor. Was this purpose protected by the covenant which was to restrain the defendant from competing with the Newark Company? The proposition is self-explanatory. The intended beneficiary was not the lessor, but the co-plaintiff who had no such interest in the contract as would merit the exaction of this restrictive clause—no pertinent interest, property or otherwise, which demanded safeguarding.

J. J. F.

CRIMINAL LAW—ABORTION—WOMAN NOT PREGNANT IN LAW UNTIL CHILD HAS QUICKENED.—The defendant was convicted under a North Carolina statute[1] which makes it unlawful for any person to administer drugs to a woman "either pregnant or quick with child . . . with intent thereby to destroy such child." The complainant's testimony indicated that she was made pregnant by the defendant on June 14, 1948; and that the defendant, when informed of the pregnancy, purchased medicine and took her to a doctor for injections in order to destroy her unborn child. She also testified that she did not feel the movement of the child within her body until after August 25, the date of the indictment. The defendant based his appeal on the fact that the complainant was not quick with child, and therefore had not advanced to the required stage of pregnancy, within the meaning of the statute, at the time of his allegedly criminal acts. *Held,* judgment reversed. If pregnancy has not advanced sufficiently so that there is a living child, that is, a quick child, then

[9] Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981 (1893).
[10] Hodge v. Sloan, *supra* note 2; Dunlop v. Gregory, 10 N. Y. 241 (1851).
[11] Herreshoff v. Bontineau, 17 R. I. 3, 19 Atl. 712 (1890).
[12] United States v. Addyston Pipe and Supply Co., *supra* note 4.
[13] Fowle v. Parke, *supra* note 7; Gibbs v. Gas Company, 130 U. S. 393 (1889); Taylor Iron Co. v. Nichols, 73 N. J. Eq. 684, 69 Atl. 186 (1908).

[1] N. C. GEN. STAT. ANN. § 14-44 (1943).