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# Contracts not to Compete Within a Certain Area Without a Provision for an Express Sale of Good Will

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court did not infer a condition subsequent, and their finding is in harmony with the usual rules of construction for conditions subsequent.

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## CONTRACTS NOT TO COMPETE WITHIN A CERTAIN AREA WITHOUT A PROVISION FOR AN EXPRESS SALE OF GOOD WILL

As a part of the contract by which he sold his hospital in Floyd County to the plaintiffs, the defendant agreed not to own or operate a hospital in that county for ten years. Under the same agreement he assigned to the plaintiffs hospitalization contracts with the county and a labor union, together with his good will. Within two years he erected another hospital in Knott County, three hundred yards from the Floyd County line. Many of the defendant's former patients, residing in Floyd County, began to patronize his new hospital instead of that of the plaintiffs. The latter sought to enjoin the defendant from receiving these former patients on the ground that he was breaching his contract not to compete with the plaintiffs in Floyd County. The lower court enjoined the defendant from receiving the patients covered by the assigned contracts, but refused to enjoin him from receiving any other patients. This decision was reversed upon appeal and the defendant was enjoined from receiving at his hospital, for the remainder of the ten year period, any patients from Floyd County.[1]

By the contract there was an express sale of good will as to the assigned contracts, but mention was not made of a sale of the good will of the hospital. Nevertheless, the sale of a business includes an implied transfer of good will, though there is no stipulation to that effect in the contract.[2] The only effect of this implied sale of good will is to raise an obligation on the part of the seller not to derogate from his grant by directly interfering with the business which he has sold to the purchaser.[3]

However, this obligation does not extend so far as to preclude the transferor from opening up a new business in competition with that of the purchaser. While he could not directly interfere with the business that he has sold to the purchaser by soliciting his old customers, he could indirectly interfere with it by dealing with them when they came to him of their own accord.[4] That was what the defendant did here. Since it was not alleged that the defendant solicited any of his former customers or did anything else that would amount to a direct inter-

[1] Johnson et al. v. Stumb et al., 277 Ky. 301, 126 S. W. (2d) 165 (1938).

[2] Johnson v. Bruzek, 142 Minn. 454, 172 N. W. 700 (1909). See Madox v. ———— Fuller, 173 So. 12, 14 (Ala. 1937); 5 Williston on Contracts (Rev. Ed. 1937), sec. 1640.

[3] 5 Williston, Contracts (Rev. Ed. 1937), sec. 1640.

[4] *Ibid.*

ference with the business that he has sold, the principles covering an implied sale of good will are opposed to the decree of the upper court.

The defendant agreed not to own or operate a hospital in Floyd County.[5] This provision was inserted in the contract to enable the plaintiffs to operate a hospital without the competition of a hospital conducted by the defendant in Floyd County. The effect of this contract not to compete is to supplement the protection given the purchaser by the implied sale of good will.

Contracts not to compete are strictly construed.[6] The reason for such strict construction is to prevent the extension of contracts, the natural effect of which is to restrain trade and personal liberty, beyond their fair import.[7] The effect of the decree of the appellate court was to give an extremely liberal construction to the contract. By the terms of that contract the defendant agreed not to own or operate a hospital in Floyd County.[8] He did not agree that he would not own or operate a hospital in any county other than Floyd County. He did not say in the contract that if he did operate a hospital in another county, he would refuse to accept patients from Floyd County. If the plaintiffs had desired to protect their practice from the competition of the defendant wherever his hospital was located, they might have inserted a provision to that effect in the contract. The liability of construction given the contract in the instant case has little support.[9] Moreover, the effect

[5] See Johnson et al. v. Stumbo et al., 277 Ky. 301, 126 S. W. (2d) 165, 168 (1938).

[6] Haldeman v. Simonton, 55 Iowa 144, 7 N. W. 483 (1880); State ex rel. Youngman v. Calhoun, 231 S. W. 647 (Mo. App. 1921); McCarty v. Constable, 221 App. Div. 307, 223 N. Y. Supp. 484 (1927) (The promisor made an unsolicited sale to a resident of the forbidden area at his store); Thomas v. Miles, 3 Ohio St. 274 (1854) (The promisor was allowed to supply customers in Ohio from his business in New York, when he had agreed not to conduct this business in Ohio); Raub v. Van Horn, 133 Pa. 573, 19 Atl. 704 (1890) (Under the promisor's agreement not to resume his practice at a certain town, he was allowed to receive patients from there at another town, six miles away); Midland Lumber & Coal Co. v. Roesler, 203 Wis. 129, 233 N. W. 614 (1930) (A sale to a resident of the prohibited area at the promisor's lumber yard and a delivery of the goods inside that area for the customer's accommodation was held not to be doing business in that area in violation of the contract).

[7] See Haldeman v. Simonton, 55 Iowa 144, 7 N. W. 493, 494 (1880).

[8] See Johnson et al. v. Stumbo et al., 277 Ky. 301, 126 S. W. (2d) 165, 168 (1938).

[9] See Skaggs v. Simpson, 33 Ky. Law Rep. 410, 110 S. W. 251 (1908). This case may possibly be distinguished on the ground that the promisor started his business anew just outside the limits of the city where he had agreed not to practice. This is such a minor distinction, however, that it is doubtful that it would prevent the Skaggs case from being in point and supporting the decision in the Stumbo case. The other cases which are cited in support of it are not in point. Elkins v. Barclay, 243 Ky. 144, 47 S. W. (2d) 945 (1932) is not in point, for in that case the promisor entered the territory in which he had agreed not to compete and there performed burial services. This violated the express terms of the contract by which the promisor agreed not to

of the decree is to unduly restrict the people of Floyd County in their free choice of hospitalization.[10]

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## CONTRACTS—IS A NEW AMORTIZATION PLAN FOR PAYMENT OF A MORTGAGE CONTRACT A NOVATION IN KENTUCKY?

A stockholder in an insolvent national farm loan association sought payment of the face value of his stock. A mortgage contract between the stockholder and the association had been made in 1926 as a condition precedent to a loan granted by the Federal Land Bank of Louisville.[1] Subsequent to amendment of the Farm Loan Act in 1933 a new agreement had been made which stipulated that the unpaid amount of indebtedness should be repaid on an amortization plan. Plaintiff contended, *inter alia*, that by reason of the "new contract" his liability as a stockholder should be determined by the provisions of the amendment. The court denied recovery, holding that the amendment relied on applied only to contracts, debts or engagements of the association entered into after 1933. The court further stated that the new agree-

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compete with the promissee in that county. Kochenrath v. Christman, 180 Ky. 799, 203 S. W. 738 (1918) is not in point, for there the promisor set up a business in the forbidden territory and could not have violated the provisions of the contract more flagrantly. Gutzeit v. Strader, 158 Ky. 131, 164 S. W. 318 (1913) is not in point, for in that case the promisor had operated a business in the forbidden territory by means of a dummy corporation. This amounted to a violation of the express terms of the contract. Foxworth-Galbraith Lumber Co. v. Turner, 121 Tex. 177, 46 S. W. (2d) 663 (1932) is distinguishable. There the promisor did considerable solicitation in the territory in which he had agreed not to compete, which might amount to doing business there according to the dictum of Midland Lumber Co. v. Roessler, 203 Wis. 129, 233 N. W. 614, 616 (1930).

[10] (1939) 38 Mich. Law Rev. 242, 244.

[1] One desiring to borrow money from a Federal Land Bank must become a shareholder in the Farm Loan Association; as such a shareholder, prior to 1933, he was individually responsible, not only for the amount represented by his shares, but in addition thereto to the extent of the amount of stock owned by him at its par value. See Byrne v. Federal Land Bank of St. Paul, 61 N. D. 265, 237 N. W. 797 (1931). However, in 1933 the Farm Loan Act was amended to read: ". . . the shareholders of national farm loan associations shall not be held individually responsible for any *contract, debt, or engagement of such association entered into after June 16, 1933*". (Italics added.) 12 U. S. C. A. sec. 744a. Thus if, and only if, the new agreement discharged and took the place of the existing loan contract it was a "contract, debt, or engagement of such association entered into after June 16, 1933". The purpose of the amendment is not entirely clear. If it contemplated a different degree of liability for all who became stockholders after 1933, then the court's concern as to a novation, or new contract, was unnecessary. If it is to be construed literally to apply to contracts made after 1933, it must be decided whether the new agreement novated the old.