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NOTES

Validity and Enforceability of Restrictive Covenants Not to Compete

INTRODUCTION

In the American ethos, an employee is expected to put his talents to the most productive use for his employer. Also, an employee is entitled to change employers as the vagaries of his own circumstances may dictate. Under American law, however, an employee is expected not to breach any confidential relationship which he may have had with a former employer. The effect is a seemingly unresolvable conflict which has left even the wisest of judges with only the choice of determining the path of least net injustice. In traveling this path, the courts have adopted rules which reflect the whole evolution of industrial technological advances, business methods, social values, and population growth.

For most employers in American business, the most convenient method of protecting valuable business interests and trade secrets against appropriation by competitors is the covenant not to compete.[1] In fact, covenants of this type have come to be regarded as perhaps the only com-

1. There are many forms of restrictive covenants not to compete. Judges and legal scholars classify such covenants on the basis of the type of transaction which engendered them; to each category thus obtained they have attributed legal consequences which differ, at least in some part, from the consequences attendant upon the rival categories. The traditional common law restraints are classified into two groups: (1) restraints *ancillary* to underlying contracts, and (2) restraints *not ancillary* to underlying contracts. The *first group* includes: (a) a contract by the seller of property or a business not to compete with the purchaser so as to derogate from the value of the property or business sold; (b) an agreement by an agent or employee not to compete with his master or employer after the expiration of his term of service; (c) an agreement by a partner not to interfere or compete during the existence of the partnership; (d) an agreement ancillary to the sale of a professional practice; (e) assignments of patent rights; (f) a covenant by a buyer or lessee of property not to use the same in competition with the business retained by the seller; (g) a covenant entered into by an employee for the benefit of his employer during the period over which the employment lasts; and (h) more recently, employee-retirement agreements. For a discussion of this classification see United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 282-83 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899); Carpenter, *Validity of Contracts Not to Compete*, 76 U. PA. L. REV. 244, 248 (1928); Kales, *Contracts to Refrain from Doing Business or from Entering or Carrying on an Occupation*, 31 HARV. L. REV. 193 (1917).

Included in the second group are: (a) arrangements to divide market areas; (b) agreements to limit production; (c) price-fixing arrangements; and (d) arrangements to buy out potential competitors. "Nonancillary" agreements were not commonly regarded as subject to traditional "restraint of trade" doctrines until the nineteenth century. Pierce v. Fuller, 8 Mass. 223 (1811). See also HANDLER, ANTITRUST IN PERSPECTIVE 9-13 (1957); Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 CALIF. L. REV. 667, 676-77 n.220 (1940); Packer, *Book Review*, 67 YALE L.J. 1141 (1958). Some authorities recognize the possibility of over-categorization along these lines so that the resulting categories become nothing more than irrelevant abstractions. For example, Carpenter, *supra* at 258, states that no significant legal distinction ought to depend upon whether the obligor is the purchaser or seller of the business or other property being conveyed under a restrictive covenant not to compete.

plete safeguard against competitors or employees appropriating valuable market areas and trade information for their own benefit. Today, however, this method of protection may not produce the anticipated results. This is attributable to at least two factors. First, the employment market has become very competitive, especially for highly trained technical personnel; skilled engineers and research personnel are therefore refusing to agree to restrictions on personal economic freedom and mobility through covenants contained in employment contracts, or covenants ancillary to the sale of a business.[2] Second, the courts have had an increasing tendency to refuse enforcement of covenants in terms as broad as are presently required to insure against loss of exclusive economic use of ideas, processes, and methods.[3] As a result, lawyers ought to re-examine the methods employed by their clients to protect business interests, for present techniques may not be enforceable under recent developments in many jurisdictions. A necessary preliminary to an analysis of these developments, however, is a discussion of the common law foundations of the negative covenant.

COMMON LAW FOUNDATIONS

Early Cases

The first known case involving a postemployment covenant is *Dyer's Case*[4] decided in 1414. This case, like most early cases,[5] involved the medieval apprentice system and a restraint undertaken by an apprentice. In an effort to prolong the traditional period of subservience of a journeyman or apprentice, unethical masters attempted to interfere with the rights of such apprentices to enter the guilds as craftsmen by way of restrictive covenants.[6] However, these arrangements were not only in violation of guild custom, but absolutely void without consideration as to the issue of reasonableness of time or scope.[7] Although *Dyer's Case* and

2. See Bowen, *Who Owns Whats in Your Head?* Fortune, July 1964, p. 175.

3. See generally Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

4. Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414).

5. Colgate v. Bachelor, Cro. Eliz. 872, 78 Eng. Rep. 1097 (Q.B. 1602); Anonymous, Moore K.B. 115, 72 Eng. Rep. 477 (Q.B. 1578)

6. Covenants during this period of history usually took the form of a restriction contained in a bond by which the obligor undertook to forego the exercise of a trade. For example, in *Dyer's Case*, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414), a writ of debt was brought upon an obligation undertaken by John Dyer, an apprentice, under oppression of a grasping master, in which he agreed to refrain from practicing his trade in plaintiff's town for a period of six months. Judge Hull struck down the covenant and held the restraint void without regard to geographical scope, duration, or reasonableness. For a discussion of these early cases see generally MATTHEWS & ADLER, RESTRAINT OF TRADE (2d ed. 1907); POLLOCK, PRINCIPLES OF CONTRACT 326-31 (13th ed. 1950); SANDERSON, RESTRAINT OF TRADE IN ENGLISH LAW 97 (1926).

7. The guild system was based on the policy that every able-bodied man should work at some gainful occupation. Formulation of this policy occurred after the manpower shortage oc-

its two successors[8] are usually cited in support of the contention that the common law regarded all restraints on employment as a departure from the principles of economic freedom, it would seem more accurate to interpret these cases as holding that only restraints on future employment were void without regard to reasonableness.[9] Moreover, the conclusions reached in these decisions may be only a reflection of the court's reluctance to sanction circumventions of the customary rules of apprenticeship.[10]

In 1711, the unifying principles on enforcement of such covenants were finally pronounced in the highly celebrated case of *Mitchel v. Reynolds*.[11] There, Lord Macclesfield thoroughly reviewed the earlier cases and enunciated the "rule of reason" which was to be followed for more than 250 years. The opinion began by noting that there was a presumption that *all* restraints of trade were invalid.

> The true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded, are, 1st, the mischief which may arise from them, 1st, to the party, by the loss of his livelihood, and the subsistence of his family; 2dly to the publick, by depriving it of an useful member.[12]

The court further stated that such covenants may be abused in the hands of corporations "who are perpetually labouring for exclusive advantages

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casioned by the Black Death. Pursuant to this policy, the Statute of Laborers was passed in 1349 requiring that every able-bodied man under sixty years of age not engaged in a trade, tilling land, or otherwise profitably employed be engaged "to serve him that doth require him, or else be committed to the goal." Statute of Laborers, 1349, 23 Edw. 3, c. 1. This apprenticeship system provided the master craftsman with a work force and the apprentice with a system of technical training which would eventually lead the apprentice to a position as a master craftsman in the town in which he served his apprenticeship. Subsequently, the Statute of Apprentices, 1563, 5 Eliz. 1, c. 4, was passed which made a seven-year apprentice period mandatory. However, occasional enterprising craftsmen would bind their helpers for a longer period of apprenticeship. This practice became more and more prevalent until the sixteenth century when numerous statutes and ordinances were passed, primarily at the instigation of senior guild masters, outlawing such invasions upon the traditional rules of apprenticeship. By way of example, in 1536 an Act for Avoiding of Exactions Taken upon Apprentices, 1536, 26 Hen. 8, c. 5, was passed which recognized that masters had "by cautil and subtil means compassed and practiced to defraud and delude" apprentices by prohibiting them from setting up shops or trades without the consent of their master. To prevent such action, the statute made it illegal to "compel or cause any apprentice or journeyman, by oath or bond that he, after his apprenticeship or term expired, shall not set up or keep any shop" nor take compensation in money or property "for or concerning his or their freedom of occupation." Although this act was not cited by the courts in deciding any of the contemporary cases, it no doubt represented the temper of the times. For a general survey of this early development see DIETZ, A POLITICAL AND SOCIAL HISTORY OF ENGLAND 57-58 (3d ed. 1946); 5 WILLISTON, CONTRACTS §§ 1634-35 (rev. ed. 1937); Blake, *supra* note 3, at 629-46; Jones, *Historical Development of the Law of Business Competition*, 35 YALE L.J. 905 (1926); Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954)

8. See note 5 *supra* and accompanying text.

9. See 2 PARSONS, CONTRACTS 748-51 (1939); Letwin, *supra* note 7, at 373.

10. See note 7 *supra*.

11. 1P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

12. *Id.* at 190, 24 Eng. Rep. at 350.

in trade, and to reduce it into as few hands as possible. "[13] Notwithstanding this initial aversion to any agreement in restraint of trade, Lord Macclesfield felt it necessary to balance the social utility of such restraints against their possible undesirable effect upon the covenantor and the public. He stated that a "special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the same is good. [14] [A] man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade, and part with it to another. "[15]

In reaching this decision, Lord Macclesfield recognized two other factors which were to become significant in the modern approach to the problems involved in enforcing restrictive covenants. First, the opinion noted that the effects may be different in the case of covenants in employment agreements as distinguished from restraints incident to the transfer of business interests; covenants in employment agreements are subject to "great abuses from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practises to procure such bonds from them, lest they should prejudice them in their custom, when they come up to set up for themselves."[16] The inference is therefore clear that the burden of showing reasonableness in restraints ancillary to an employment agreement might be greater than in cases involving covenants incident to the transfer of a business.[17]

The second factor considered by Lord Macclesfield, which is recognized even today by many American courts, is the distinction between general and partial restraints. On this matter, the court was of the opinion that a partial restraint, limited in area or applied only to certain persons, should be upheld if there is good and adequate consideration to support the promise.[18] On the other hand, the court noted that a general restraint, extending throughout the kingdom or unlimited as to time, should never be enforced since it would be unreasonable to keep a man from practicing his trade where this would be of no benefit to either party.[19]

The court's decision in the *Mitchel* case is remarkable for many reasons. Primarily, it was the first sound analysis of the problems which

13. *Ibid.*

14. *Id.* at 182, 24 Eng. Rep. at 348.

15. *Id.* at 186, 24 Eng. Rep. at 349.

16. *Id.* at 190, 24 Eng. Rep. at 350.

17. For a discussion of this distinction in modern American cases see notes 33-36 *infra* and accompanying text.

18. Mitchel v. Reynolds, 1P Wms. 181, 186, 197, 24 Eng. Rep. 347, 349, 352 (Q.B. 1711)

19. In illustrating this point, Lord Macclesfield stated: "[I]n a great many instances, they [the general restraints] can be of no use to the obligee for what does it signify to a tradesman in *London*, what another does at *Newcastle*. ?" *Id.* at 190-91, 24 Eng. Rep. at 350. (All italicized in original.)

had eluded other courts for more than two centuries. In fact, there is very little in today's approach to these problems which does not find support in the *Mitchel* decision.

Post-Mitchel Development

English decisions.—As technology advanced it became increasingly difficult for the courts to apply the reasonableness test to the more complicated situations which confronted them. Thus, in 1831 an English court modified the established rule holding that the test of reasonableness was not limited to the consideration stated in the contract, but extended to a proper balance of all the interests involved.[20] The court stated that the restraint must be such as to afford only a fair protection to the interests of the employer, and not so large as to interfere with the interests of the public.

The second modification of the principles enunciated in the *Mitchel* case came in the House of Lords' decision in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*[21] There, a world-wide covenant not to compete given ancillary to the sale of a vast munitions business was held enforceable by the consensus of the Lords. The case rejected the distinction between general and partial restraints made earlier in the *Mitchel* decision on the grounds that technological advances had rendered its application obsolete. The case was also quite clear in pointing out that its rejection of the general-partial distinction also extended to employee restraints. But Lord Macnaghten added a caveat: "[D]ifferent considerations must apply in cases of apprenticeship. . . . A man is bound an apprentice because he wishes to learn a trade and to practise it. . . [T]here is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment."[22] It was thus made quite clear that such freedom to contract against future competition upon the sale of a business might not be as easily justified in cases involving negative employee covenants. However, the substance of this position was not new; Lord Macclesfield had registered the same warning in the *Mitchel* case.[23]

American decisions.—The pattern developed in England with respect to enforcement of restrictive covenants was for the most part paralleled in America. The objections originally levied in England against these covenants were established as law in this country by the

20. Horner v. Graves, 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831). In that case the court held that a restraint upon a dentist's assistant not to practice dentistry within 100 miles of his employer's town was unreasonably broad.

21. [1894] A.C. 535, *affirming* [1893] 1 Ch. 630 (C.A. 1892).

22. *Id.* at 566.

23. See note 16 *supra* and accompanying text.

early Massachusetts decision of *Alger v Thacher*[24] However, the American courts were confronted with somewhat different conditions. With state and federal boundaries to contend with, the courts had to struggle with application of the general-partial distinction enunciated in the *Mitchel* case. At first the courts were inclined to follow the early English rule that all general restraints were void;[25] but in 1874, twenty years before the House of Lords rejected the distinction between general and partial restraints in England,[26] the United States Supreme Court upheld a covenant in *Oregon Steam Nav. Co. v. Winsor*[27] covering the entire state of California. The Court stated.

> In this country especially, where State lines interpose such a slight barrier to social and business intercourse cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State.[28]

After the Supreme Court's decision in the *Winsor* case, New York, which had previously held that restraints extending over the entire state were void without regard to underlying circumstances,[29] reversed its position in *Diamond Match Co. v. Roeber*[30] Many states were quick to follow by expressly rejecting the state boundary limitation,[31] and in less than fifty years the reasonableness test was firmly established in most states. The mechanical general-partial distinction had been all but abandoned in determining the enforceability of restrictive agreements. Moreover, it was well established by the end of the nineteenth century that

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24. 36 Mass. 51 (1837) The reasons given in the instant case for holding the covenant void were substantially the same as those enunciated by the English court in the *Mitchel* decision. The court stated: "Against evils like these [restrictive covenants], wise laws protect individuals and the public, by declaring all such contracts void." *Id.* at 54.

25. See Lawrence v. Kidder, 10 Barb. 641 (N.Y. Sup. Ct. 1851); Dunlop v. Gregory, 10 N.Y. 241 (1851) (dictum)

26. See note 21 *supra* and accompanying text.

27 87 U.S. (20 Wall.) 64 (1874).

28. *Id.* at 67

29. See note 25 *supra.*

30. 106 N.Y. 473, 13 N.E. 419 (1887). The court held that a contract made by the seller with the purchaser that he would not at any time within 99 years compete in the manufacture or sale of friction matches within any of the several states of the United States, except Nevada and Montana, was not void as a covenant in general restraint of trade. The court stated that "it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed." *Id.* at 484, 13 N.E. at 423.

31. See Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N.E. 629 (1887) (covenant between incorporators in furtherance of territory-dividing agreement); Newell v. Meyendorff, 9 Mont. 254, 23 Pac. 333 (1890) (contract to sell certain brands of cigars to no one in the state but defendant); Bancroft v. Union Embossing Co., 72 N.H. 402, 57 Atl. 97 (1903) (contract of exclusive right to manufacture and sell certain embossing machines); Herreshoff v. Boutineau, 17 R.I. 3, 19 Atl. 712 (1890) (contract not to teach French or German languages in the state of Rhode Island for a year after leaving complainant's employ).

different considerations must apply in cases of employee covenants as contrasted with covenants ancillary to the sale of a business.

DISTINCTION BETWEEN EMPLOYEE COVENANTS AND COVENANTS ANCILLARY TO THE SALE OF A BUSINESS

In *Mitchel v. Reynolds*,[32] the court enunciated the distinction between restraints ancillary to an employment agreement and restraints incident to the transfer of a business. Today, however, it remains unsettled among text authorities and courts as to the advisability of making such a distinction. One view is that "if it is lawful and proper to protect a business *just about to be acquired* from certain acts by the seller who is familiar with such business," there should be no reason why it is "not equally lawful and proper to protect an *established* business from such acts by one who has become familiar therewith."[33] On the other hand, a growing number of courts have taken the position that there exists a difference between the two types of covenants in the nature of the interests to be protected.[34] It is the contention of this line of authority that the extent of restraint possible in the two types of cases is different. This attitude developed as a result of the realization that, in the case of a business transfer, a promise not to compete and its fulfillment are essential for adequate protection of the good will transferred with the business.[35] This is not

32. 1P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

33. Eureka Laundry Co. v. Long, 146 Wis. 205, 208-09, 131 N.W 412, 413 (1911). (All italicized in original.) See also Foster v. White, 248 App. Div. 451, 290 N.Y. Supp. 394, *aff'd without opinion*, 273 N.Y. 596, 7 N.E.2d 710 (1936); McCall Co. v. Wright, 198 N.Y. 143, 91 N.E. 516 (1910); Cowan, *Covenants Not to Compete After Termination of Employment*, 5 PEABODY L. REV. 79, 82 (1941); Note, *Validity and Enforceability of Restrictive Covenants in Contracts of Employment* 31 IOWA L. REV. 249 (1946). Professor Williston states that "the distinction seemes unadvisable as a positive rule of law." 3 WILLISTON, CONTRACTS § 1643 (1920).

34. See, *e.g.*, Samuel Stores, Inc. v. Abrams, 94 Conn. 248, 108 Atl. 541 (1919); Stein Steel & Supply Co. v. Tucker, 219 Ga. 844, 136 S.E.2d 355 (1964); Kaumagraph Co. v. Stampagraph Co., 197 App. Div. 66, 188 N.Y. Supp. 678, *aff'd*, 235 N.Y. 1, 138 N.E. 485 (1921); Arthur Murray Dance Studios, Inc. v. Witter, 105 N.E.2d 685 (Ohio C.P. 1952). See also RESTATEMENT, CONTRACTS § 515, comment *b* (1932); Carpenter, *supra* note 1, at 244.

35. One of the first cases to elaborate on this attitude was the English decision of Herbert Morris, Ltd. v. Saxelby, [1916] 1 A.C. 688, wherein Lord Atkinson stated:

> These considerations [of policy] in themselves differentiate, in my opinion, the case of the sale of goodwill from the case of master and servant or employer and employee. The vendor in the former case would in the absence of some restrictive covenant be entitled to set up in the same line of business as he sold in competition with the purchaser, though he could not solicit his own old customers. The possibility of such competition would necessarily depreciate the value of the goodwill. The covenant excluding it necessarily enhances that value, and presumably the price demanded and paid, and, therefore, all those restrictions on trading are permissible which are necessary at once to secure that the vendor shall get the highest price for what he has to sell and that the purchaser shall get all he has paid for. Restrictions on freedom of trading are in both classes of case imposed, no doubt, with the common object of protecting property. But the resemblance between them, I think, ends there. *Id.* at 701.

For a further discussion of the English development on this subject see Farwell, *Covenants in*

true, it is maintained, where the promisor sells his services. The argument is that an employer's attempt to do more than protect his business from inroads which his former employee could make by virtue of the confidential knowledge or trade secrets which he holds is to seek a special advantage which does not rightly belong to the employer.[36]

Another important distinction between employee covenants and covenants ancillary to the sale of a business is the inequality of bargaining power which is ordinarily characteristic of employment contracts, but not of covenants incident to the sale of a business. Most employee restraints are formulated when the employee is off guard; he is intent on obtaining employment and is willing to make the required promise to obtain it. On the other hand, covenants given incident to the transfer of a business or other property are bargained for, and the vendor is generally well rewarded for the sale of his right to re-enter the same or similar business in competition with the vendee. It has thus become well established in jurisdictions adhering to this view that cases involving one type of covenant have very little persuasive effect in a dispute involving another type.

The Ohio courts have either failed or refused to recognize any distinction between the two types of covenants. The apparent confusion on this subject is well illustrated in *Federal Sanitation Co. v Frankel.*[37] There, the court upheld the validity of a contract restraining a salesman from competing with his employer in a certain area for twelve months after termination of his employment. In reaching this decision, the court cited an Ohio Supreme Court decision[38] involving a business transfer, without drawing a distinction between the vendor-vendee covenant involved there-

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Restraint of Trade as Between Employer and Employee, 44 L.Q. REV. 66 (1928). A discussion of the American views on limitations imposed upon the vendor resulting from the sale of good will appears in Levin, *Non-Competition Covenants in New England: Part I*, 39 B.U.L. REV. 483, 500 (1959); Note, *Limitations Which Result in Law from the Sale of the Goodwill of a Business*, 4 BROOKLYN L. REV. 172 (1934); Note, *The Sale of a Business — Restraints Upon the Vendor's Right to Compete*, 13 W. RES. L. REV. 161 (1961).

36. In Herbert Morris, Ltd. v. Saxelby, [1916] 1 A.C. 688, Lord Shaw recognized a distinction between what he called "objective knowledge" and "subjective knowledge." He stated:

> Trade secrets, the names of customers, all such things which in sound philosophical language are denominated *objective knowledge* — these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability — all those things which in sound philosophical language are *not objective, but subjective* — they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unvailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large. *Id.* at 714. (Emphasis added.)

37 34 Ohio App. 331, 171 N.E. 339 (1929).

38. Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N.E. 1030 (1898).

in and the employer-employee covenant under consideration.[39] Again in *Elevator Co. v. Kendall,*[40] the court cited a case involving a vendor-vendee contract as the governing rule in Ohio in deciding the validity of a restrictive employer-employee covenant.[41] The most recent Ohio case in point, *Extine v. Williamson Midwest, Inc.*,[42] is also of little or no help here since the relief sought and granted — a declaratory judgment to determine an employee's rights under an employer-employee type covenant —turned on the question of divisibility of the contract.[43] However, notwithstanding this anomaly in Ohio, it is necessary to examine the application of the restraint-of-trade doctrine to each of these two types of covenants on a separate basis.

Restrictive Covenants Incident to an Employment Agreement

The general rule throughout the United States is that a postemployment covenant restraining an employee from competing with his employer after termination[44] of the employment relationship is valid if it is

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39. It is also interesting to note that the court compounded the confusion on this subject in the *Federal Sanitation Co.* case by quoting a passage from an annotation to the Connecticut case of Sammuel Stores v. Abrams, 94 Conn. 248, 108 Atl. 541 (1919), in Annot., 9 A.L.R. 1456, 1468 (1920). The *Sammuel* case expressly recognized the English doctrine which stresses the importance of the confidential and personal nature of the relationship in an employee covenant not generally present in a vendor-vendee covenant.

40. 27 Ohio L. Rep. 679 (Ct. App. 1928).

41. Other cases involving this same conflict which may prove helpful in disclosing the present status of Ohio law are: Welcome Wagon Service Co. v. Butler, 140 Ohio St. 499, 45 N.E.2d 757 (1942); Conforming Matrix Corp. v. Faber, 104 Ohio App. 8, 146 N.E.2d 447 (1957); Null v. Guilliams, 22 Ohio L. Abs. 602 (Ct. App. 1936); Red Star Yeast Prods. Co. v. Hague, 25 Ohio App. 100, 157 N.E. 393 (1927); Hance Bottled Gas v. Peacock, 169 N.E.2d 564 (Ohio C.P. 1960); Arthur Murray Dance Studios, Inc. v. Witter, 105 N.E.2d 685 (Ohio C.P. 1952); Individual Damp Wash Laundry Co. v. Meyers, 26 Ohio L. Abs. 142, 10 Ohio Op. 517 (Ohio C.P. 1938). See also Note, *Trade Regulations: Employer Protection From Employee Competition After a Term of Employment*, 5 Ohio St. L.J. 263 (1939).

42. 176 Ohio St. 403, 200 N.E.2d 297 (1964).

43. The restraints in the instant case were unlimited as to space. The court stated that "these restraints, if enforced, would apply to areas in the world where the employer-appellee has no activity whatsoever and may never intend to engage in any activity in such a location." Extine v. Williamson Midwest, Inc., *supra* note 42, at 406-07, 200 N.E.2d at 299-300. However, the court did not invalidate the entire covenant. The terms of the contract being severable, the court held illegal only those portions which were unreasonable. This was accomplished by application of the so-called "blue-pencil" test by which the court is able to remove illegal clauses from the contract leaving the remainder of the contract enforceable. For further discussion of this judicial technique see notes 98-118 *infra* and accompanying text.

44. Frequently there is a problem as to what constitutes "termination." In Universal Elec. Corp. v. Golden Shield Corp., 316 F.2d 568 (5th Cir. 1963), the defendant-employee took the position that the restrictive covenant applied only in the event that the employer terminated his employment; he contended that if he (the employee) terminated the employment himself he would be free to compete. The court held that termination by either party would bring into operation the covenant not to compete.

reasonable.[45] Among other factors,[46] reasonableness requires that: (1) the covenant be no greater than is required for protection of the *employer*; (2) the covenant impose no undue hardship on the *employee*; and (3) the covenant is not injurious to the *public*. These tests are applied in light of the duration and geographical extent of the restraint.

Enforceability as Affected by Duration of Restriction

The majority view in the United States is that a restraint unlimited as to time is not unreasonable per se.[47] For example, an agreement not to carry on a trade, business, or profession in a certain city has been held to be valid, even though it may be agreed that it shall never be carried on there.[48] This only means that if no time limit is stated, the promise may be held lawful and enforceable for such time as is necessary to protect the employer. One time limit, however, is definitely set in all cases; the restraint cannot exceed the covenantor's own life. But, the covenantor

45. Restrictive agreements in employment contracts are of two kinds: (1) restrictions operative during the term of employment, and (2) restrictions operative after the time of employment expires. SIMPSON, CONTRACTS § 167 (1954). Where the restriction binds the employee not to engage in a competitive business during the term of employment, it is generally held valid. See Rely-A-Bell Co. v. Eisler, [1926] 1 Ch. 609.

46. In James C. Greene Co. v. Kelley, 261 N.C. 166, 134 S.E.2d 166 (1964), the court held that in addition to being reasonable as to time and space, a restrictive covenant, to be enforceable, must be supported by valid consideration. This court found it to be "generally agreed that mutual promises of employer and employee furnish valuable considerations each to the other for the contract. However, when the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon new consideration." *Id.* at 166-67, 134 S.E.2d at 167. Also, the employer's interest must be protectible. Thus, an employment covenant prohibiting an employee whose duties were largely administrative "from being employed by any manufacturer in competition with the employer" was held unenforceable in Beltone Electronics Corp. v. Smith, 44 Ill. App. 2d 112, 194 N.E.2d 21 (1963); see also Solar Textiles Co. v. Fortino, 46 Ill. App. 2d 436, 196 N.E.2d 719 (1964). The question of whether such covenants are unreasonable under the circumstances is one for the court to decide. Dixie Bearings, Inc. v. Walker, 219 Ga. 353, 133 S.E.2d 338 (1963); Sark County Milk Producers' Ass'n v. Tabeling, 129 Ohio St. 159, 194 N.E. 16 (1934).

47. Styles v. Lyon, 87 Conn. 23, 86 Atl. 564 (1913); J. Schaeffer, Inc. v. Hoppen, 127 Fla. 703, 173 So. 900 (1937); Ebbeskotte v. Tyler, 127 Ind. App. 433, 142 N.E.2d 905 (1957); Larx Co. v. Nicol, 224 Minn. 1, 28 N.W.2d 705 (1946) (applying Illinois law); Dow v. Gotch, 113 Neb. 60, 201 N.W 655 (1924); Spaulding v. Mayo, 81 N.H. 85, 122 Atl. 899 (1923); Steinmeyer v. Phenix Cheese Co., 91 N.J.L. 351, 102 Atl. 150 (Ct. Err. & App. 1917); Keen v. Schneider, 202 Misc. 298, 114 N.Y.S.2d 126, *aff'd without opinion*, 280 App. Div. 954, 116 N.Y.S.2d 494 (1952); Kelite Prods., Inc. v. Brandt, 206 Ore. 636, 294 P.2d 320 (1956); Scott v. McReynolds, 36 Tenn. App. 289, 255 S.W.2d 401 (1952); United Dye Works v. Strom, 179 Wash. 41, 35 P.2d 760 (1934). See also 6-A CORBIN, CONTRACTS § 1391 (1962); Annot., 41 A.L.R.2d 15, 41 (1955). However, a few cases support the view, at least by inference, that a restrictive covenant is ipso facto unenforceable if unlimited as to time. See, *e.g.*, Feudenthal v. Espey, 45 Colo. 488, 102 Pac. 280 (1909); Mandeville v. Harman, 42 N.J. Eq. 185, 7 Atl. 37 (Ch. 1886). It should be noted, however, that none of the foregoing cases specifically held that the covenant was void due to the lack of a time limitation. In addition, it is important to note that the courts are more inclined to support this view when the covenant has been entered into by professional people. See Annot., 41 A.L.R.2d 15, 45 (1955).

48. See, *e.g.*, Griffin v. Guy, 172 Md. 510, 192 Atl. 359 (1937)

can bind himself for a period longer than the life of the covenantee, for the covenantee's right to the covenantor's forbearance from competition lasts as long as the reason for the protection may last. Furthermore, the covenantee has the power to assign his right to the covenantor's forbearance as part of his business. This right will also pass to the covenantee's personal representative upon his death.[49] However, the covenant terminates when the reason for it terminates; it therefore is not separately assignable.[50]

Customer relationships.—Reasonable time limitations will vary with the type of interest sought to be protected. With respect to a restraint covering customer relationships, it is generally held that an employer is entitled to a time restriction no longer than is necessary for a new employee to establish a good working relationship with the customers previously served by the covenantor.[51] How long it will take for this relationship to develop will depend to a great extent on the type of service rendered. If, for example, the nature of the service involves a substantial amount of skill, the time period will be comparatively long. On the other hand, if the service is simple, such as house-to-house calls over a route, the time limitation allowed will be relatively short.[52] As a general rule, the courts will not criticize a restraint of six months or a year since that appears to be the minimum amount of time in which an employer is able to re-establish even the simplest customer service relationship.[53]

In Ohio, as in other jurisdictions, enforceability of covenants against loss of customers through a former employee depends to a great degree on the particular position formerly occupied by the employee in the

49. In Hitchcock v. Coker, 6 Ad. & E. 438, 112 Eng. Rep. 167 (Ex. 1837), the covenator agreed not to carry on a business in competition with his former employer. The King's Bench held that the covenantee's right to forbearance from competition may be sold, bequeathed, or become an asset in the hands of the personal representative.

50. See, *e.g.*, Russell v. Russell, 39 Cal. App. 174, 178 Pac. 307 (1918).

51. See, *e.g.*, Fullerton Lumber Co. v. Torborg, 270 Wis. 133, 70 N.W.2d 585 (1955).

52. The most common example of this type of service is the route man. See Little Rock Towel & Linen Supply Co. v. Independent Linen Serv. Co., 377 S.W.2d 34 (Ark. 1964); Deuerling v. City Baking Co., 155 Md. 280, 141 Atl. 542 (1928) (bakery route); Schumacher v. Loxterman, 77 N.E.2d 257 (Ohio C.P. 1947) (dairy products route); Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N.W 412 (1911) (laundry route).

53. See generally Kramer, *Protection of Customer Lists in California*, 23 CALIF. L. REV. 399 (1935); Note, *Protection of Customer Lists in New York*, 1 SYRACUSE L. REV. 110 (1949). The court will not refuse to enforce a salesman's contract not to solicit his employer's customers on the ground that an injunction would put the salesman innocently in peril of contempt because he could not know all those who had been his employers s customers. Thus, the recent English case of G. W Plowman & Sons, Ltd. v. Ash, [1964] 1 Weekly L.R. 568 (C.A.) offered a unique solution to the problem. The court stated that it is "not difficult for the employee to comply with the covenant although he may not have knowledge of all the people who were customers; because all he need do when calling upon anybody is ascertain first whether he was a customer of the employer in the relevant period; and if he finds that he was such a customer, then he must say goodbye,' or whatever the appropriate form of words is in this trade in this part of the country." *Id.* at 570.

employer's business. Factors frequently employed by the Ohio courts in determining a reasonable time restriction in this area are: (1) the nature of the information to be protected,[54] (2) the opportunity of the covenantor-employee to become acquainted with his employer's customers,[55] (3) efforts of the employer to keep the information confidential,[56] and (4) the intensity of the personal contact which the employee had with such customers. Examples of this last factor are milkmen[57] or laundrymen[58] who regularly visit their employers' customers on routes, and succeed in establishing a close, personal, and ingratiating contact with them. In such cases, a one year limitation has been held reasonable,[59] but a three year time limitation has been held to impose not only an undue hardship on the employee, but is greater than is reasonably necessary for the employer's protection.[60] In other situations, the contact may be less frequent and less intense, but the degree of identification of the business with the employee may be greater, as for example, where the employee occupies a position of authority in the business giving him power to make decisions for his employer. Thus, a manager of a business may be in a position to extend credit or fix prices of merchandise to the extent that the customer identifies the employee rather than the employer with the service.[61] Technical associates of physicians,[62] lawyers,[63] and dentists[64] may also be in positions involving substantial client contact. In such situations, the service relationship is generally more complex than house-to-house servicing and consequently a longer time limitation will usually be allowed.[65]

54. See Briggs v. Butler, 140 Ohio St. 499, 45 N.E.2d 757 (1942).

55. See Skyland Broadcasting Corp. v. Hamby, 141 N.E.2d 783 (Ohio C.P. 1957), where the court upheld a covenant undertaken by a "disc jockey" when he attempted to take employment with a competing radio station.

56. See Gates-McDonald Co. v. McQuilkin, 34 N.E.2d 443 (Ohio Ct. App. 1941)

57 Pestel Milk Co. v. Model Dairy Prods. Co., 52 N.E.2d 651 (Ohio Ct. App. 1943)

58. Individual Damp Wash Laundry Co. v. Meyers, 26 Ohio L. Abs. 142, 10 OHIO OP. 517 (Ohio C.P. 1938).

59. Individual Damp Wash Laundry Co. v. Meyers, *supra* note 58. *But see* Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32 (1934), which represents the minority view in the United States. The rationale of this line of authority is that "if the driver of a laundry truck gains such friendships and confidence amongst customers that the customers will change laundries when the driver changes employment, it is not because of the use of any property or property rights of the laundry owner, but it is because of the driver's God-given, or self-cultivated, ingratiating personality, and to this the employer acquires no property interest." *Id.* at 147-48, 160 So. at 36.

60. Gates-McDonald Co. v. McQuiklin, 34 N.E.2d 443 (Ohio Ct. App. 1941).

61. See, *e.g.*, Harry Livingston, Inc. v. Stern, 69 Ohio App. 105, 43 N.E.2d 302 (1941)

62. See Droba v. Berry, 139 N.E.2d 124 (Ohio C.P. 1955) The covenant in the instant case, however, was held unenforceable due to an unreasonable space limitation. For a general discussion of covenants relating to the medical profession see Dodd, *Contracts Not To Practice Medicine*, 23 B.U.L. REV. 305 (1943).

63. See Toulmin v. Becker, 124 N.E.2d 778 (Ohio Ct. App. 1954), noted in 7 W RES. L. REV. 260 (1956)

64. See Erikson v. Hawley, 12 F.2d 491 (D.C. Cir. 1926).

65. See generally 48 IOWA L. REV. 159 (1963)

Trade secrets and other confidences.—The traditional rule with respect to protection of trade secrets and other confidences was that a covenant was enforceable against the covenantor as long as the secrecy was maintained.[66] The modern trend, however, is that maintenance of secrecy alone will not justify a restraint of indefinite duration; in order to determine reasonableness of duration under this view, account must be taken of what time period is reasonably necessary for the protection of the employer.[67] In many cases, this may be a much shorter time than the life of the secret. One rule for determining reasonableness which has found favor in some courts is based on the length of time that the confidential information will have "business significance." Thus, if an employee possesses knowledge of the confidential terms of a contract, this confidential information loses its business significance upon cancellation or renewal of the contract.[68] However, most courts have found that in determining what constitutes a reasonable duration for agreements protecting confidential information, due regard must be given to both the risk of the employer and the burden placed on the employee. With respect to the latter, a contract which prohibits disclosure of *particular* secrets will not usually impair an employee's opportunities for related employment. But if the contract contains a general prohibition against disclosure of *all* trade secrets or confidences gained during employment, the restraint is much more limiting on future employment opportunities. Such restraints are thus more in the nature of covenants not to compete rather than agreements not to disclose. A few courts have recognized this similarity and have applied the same standard of reasonableness as to time and space limitations.[69] With respect to the employer, reasonable legal protection of trade secrets tends to encourage substantial expenditures to find or improve ways of accomplishing commercial and industrial goals. The protection of such efforts when transplanted into trade secrets tends to encourage such efforts, and the result is beneficial to both the employer and the public.[70]

66. 2 CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 816 (2d ed. 1950). See also McClain, *Injunctive Relief Against Employees Using Confidential Information*, 23 KY. L. J. 248 (1935).

67. 1 NIMS, UNFAIR COMPETITION AND TRADE-MARKS § 149 (1947).

68. See Arkansas Dailies, Inc. v. Dan, 36 Tenn. App. 663, 260 S.W.2d 200 (1953).

69. See, *e.g.*, Guth v. Minnesota Mining & Mfg. Co., 72 F.2d 385 (7th Cir. 1934), *cert. denied*, 294 U.S. 711 (1935); Ward Baking Co. v. Tolley, 248 N.Y. 603, 162 N.E. 542 (1928) (memorandum decision); Kaumagraph Co. v. Stampagraph Co., 235 N.Y. 1, 138 N.E. 485 (1923); Tolman v. Mulcahy, 119 App. Div. 42, 103 N.Y. Supp. 936 (1907).

70. E. I. du Pont de Nemours & Co. v. American Potash & Chem. Corp., Civil No. 1690, Ch. Del., May 5, 1964. See also B.F. Goodrich Co. v. Wohlgemuth, 117 Ohio App. 493, 192 N.E.2d 99 (1963), wherein the court stated: "We have no doubt that Wohlgemuth [employee-covenantor] had the right to take employment in a competitive business, and to use his knowledge (other than trade secrets) and experience, for the benefit of his new employer, but a public policy demands commercial morality, and courts of equity are empowered to enforce it by enjoining an improper disclosure of trade secrets known to Wohlgemuth by

Enforceability as Affected by Geographical Extent of Restriction

It is generally held that the mere fact that a covenant contains no limit as to geographical extent does not, in and of itself, render the covenant void.[71] However, this formulation is so general that it does not assist in the solution of the specific problems raised by more complex fact situations present in modern cases. First, it should be noted that the problem of spatial limitation is closely related to the historical development of the general-partial restraint doctrine. For a considerable period in American history, it was apparently assumed that the legality of a covenant not to compete was to be determined solely upon the distinction between general and partial restraints. Today, however, the formulation has become much more detailed.

Factors in determining reasonableness.—The basic factors taken into consideration in determining the reasonableness of the geographical scope of a covenant are: (1) necessity of the restraint for protection of the *employer's business* and the good will which is attached thereto; (2) effect of the restraint upon the economic freedom of the *employee*; and (3) effect of the restraint upon the *public.* This division of the concept of reasonableness has been recognized by the majority of jurisdictions.[72] However, this categorization is too broad to be used with any amount of success as a guide in determining when and under what circumstances a covenant will be held reasonable as to geographical scope. Thus, to facilitate a more definite determination of reasonableness, most courts have further separated these three basic elements into specific individual factors to accommodate varying social and economic conditions.[73] As to the element of protection for the employer, the factors to be considered

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virtue of his employment. Under the American doctrine of free enterprise, Goodrich is entitled to this protection." *Id.* at 500, 192 N.E.2d at 105.

71. See, *e.g.*, Carter v. Alling, 43 Fed. 208 (C.C.N.D. Ill. 1890); DeLong Corp. v. Lucas, 176 F. Supp. 104 (S.D.N.Y. 1959), *aff'd*, 278 F.2d 804 (2d Cir.), *cert. denied*, 364 U.S. 833 (1960) (applying New York Law); Davis-Robertson Agency v. Duke, 119 F. Supp. 931 (E.D. Va. 1953) (applying Virginia law); Fountain v. Hudson Cush-N-Foam Corp., 122 So. 2d 232 (Fla. Ct. App. 1960); Interstate Tea Co. v. Alt, 271 N.Y. 76, 2 N.E.2d 51 (1936); Plunkett Chem. Co. v. Reeve, 373 Pa. 513, 95 A.2d 925 (1953); Martin v. Hawley, 50 S.W.2d 1105 (Tex. Civ. App. 1932); Pancake Realty Co. v. Harber, 137 W Va. 605, 73 S.E.2d 438 (1952). See also Annot., 43 A.L.R.2d 94, 130 (1955) However, there is some authority to the effect that where the territory is unlimited, either through failure to mention a limitation or expressly unlimited, it is ipso facto void. See, *e.g.*, Victor Chem. Works v. Iliff, 299 Ill. 532, 132 N.E. 806 (1921); Lufkin Rule Co. v. Fringeli, 57 Ohio St. 596, 49 N.E. 1030 (1898); Sekal v. Fleischer, 93 Ohio App. 315, 113 N.E.2d 608 (1952); Emler v. Ferne, 23 Ohio App. 218, 155 N.E. 496 (1926)

72. See May v. Young, 125 Conn. 1, 2 A.2d 385 (1938); Ogle v. Wright, 187 Ga. 749, 2 S.E.2d 72 (1939); Smithereen Co. v. Renfroe, 325 Ill. App. 229, 59 N.E.2d 545 (1945); Brecher v. Brown, 235 Iowa 627, 17 N.W.2d 377 (1945); Heckard v. Park, 164 Kan. 216, 188 P.2d 926 (1948); Silver v. Goldberger, 231 Md. 1, 188 A.2d 155 (1963); Oxman v. Profitt, 241 S.C. 28, 126 S.E.2d 852 (1962)

73. See generally Annot., 43 A.L.R.2d 94, 148 (1955)

are: (1) nature of the trade or business involved;[74] (2) existence of legitimate interests;[75] (3) nature of the employee's occupation;[76] and (4) nature of the skill acquired by the employee during employment.[77] In determining reasonableness as to the employee, the following factors are considered: (1) economic hardship to the employee and his family;[78] (2) inconvenience to the employee, such as the necessity of changing occupation or residence;[79] and (3) nature of the skill acquired by the employee during employment.[80] The major factors to be considered in defining the third element of reasonableness as to the general public are: (1) interference with utilization of the employee's skill and productivity;[81] (2) shortage of the employee's type of service;[82] (3) possibility of a consequent shift of competition or creation of a monopoly;[83] (4) possibility

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74. This factor is usually considered when dealing with situations where the success of the business depends upon a special process, plan or method. Confidential business information, such as trade secrets, plans, processes, and business methods known only to the owner is the archetype of this class of interests. See, *e.g.*, Orkin Exterminating Co. v. Murrell, 212 Ark. 449, 206 S.W.2d 185 (1947) (protection of development, manufacture, and use of pest control product); Haysler v. Butterfield, 240 Mo. App. 733, 218 S.W.2d 129 (1949), wherein a counselor in an employment agency was held to be in a position to injure his employer by imparting to another agency the knowledge of needs of many employers; Ontario County Artificial Breeders Co-op v. Shappee, 205 Misc. 175, 127 N.Y.S.2d 888 (1954) (dissemination of customer lists); Eagle Pencil Co. v. Jannsen, 135 Misc. 534, 238 N.Y.S. 49 (1929) (protection of machine design). For cases involving types of knowledge not protectible see Annot., 43 A.L.R.2d 94, 196 (1955).

75. *E.g.*, Arthur Murray Dance Studios, Inc. v. Witter, 105 N.E.2d 685 (Ohio C.P. 1952), wherein an injunction was denied on the ground that no irreparable injury, actual or threatened was shown.

76. Agreements involving the sale of a professional practice or employment are more readily enforced than agreements involving occupations where no special skill is involved. See, *e.g.*, Foltz v. Struxness, 168 Kan. 714, 215 P.2d 133 (1950).

77. *E.g.*, Davey Tree Expert Co. v. Ackelbein, 233 Ky. 115, 25 S.W.2d 62 (1930) (injunction granted against employee using knowledge obtained through attending institute sponsored by his employer).

78. See, *e.g.*, Menter Co. v. Brock, 147 Minn. 407, 180 N.W 553 (1920).

79. *E.g.*, Crowell v. Woodruff, 245 S.W.2d 447 (Ky. 1951), wherein it was held that to grant specific performance of the covenant would be to deprive the employee and his family of work at his trade in the town where he was firmly established.

80. See note 77 *supra.*

81. *E.g.*, Deuerling v. City Baking Co., 155 Md. 280, 131 Atl. 542 (1928), where the court stated: "In the exercise of such a right the employee has an interest, as also the general public, who are entitled to have the energy, industry, skill, and talents of all individuals freely offered upon the market, and it can be easily imagined that by unreasonable curtailment, through restrictive covenants the public at large might thereby be deprived of the service of individuals so essential to the progress, welfare, and happiness of mankind." *Id.* at 284, 141 Atl. at 543-44.

82. *Compare* Ridley v. Krout, 63 Wyo. 252, 180 P.2d 124 (1947), where the interest of the general public in prompt and efficient repair work was stressed, *with* Lareau v. O'Nan, 355 S.W.2d 679 (Ky. 1962), wherein the court held that even if the county may need more doctors, it will not suffer injury so as to justify denial of relief.

83. *E.g.*, Tawney v. Mutual Sys., Inc., 186 Md. 508, 47 A.2d 372 (1946), where the court held that covenants entered into by employees of a small-loan company would "stifle competition in a field where the existence of competition is clearly in the public interest." *Id.* at 521, 47 A.2d at 379.

of the employee becoming a public charge;[84] and (5) creation of opportunity of employment.[85]

It can be seen from this number of factors that no all inclusive general rule can be formulated as to the reasonableness of spatial limitations. Thus, an agreement unlimited as to space may be held harsh and oppressive under one set of circumstances, whereas under another it may be justified as reasonable.

Ohio development.—As noted previously, the general rule with respect to the reasonableness of a covenant in terms of spatial limitation depends on its effect on the employer, the employee, and the public.[86] Until recently, however, the Ohio courts gave no consideration to the rule of reason. For example, in the early case of *Lange v. Werk*,[87] the court refused to test the validity of a covenant covering the entire state, "or any other place in the United States," in terms of its reasonableness to the parties. The court merely stated that insofar as the covenant extended to the prohibition of the whole United States, it was a general restraint and therefore illegal. In a subsequent case, the *Lange* decision was followed in holding that a covenant unlimited as to space was void as a general restraint of trade.[88] Here again, no consideration was given to the question of whether the restraint was reasonable in light of the circumstances presented; the court merely assumed that it was since it was unlimited.

A number of recent lower court decisions in Ohio, however, have apparently rejected the view that a covenant unlimited as to space or covering a substantial portion of the United States is per se too large to be reasonable. For example, in *Conforming Matrix Corp. v. Faber*[89] the court upheld a postemployment covenant prohibiting competition with the business of the employer in nineteen states, including Ohio. In so holding, the court considered the reasonableness of the covenant as to all parties. With respect to the employer, the court stated that the covenant was no wider than was reasonably necessary for the protection of the

84. *Compare* Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32 (1934), where the court held that to enforce covenants made by three laundry truck drivers would mean that they, together with their families, would become charges on the public, *with* Universal Elec. Corp. v. Golden Shield Corp., 316 F.2d 568 (1st Cir. 1963) (applying New York law), where the court held that enforcement of a postemployment covenant restraining the vice president and comptroller of a corporation would not be likely to render him a charge on the public. See generally Comment, *Covenants Not to Compete*, 7 ARK. L. REV. 35 (1952)

85. *E.g.*, Becker College v. Goss, 281 Mass. 355, 183 N.E. 765 (1933), wherein the court held that there is no public policy against an employer refusing employment to one who may, in the future, be a source of injury to him, unless such injury can be guarded against by contract.

86. See note 72 *supra* and accompanying text.

87. 2 Ohio St. 519 (1853).

88. Emler v. Ferne, 23 Ohio App. 218, 155 N.E. 496 (1926).

89. 104 Ohio App. 8, 146 N.E.2d 447 (1957), noted in 10 W RES. L. REV. 365 (1959).

employer's business.[90] As to the employee, the court held that "there is no evidence that the contract operated as an unreasonable hardship on defendant; he could practice his profession generally as an engineer anywhere other than in competition with the specialized business of plaintiff. ."[91] Finally, as to the public, the court found "that such limited restraint of trade would not be in contravention of public policy."[92] In *Minnesota Mining & Mfg. Co. v. Schuler,*[93] the covenant therein involved contained no area or space limitation. There, as in *Conforming Matrix,* the court ignored the supreme court's view that all restraints unlimited as to space were absolutely void. The court gave as its reason for upholding the covenant the fact "that Minnesota Mining's business was world-wide and, consequently, the negative covenant did not have to be restricted to any particular city, state or territory in order to be valid."[94]

Although the effect of the *Conforming Matrix* and *Schuler* decisions was a rejection of the strict position previously taken by the supreme court, it appears to have had little or no effect on the status of Ohio law at that time. Evidence of this appears in *Burndy Corp. v. Cahill,*[95] where a New York corporation brought an action in a Minnesota district court to enjoin the breach of a covenant not to compete. The contract was made in Ohio and both parties agreed that the law of Ohio controlled as to the determination of whether the negative covenant was enforceable. The defendant argued that the covenant was not enforceable and void *ab initio,* because it was unlimited as to both time and space. The plaintiff, on the other hand, cited the *Conforming Matrix* and *Schuler* decisions as showing that the defendant's positon was no longer the law in Ohio. The court responded:

90. In reaching this conclusion, the court found: (1) that the employer sold its product and had customers in at least sixteen states as well as Canada; (2) that the defendant-employee, during his employment with plaintiff, was chief engineer and plant superintendent in charge of design, production, and manufacture of machines sold by plaintiff; and (3) that by virtue of this position with the plaintiff-employer, defendant-employee had frequent contact with plaintiff's customers and dealt with them directly on many orders of equipment. The court held that these facts fell within the policy announced in Briggs v. Butler, 140 Ohio St. 499, 45 N.E.2d 757 (1942), that "the fact that in the operation of a business the public may learn methods, systems and trade usages does not make such methods public property and consequently deprive an employer of any protection." *Id.* at 509, 45 N.E.2d at 762.

91. Conforming Matrix Corp. v. Faber, 104 Ohio App. 8, 12, 146 N.E.2d 447, 450 (1957).

92. *Id.* at 12-13, 146 N.E.2d at 450. *But see* Hubman Supply Co. v. Irvin, 119 N.E.2d 152 (Ohio C.P. 1953), wherein plaintiff's former salesman, who had represented plaintiff in Ohio and three other states, covenanted in an employment contract not to sell for any other person in plaintiff's business line for ten months after termination of employment. The court held the contract void as a general restraint of trade.

93. Civil No. 635,064, C.P. Ohio, July 15, 1952, *aff'd per curiam,* Civil No. 22,618, Ohio Ct. App., October 31, 1952.

94. See Burndy Corp. v. Cahill, 196 F. Supp. 619, 625 (D. Minn. 1961), *vacated,* 301 F.2d 448 (8th Cir. 1962).

95. *Ibid.*

> While the court in the Conforming Matrix case in effect belittled the Ohio rule that a negative covenant unrestricted as to area was void ab initio, *the court failed to show where the Supreme Court of Ohio had changed the law in this respect.*
>
> This court cannot change Ohio law. Even though we might disagree with it, we are obligated to follow it.[96]

In the recent case of *Extine v. Williamson Midwest, Inc.*,[97] the Ohio Supreme Court modified its prior position that all restraints unlimited as to space were void by adopting the so-called "blue pencil" test. Under this test, only those portions of the agreement which are unreasonable are held void and inoperative; the balance of the contract is left enforceable. However, the availability of this method of saving the agreement by removing only the unreasonable portions is, in many jurisdictions, dependent on whether the terms of the contract are divisible.

Divisibility

The fact that a restraint on the activities of an employee is too broad to be enforceable does not, as a general rule, prevent most courts from enforcing it in part — insofar as that part is reasonable.[98] However, the concept of divisibility has by no means become universally accepted by the courts or legal writers. For example, Professor Corbin states 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."[99]

The doctrine of divisibility was first applied in the early English decision of *Chesman v Nanby.*[100] There, an employee in a linen-drapery shop covenanted that in consideration for her employment she would "not nor will at any time after she shall have left the service of her [employer] . set up or exercise the trade or mystery of a linen draper in any shop, room or place within the space of half a mile of the said now dwelling house of [her employer] . situate in Drury-Lane, *or any other house that she shall think proper to remove to.*"[101] The defendant argued that the covenant was a general restraint because the clause "any

96. *Id.* at 626. (Emphasis added.) The court of appeals was of the opinion that "whether the views of the District Court as to the applicable law of Ohio are or are not correct, there is sufficient doubt about the law of that state to entitle Burndy to a trial on the merits of its claim. . ." Burndy Corp. v. Cahill, 301 F.2d 448, 449 (8th Cir. 1962).

97. 176 Ohio St. 403, 200 N.E.2d 297 (1964)

98. See generally 6-A CORBIN, CONTRACTS § 1390 (1962). *But see* RESTATEMENT, CONTRACTS § 518 (1932), which limits divisibility to cases where the covenant "by its terms" is divisible. For a discussion of the remedies available upon breach of such covenants see 15 S.W.L.J. 437 (1961); 40 TEXAS L. REV. 152 (1961)

99. 6-A CORBIN, *op. cit. supra* note 98.

100. 2 Str. 739, 93 Eng. Rep. 819 (K.B. 1726).

101. *Ibid.* (Emphasis added.)

other house" put it in the power of the plaintiff to prevent the defendant from exercising the trade in any part of the kingdom. However, the court found the covenant to be severable; it struck the clause restraining the employee from competing in "any other house that she shall think proper to remove to" and issued an injunction covering the half mile area around plaintiff's then place of business.[102]

Today, American jurisdictions are divided into four distinct groups on the question of divisibility.[103] The first view which finds support in the majority of jurisdictions permits severability only if the provisions of the covenant are by their very terms distinct and severable.[104] According to this view, the severability of the covenant must be determined by the language and the subject matter of the agreement. If the terms are found to be indivisible, the entire agreement is said to fail.[105] This view has been criticized by many writers as being nothing more than a mechanical application of the old rule against rewriting the parties' contract.[106] However, the counterargument is that by interpolating divisibility the court is not making a new contract for the parties, but is merely determining the effect of the one made by the parties themselves, within the doctrine of reasonableness.[107]

The second view which finds favor in a growing minority of states upholds so much of the restraint as is reasonable, regardless of whether

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102. For a further discussion of the English development of this subject see Nevanas & Co. v. Walker, [1914] 1 Ch. 413; Mason v. Provident Clothing & Supply Co., [1913] A.C. 724; Goldson v. Goldman, [1905] 1 Ch. 292; Farwell, *Covenants in Restraint of Trade as Between Employer and Employee*, 44 L.Q. REV. 66 (1928).

103. Although none of the older decisions applied severance to the *time* dimension, it is recognized today that if a restriction, otherwise reasonable, has no time limit, or an unreasonable time limit, it is quite possible for the court to grant injunctive relief for a specific or reasonable time. See, *e.g.*, McQuown v. Lakeland Window Cleaning Co., 136 So. 2d 370 (Fla. Ct. App. 1962). *Contra*, McLeod v. Meyer, 372 S.W.2d 220 (Ark. 1963). Further discussion on the question of divisibility appears in 32 MARQ. L. REV. 282 (1949); 9 WIS. L. REV. 308 (1934). A comment on the English position appears in 98 SOL.J. 467 (1954).

104. Covenants which are severable *by their very terms* are those in which, for example, a number of states, cities, or territories are described. Thus, if a covenant is too broad in time or space, the court merely releases from the strictures of the covenant those clauses which are too broad and offend reasonableness. The leading case supporting this view is Somerset v. Reyner, 233 S.C. 324, 104 S.E.2d 344 (1958). See also Paramount Famous Lasky Corp. v. National Theatre Corp., 49 F.2d 64 (4th Cir. 1931); Fidelity Credit Assur. Co. v. Cosby, 90 Cal. App. 22, 265 Pac. 372 (1928); Roberts v. H. C. Whitmer Co., 46 Ga. App. 839, 169 S.E. 385 (1933); Eldridge v. Johnston, 195 Ore. 379, 245 P.2d 239 (1933). *Cf.* Riddlestorffer v. City of Rahway, 82 N.J. Super. 423, 197 A.2d 883 (1964); Schmidt v. Foster, 380 P.2d 124 (Wyo. 1963).

105. Somerset v. Reyner, *supra note* 104. See also McLeod v. Meyer, 372 S.W.2d 220 (Ark. 1963).

106. Williston & Corbin, *On the Doctrine of Beit v. Best*, 23 CONN. B.J. 40 (1949).

107. See, *e.g.*, McQuown v. Lakeland Window Cleaning Co., 136 So. 2d 370 (Fla. Ct. App. 1962), wherein the court assumed the burden of interpolating divisibility into the text of the covenant limiting a five year time limitation to one year.

the covenant is by its terms divisible.[108] This view has been criticized by some courts and writers as allowing an employer to draft an agreement in the most comprehensive terms, with the confidence that the court will rewrite the covenant to give him the broadest possible protection.[109] However, if the ultimate question is reasonableness, it would seem that the mere question of whether the restraint should be limited by inclusion or exclusion is immaterial. Most courts adhering to this view will not, however, undertake to reduce and define contractual restrictions which are so unreasonable as to either time or space as to be incapable of modification.[110] The most common example of this situation occurs where the restraint is entirely devoid of limitation as to both time and space.[111]

The third view which finds very little favor in the United States permits severability only if the provisions of the covenant are distinct and severable and the agreement contains a clause providing expressly for severability.[112] This of course obviates the problem of the parties' intent, for the parties have consented in advance to any restriction of lesser extent should the full restriction prove unenforceable.

The fourth view is represented by states which have enacted statutes declaring void and unenforceable all contracts in partial restraint of trade, regardless of severability provisions.[113] The underlying theory of this view is that denial of enforcement is a penalty for attempting to unduly restrain trade in violation of public policy. Other modifications of this view include states with statutes that (1) limit the restraint to the specific area in which the employer's business is located,[114] (2) limit re-

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108. See, *e.g.*, Hill v. Central West Pub. Serv. Co., 37 F.2d 451 (5th Cir. 1930); Davey Tree Expert Co. v. Ackelbein, 233 Ky. 115, 25 S.W.2d 62 (1930); Redd Pest Control Co. v. Heatherly, 157 So.2d 133 (Miss. 1963); Kelite Prods., Inc. v. Brandt, 206 Ore. 636, 294 P.2d 320 (1956), Fullerton Lumber Co. v. Torborg, 270 Wis. 133, 70 N.W.2d 585 (1955).

109. Hudson Foam Latex Prods., Inc. v. Aiken, 82 N.J. Super. 508, 198 A.2d 136 (1964). See also Beit v. Beit, 135 Conn. 195, 63 A.2d 161 (1948); Mason v. Provident Clothing & Supply Co., [1913] A.C. 724. For further discussion of this problem see 5 DUKE B.J. 115 (1956); 45 HARV. L. REV. 751 (1932); 54 MICH. L. REV. 416 (1956)

110. See, *e.g.*, Pancake Realty Co. v. Harber, 137 W Va. 605, 73 S.E.2d 438 (1952).

111. *Ibid.*

112. See Beloit Culligan Soft Water Serv., Inc. v. Culligan, Inc., 274 F.2d 29 (7th Cir. 1960), wherein the contract in question provided as follows: "Any provision of this Agreement prohibited by law shall be ineffective to the extent of such prohibition without in any way invalidating or affecting the remaining provisions of this Agreement." *Id.* at 31.

113. *E.g.*, N.D. CENT. CODE § 9-08-06 (1959); OKLA. STAT. tit. 15, § 217 (1951) CAL. BUS. & PROF. CODE § 16600 also declares void and unenforceable all such agreements. However, it is important to note that Gordon v. Landau, 49 Cal. 2d 690, 321 P.2d 456 (1958), appears to exclude from the California statute, employee covenants not to solicit customers which are reasonably limited as to time. For further discussion on the California law in this area see generally Hines, *Employees' Covenants Not To Solicit Former Patrons*, 20 CALIF. L. REV. 607 (1932); 26 SO. CAL. L. REV. 208 (1953)

114. *E.g.*, ALA. CODE tit. 9, §§ 22-23 (1958)

straints to a reasonably limited time and area,[115] and (3) allow employee restraints only where the employee has had access to route lists of the employer.[116]

The present status of Ohio law with respect to the question of divisibility does not lend itself to any of the above classifications. The most recent pronouncement by the Ohio Supreme Court in this area, *Extine v. Williamson Midwest, Inc.*,[117] left unsettled the question of whether an indivisible restraint would be enforceable in part. In *Extine*, the court found the restraint in question to be divisible and consequently had no problem striking from the agreement the unreasonable portions of the restraint. Hence, whether the same result would have been reached if the terms of the agreement had been indivisible is yet to be decided in Ohio.[118]

COVENANTS ANCILLARY TO THE SALE OF A BUSINESS OR OTHER PROPERTY

Protectible Interests

The primary purpose of the business sale restraint is to prevent the destruction of good will by competition[119] from the vendor. Since good

115. *E.g.*, FLA. STAT. § 542.12 (1961), whereunder it has been held that there are two discretionary steps to be performed by the court in determining the reasonableness of a restrictive covenant: "(1) the reasonableness of the agreement per se; (2) the reasonableness of the agreement as applied in [the particular] case, taking into consideration all of the facts, including those which have occurred subsequent to the execution of the agreement." American Bldg. Maintenance Co. v. Fogelman, 167 So.2d 791 (Fla. App. 1964). See also Atlas Travel Serv. v. Morelly, 98 So.2d 816 (Fla. App. 1957). Additional comment on Florida law in this area can be found in 8 U. FLA. L. REV. 351 (1953).

LA. REV. STAT. § 23:921 (1964), provides that in those cases where the employer incurs an expense in training the employee, or incurs an expense in the advertisement of the business that the employer is engaged in, a covenant will be enforceable for two years. In the recent case of Marine Forwarding & Shipping Co. v. Barone, 154 So.2d 528 (La. Ct. App. 1963), the court held that the language of this section was broad enough to include an officer or director of a corporation. Additional comments on this subject in Louisiana can be found in Notes, *Obligations — Agreements in Restraint of Competition*, 11 LA. L. REV. 383 (1951); *Contracts — Restrictive Covenants — Agreements Not to Compete*, 27 TUL. L. REV. 364 (1953).

116. *E.g.*, MICH. COMP. LAWS §§ 445.761, .766 (1948).

117. 176 Ohio St. 403, 200 N.E.2d 297 (1964).

118. If the Ohio courts were to follow Emler v. Ferne, 23 Ohio App. 218, 155 N.E. 496 (1926), severability would be allowed only if the provisions of the covenant were by their terms distinct and severable. There, the court stated:

> The negative covenant as to space is a general restraint of trade, *and is not divisible.* Had the covenant provided that the parties should not engage in the same or similar business for the period of 100 years, it would not be contended that the court might grant the injunction for a period of 5 years. In other words, the court cannot make the contract for the parties. He cannot place a restriction on a negative covenant where there is no valid negative covenant. *Id.* at 223, 155 N.E. at 497 (Emphasis added.)

119. The question frequently arises as to what constitutes competition on the part of the vendor. In Dowd v. Bryce, 95 Cal. App. 2d 644, 213 P.2d 500 (1950), the vendor of certain real estate and a business operated thereon convenanted not to directly or indirectly engage in a similar business within a specified time and space limitation. The particular question

will generally constitutes a valuable part of the business assets, the vendee will usually want to incorporate a restrictive covenant into the sales contract, inasmuch as it is the only assured means of reaping the full benefit of his investment.[120] Care must be exercised in drafting such a covenant, however, for there are many factors upon which the value of good will and the extent of its protectibility when transferred as part of a business are dependent. By way of example, the good will of a professional practice depends upon factors other than the mere location of the practitioner's office; the enforceable scope of protection against competition in this situation is often broader than that of a mercantile establishment. Similarly, professional good will, being tied to the personality, character, and integrity of the individual, is necessarily limited by that person's life span.[121] On the other hand, the good will of a business enterprise may

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presented was whether the obligation of the vendor under the contract would be violated by his leasing a parcel of real property within the two-mile radius to a lessee who admittedly intended to operate a business thereon in competition with the vendee. The court adopted the decision of the trial judge who stated:

> When a seller lawfully agrees not to directly or indirectly compete with his buyer, he may be said to be indirectly competing when he leases his land within the restricted territory for a consideration, knowing at the time of the lease that it is to be and will be used for the same kind of business which his purchaser bought from him in competition with the purchaser. This is for the reason that he has control of the opportunity to compete and desires a profit therefor in the form of rental for his lease, as his lessee can only pay rent out of profits made in competing with the purchaser from his lessor. *Id.* at 647, 213 P.2d at 501-02.

A similar situation was presented in the recent Ohio decision of J. D. Nichols Stores, Inc. v. Lipschutz, 120 Ohio App. 286, 201 N.E.2d 898 (1963), where the court upheld an injunction against the vendor of a men's clothing store from leasing certain premises within the prohibited area of the covenant. In Langenback v. Mays, 207 Ga. 156, 60 S.E.2d 240 (1950), the seller of a tourist camp who agreed not to use his adjacent acreage for competitive purposes was enjoined from leasing such land for use as a competing tourist camp. See also Slate Co. v. Bikash, 177 N.E.2d 780 (Mass. 1961), discussed in 11 AM. U. L. REV. 209 (1962) On the other hand, it is generally held that there is no breach of a non-competition covenant by a vendor who merely lends money to a person engaged in a competing business. See, *e.g.*, McKeighan Wachter Co. v. Swanson, 138 Wash. 682, 245 Pac. 10 (1926), *aff'd per curiam on rehearing*, 141 Wash. 694, 250 Pac. 353 (1926) *But see* Uptown Food Store, Inc. v. Ginsberg, 123 N.W.2d 59 (Iowa 1963) For a further discussion of this subject see generally Annot., 14 A.L.R.2d 1333 (1950).

120. Upon resale of the business by the vendee, the question arises as to assignment of the covenant to a subsequent purchaser. It is generally held that an express assignment of a covenant to a subsequent purchaser is unnecessary; such covenant will pass as an incident of the business although not *expressly assigned.* See, *e.g.*, Sickles v. Lauman, 185 Iowa 37, 169 N.W 670 (1918); Public Opinion Pub. Co. v. Ransom, 34 S.D. 381, 148 N.W 838 (1914) See generally Annot., 4 A.L.R. 1073 (1918); Comment, *Assignability of Employees' Covenants Not to Compete,* 19 U. CHI. L. REV. 97 (1952); Note, *Assignability of Contracts in Restraint of Trade,* 79 L. J. 219 (1935); 11 U. KAN. L. REV. 405 (1963); 17 U. MIAMI L. REV. 196 (1962). A further question of whether the covenant passes to the buyer without any agreement and *without the buyer's knowledge* of the existence of such covenant was raised in the recent case of Jenson v. Olson, 395 P.2d 465 (Mont. 1964). There, the court held that the buyer must at least have knowledge of the existence of the covenant in order for it to pass. The transfer of good will serves as the vehicle for the transfer of the covenant, but it must be shown that such covenant was intended to be a part of the deal in the subsequent sale. The burden of proving that there is some understanding or agreement that the covenant was to pass as part of the good will rests with the subsequent purchaser.

121. See Styles v. Lyon, 87 Conn. 23, 86 Atl. 564 (1913)

have an indefinite existence and so be amenable to a negative covenant unrestricted as to time.[122]

Permissible Time and Geographical Limitations

As in the cases involving employee covenants, the courts have traditionally made the same distinction between general and partial restraints in dealing with vendor-vendee covenants. However, the new enlightenment on the permissible scope of a restraint dictates that the relevant inquiry is not merely whether the restraint is general or partial, but whether the restraint is *reasonable* in terms of time and space limitations. However, since reasonableness cannot be determined in a vacuum, the courts generally divide the question into three independent categories, *i.e.,* reasonableness as to the vendee, vendor, and public.

Reasonableness as to vendee.—The primary consideration in determining the reasonableness of either a time or space restriction in a vendor-vendee covenant is the nature of the good will to be protected. The point of departure here is that the vendee is entitled to no greater restraint than is reasonably necessary for protection of the good will he has purchased. Thus, with respect to a time limitation, it is generally held that there is no justification for a restraining period in excess of the duration that the good will can reasonably be expected to continue.[123] This is generally understood to mean that the vendee is entitled to no greater time period than is sufficient to establish himself favorably with his predecessor's customers. However, this standard varies greatly with the type of business involved. For example, the vendee of a mercantile enterprise generally requires only a relatively short period of protection. Although the nature of the service relationship in such a business may be highly personal, it is nevertheless relatively simple. Customers of a grocery store, for instance, normally patronize the business at relatively short intervals and therefore it is likely that the vendee can establish an advantageous position with them in a short duration of time. Covenants restraining competi-

122. The question frequently arises as to whether, in the absence of express provision, the transfer of good will ought to be implied. Some courts have held that the sale of a firm's assets raises a presumption that good will has passed. See, *e.g.*, Pitman v. J. C. Pitman & Son, Inc., 324 Mass. 371, 86 N.E.2d 649 (1949). Others are unwilling to imply such a transfer. Haggin v. Derby, 209 Iowa 939, 229 N.W 257 (1930). This raises an interesting question as to whether an implied covenant would stand on even higher footing in some jurisdictions where the courts completely invalidate many express covenant which are not grammatically severable. See, *e.g.*, Beit v. Beit, 135 Conn. 195, 63 A.2d 161 (1948) However, numerous contentious problems are raised by this subject which are beyond the scope of this note. Further discussion on this question can be found in Levin, *Non-Competition Covenants in New England: Part I,* 39 B.U.L. REV. 483, 500 (1959); Note, *Limitations Which Result In Law From The Sale Of The Goodwill Of A Business,* 4 BROOKLYN L. REV. 172 (1934); Note, *The Sale of a Business — Restraints Upon the Vendor's Right to Compete,* 13 W RES. L. REV. 161, 162 (1961).

123. 6-A CORBIN, CONTRACTS § 1390 (1962).

tion for three years[124] and even ten years[125] have been upheld as reasonable in such situations, but a covenant for thirty years has been held unreasonable in light of the nature of the interest involved.[126] The permissible geographical scope of a covenant incident to the sale of a mercantile enterprise is also relatively small. Thus, a covenant entered into upon the sale of a grocery store forbidding competition by the vendor within a one-mile radius from the store conveyed[127] has been held reasonable. Covenants protecting the vendee within the town in which the business was located,[128] or within a ten-mile radius of the business sold[129] have also been upheld. However, a covenant prohibiting competition over an entire county is unreasonable for this type of business.[130]

In manufacturing businesses, the reasonable duration of a covenant is generally longer than in mercantile businesses. Early cases involving manufacturing businesses upheld restrictive covenants which imposed unlimited restrictions as to time where the nature and the surrounding facts justified the conclusion that they were reasonable.[131] The modern trend has been in favor of permitting restraints as wide as necessary;[132] in fact, it has been stated that in certain industries all inquiry into limiting restraints is merely academic.[133] This view is consistent with the conditions in industry today where it is not uncommon to find world-wide markets, the expansion of which is neither limited in time nor space. Moreover, since a substantial part of the consideration upon the transfer of such businesses is based on good will, the courts are not wont to disturb the protection of this valuable asset which has been so handsomely paid for by the vendee.[134] Such broad restrictions have been upheld despite the fact that they have been attacked on the ground of placing too great a hardship on the vendor.[135]

Businesses which involve routes of delivery, such as laundries, bakeries, and dairies, are greatly dependent upon the good will which has

124. Adamowicz v. Iwanicki, 286 Mass. 453, 190 N.E. 711 (1934)

125. Tancreti v. Terino, 118 Vt. 245, 108 A.2d 520 (1954)

126. Beit v. Beit, 135 Conn. 195, 63 A.2d 161 (1948)

127 Adamowicz v. Iwanicki, 286 Mass. 453, 190 N.E. 711 (1934)

128. Milaneseo v. Calvanese, 92 Conn. 641, 103 Atl. 841 (1918).

129. Tancreti v. Terino, 118 Vt. 245, 108 A.2d 520 (1954).

130. Beit v. Beit, 135 Conn. 195, 63 A.2d 161 (1948) See also Note, *Covenants Not to Compete in Kentucky*, 29 KY. L. J. 110 (1940), which discusses the test of reasonableness as to territory.

131. See, *e.g.*, Hall Mfg. Co. v. Western Steel & Iron Works, 227 Fed. 588 (7th Cir. 1915)

132. See generally Annot. 46 A.L.R.2d 119 (1956).

133. See Anchor Elec. Co. v. Hawkes, 171 Mass. 101, 50 N.E. 509 (1898).

134. In United Shoe Mach. Co. v. Kimball, 193 Mass. 351, 79 N.E. 790 (1907), the sale of shoe machinery carried with it the sale of good will which constituted half of the consideration. The covenant not to compete for fifteen years and unlimited as to area was upheld by the court.

135. See General Bronze Corp. v. Schmeling, 208 Wis. 565, 243 N.W 469 (1932)

been established with their customers. Thus, the good will and customer lists of such businesses have been jealously guarded, and the courts have been generous in allowing restraints of substantial duration and geographical scope. Seven to ten years is generally found to be a reasonable duration in such businesses,[136] and in some cases even a perpetual limitation upon the vendor's re-entry into the business has been sustained.[137] The route formerly occupied and run by the vendor is generally the limit as to the extent of spatial restraint,[138] but a few courts take a more liberal view and hold that the territorial scope of a restraint may include territory into which the business might reasonably be expected to expand.[139]

Professional practices, tied up as they are with the personal attributes of the practitioner, possess a substantial amount of good will which is protectible by restrictions of longer duration than businesses of lesser personal relationships.[140] For example, in a medical practice the good will of the business depends to a great extent upon the respect and esteem held by the community for the practitioner. An acquiring practitioner may therefore have an interest in this good reputation longer than the duration of his own engagement in the practice.[141] On the other hand, one undertaking the practice of a profession on behalf of another may, through his own personal and professional competence, thoroughly establish himself with the clients of his predecessor in as little as three years.[142] Also, the permissible geographical scope of a covenant prohibiting competition in such a business is usually larger than a mercantile business. Thus, a covenant prohibiting competition within the town or city in which the practice is located is without question a reasonable restraint. Indeed, a restraint may be extended for distances of ten[143] or even twenty[144] miles beyond the town in which the business is located; however, such extensions are most commonly allowed where the covenant involves an area of sparse population.[145]

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136. See, *e.g.*, North Shore Dye House, Inc. v. Rosenfield, 53 R.I. 279, 166 Atl. 346 (1933).

137. Barry v. Harris, 49 Vt. 392 (1877).

138. See, *e.g.*, Webster v. Buss, 61 N.H. 40 (1881).

139. *Cf.* Knapp v. S. Jarvis Adams Co., 135 Fed. 1008 (6th Cir. 1905).

140. *E.g.*, Webster v. Williams, 62 Ark. 101, 34 S.W 537 (1896), where the court permanently enjoined a physician from practicing where he had expressly agreed to retire upon the sale of his practice. See also Styles v. Lyon, 87 Conn. 23, 86 Atl. 564 (1913); Storer v. Brock, 351 Ill. 643, 184 N.E. 868 (1933).

141. See, *e.g.*, Cook v. Johnson, 47 Conn. 175 (1879).

142. See Wightman v. Wightman, 223 Mass. 398, 111 N.E. 881 (1916).

143. Cook v. Johnson, 47 Conn. 175 (1879).

144. Butler v. Burleson, 16 Vt. 176 (1844)

145. In addition to the above types of business transfer covenants, there is nothing to prevent a negative covenant from being given upon the sale and conveyance of real estate. Covenants incident to the sale of real estate may protect either the grantor or grantee. The grantor may covenant not to use his retained property in competition with the uses to which the

Reasonableness as to vendor—Unlike an employee under a postemployment covenant not to compete, the vendor, under a vendor-vendee covenant, suffers comparatively little economic hardship from his promise not to re-enter business in competition with the vendee. Whereas an employee under a postemployment covenant parts with his only valuable economic asset — specialized proficiency — a vendor of a business or other property under a similar restriction is more likely to have some other source of income; and even if the vendor has no other source of income, he still has the benefit of the capital realized from the sale. Moreover, a vendor is usually fully apprised of the degree of restraint which he has accepted at the time of signing the sales agreement. Therefore, courts generally display a strong reluctance to overturn this important part of the bargain.[146] There are of course exceptions to this rule, but these are cases where the covenant is so broad in terms of duration or geographical extent that to enforce the covenant would be to impose an impossible hardship upon the vendor.[147]

Reasonableness as to public.—Even though a covenant may be reasonable as to time and space between the vendor and vendee, it may nevertheless be found to be injurious to public interest. The primary consideration here is whether the duration of the restraint will tend to create or enhance a local monopoly. By way of example, if in the area covered by the restraint there is little competition by third parties, a covenant unrestricted as to time or space would tend to deprive the public of any possibility of future benefits which usually flow from competition.[148] On the other hand, if it is apparent that the territory over which

buyer intends to put his acquisition. Stevens v. Pillsbury, 57 Vt. 205 (1884). Conversely, the grantee may covenant not to interfere with the grantor's activities through use of the transferred real estate. Lampson Lumber Co. v. Caporale, 140 Conn. 679, 102 A.2d 875 (1954). The problem here, however, in determining the reasonable duration of the restraint is whether such covenants run with the land or are merely personal between the contracting parties. Two views exist on this subject. The Connecticut view holds that a non-competition covenant incident to the transfer of realty runs with the land. Lampson Lumber Co. v. Caporale, *supra*. The Massachusetts view, on the other hand, holds that such covenants do not touch and concern the land to the extent that they can be considered to run along with it. Shade v. M. O'Keefe, Inc., 260 Mass. 180, 156 N.E. 867 (1927); Jenson v. Olson, 395 P.2d 465 (Mont. Sup. Ct. 1964). The latter view would seem to be the better rule. If a restrictive covenant is allowed to run with the land, it might well exceed the duration of the business it was designed to protect. This problem is avoided under the Massachusetts view, and although the protection does not automatically run with the land, the same protection could be afforded by an express assignment of the non-competition covenant. In any event, the permissible duration of a restrictive covenant given incident to the transfer of property should be governed solely by the considerations germane to the protection of good will and not by principles involving the transfer of interests in real property,

146. See Barrows v. McMurtry Mfg. Co., 54 Colo. 432, 131 Pac. 430 (1913); Stephens v. Pahl, 23 Ohio N.P. (n.s.) 377 (1921).

147 See Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N.E. 1048 (1895).

148. See Fairbank, Morse & Co. v. Texas Elec. Serv. Co., 63 F.2d 702 (5th Cir.), *cert. denied*, 290 U.S. 655 (1933). In some cases, however, the absence of competition from the territory is interpreted to mean that the community is best served in that area by a monopoly. See, *e.g.*, Perkins v. Lyman, 9 Mass. 521 (1813)

the restraint is applicable supports many competitors, the public will incur little injury by the vendor's withdrawal from competition for an unlimited time period.[149] There is one area, however, where an unrestricted covenant is in and of itself void as against public policy and that is where it is shown that the sole purpose of the covenant was to create a monopoly. In such cases, the covenant is void *ab initio* without regard as to whether it was reasonable between the parties.[150]

The status of Ohio law with respect to the permissible scope of a covenant ancillary to the sale of a business is at best undeterminable. In the early case of *Lufkin Rule Co. v. Fringeli*,[151] the court held that a covenant which brought within its prohibtion an area equal to or greater than the state Ohio was in general restraint of trade and thus unenforceable. The most recent pronouncement by the Ohio Supreme Court in the *Extine* case is of no help, for little consideration was given to the rule of reasonableness. However, in light of the substantial body of case law in the lower Ohio courts,[152] as well as countless other persuasive authorities outside Ohio, it is questionable whether the outdated *Lufkin* decision remains today as a realistic expression of the Ohio view.[153]

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149. *Cf.* Beit v. Beit, 135 Conn. 195, 63 A.2d 161 (1948) (dissenting opinion). The argument is sometimes raised that a covenant unlimited as to time or space permanently deprives the community of the vendor's specialized skill or talent. However, this argument is generally rejected on the basis that the sale and prohibition against competition does not remove the business from the market, but merely substitutes ownership of it. See, *e.g.*, Burdine v. Brooks, 206 Ga. 12, 55 S.E.2d 605 (1949).

150. Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 561, 41 N.E. 1048, 1050 (1895).

151. 57 Ohio St. 596, 49 N.E. 1030 (1898). In the instant case, the defendant-vendor sold a business that manufactured instruments used in the logging industry. By the terms of the covenant, the parties recognized that while the agreement purported to cover both Ohio and the entire United States, it in fact covered only those areas necessary to the protection of the vendee, *i.e.*, logging areas. Nonetheless, the court refused to enforce the agreement and held it void as to Ohio as well as to the rest of the United States. The court reasoned:

> [I]f the restraint is no more than the purchaser requires as a protection to the enjoyment of what he purchased and for which the vendor received a fair consideration, then it is argued that there is no objection to the contract; because the limits of trade and commerce are now so great, under modern conditions, that a general restraint is not more than is reasonable to afford protection to the purchaser in his business. *This, as we think, is fallacious, as it ignores the interest of the public in the question, which now, more than at any former time, is involved.* *Id.* at 607, 48 N.E. at 1033. (Emphasis added.)

152. See notes 89-96 *supra* and accompanying text. Admittedly, these cases involved employee agreements, and it has been said that cases involving one type of covenant have very little persuasive effect in a dispute involving another type. See note 34 *supra* and accompanying text. But, although there seems to be good reason for rejecting the application of decisions involving business covenants in a dispute involving an employer-employee agreement, the reverse would not seem to be true.

153. See Burndy Corp. v. Cahill, 301 F.2d 448, 449 (8th Cir. 1962), wherein the appellant contended that the district court had "misconceived the applicable laws of Ohio, and that there are valid reasons to believe that the Supreme Court of that State would not now rule that a restrictive covenant such as that in suit entered into by a sales manager of a division of a corporation doing a world-wide business and his employer was void from its inception and a complete nullity."

Severance of Terms

As in employee contracts, some courts have applied the principle of partial validity in determining the extent of enforceability of a vendor-vendee contract. The majority view is that this rule may be applied only if the terms of the contract are grammatically severable.[154] However, the modern trend is to apply the rule of partial enforcement even though the terms of the contract are indivisible.[155]

The Ohio rule with respect to severability of vendor-vendee covenants is unsettled. The last pronouncement by the Ohio Supreme Court on this subject occurred in the *Lufkin* case where it was held that a covenant covering the entire state of Ohio and the rest of the United States was void, notwithstanding the fact that the terms of the covenant were severable. However, in light of the supreme court's recent adoption of the "blue-pencil" test in a case involving a postemployment agreement,[156] there would seem to be no reason why the court would not also apply the same test in a case involving a vendor-vendee type covenant.

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154. *E.g.*, Kroger Co. v. Weingarten, Inc., 380 S.W.2d 145 (Tex. Civ. App. 1964), wherein the court stated: "It is our opinion that under the only reasonable construction of the illegal restrictions [they] are so interdependent and indivisible that they cannot be separated and must fall together." *Id.* at 152. See generally 5 WILLISTON, CONTRACTS § 1659 (1951).

155. See 5 WILLISTON, *op. cit. supra* note 153, at § 1660. An interesting question arises with respect to vendor-vendee covenants which is not generally present in the postemployment covenant situation, *i.e.*, the question of "transactional severability." The two specific aspects of the question are: (1) the effect of subsequent economic and transactional changes on the scope of the restraint; and (2) the concomitant consideration of whether the test of reasonableness should be applied as of the time when the covenant is originally executed, or, on the other hand, as of the time when the terms of the covenant are litigated. With respect to the first aspect, a question may arise as to whether the court should determine reasonableness as of the time of the sale and execution of the covenant, or as of the time when the matter is litigated. In other words, should the court sever terms from the contract which were reasonable at the time of its execution, but which, in light of a subsequent contraction of activity by the vendee in the area covered by the covenant, are no longer reasonable? Under the general rule, it would seem that the crucial time of inquiry as to reasonableness would be the time of original execution. From the vendee's point of view, the fact that business operations have been cut back in the area prohibited by the covenant should not constitute a release of the protection to that extent. The vendee has bargained and paid for the protection as originally executed, and whether the vendee is either unable or unwilling to continue operations in the prohibited area should be immaterial. This is not to suggest, however, that the covenant should stand as executed if it becomes *permanently* impossible for the vendee to utilize the protection afforded by the covenant. An example of this situation might occur in Massachusetts where a realty corporation is limited by statute to an existence of fifty years. MASS. ANN. LAWS Ch. 156, § 7 (1959)

The concept of transactional severability also poses some interesting problems with respect to a covenant that was excessive when executed, but which subsequently becomes reasonable as a result of an unexpected expansion of the newly acquired business. Here again, it is submitted that the crucial time of inquiry should be as of the time the covenant was originally executed. Otherwise, justification of all restraints unreasonable at the time of execution might be attempted by the vendee's contention that someday his business might expand and thus render the scope of the restraint reasonable.

156. Extine v. Williamson Midwest, Inc., 176 Ohio St. 403, 200 N.E.2d 297 (1964).

CONCLUSION

The need for protection of customers and trade secrets was fully recognized by the Middle Ages. During this period business confidences were so jealously guarded by the craft guilds that employees were rigorously prevented from changing jobs.

With a *laissez-faire* industrial society came emphasis on the principle that the individual is entitled to rise in the world by taking the best opportunity he is afforded. Consequently, the courts took a far more lenient position as to an employee's right to change jobs; far more consideration was given to the right of the individual to exploit his talents and pursue his calling without undue hindrance from a prior employer. However, the right of a business organization to keep its secrets or protect its good will has survived, and the fabric of modern commercial life is tightly interwoven with covenants not to disclose or compete. But as both scientific research and industrial organization have become infinitely more complex, so have the questions of what must be considered in determining the enforceability of such covenants. Balanced against society's need that each of its members be free to utilize skills and talents to the fullest extent is the right of business to reasonable legal protection of valuable assets. Without such protection there would be little incentive on the part of business to expend substantial sums of money to find or improve ways of accomplishing commercial and industrial goals. On the other hand, it is hard to ask a man to release his future liberty of action and use of knowledge and skills which are intertwined with his knowledge of business confidences. It is repugnant to the *Weltanschauung* of a modern democratic society to allow individuals to be permanently located in a deplorable kind of intellectual servitude because they knew too much.

The interests involved are as easy to state as they are difficult to protect. There is no absolute solution; each determination must follow the path of least net injustice.

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