



1953

# Equity--Contracts in Restraint of Trade--Partial Enforcement--Ceresia v. Mitchell

James S. Kostas  
*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Contracts Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Kostas, James S. (1953) "Equity--Contracts in Restraint of Trade--Partial Enforcement--Ceresia v. Mitchell," *Kentucky Law Journal*: Vol. 41 : Iss. 4 , Article 14.

Available at: <https://uknowledge.uky.edu/klj/vol41/iss4/14>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

any device used for transferring the assets, or any part thereof, to one not entitled to receive them in liquidation, and by transferring the purchase money to the shareholders so entitled; 3) taxation of any transfer within an arbitrary time limit of assets to one not entitled to receive them in liquidation; or 4) legislative repeal or judicial overruling of the doctrine that a distribution in kind is tax-free to the corporation.<sup>23</sup>

In conclusion, it is believed that the decision in the *Lynch* case places an unnecessary burden on the corporation to liquidate immediately and to show that the sale of the assets was in fact made by the stockholders and not through the offices of the corporation. In spite of authority to the contrary it appears that tax avoidance is still to be reckoned with when an attempt is made to sell the assets of the corporation. Therefore, one can only conclude that, at least in the Ninth Circuit, some of the clouds created by the *Court Holding Co.* decision still remain.

JAMES F. HOGE

#### EQUITY—CONTRACTS IN RESTRAINT OF TRADE— PARTIAL ENFORCEMENT—CERESIA V. MITCHELL

Although contracts in total restraint of trade are void as against public policy those in partial restraint only, under certain circumstances, will be enforced. In determining whether or not to enforce a contract admittedly in partial restraint only, the courts have developed certain criteria as to the reasonableness of the restraint. These include an examination of the subject matter, the nature of the business, the situation of the parties and the circumstances of the particular case. Covenants not to engage in a certain occupation or business must not be wider than reasonably required for the protection of the business and good will of the promisee, i.e., the employer or vendee.<sup>1</sup> However, if the restriction affords unusually wide protection to the interests of the promisee but does not interfere with the public interest or impose an undue hardship on the promisor it normally will be enforced,<sup>2</sup> even though, for example, the restriction extends to an entire

---

<sup>23</sup> Note, 63 HARV. L. REV. 484, 493-4 (1950).

<sup>1</sup> Thomas W. Briggs Co. v. Mason, 217 Ky. 269, 289 S.W. 295 (1926); Owl Laundry Co. v. Banks, 83 N. J. Eq. 230, 89 Atl. 1055 (1914).

<sup>2</sup> 17 C.J.S. 630-632 (1939).

state,<sup>3</sup> or, in effect, the entire United States.<sup>4</sup> Although the decision is questionable, the court in *Diamond Match Co. v. Roeber*<sup>5</sup> went so far as to hold that even what amounted to a general restraint was valid when it was no more than reasonably necessary to protect the promisee. However, even though the restraint may afford only reasonably necessary protection as between the contracting parties it will be unenforceable if injurious to the public interest, or if it tends unreasonably to lessen legitimate competition or raise commodity prices.<sup>6</sup>

Thus, as a general rule, if a covenant is no more than reasonably necessary for the protection of the parties under the circumstances of the particular case it will be enforced. If not, it will be invalidated.

It was early recognized that these polarized rules worked undue hardship. Often the contracting parties while intending to give adequate protection to the vendee or employer unwittingly went beyond what was reasonably necessary, thus coming in conflict with the public interest in one way or another. To alleviate the harsh results encountered in complete invalidation a new approach was developed. In *Price v. Green*<sup>7</sup> a London and Westminster perfumer on disposing of his business agreed not to carry on the perfumer's business in London or Westminster or within 600 miles of either. The court held that though the covenant was unenforceable as an entity it was capable of severance as to the proposed area. Accordingly the covenant was enforced as to London and Westminster and invalidated as to the remainder. The court said: "The question, therefore, seems to be one of construction, whether, from the language used, the covenant be capable of division."<sup>8</sup> In England the courts guarded this extension of the rule with a jealous eye. In *Mason v. Provident Clothing & Supply Co.*,<sup>9</sup> it was said that the principle of severability ought only to be applied where the enforceable part of the covenant "is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not part of the main purport and substance of the clause."<sup>10</sup> In *Attwood v. Lamont*<sup>11</sup> defendant agreed,

<sup>3</sup> *Kochenrath v. Christman*, 180 Ky. 799, 203 S.W. 738 (1918). For the old rule, contra, see *Taylor v. Blanchard*, 13 Allen (Mass.) 370 (1866); *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 49 N.E. 1030 (1898).

<sup>4</sup> *General Bronze Corporation v. Schmeling*, 208 Wis. 565, 243 N.W. 469 (1932). See also in this connection the English case of *Nordenfellt v. Maxim, etc. Co., Ltd.*, [1894] A.C. 535, 573.

<sup>5</sup> 106 N. Y. 473, 13 N.E. 419 (1887).

<sup>6</sup> 17 C.J.S. 632-634 (1939).

<sup>7</sup> 16 M. & W. 346, 153 Eng. Rep. 1222 (1847).

<sup>8</sup> *Id.* at 353.

<sup>9</sup> [1913] A.C. 724.

<sup>10</sup> *Id.* at 745.

<sup>11</sup> [1920] 2 K.B. 146.

on termination of his employment as a tailor, not to engage in any of nine related occupations. The court held the contract severable and granted an injunction restricted to the tailoring trade. In doing so they considered but did not follow the *Mason* case. On appeal<sup>12</sup> the decision was reversed. It was held that the covenant was a single one for the protection of the plaintiff's entire business, and not several covenants for the protection of his several businesses, and could not be severed.<sup>13</sup> The *Mason* case was applied and followed.

The doctrine of *Price v. Green* was developed also in the United States.<sup>14</sup> As adopted by the American Law Institute the rule is couched in the following language:

"Where a promise in reasonable restraint of trade in a bargain has added to it a promise in unreasonable restraint, the former promise is enforceable unless the entire agreement is part of a plan to obtain a monopoly; but if full performance of a promise indivisible in terms would involve unreasonable restraint, the promise is illegal and is not enforceable even for so much of the performance as would be a reasonable restraint."<sup>15</sup>

Unlike the English, the American courts have not been reluctant to extend the doctrine of *Price v. Green*. Thus, in *Stanley Co. v. Lagomarsino*,<sup>16</sup> where defendant-vendor agreed not to resume the type business sold, nor the related business of soap manufacture ( in which he had never been engaged), within New York or New Jersey, the court construed the covenant in two ways. As to the prohibition against manufacturing soap it was held that this restraint was severable, void and unenforceable under the divisibility rule. As to the territory embraced the court "strained" to place a construction of divisibility on the covenant, holding that since the covenant stated "within" New York and New Jersey, rather than "throughout" it could be interpreted as applying only to those places within the two states where the defendant had previously conducted his business. Other courts have likewise "strained" to place a construction of divisibility

<sup>12</sup> *Attwood v. Lamont*, [1920] 3 K.B. 571.

<sup>13</sup> See also, *British Reinforced Concrete Engineering Co., Ltd. v. Shelliff*, [1921] 2 Ch. 563.

<sup>14</sup> See, *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251 (1886); *General Bronze Corp. v. Schmeling*, 208 Wis. 565, 243 N.W. 469 (1932); *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507, 43 Atl. 723 (1899); *Thomas v. Miles*, 3 Ohio St. 275 (1854) (restriction in "said city or elsewhere"); *Lange v. Werk*, 2 Ohio St. 520 (1853) (restriction in ". . . the county of Hamilton, in the State of Ohio, or any other place in the United States . . ."). This was held valid as to Hamilton County); *Wiley v. Baumgardner*, 97 Ind. 66 (1884); *Oregon Steam Navigation Corp. v. Winsor*, 87 U. S. 64 (1873) (restriction held divisible as to time).

<sup>15</sup> RESTATEMENT, CONTRACTS, sec. 518 (1932).

<sup>16</sup> 53 F. 2d 112 (S.D.N.Y. 1931).

on covenants under consideration.<sup>17</sup> Beyond this, however, the great majority of courts have refused to proceed. Indeed, the line is usually drawn at the point beyond which it would be necessary to "strain" the meaning of the language employed.

Suppose a situation where some protection for the vendee of a going concern unquestionably is required, but the parties in drafting their covenant frame it in indivisible terms and it is clearly unreasonable as to time, space or subject matter. The question immediately arises as to whether the entire covenant should be struck down thus leaving the vendor free, if he so chooses, to operate a competing business next door to the one conveyed. The majority rule is ordinarily stated in these terms:

"A restrictive covenant which contains or may be read as containing distinct undertakings bounded by different limits of space or time, or different in subject matter, may be good as to part and bad as to part. *But this does not mean that a single covenant may be artificially split up in order to pick out some part of it that can be upheld.* Severance is permissible only in the case of a covenant which is in effect a combination of several distinct covenants." [Writer's italics]<sup>18</sup>

The court cannot create a new agreement for the parties<sup>19</sup> and thereby uphold the contract in part when the severable character of the agreement is not determinable from the contract itself.<sup>20</sup>

Although a majority of American jurisdictions refuse to enforce an unreasonable covenant to *any* extent if it is indivisible, a few, with Massachusetts pioneering, have begun "artificially splitting up" such covenants, when they are clearly indivisible, and enforcing them either as to time, space or subject matter according to what the court considers reasonable. Thus, in *Edgecomb v. Edmonston*<sup>21</sup> where defendant covenanted that on termination of employment as stenographer he would not, without plaintiff's consent, engage in business similar to plaintiff's within the Commonwealth of Massachusetts, the covenant was clearly indivisible as to space, involving the entire state, and such a wide restriction was not necessary for plaintiff's protection. The court enjoined defendant from engaging in any business similar to plaintiff's in Boston and from soliciting the plaintiff's customers

---

<sup>17</sup> See *Fleckenstein Bros. v. Fleckenstein*, 76 N. J. L. 613, 71 Atl. 265 (1908); *Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507, 43 Atl. 723 (1899); *Edwards v. Mullin*, 220 Colo. 379, 30 P. 2d 997 (1934).

<sup>18</sup> POLLOCK, *CONTRACTS* 327 (12th ed. 1946).

<sup>19</sup> Although reformation will ordinarily be permitted in equity for fraud or mistake, in the usual covenant involved in these cases neither is present.

<sup>20</sup> See *Buckelew v. Martins*, 108 N. J. L. 339, 156 Atl. 436 (1931).

<sup>21</sup> 257 Mass. 12, 153 N.E. 99 (1926).

within the Commonwealth. It said that this was a reasonable result and more in harmony with public policy than to declare the entire covenant void as unreasonable.<sup>22</sup>

In the recent Kentucky case of *Ceresia v. Mitchell*<sup>23</sup> the Court of Appeals has adopted this so-called Massachusetts or minority view.<sup>24</sup> The appellant Ceresia sold his produce business and leased the buildings in Muhlenberg County, Kentucky, to appellee Mitchell. Included in the contract of sale was a covenant which prohibited appellant, his children and his executors and administrators, forever from engaging "in any kind of business of whatsoever kind, character or nature in his own name or in the name of any other person or persons with him as a silent partner in the County of Muhlenberg and State of Kentucky." [Writer's italics] The reputation, good will and influence of the appellant were acknowledged as forming "a most valuable part of the property" sold. It is thus apparent that this contract was unreasonable as to time and space as well as subject matter.

The Court quoted freely from the works of Professor Corbin on Contracts in upholding the lower court's decision enjoining appellant for the term of the lease from engaging in competition with appellees in Central City or Muhlenberg County, Kentucky, and refusing to

---

<sup>22</sup> For similar cases, see *Whiting Milk Co. v. O'Connell*, 277 Mass. 570, 179 N.E. 169 (1931); *Metropolitan Ice Co. v. Ducas*, 291 Mass. 403, 196 N.E. 856 (1935); *Hill v. Central West Public Service Co.*, 37 F. 2d 451 (C.C.A. 5th 1930).  
<sup>23</sup> 242 S.W. 2d 359 (Ky. 1951).

<sup>24</sup> Perhaps at this point should be noted the 1930 Kentucky case, *Davey Tree Expert Co. v. Ackelbein*, 233 Ky. 115, 25 S.W. 2d 62. Here the defendant covenanted not to engage in tree surgery similar to that performed while in plaintiff's employ, after termination of the employment, at any place in the U. S. or Canada within a radius of 100 miles of any city where plaintiff may have been at any time operating an office. The court held that this negative covenant was not too unreasonable and enjoined defendant from working within 100 miles of Cincinnati, Ohio, or Louisville, Ky. The exact holding of the court is rather difficult to determine. They apparently say that the covenant is not unreasonable, which would seem to preclude any further discussion of divisibility, etc. They then quoted however, from the opinion of Judge Dietzman of the Court of Appeals in regard to a motion to discharge the temporary injunction in the case. Judge Dietzman had said the covenant was too harsh since the plaintiff did not need protection to that extent. He then recommended that since it was capable of division it should be enforced as to only the two cities mentioned. He then continued: "The Mass. rule coincides with what the business world, both that of the employer and that of the employee, would deem a reasonable and just interpretation. Parties ought not to be left to the hazard of having their contracts held valid depending on the varying views different courts might take of the reasonableness of the covenant. The whole includes the part, and if the covenant is broad, there is no reason why the parties should not receive protection to the extent of the reasonable part included in the whole." The court adopted these views and also specifically declared the Mass. rule to be "a sound and safe rule." It would appear, therefore, that while not actually applying the majority or minority rule (since the Court held the covenant to be reasonable), the court in its dictum laid the groundwork for its subsequent decision adopting the minority view in the *Ceresia* case.

enforce the covenant in full. It approved Corbin's statement that "Divisibility' is a term that has no general and invariable definition; instead the term varies so much with the subject-matter involved and the purposes in view that its use either as an aid to decision or in the statement of results tends to befog the real issue."<sup>25</sup>

What the Court did here amounted to a virtual rewriting of the contract according to what the majority of the Court considered reasonable. The intent of the parties, as gleaned from their written agreement, was completely unrecognizable in the finished product produced by the Court. The time restriction was changed from "forever" to "until the expiration of the lease." The area comprised was changed from "the county of Muhlenberg and State of Kentucky" to the "city of Central City and county of Muhlenberg." The subject matter from "any kind of business of whatsoever kind" to any business "in competition with appellees."

It is not an easy task to determine which view is more sound. Professor Williston, at the time the Restatement of Contracts was written,<sup>26</sup> adopted the majority view therein contained. He has since, however, changed his position. He now says that questions involving legality of contracts should not depend on the mere form of wording but rather upon the reasonableness of giving effect to the indivisible promise to the extent that would be lawful.

A primary, and practical, objection to partially enforcing indivisible promises is that it tends to encourage employers and vendees possessing superior bargaining power over that of their employees and vendors to insist upon unreasonable and excessive restrictions with the expectation that, for one reason or another, no litigation will ever arise. If it should, then the covenant will in any event be upheld to some extent. In stressing this practical consideration, at least in employment contracts, Moulton, J., in *Mason v. Provident Clothing & Supply Co.*<sup>27</sup> said:

"It would in my opinion be *peccati exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Court were to come to his assistance and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. 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."<sup>28</sup>

---

<sup>25</sup> 242 S.W. 2d 359, 362 (Ky. 1951).

<sup>26</sup> *Supra*, note 16.

<sup>27</sup> [1913] A.C. 724.

<sup>28</sup> *Id.* at 745.

Professor Williston says this objection can be overcome, in part at least, by completely invalidating covenants unreasonable and oppressive, whether severable or not, where it is apparent that the restrictions were deliberately unreasonable. It is submitted, however, that in a great majority of cases it would be purely arbitrary to hold that any promise secured was *deliberately* unreasonable and oppressive. The purchaser or employer can usually show a justification, at least in his own mind, for the promise exacted. Indeed, it may even be argued that the mere fact that a promise is unreasonable shows that it was a deliberate attempt at oppressiveness since a "reasonable man" should have known that such protection was unwarranted.

A further objection is that of where to draw the line if partial enforcement is allowed. Every court will vary in its opinion of what is reasonable and just. While, as in the *Ceresia* case, the Kentucky Court re-wrote the contract so as to constrict the area of restriction from the State of Kentucky to Central City and Muhlenberg County, another court could, under identical reasoning, limit the restriction merely to Central City or to a radius of four blocks from the location of the business conveyed, etc. Consider a recent Massachusetts case<sup>29</sup> where the defendant-vendor of a bakery business agreed not to engage directly or indirectly in a competing business for a period of *seven* years within a radius of *seven* miles of Boston. The court enjoined the defendant for a period of *four* years within a radius of *four* miles of Boston. Should the parties be required to surrender their bargained-for concept of what protection is reasonably required for the opinion of a particular court at a particular time? It would seem not, unless the restriction is clearly unreasonable. Judges should decide individual cases in the light of objective rules. Otherwise the decision is too apt to depend upon the whim of the presiding judge—or the cumulative whim of the appellate court. The application of an objective rule may result in a harsh decision in a particular case but it will reach justice more often in the great majority of cases. It is upon that principle that the law insists upon objective rules.

It would seem, then, that in these cases such restrictions should be enforced if not clearly unreasonable; if they are clearly unreasonable they should not be "partially" enforced unless the covenant is reasonably divisible. The only area of conflict in the operation of these rules would present itself in the latter situation, where the covenant is clearly unreasonable but is not divisible. It there becomes necessary to weigh the benefits gained from partial enforcement against the

---

<sup>29</sup> Thomas et al. v. Parker, 98 N.E. 2d 640 (Mass. 1951).



cumulative disadvantages of allowing the courts, in effect, to rewrite contracts for the parties involved. In addition to the disadvantages already listed, what would prevent the courts (if the minority view prevailed) from extending the area of covenants they would partially enforce from the present category of those "clearly unreasonable" to those only bordering on the unreasonable or, in some instances, to those now universally held to be reasonable? It is submitted that the benefits to be gained from partial enforcement in isolated cases is far outweighed by the disadvantages inherent in any rule which would give the courts power ultimately to destroy the sanctity of contracts in a great many situations.

In the light of these observations it would appear that the decision in the *Ceresia* case is erroneous.

JAMES S. KOSTAS