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ever, the Court, in the interest of uniformity, should hold that *Boys Markets* is applicable to the states. *Teamsters Local 174 v. Lucas Flour Co.*[38] emphasized that national labor policy could not tolerate inconsistent state and federal court enforcement and interpretation of labor contracts:

> Incompatible doctrines of local law must give way to principles of federal labor law . . . . The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy . . . . [T]he subject matter of § 301 (a) "is peculiarly one that calls for uniform law."[39]

The field of labor law stands on the threshold of a new era that promises consistent development on both state and federal levels. Broad policies of national interest will be the predominant concern in any labor-management controversy. Past errors and incompatible doctrines should be cast aside and resurrected only in historical comment. The judiciary should not take umbrage at emerging concepts alien to past interpretations. As Justice Stewart noted, concurring in *Boys Markets*, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late."[40]

ROBERT D. RIZZO

Restraints on Trade—Covenants in Employment Contracts not to Compete within the Entire United States

The North Carolina Supreme Court has now put to rest the notion that nationwide restraints on trade were per se illegal in North Carolina. In *Harwell Enterprises, Inc. v. Heim*,[1] the supreme court upheld a re-

No-Strike Clauses in the Federal Courts, 59 MICH. L. REV. 673, 675-76 (1961); H.R. REP. No. 510, 80th Cong., 1st Sess. 42 (1947); 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT 546 (1948). The NLRB honors this distinction. Repeatedly it has said it will not adjudicate contract violations. At least one commentator disagrees. Kiernan, *Availability of Injunctions Against Breaches of No-Strike Agreements in Labor Contracts*, 32 ALBANY L. REV. 303, 316 (1968).

[38] 369 U.S. 95 (1962).

[39] *Id.* at 102-03.

[40] Justice Stewart borrowed this quote from Justice Frankfurter. 398 U.S. at 255.

[1] 276 N.C. 475, 173 S.E.2d 316 (1970).

strictive covenant in an employment contract in which the employee covenanted that he would not compete with the corporation anywhere within the United States for a period of two years.[2]

The plaintiff-corporation was engaged in various business endeavors including all phases of silk screen processing, plastics, importing and various other ventures throughout the United States and brought this action against its former employee for the violation of the restrictive covenant.[3] The case reached the North Carolina Supreme Court on a demurrer which had been sustained by the court of appeals on the grounds that the territory embraced in the restrictive covenant was too great.[4] In ruling upon the demurrer the supreme court accepted, *inter alia*, the allegations that there was a valid written contract, that plaintiff-corporation was engaged in this business throughout the United States, and that Heim had acquired valuable trade secrets and technical processes, customer lists, price information, and research and development data while employed by plaintiff.[5] The court said that "upon the allegations of the complaint, which the proof may or may not sustain, the court should have overruled both demurrers and permitted the defendants to answer and proceed to trial of the case on its merits."[6] The supreme court, therefore, held

[2] *Id.* at 476, 173 S.E.2d at 317.

[3] *Id.* The action was commenced against Heim, individually, for violating his restrictive covenant in the employee contract; and against Heim and Ballard, a codefendant, trading as Metro Screen Engraving Co. of Gastonia, for conspiracy to violate the covenant.

[4] 6 N.C. App. 548, 170 S.E.2d 540 (1969). The court of appeals determined that the mere allegation of business throughout the United States which needed to be protected was not sufficient, and stated that it was incumbent upon plaintiff to show that such a business exists and that the contract was necessary to protect such legitimate interest.

[5] 276 N.C. at 478, 173 S.E.2d at 318.

[6] *Id.* at 480, 173 S.E.2d at 320-21. The supreme court in *Harwell* apparently felt that the burden rested upon the plaintiff to plead such facts in his complaint that would show the covenant to be reasonable on its face. The issue before the court on this demurrer was whether the complaint contained a plain and concise statement of facts constituting a cause of action. What should the plaintiff be required to plead to show that he has a cause of action? Under the pleading rules applicable when this case was tried, the plaintiff needed not plead any more than facts constituting a cause of action and a demand for relief to which the plaintiff is entitled. He did not have to allege evidentiary facts, nor was he required to plead the law. Furthermore, he was not required to anticipate and negate in advance the defenses that the defendant may interpose. In *Harwell* the supreme court seemed to vary these rules and require the plaintiff to plead more than would normally be required. If the plaintiff in a *Harwell* situation is required to plead certain additional facts to indicate reasonableness, what of the many factors affecting reasonableness should he be required to plead? Why should not the burden fall on the defendant, who arguably is in a better position to know if the covenant is un-

that these allegations of the complaint constituted a valid cause of action. This decision indicated that the covenant restricting employment throughout the United States was not void on its face.[7]

The earlier North Carolina precedent concerning nationwide restraints on trade in employment contracts has been unclear although it seems to have limited the area of noncompetition more severely than the court has done in *Harwell*.

The leading case prior to *Harwell* was *Comfort Spring Corp. v. Burroughs*[8] in which the defendant-employee covenanted that for a period of five years after termination of the contract by either party, he would not directly or indirectly enter into the employ of or represent a *certain named competitor* within the entire United States.[9] The court sustained the defendant's demurrer and held that the restriction covering the entire United States was void and unreasonable as to territory, and was unnecessary for the protection of the plaintiff.[10]

The employee-defendant in *Welcome Wagon, Inc. v. Morris*,[11] covenanted not to engage directly or indirectly in the same kind or similar business as that of the plaintiff-corporation in Gastonia or in any other town or city in the United States in which the plaintiff did or had sig-

reasonable as to him, to come forward with facts showing the covenant to be unreasonable? A possible justification for the court's approach in *Harwell* is that historically restraints of trade have been disfavored. Therefore, with no summary judgment provision, the court, for the purpose of intercepting more quickly these possibly unreasonable restraints has decided to require the plaintiff to plead the scope of his business and facts showing that he was a legitimate interest to be protected. The problem is that the supreme court has never articulated the reasons for requiring the plaintiff to plead these things. Where does the plaintiff in a *Harwell* situation look for guidance when he prepares his complaint? Under the new North Carolina Rules of Civil Procedure, the plaintiff apparently will not be required to plead the additional facts as he had to do in *Harwell*. The emphasis in the new rules is on *notice pleading*—giving the defendant notice of the nature and basis of plaintiff's claim to enable him to answer and prepare for trial—with the use of other pretrial procedures to disclose more precisely the basis of the claim and define more narrowly the disputed facts and issues. Fact interception is now handled via the summary judgment procedure. *See* Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970), for a decision interpreting N.C.R. Civ. P. 8(a)(1).

[7] 276 N.C. at 480, 173 S.E.2d at 320-21.

[8] 217 N.C. 658, 9 S.E.2d 473 (1940).

[9] *Id.* at 659, 9 S.E.2d at 474.

[10] *Id.* at 661-62, 9 S.E.2d at 475-76. *See* Annot., 43 A.L.R.2d 94, 276 (1955), in which the *Comfort Spring* decision is cited in the list of cases that have held nationwide restrictive covenants unreasonable. *See also* 2 J. Strong, North Carolina Index 2d *Contracts* § 7 (1967), which cites *Comfort Spring* as authority for the proposition that nationwide restraints are per se unreasonable and void in North Carolina.

[11] 224 F.2d 693 (4th Cir. 1955) (applying North Carolina Law).

nified its intention to do business.[12] Judge Dobie, speaking for the court, said:

> In Comfort Spring Corp. v. Burroughs, . . . defendant employee, apparently a salesman, covenanted, inter alia, not to work for a certain competitor anywhere in the United States for a five year period after the termination of his employment with plaintiff-employer. The covenant was breached, but the court held that the covenant was void because it was unreasonable in territorial extent . . . .[13]

Arguably Judge Dobie interpreted *Comfort Spring* as requiring that the restrictive covenant in *Morris* be declared void and unreasonable since the period was unreasonably long and the territory covered was too vast.[14]

In *Welcome Wagon International, Inc. v. Pender*[15] there was a covenant by the employee-defendant which prohibited the employee from engaging in business competitively with the employer in

> (1) Fayetteville, North Carolina, (2) in any other city, . . . or other place in North Carolina, in which the Company is then engaged in rendering its said service, (3) in any city, . . . or village in the United States in which the Company is then engaged in rendering its said service, or (4) in any city, . . . or village in the United States in which the Company has signified its intention to be engaged in rendering its said service.[16]

The covenant was declared void to the extent that it related to any place in the United States where plaintiff was engaged or intended to carry on business, but it was reasonable as to Fayetteville.[17] The court in *Pender*

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[12] *Id.* at 696.

[13] *Id.* at 699.

[14] *Id.* at 694. Possibly Judge Dobie misconstrued the holding of the *Comfort Spring* decision, as did the court of appeals and the defendant in *Harwell*. *Comfort Spring* did not hold that nationwide restrictive covenants were ipso facto void and unreasonable. However, Judge Dobie may still have reached the correct result. The plaintiff in *Morris* alleged that he did business in many cities throughout the United States, but there was no allegation or proof that the defendant-employee had gained such trade secrets as would cause irreparable harm to the plaintiff if the employee was allowed to use them with another employer. Judge Dobie pointed out in the opinion that no trade secrets passed from Welcome Wagon to Morris. The procedural aspect of *Morris*—appeal from a denial of injunctive relief—was different from that of *Harwell*—appeal from granting of a demurrer. It is interesting to note that the court in *Morris* made findings of fact even though it was an appeal from denial of injunctive relief.

[15] 255 N.C. 244, 120 S.E.2d 739 (1961).

[16] *Id.* at 246, 120 S.E.2d at 740.

[17] *Id.* at 248, 120 S.E.2d at 742. In considering the covenant the court said that it was

noted that "the court [in *Comfort Spring*] recognized, as valid, the rule [reasonableness test] . . . but refused to restrain the defendant because of plaintiff's failure to allege sufficient facts . . . ."[18] The differences in facts, allegations, and specific circumstances led to a result in *Pender* that was different, though not conflicting, with that in *Harwell*. In *Pender* the court certainly did not hold that nationwide restrictive covenants were ipso facto void.

The defendants in *Harwell* had relied on *Comfort Spring* to support their contention that the covenant in their contract was void because the territory covered was unreasonable. However, the court in *Comfort Spring* did not hold that nationwide restrictive covenants were ipso facto unreasonable for the court there had expressly pointed out that "[t]here is no allegation nor evidence as to the territory in which the defendant is calling upon the plaintiff's customers . . . . In truth, there is no allegation nor evidence as to over what territory the plaintiff's business extends."[19] Even though the defendant had acquired certain trade and confidential information, the court indicated that the absence of the particular allegation that plaintiff does business throughout the United States left it no choice but to declare the covenant unreasonable for purpose of the demurrer. Apparently the court felt that the absence of this allegation indicated on the face of the complaint that plaintiff had no legitimate interest that required protection throughout the entire United States.

Pender and *Morris*, likewise, would not support the plaintiff's contention that a nationwide restrictive covenant should be enforced. In both *Pender* and *Morris* there were allegations that plaintiff did business throughout the United States. However, in *Pender* there was no allega-

without power to vary or reform the contract by reducing either territory or the time covered by the restrictions. However, where as here, the parties have made divisions of the territory, a court of equity will take notice of the divisions the parties themselves have made, and enforce the restrictions in the territorial divisions deemed reasonable. . . . It is patent that division (1)—Fayetteville—is not unreasonable. Likewise it appears that divisions (3) and (4)—any city or town in the United States in which the plaintiff is doing, or intends to do business—are unreasonable—and will not be enforced. Whether (2) is reasonable is for the chancellor.

Id. The court in *Pender* applied the "blue pencil test"—since the parties had made divisions in the territory themselves, the court could "pencil out" the unreasonable areas and permit the reasonable areas to stand. The *Pender* case was up on a demurrer, and, therefore, only the allegations of the complaint were before the court. There was no allegation that valuable trade secrets and confidential information was acquired by the defendant during the course of her employ.

[18] *Id.* at 249, 120 S.E.2d at 743. *See* note 6 *supra*.

[19] 217 N.C. at 661, 9 S.E.2d at 475.

tion that the employee had acquired valuable trade secrets and confidential information during the course of her employment.[20] In *Morris*, there was allegation that the employee had become acquainted with certain "methods, systems, and trade usages"[21] during the course of her employment, but the court stated that "there were no deep trade secrets, and no highly confidential information was given by Welcome Wagon to Morris."[22] The court in both cases apparently felt that the plaintiff did not have legitimate interests that required protection throughout the United States. In *Harwell* the plaintiff alleged that he did business throughout the United States. This allegation coupled with the allegation that defendant Heim had acquired valuable trade secrets that could irreparably damage the plaintiff competitively, allowed the court to overrule the demurrer and uphold the nationwide restrictive covenant. The combination of these two allegations was absent in *Comfort Spring, Pender*, and *Morris*.

Various states have approached the problem of nationwide territorial restraints on trade in several ways. A few states have antitrust statutes specifically limiting the enforceability of contracts restraining anyone from exercising a lawful trade, profession, or business. Included in this category are Montana,[23] North Dakota,[24] and Oklahoma,[25] which prohibit any such restrictive covenant, except where the covenantor is the seller of a business who agrees not to compete within a specified county, city or part thereof, so long as the vendee or his assignee conducts the business therein, or the seller is a partner who agrees not to compete in order to facilitate dissolution of a partnership.[26] California apparently prohibits post-employment restrictions although it does permit the enforcement of agreements that are ancillary to the sale of a business and its good will or incidental to a partnership dissolution.[27]

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[20] The court apparently felt that without this allegation the covenant would not be reasonable. Thus, in effect, there would be no cause of action. *See* 255 N.C. at 249, 120 S.E.2d at 743.

[21] 224 F.2d at 696.

[22] *Id.* at 701. This language indicates that "trade secrets" in and of themselves are not sufficient. There must be "trade secrets" of the sort found in *Harwell* in order that nationwide protection will be granted.

[23] MONT. REV. CODES ANN. §§ 13-807 to -809 (1967).

[24] N.D. CENT. CODE § 9-08-06 (1959).

[25] OKLA. STAT. tit. 15, §§ 217-19 (1961).

[26] Note, *Employment Contracts and Non Competition Agreements*, 1969 U. ILL. L.F. 61, 63.

[27] CAL. BUS. & PROF. CODE § 16600-02 (West 1964). *But see* Ingrassia v. Bailey, 172 Cal. App. 2d 370, 341 P.2d 370 (1959). (Enforcing employee's agreement not to solicit former employer's customers whose identities were confidential.)

There are some states which by judicial decision hold void a contract restricting the employee beyond the scope of his original employment, even though the employer's business extends further;[28] while a few states apparently hold, without regard to particular facts, that any restraint that covers at least an entire state is invalid.[29] Several states support the rule that a restrictive covenant not to compete is ipso facto void if unlimited as to territory.[30] Even where there is no limitation as to territory, or territory is expressly made unlimited, however, the majority of jurisdictions hold that the covenant is not ipso facto invalid[31] and apply the test of reasonableness to the specific circumstances and facts of each case.[32] Generally the nationwide restrictive covenant has been upheld where the employer's business actually covered the United States and the breaching employee had possession of "valuable trade secrets"[33] of the employer.[34] However, where it does not appear that the employer conducted a nationwide business or that the employee had garnered such secret or confidential

[28] *See* Comment, *Contracts in Restraint of Trade: Employee Covenants Not to Compete*, 21 ARK. L. REV. 214, 219 (1967).

[29] Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 51 S.E.2d 669 (1949); Hubman Supply Co. v. Irvin, 67 Ohio L. Abs. 119, 119 N.E.2d 152 (C.P. 1953).

[30] Vendo Co. v. Long, 213 Ga. 774, 102 S.E.2d 173 (1958); Magic Fingers, Inc. v. Robins, 86 N.J. Super. 236, 206 A.2d 601 (Super. Ct. 1965); Annot., 43 A.L.R.2d 94, 125 (1955).

[31] Award Incentives, Inc. v. Van Rooyen, 263 F.2d 173 (3d Cir. 1959); Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 28 So. 669 (1899); Annot., 43 A.L.R.2d 94, 130 (1955).

[32] *See, e.g.*, Annot., 43 A.L.R.2d 94, 116-21, 141-236 (1955). *See generally* these North Carolina cases: Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968); Orkin Exterminating Co. v. Griffin, 258 N.C. 179, 128 S.E.2d 139 (1962); Beam v. Rutledge, 217 N.C. 670, 9 S.E.2d 476 (1940); Scott v. Gillis, 197 N.C. 223, 148 S.E. 315 (1929).

[33] The use of the term "trade secrets" covers a broad area. General "trade secrets" may or may not be protected depending on the circumstances. Usually secrets are protected when they are of a special type—secret technical processes developed at great expense. *See generally* Annot., 43 A.L.R.2d 94, 275 (1955) for the types of trade secrets that are protected.

[34] *See, e.g.*, Irvington Varnish & Insulator Co. v. Van Norde, 138 N.J. Eq. 99, 46 A.2d 201 (1946); Eastman Kodak Co. v. Powers Film Prod., 189 App. Div. 556, 179 N.Y.S. 325, *appeal denied*, 190 App. Div. 970, 179 N.Y.S. 919 (1919); Eagle Pencil Co. v. Jannsen, 135 Misc. 534, 238 N.Y.S. 49 (Sup. Ct. 1929). *See* Annot., 43 A.L.R.2d 94, 275 (1955); 36 AM. JUR. *Monopolies* § 79 (1941).

> The fact that the employment is of such a character as to inform the employee of business methods and trade secrets, which if brought to the knowledge of a competitor, would prejudice the interests of the employer, tends to give an element of reasonableness to a contract that the employee will not engage in a similar business for a limited time after the termination of his employment, and is always regarded as a strong reason for upholding the contract.

Id.

trade information that could cause irreparable harm to the employer, nationwide covenants are declared unreasonable.[35] The individual factual situation and the specific circumstances of each case generally seem to determine whether or not the covenant will meet the required test of reasonableness.[36]

This test of reasonableness is comprised of three elements—reasonableness as to the employer, as to the employee, and as to the public interest. The reasonableness of each element is contingent upon the absence or presence of a number of factors.[37] As to the protection desired by the employer, consideration must be given to the nature of the trade or business involved, the nature of the employee's occupation, the nature of the skill acquired by the employee during employment, the employee's contact with customers, the employee's contact with and acquisition of trade secrets and confidential information, and generally whether or not the employer has a legitimate interest that requires protection. As to the reasonableness of the covenant with respect to the employee, consideration must be given to possible economic hardship to the employee and his family, the inconvenience to the employee resulting from the necessity of changing occupation or residence, and the nature of the skill acquired by the employee during employment.[38] As to the public interest, consideration must be given to the interference with the utilization of the employee's skill and productivity, the possibility of a consequent shift of competition or creation of a monopoly,[39] the possibility of the employee becoming a public charge, and the creation of opportunity of employment. Each of the elements must, also, be considered in relation to the duration of the covenant and the territory restricted by the covenant.[40] In order for the restrictive covenant

[35] *See, e.g.*, Hydraulic Press Mfg. Co. v. Lake Erie Eng'r Corp., 132 F.2d 403 (2d Cir. 1942); McCluer v. Super Maid Cook-Ware Corp., 62 F.2d 426 (10th Cir. 1932); Mallinckrodt Chem. Works v. Nemnich, 169 Mo. 388, 69 S.W. 355 (1902).

[36] In Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968), the North Carolina Supreme Court emphasized that time and area must be considered in determining reasonableness but neither is conclusive of the validity of the covenant.

[37] See Comment, note 28 *supra* at 215-17; Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 647 (1960); Note, *Validity and Enforceability of Restrictive Covenants Not to Compete*, 16 WES. RES. L. REV. 161 (1964). For excellent discussions of these three elements of reasonableness and factors that influence them, see 17 C.J.S. *Contracts* § 247 (1963); Annot., 43 A.L.R.2d 94, 141-236, 275-77 (1955); Annot., 41 A.L.R.2d 15, 46-154 (1955).

[38] For an example of this resulting situation see Annot., 43 A.L.R.2d 94, 141-236 (1955).

[39] *Id.*

[40] *See generally* authorities cited note 37 *supra*.

to be reasonable under a certain factual situation, there must be some combination of the above factors to make each element reasonable in respect to the duration of the covenant and the territory restricted by the covenant.[41] In balancing these elements, courts have found that the covenant will be enforceable if it is ancillary to the employment contract; if it is no greater than is required for the protection of the person—employer—for whose benefit the restraint is imposed; if it does not impose undue and unreasonable hardship on the person restricted—employee; and if it is not injurious to the public interest.[42]

When analyzing the reasonableness test, it does not seem impossible, illogical, or unlikely that courts in North Carolina, under the appropriate factual situations, could find a nationwide restrictive covenant reasonable and enforceable. However, the *Harwell* decision is the first in North Carolina to uphold such a covenant.

With the growth of nationwide business, increased use of nationwide restrictive covenants will follow.

> Because of the increased technical and scientific knowledge used in business today, the emphasis placed upon research and development, the new products and techniques constantly being developed, the nation-wide activities (even world-wide in some instances) of many business enterprises, and the resulting competition on a very broad front, the need for such restrictive covenants to protect the interests of the employer becomes increasingly important. If during the time of employment new products are developed and new activities are undertaken, reason would require their protection as well as those in existence at the date of the contract, and to a company actually engaged in nationwide activities, nationwide protection would appear to be reasonable and proper.[43]

But what of the employee bound by this restrictive covenant? Either he must change occupations or leave the country; certainly neither alternative is desirable. There must of necessity, be a balancing process between the interests of the employer and employee. In traveling this path of bal-

[41] These factors are easy to list. The difficulty arises when one tries to apply these factors to specific circumstances. *See generally* authorities cited in note 37 *supra*. The cases cited in those discussions will be an aid in determining what factors are relevant in a particular situation and covenant.

[42] *See generally* authorities cited in note 37 *supra*; Sineath v. Ratzis, 218 N.C. 740, 12 S.E.2d 671 (1940). Note, *Employment Contracts and Non Competition Agreements*, 1969 U. ILL. L.F. 61. *See also* 17 C.J.S. *Contracts* § 247 (1963); Annot., 9 A.L.R. 1456, 1468 (1920).

[43] 276 N.C. at 480-81, 173 S.E.2d at 320.

ancing, the courts have adopted rules which reflect the whole evolution of industrial technological advances, business methods, social values, and popluation. In *Harwell*, North Carolina took the path of least net injustice.

MICHAEL GUNTER

Torts—Comparative Injury Doctrine of Nuisance

Should a court of equity close a forty-five million dollar cement plant, thereby destroying the jobs of over three hundred workers and depriving the county of important tax revenue, in order to prevent comparatively minor damages[1] to nearby property? This was the question that confronted the New York Court of Appeals recently in *Boomer v. Atlantic Cement Co.*[2] The cement plant emitted dirt, smoke, and vibrations which neighboring property owners claimed injured their lands. The owners filed several suits asking the court to restrain the operation of the plant as a nuisance and to award money damages for past injury. The trial court found that the operation of the plant did indeed constitute a nuisance, even though the plant was equipped with the most effective pollution control devices available, and that plaintiffs had been substantially injured. Damages for past injuries were awarded, but the court refused to issue an injunction because of the great hardship it would bring upon defendant and the community.[3] The appellate division affirmed.[4]

The court of appeals agreed with the lower courts that closing the plant was too drastic a remedy but disagreed with the manner in which the lower courts had avoided such remedy. With one judge dissenting, the court reversed the order of the trial court and instructed that an injunction be issued unless defendant paid plaintiffs' permanent damages. Such relief, said the court, would do justice between the parties as it would fully redress the economic loss to plaintiffs' properites without being overly oppressive to defendant. Citing *United States v. Causby*,[5] the

[1] Approximately 535 dollars per month.

[2] 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). This decision consolidated appeals handled separately by the appellate division.

[3] Boomer v. Atlantic Cement Co., 55 Misc. 2d 1023, 287 N.Y.S.2d 112 (Sup. Ct. 1967).

[4] Boomer v. Atlantic Cement Co., 30 App. Div. 2d 480, 294 N.Y.S.2d 452 (1968); Meliak v. Atlantic Cement Co., 31 App. Div. 2d 578, 295 N.Y.S.2d 622 (1968) (mem.).

[5] 328 U.S. 256 (1946).