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Equity -- 1961 Tennessee Survey (II)

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During the current survey period, each of the higher Tennessee courts has been called upon to exercise its injunctive powers in significant and perplexing types of controversies. The court of appeals for the western section had to decide whether to take the risk of interfering in a bitter dispute between opposing factions of a church which had been torn by interfraternal strife for several years. In the middle section court of appeals an injunction was sought to restrain a store owner from operating his business under the name of a former manager of the store who had left his position and desired to take his name with him. Both the eastern section court of appeals and the supreme court were asked to enforce noncompetition covenants against employees whose employment had been terminated. These decisions involved matters of law and policy which merit extended discussion, while several other decisions are worthy of passing note.

I. Interference in a Church Factional Controversy

The Tennessee courts have frequently reaffirmed the general policy of equity to refrain from interfering in controversies between members or factions of religious organizations. In a succession of decisions the proposition has been established that the civil courts have no jurisdiction over matters of church government, organization and internal affairs, nor over purely religious disputes involving church doctrine, tenets, faith and conscience.[1] Several persuasive reasons are advanced in support of this restrictive policy. Perhaps the most obvious one, though it is not often expressed, is that the civil courts, designed to administer civil justice under secular law, are not well qualified to decide complex and delicate disputes concerning religious doctrine and ecclesiastical practice. Further, the

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1. Mason v. Winstead, 196 Tenn. 268, 265 S.W.2d 561 (1954); Travers v. Abbey, 104 Tenn. 665, 58 S.W. 247 (1900); Bridges v. Wilson, 58 Tenn. 458 (1872); Murrell v. Bentley, 39 Tenn. App. 563, 286 S.W.2d 359 (W.S. 1954).

argument is made that court intervention in such controversies creates the danger of infringement "upon our highly cherished freedom of conscience in religious practices and beliefs . . . ."[2] Finally, it has been pointed out that when a person becomes a member of such a voluntary association he impliedly consents to subject himself to the decisions of the organization in regard to doctrine, discipline and internal government.[3] Therefore, the tribunals of the church itself, constituted and regulated by the church's own laws, have exclusive jurisdiction over controversies of purely ecclesiastical nature.

However, the corollary to this proposition is accepted with equal consensus: since the civil courts are the only agencies with power to adjudicate controversies over property and civil rights, equity has jurisdiction in such cases even though their determination may require the court to pass on ecclesiastical matters.[4] Thus, once it is found that the factional dispute threatens a right of this type, the equity court, in spite of its proclaimed lack of qualifications for the job, must construe religious doctrine, ecclesiastical law and church policy in order to decide which faction of the organization should prevail. Recognizing the incongruity in this situation, a court of appeals has recently cautioned that even in cases in which property rights are affected the court should not interfere "if the basis of the schism is due merely to a disparate interpretation of doctrine. Such matters must be settled by the society itself."[5] Nevertheless, that court accepted jurisdiction to determine the issue of whether the manner in which the majority faction was conducting the affairs of a local church constituted "such a radical departure from the fundamental principles and practices of the church that defendants [the majority faction] can no longer be identified as the true exponents of its doctrine and faith and authentic members of the congregation."[6]

In applying these rules to determine the existence of jurisdiction, the courts have been confronted with the recurring problem of what constitutes

2. Beard v. Francis, 43 Tenn. App. 513, 520, 309 S.W.2d 788, 791 (E.S. 1957).

3. Travers v. Abbey, 104 Tenn. 665, 668-69, 58 S.W. 247, 248 (1900); Nance v. Busby, 91 Tenn. 303, 327, 18 S.W. 874, 880 (1892); Deaderick v. Lampson, 58 Tenn. 523, 535 (1872).

4. Lewis v. Partee, 62 S.W. 328 (Tenn. Ch. App. 1901) and cases cited at notes 1, 3 *supra*. "No other body or judicatory [except the civil court] could give the remedy [of redress for infringement of property rights]. Ecclesiastical courts could only inflict spiritual censures or pass judgment on the moral aspects of the question, or if they should determine and adjudge the right to possession in favor of one party as against the other, they are utterly powerless to enforce their judgments; and such a judgment would at most be but an authoritative expression of opinion, but would settle effectually the rights of no one." Deaderick v. Lampson, *supra* note 3, at 533-34.

5. Beard v. Francis, *supra* note 2, at 520, 309 S.W.2d at 791, quoting from Mount Olive Primitive Baptist Church v. Patrick, 252 Ala. 672, 674, 42 So. 2d 617, 618 (1949).

6. Beard v. Francis, *supra* note 2, at 515, 309 S.W.2d at 789.

a "property or civil right" which supports the intervention of equity. The latter right apparently refers to a church member's "civil liberty to worship undisturbed by threats and violence or from trespasses by those who are not officers and members of the church."[7] Property rights are found in a variety of forms. The right, as members of a church, to use and hold possession of the church building is a property right,[8] as is the right to manage the affairs of the church.[9] Further, when a church holds its property under a trust for certain uses, the interest of the individual members as beneficiaries of the trust is a property right which justifies a court in taking jurisdiction of a suit brought to prevent diversion of the property from the trust purposes.[10] Since church factional disputes, by the time they ripen into civil litigation, frequently involve a contest for control of the church building, these concepts of "property rights" are broad enough to put many cases within the scope of equity's jurisdiction.[11] For this reason, Tennessee chancellors have often found themselves embroiled in church controversies which would challenge the proverbial wisdom of Solomon.[12] In such a situation a court, recognizing that discretion may truly be the better part of valor, may understandably seek a basis for being relieved from the duty to settle the dispute.

In the case of *Bentley v. Shanks*[13] the western section court of appeals invoked a familiar but questionable rule to achieve that end. The three complainants, acting as elders of the church, had hired defendant to be the

7. Lewis v. Partee, *supra* note 4, at 333, quoted with approval in Murrell v. Bentley, *supra* note 1, at 577, 286 S.W.2d at 366.

8. Deaderick v. Lampson, *supra* note 3; Mason v. Winstead, *supra* note 1.

9. Murrell v. Bentley, *supra* note 1; Lewis v. Partee, *supra* note 4.

10. Beard v. Francis, *supra* note 2. "The interest of all such members, while not a pecuniary one, is yet such a direct interest in the property so devoted to a pious use as to entitle them to apply to a Court of Equity to prevent its diversion." Nance v. Busby, *supra* note 3, at 315, 18 S.W. at 877.

11. However, a pastor has no such property right in his salary as will support a suit in equity to prevent his unjustifiable ouster from his position by a dissident faction of the congregation. Travers v. Abbey, *supra* note 1, at 669, 58 S.W. at 248: "He may secure this [right to salary] as a matter of contract with members of his congregation or others, and when such contract exists, it may be enforced in the Courts; but when the pastor relies simply on the duty of his church to support him, if he seeks redress, he must find it at the hands of the church."

12. For example, see Mason v. Winstead, *supra* note 1, in which plaintiffs, some of the trustees of a church, alleged that because of the pastor's abusive language and offensive conduct in the church, a majority of the members voted, at a properly called and conducted congregational meeting, to remove him from his position as pastor; that he had refused to vacate the pulpit, but rather had, without authority, called a secret meeting of a small number of his friends in the congregation and had himself elected pastor of the church for life in violation of the rule of the church that no pastor may serve longer than desired by the congregation; and that he had padlocked the church doors and refused to allow the trustees to enter the building. The pastor, in his answer to the complaint, denied each and every material allegation.

13. 348 S.W.2d 900 (Tenn. App. W.S. 1960).

minister of the church; and, after an extended series of controversies within the congregation, they had attempted to remove him from office. Defendant refused to accept his discharge, contending that complainants had been expelled from membership by a vote of the congregation, and that they therefore had no authority over the affairs of the church. Denying that the congregation had validly revoked their authority or had the power to do so, complainants brought suit in the chancery court to expel defendant from the parsonage and the church building.

Since a property interest was obviously involved, the case was clearly within equity's jurisdiction; and since the decision would turn on the issue of who had the power to discharge a minister, the court was faced with the prospect of passing on matters of church government and internal affairs. However, the chancellor and the court of appeals agreed upon a means of bypassing the ecclesiastical problem presented and of reaching a decision by a less arduous route. The chancellor found as a fact that "a special meeting of the male members of the . . . Church . . . was held, and that the said congregation did withdraw the hand of fellowship from the complainants herein and no longer recognized them as Elders . . . ."[14] It necessarily followed, he ruled, that since complainants were no longer members or officers of the church, they had no right to control the affairs of the church. To the complainants' objection that their expulsion was not valid because the meeting at which the vote was taken was not held in conformity with church law, the chancellor responded that "because such meeting was an ecclesiastical meeting," the court would not inquire into the method by which it was conducted.[15] The court of appeals, in affirming the judgment below, expressly approved this rule, declaring: "If these complainants have been excommunicated from their church in a manner not consistent with the doctrine and procedural rules of the church, their only redress is in the congregation itself and not in the court."[16]

Under this rather curious process of reasoning, equity declares that it will protect a person against deprivation of the property rights he holds as a member of the church, but then allows him to be deprived of those property rights by being wrongfully expelled from the church membership. Having asserted that equity can pass on ecclesiastical matters when a property right is involved, the court then denies that it can pass on the propriety of the expulsion action of the congregation, because that is an ecclesiastical matter. Thus, the Tennessee Supreme Court long ago declared:

> It may be the disciplinary proceeding in this case is an arbitrary one; of that the members of the church must judge, and the Courts cannot. It

14. *Id.* at 902.
15. *Ibid.*
16. *Id.* at 904.

> may be the proceedings were irregularly conducted, measured by the disciplinary standard; that is a question for the ecclesiastical or church revising authority, and not for the Courts.[17]

This refusal to intervene on behalf of the aggrieved member is said to be justified by the fact that a person who voluntarily becomes a member of an association impliedly submits himself to the decisions of the organization, and consents to be bound by them.[18]

However, a more accurate appraisal of the member's intention would seem to be that he consents to abide by the decisions of the organization when they are reached *in accordance with the methods and procedures prescribed by the rules of the association itself;*[19] and, in fact, the Tennessee Supreme Court did adopt such a view in an early case.[20] No reason is suggested why a member would agree to yield to any arbitrary or capricious action the group might at any time see fit to take in regard to terminating his membership, and it is surely unrealistic, if not nonsensical, for a court to advise a member who has just been wrongfully expelled by the majority of the other members that if his exclusion was in violation of the rules of the organization, he can look only to the organization for redress.[21] Obviously, no relief is likely to be forthcoming from the very persons who have just committed the wrong of which he is complaining.

While it would no doubt be unwise for the courts to attempt to decide the merits of intra-organization controversies, it would seem to be within both the function and spirit of equity for the court to protect a member against being expelled except by means conforming to the laws which the

17. Travers v. Abbey, *supra* note 1, at 668-69, 58 S.W. at 248.

18. Bentley v. Shanks, *supra* note 13, at 904; Nance v. Busby, *supra* note 3, at 327, 18 S.W. at 880.

19. Medical Soc'y v. Walker, 245 Ala. 135, 139, 16 So. 2d 321, 325 (1944) ("[I]n every case of the disfranchisement of a corporator . . . the courts will entertain jurisdiction to restore him . . . where the proceedings by which [his disfranchisement] has been attempted are irregular, according to, or as tested by the charter or by-laws of the corporation. But no inquiry will be made into the merits of what has been regularly done by due course of proceeding."); Lawson v. Hewel, 118 Cal. 613, 50 Pac. 763, 764 (1897) ("Whether the rules have been violated, or whether a member has been guilty of conduct which authorizes an investigation by the association, or the imposition of the penalty prescribed by it, is eminently fit for the association itself to determine; and, *if the investigation is in accordance with its rules,* the party charged has no ground of complaint, since it is but carrying into effect the agreement he made when he became a member of the association." (Emphasis added.)); See Harris v. National Union of Marine Cooks, 98 Cal. App. 2d 733, 221 P.2d 136 (Dist. Ct. App. 1950); Hatfield v. DeLong, 156 Ind. 207, 59 N.E. 483 (1901); Jones v. State, 28 Neb. 495, 44 N.W. 658 (1890); Rodier v. Huddell, 232 App. Div. 531, 250 N.Y. Supp. 336 (1931).

20. Deaderick v. Lampson, *supra* note 3, at 535: "They have, by voluntarily connecting themselves with it [the church], bound themselves to abide by the decisions of its tribunals, in accordance with its established laws and usages."

21. Bentley v. Shanks, *supra* note 13, at 904.

organization has itself adopted to control the expulsion process.[22]

The existence of jurisdiction to decide a case of this kind can readily be established on the basis of the historic and fundamental ground for equity jurisdiction—the inadequacy of the remedy at law.[23] Courts of law have no means of restoring a person to membership; and money damages for wrongful expulsion, if recoverable at all, would generally not compensate the expelled member for the primarily nonpecuniary loss to be sustained by being excluded from the organization, especially from a church. The exercise of this jurisdiction seems to be justified, and even required, in order that arbitrary action may be prevented and that unconscionable hardship be avoided. Surely equity need not be reluctant to act on behalf of fairness and justice. Without purporting to determine whether there was good cause for the expulsion, the court should at least assure the member that he will receive the procedural due process called for by the organization's own laws.[24]

II. Protection Against Unauthorized Use of a Name

If the *Bentley* decision represents an unfortunate limitation of equity's power, another recent case demonstrates the more characteristic tendency of Tennessee chancery courts to reject artificial restrictions on their traditional function to grant relief where other remedies are inadequate. In *McDonald v. Julian*,[25] complainant, Julian, sued to enjoin the use of his

22. See cases cited at note 19 *supra*. Many decisions go beyond this point, and hold that, regardless of the rules of the association, a member cannot be validly expelled unless he has had a fair hearing with adequate notice to allow him to appear and defend against the charges. Ellis v. AFL, 48 Cal. App. 2d 440, 120 P.2d 79 (Dist. Ct. App. 1941); Gardner v. Newbert, 74 Ind. App. 183, 128 N.E. 704 (1920); Evans v. Brown, 134 Md. 519, 107 Atl. 535 (1919); Peters v. Minnesota Dep't of Ladies of Grand Army of Republic, Inc., 239 Minn. 133, 58 N.W.2d 58 (1953); Jones v. State, *supra* note 19; Gilmore v. Palmer, 109 Misc. 552, 179 N.Y. Supp. 1 (Sup. Ct. 1919).

23. Hatfield v. DeLong, *supra* note 19, at 212, 59 N.E. at 485 ("As an unlawful expulsion would affect appellant's standing in his community, and accomplish an injury for which there is no adequate remedy at law, injunction is the proper remedy"); Walsh, Equity 275-78 (1930); DeFuniak, Handbook of Modern Equity 144 (2d ed. 1956).

24. Medical Soc'y v. Walker, *supra* note 19; Hatfield v. DeLong, *supra* note 19, at 211, 59 N.E. at 484 ("This court will have nothing to do with the charge of a spiritual offense. That is an ecclesiastical question purely. But the inquiry whether or not the tribunal has been organized in conformity with the constitution of the church is not ecclesiastical. It is the same question, and that only, that may arise with respect to any voluntary association, such as fraternal orders and social clubs. The assertion of jurisdiction in such a case is not an interference with the control of the society over its own members; but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its own organic law."); McClintock, Equity 436 (2d ed. 1948); Note, 13 Wash. & Lee L. Rev. 216 (1956).

25. 348 S.W.2d 749 (Tenn. App. M.S. 1961).

name by defendants in connection with the operation of their retail shoe store. He had been employed by defendants to manage the store, and because he already had an established reputation in the area as a shoe merchant, he had agreed that the business should be called "Julian's Shoe Store." However, it had been further agreed that his name would be used only as long as he continued to manage the store. After some ten months, Julian became dissatisfied with his association with defendants because they were diverting the income from the business to make investments in other ventures while creditors of the store were threatening to sue Julian to obtain payment of their claims. He therefore withdrew from the business and demanded that defendants cease to use his name in the operation of the store. Upon their refusal to comply, Julian sought injunctive relief, which the chancellor granted. The court of appeals affirmed, finding that complainant's good name would be damaged by its further use in defendant's business, and that his remedy at law was inadequate because there was no means of calculating the amount of monetary damage he would suffer from the continuation of this wrong. In support of the decision, the court declared:

> It is the rule that while an individual ordinarily has no exclusive right to the use of his own name, he is entitled to the protection of the law with respect to the use of that name in cases involving its use in trade or business, or where special injury to character, reputation, or property is involved . . . .[26]

Though the court did not indicate that it was deciding a case of first impression in this state, no Tennessee decision passing on the issue here presented was cited as authority, and no such case has been found by this writer. Nevertheless, the decision itself is not especially noteworthy, as equity regularly intervenes to protect a person against the unauthorized use of his name by another in such a way as to infringe on a property right.[27] Complainant could readily establish injury to a property right in two respects. First, because he was well known in the area as a highly reputable shoe salesman, his name had substantial commercial value for advertising purposes, and defendants' wrongful action was damaging his good name and so reducing its value for commercial use.[28] Second, the

26. *Id.* at 750.

27. See Bartholomew v. Workman, 197 Okla. 267, 269, 169 P.2d 1012, 1014 (1946); 65 C.J.S. *Names* § 13 (1950); McCLINTOCK, *op. cit. supra* note 24, at 396 ("[E]quity refused to restrict the term 'property' to a technical meaning, and it is now almost uniformly held that any right claimed by the plaintiff which has an economic value may be protected by equity if its existence as a right is recognized at all by law."); 1 GIBSON, SUITS IN CHANCERY § 65, at 77 (5th ed. 1955) (The term property right, as used in the rule that equity protects property rights, "includes everything that is the subject of exclusive individual ownership . . . .").

28. See U. S. Life Ins. Co. v. Hamilton, 238 S.W.2d 289 (Tex. Civ. App. 1951) (cause of action for damages was recognized, though no substantial damages were found to have heen proved); DEFUNIAK, *op. cit supra* note 28, at 134; McCLINTOCK,

continued operation of the store under complainant's name was in violation of the terms of his employment contract with defendants, and equity may treat a right founded on a contract as a property right, even if it would not be so regarded in the absence of a contract.[29]

Even if the *McDonald* case is the first of its kind in Tennessee, the main significance of the decision may rest on what the court said rather than what it did. The rule laid down goes beyond the protection of property rights, and asserts that a person is entitled to protection against the wrongful use of his name when the resulting injury is to his character or reputation. Thus, the court seems to have declared that equity will intervene to protect purely personal rights. While this is an eminently sensible view and one which is supported by textwriters,[30] most American courts have persisted in following, in theory at least, the traditional rule of *Gee v. Pritchard* that equity has no jurisdiction over cases involving merely personal interests, and can only intervene where a property interest is threatened.[31] However, it has been pointed out that this rule, though frequently propounded, is very commonly circumvented by the expedient of finding tenuous "property rights" in cases in which the real purpose is to protect personal interests.[32]

It seems clear that personal rights recognized by the law should be legally protected, and it is admitted that the remedy at law for violation of such a right is usually inadequate because the amount of monetary damages are not readily calculable and because no amount of money can

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op. cit. supra note 24, at 433 ("In these days when extensive advertising has given great commercial value to the use of names of people who are known to the public for any reason, that right [to the protection of the advertising value of the name from appropriation without authority] would seem to be clearly enough a property right to warrant equitable protection . . . ."); Note, 28 HARV. L. REV. 689 (1915).

29. McCreery v. Miller's Grocerteria Co., 99 Colo. 499, 64 P.2d 803 (1937); MCCLINTOCK, *op. cit. supra* note 24, at 411.

30. See DEFUNIAK, *op. cit. supra* note 23, § 56; WALSH, *op. cit. supra* note 23, at 270 (The rule that equity will not protect purely personal rights is declared to be "a mere prejudice based on a haphazard development of the cases rather than on any controlling principle."). See also note 33 *infra.*

31. 2 Swans. 403, 36 Eng. Rep. 670 (Ch. 1818); Blanton v. Blanton, 163 Ga. 361, 136 S.E. 141 (1926); Chappell v. Stewart, 82 Md. 323, 33 Atl. 542 (1896).

32. See, *e.g.*, Reed v. Carter, 268 Ky. 1, 103 S.W.2d 663 (1937) (property right found in contract between sisters that one sister should be allowed to visit their mother who lived in the other sister's home); Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 Atl. 392 (Ch. 1907) (property interest found in possibility of plaintiff's being held liable to third parties who might be injured by use of defendant's product sold under label on which plaintiff's name and picture had been placed without authority); Annot., 37 L.R.A. 783 (1897) (The rule that equity will not protect personal rights, if "taken literally and in its full meaning would make the system of equity suitable only to a semi-savage society which has much respect for property but little for human life. Our equity jurisprudence does not quite deserve so severe a reproach. It does, indeed, do much for the protection of personal rights, although it has not been willing to acknowledge the fact but has persisted in declaring the contrary.").

actually compensate for the deprivation of most such rights. Therefore, equity's intervention to prevent wrongdoing which infringes personal rights is justified, and the courts should take jurisdiction and grant injunctive relief in cases in which the injunction could be effectively enforced.[33] It is to be hoped that the rule adopted in the *McDonald* case can be taken as an indication that the property right requirement has been relaxed in this state, and that the Tennessee chancery courts are free to intervene to prevent violations of purely personal rights.

III. ENFORCEMENT OF EMPLOYEE'S NONCOMPETITION COVENANT

In two recent decisions the Tennessee Supreme Court and the eastern section court of appeals were required to pass on the validity of covenants in employment contracts whereby an employee agreed not to enter into a competing business for a period of time after the termination of his employment. As noted in the 1961 equity survey, the higher Tennessee courts have apparently never held a noncompetition covenant in an employment contract or sale-of-a-business contract invalid;[34] and this record was maintained inviolate in the current decisions.

The facts of the two cases were basically the same, and the courts treated them as presenting the same issues. In *Di-Deeland, Inc. v. Colvin*,[35] an employee of a diaper laundry business, whose employment contract prohibited him from entering a competing business within forty-five miles of his employer and within six months after leaving the employment voluntarily or involuntarily, had in fact entered such a business within the proscribed period, and his former employer sought injunctive relief and damages for the breach of contract.[36] In *Federated Mutual Implement & Hardware Insurance Co. v. Anderson*,[37] a salaried insurance salesman had covenanted not to engage in the fire, casualty, and accident and health insurance business, directly or indirectly, in his assigned territory (six counties) for two years after the termination, voluntarily or involuntarily,

33. See Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 Atl. 97, 100 (Ct. Err. & App. 1907); Hawks v. Yancy, 265 S.W. 233, 237 (Tex. Civ. App. 1924); MCCLINTOCK, *op. cit. supra* note 24, at 427-28; POMEROY, EQUITY JURISPRUDENCE § 1338 (5th ed. 1941); Bennett, *Injunctive Protection of Personal Interests—A Factual Approach*, 1 LA. L. REV. 665 (1939).

34. Smedley, *Equity—1961 Tennessee Survey*, 14 VAND. L. REV. 1281 (1961).

35. 347 S.W.2d 483 (Tenn. 1961).

36. The opinion does not state what the nature of defendant's duties were, though the inference is that he was a laundry truck driver. Further, the opinion does not state whether his employment with plaintiff was terminated by him voluntarily or by discharge, for cause or without cause; nor does it indicate whether the competing activity consisted of employment with another diaper laundry or operation of his own business. Apparently the court felt that none of these factors was of significance in the decision of the case.

37. 351 S.W.2d 411 (Tenn. App. E.S. 1961).

of his employment with the plaintiff insurance company. After having been discharged by plaintiff, apparently because of his failure to sell enough insurance, he had immediately entered into the general insurance business in the same area, and plaintiff sought injunctive relief and damages.

In each case, the chancellor found a basis for refusing to grant relief: in the *Colvin* case, because the covenant in the employment contract was held to be void for lack of mutuality in that the employee could be discharged without cause at any time and had received no consideration for the contract other than payment for services rendered; in the *Anderson* case, because the last contract executed by the parties before defendant's discharge was held not to have included the noncompetition term which had been written into their previous contracts. On appeal, however, these findings were overruled, the decrees were reversed, and the noncompetition covenants were held to have been enforceable by injunction, and by damages awards if damages could be proved.[38]

Both the upper courts viewed the matter of the enforceability of the covenants as turning on the issue of whether the restriction thereby imposed on the employees were reasonable as to time and space.[39] Deciding that the length of the time and the scope of the area in which the employees were prohibited from entering competing businesses were reasonably necessary to protect the employer's business interests, the courts concluded that the covenants were valid and should be enforced. In this respect, these decisions follow the pattern of earlier Tennessee cases[40] and of a multitude of cases in other jurisdictions.[41]

38. In the *Colvin* case, the chancellor refused to restrain defendant from engaging in a competing business pending plaintiff's appeal of the adverse decision, and the six months period designated in the contract had presumably passed before the case was decided by the supreme court. Therefore, the latter court's decision was limited to holding the contract to be valid, and the case was remanded for taking proof as to the amount of damages the employer had suffered from the employee's breach of contract. However, the opinion indicates the court's conclusion that the noncompetition covenant should have been enforced by injunction.

39. Di-Deeland, Inc. v. Colvin, *supra* note 35, at 484: "Basically whether or not such a contract is valid and enforceable depends upon whether or not it is reasonable under the particular circumstances. This question, the rule of reasonableness applied to these contracts, applies equally to territorial limits, time, consideration, etc." See Federated Mut. Implement & Hardware Ins. Co. v. Anderson, *supra* note 37, at 415.

40. Arkansas Dailies, Inc. v. Dan, 36 Tenn. App. 663, 260 S.W.2d 200 (W.S. 1953); Matthews v. Barnes, 155 Tenn. 110, 293 S.W. 993 (1926); Turner v. Abbott, 116 Tenn. 718, 94 S.W. 64 (1906); see Jackson v. Byrnes, 103 Tenn. 698, 34 S.W. 984 (1900) (suit for damages for breach of noncompetition covenant). See generally Smedley, *supra* note 34.

41. Welcome Wagon, Inc. v. Morris, 224 F.2d 693 (4th Cir. 1955); Dow v. Gotch, 113 Neb. 60, 201 N.W. 655 (1924); Chas S. Wood & Co. v. Kane, 42 N.J. Super. 122, 125 A.2d 872 (Super. Ct. 1956); Plunkett Chem. Co. v. Reeve, 373 Pa. 513, 95 A.2d 925 (1953); Meissel v. Finley, 198 Va. 577, 95 S.E. 186 (1956). See Annots., 9 A.L.R. 1456, 1467 (1920); 98 A.L.R. 963, 966 (1935).

While noncompetition covenants, fairly entered into, upon actual substantial consideration running to the employee, and including only restraints in fact necessary to protect the employer from material prejudice should be enforced, it appears that courts often become over-zealous in giving effect to these agreements without devoting enough attention to their specific terms or the circumstances under which they were executed.

In establishing the need for protection of the employer, the opinions in cases granting relief regularly make reference to trade secrets, specialized training and unique experience obtained by the employee during his employment.[42] But one may wonder whether a diaper laundry truck driver or an ordinary fire and casualty insurance salesman actually derives any such advantages from this employment. They do, of course, learn the names of customers and policyholders, and might use this knowledge on behalf of a competitor, to the detriment of their former employer's business. However, it may be questioned whether information as to who may be potential purchasers of diaper laundry service or fire and casualty insurance is of such secretive nature or so difficult to obtain that the possessor thereof needs any special protection by the law.[43] Even if he should be protected, this can be done without prohibiting his former employee from engaging in a competing business in any connection and to any extent; the injunction could be limited to prohibit merely the disclosure of the names of the customers or policyholders of the former employer.[44] Restraint which goes beyond that point is not needed to protect the employer, and serves only to place unwarranted and oppressive restrictions on the employee's efforts to earn a livelihood. The motive of an employer who inserts a noncompetition covenant in the contract of an

42. See Annot., 43 A.L.R.2d 94, 185 (1955).

43. In McCumber v. Federated Mut. Implement & Hardware Ins. Co., 230 Ark. 13, 320 S.W.2d 637 (1959), the same insurance company was seeking to enforce the same noncompetition covenant as in the Anderson case, *supra* note 37, against another former local agent who had voluntarily left the company's employment and entered a competing business. The Arkansas court denied relief, finding that under the circumstances in which defendant had served as plaintiff's agent he had obtained no trade secrets of any kind and that the restraint imposed by the covenant was unreasonable because plaintiff needed no protection against defendant's competition. The opinion indicates that the court made its own analysis of the employment situation and of the employer's need for protection, rather than assuming, on the basis of the allegations of the complaint, that plaintiff was entitled to relief. In Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32 (1935) the court followed the same procedure in denying an injunction against a laundry truck driver. See WILLISTON, CONTRACTS § 1646, at 4625 (rev. ed. 1937); Simpson, *Equity*, 1946 ANNUAL SURVEY OF AMERICAN LAW 839.

44. This action was taken in Schmidl v. Central Laundry & Supply Co., 13 N.Y.S.2d 817 (Sup. Ct. 1939), in which the court found that the covenant prohibiting the employee from engaging in the laundry business in any connection was too broad to merit enforcement because such a restriction was not reasonably necessary to protect the employer's business. See also Sternberg v. O'Brien, 48 N.J. Eq. 370, 22 Atl. 348 (Ch. 1891).

employee in a commonplace position may be suspected to be, not to provide protection against subsequent competition, but rather to coerce the employee to continue in his job rather than accept a better position elsewhere.[45]

It may be argued that such a covenant, though unfair in its purpose and oppressive in its effect, should be enforced because the employee has voluntarily agreed to it as a condition to his being employed. However, while his agreement to the restriction may be voluntary in a technical legal sense, equity should view the case more realistically by taking into consideration the inequality of the bargaining power of the parties which enables the employer to coerce the employee to acquiesce in the inclusion of the covenant in the contract, on pain of losing much-needed employment.[46] The danger of such unfair action by an employer is greatest in the case of an unskilled worker, who has the least ability to resist the pressure, who will be most seriously prejudiced if the restriction is enforced against him, and yet against whose competition the employer least needs protection.

Reflecting further the oppressive nature of such covenants is the fact that very commouly the employee receives no actual consideration for the post-employment restriction imposed on him. It may be contended that a part of the salary which the employee receives under the contract is paid as consideration for the employee's promise not to enter a competing business; but in fact there is rarely any indication that the salary is regarded by the parties as anything but payment for the services rendered on the job,[47] or that the salary for the same work would have been less if the covenant had not been included in the contract. Consideration is sometimes found, nominally at least, in the employer's promise to provide employment; but in the typical case of an unskilled worker, the employment is not for any set period, and the employee may be discharged at

45. Menter Co. v. Brock, 147 Minn. 407, 180 N.W. 553, 555 (1920): "It may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns." See also Clark Paper & Mfg. Co. v. Stenacher, 236 N.Y. 312, 140 N.E. 708, 711 (1923).

46. Love v. Miami Laundry Co., *supra* note 43, at 36: "But those courts [enforcing covenants against employees indiscriminately] . . . have lost sight of the fact that such contracts are usually dictated by the strong and required thereby to be executed by the weak; that the terms of the contracts are dietated by the employer and required to be executed by the employee who must have employment to provide the necessities of life for himself and his family . . . ." See also Horn Pond Ice Co. v. Pearson, 267 Mass. 256, 166 N.E. 640 (1929).

47. Love v. Miami Laundry Co., *supra* note 43, at 36; May v. Lee, 28 S.W.2d 202, 204 (Tex. Civ. App. 1930). Of course, this is not always true. Occasionally, a case arises in which the evidence shows that the employee's compensation was set with specific attention to the fact that he had restricted his future employment opportunities. See Dow v. Gotch, *supra* note 41; Turner v. Abbott, *supra* note 40.

any time, without cause.[48] The lack of consideration for the noncompetition promise is especially obvious in the common case in which the employee is required to accept the inclusion of a covenant in his contract after he has already been employed for some time, and there is no change in his salary, his duties, or his tenure. A number of courts have denied enforcement of covenants executed under such circumstances,[49] and their decisions are so well-reasoned as to give rise to the hope that they will serve as a model for the disposition of cases yet to come.

The situation in the *Colvin* case illustrates most of the evils of the indiscriminate use of noncompetition covenants in employment contracts. First, the employee was a highly unskilled worker—a diaper laundry truck driver who could hardly have brought any unique talents or technical knowledge to the job nor have gained any from it which would have been of any special use to a subsequent employer in the same field. Second, though use of the first employer's customer list to solicit business for a competitor was the only way the employee could materially prejudice the employer after leaving his service, the covenant prohibited him not only from soliciting the old customers but also from going into a competing business in any connection and from divulging to others "the secrets or experience or things of that kind that he had learned" while working for the first employer.[50] Third, defendant had already been working at this job for plaintiff for several years without any noncompetition agreement when he was apparently confronted abruptly with the alternatives of losing his job or of acquiescing in the addition of the covenant. Having depended on this occupation to earn a living during the preceding fourteen years, he was obviously not in a position to resist the demand of his employer, and his acceptance of the covenant can hardly be said to have been "voluntary" in any realistic sense.[51] Fourth, there was no indication that defendant actually received any increase in pay, reduction in working

48. Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543, 548 (1944): "A consideration cannot be constituted out of something that is given and taken in the same breath—of an employment which need not last longer than the ink is dry upon the signature of the employee, and where the performance of the promise is under the definite threat of discharge. Unemployment at a future time is disturbing—its immediacy is formidable. The choice may be expected." See Love v. Miami Laundry Co., *supra* note 43; Schneller v. Hayes, 176 Wash. 115, 28 P.2d 273 (1934).

49. McCombs v. McClelland, 223 Ore. 475, 354 P.2d 311, 315 (1960) ("We hold that where one already employed is induced to enter into a subsequent agreement containing a restrictive covenant as to other employment, such agreement to be enforceable must be supported by a promise of continued employment, express or implied, or some other good consideration."); Horn Pond Ice Co. v. Pearson, *supra* note 46; Kadis v. Britt, *supra* note 48; Schneller v. Hayes, *supra* note 48.

50. Di-Deeland v. Colvin, *supra* note 35, at 484. The court did not state what valuable secrets or special experience or "things of that kind" a diaper laundry truck driver might be expected to acquire in such a menial job.

51. See Kadis v. Britt, *supra* note 48: "Unemployment at a future time is disturbing —its immediacy is formidable. The choice may be expected."

hours, or any other form of consideration for agreeing to the future restriction on his right to work in a competing business. The covenant apparently included the stock phrases declaring the consideration to lie in his being employed by plaintiff, and in the compensation received for that employment and "other good and valuable consideration";[52] but in view of the fact that he was already employed, that he had apparently already been receiving the same compensation for his services, and that no "other" consideration of any type whatsoever was shown or suggested to have actually been given, these legal jingles do nothing more than reveal the one-sided character of the covenant. The chancellor seems to have recognized the true situation, for he held the covenant invalid for lack of consideration. But the supreme court, seemingly without requiring plaintiff to demonstrate that any real benefit of any kind whatsoever was actually given to defendant for his promise, overruled the chancellor's finding after devoting only a part of one sentence of the opinion to this issue.[53] Finally, the ultimate arrogance of the employer in imposing the covenant on his employees is disclosed in the fact that defendant's employment contract could be terminated by either party on two week's notice. This provision is significant in two respects: it shows that defendant did not receive consideration for the noncompetition covenant in the form of a promise of continued employment, as plaintiff still had the right to discharge him at any time; and it shows the extreme unfairness of the total effect of the contract, which vested plaintiff with the power to discharge defendant, without cause, two weeks after the covenant was executed, and thereafter prevent him from entering any competing business within an area of some 6,300 square miles during the next half-year. Surely, equity should not countenance such a contract.[54]

An indication that courts may sometimes fail to analyze sufficiently the

52. Di-Deeland v. Colvin, *supra* note 35, at 484.

53. Di-Deeland v. Colvin, *supra* note 35, at 485-86: "After thoroughly considering the matter we are convinced that there is sufficient consideration to support this contract . . . ." The opinion contains no discussion of the consideration issue, as the court's entire attention seems to have been diverted to the matter of whether the restrictions on defendant's future employment were reasonable in regard to duration and territory.

54. See Herreshoff v. Boutineau, 17 R.I. 3, 19 Atl. 712, 713 (1890): "Covenantees desiring the maximum of protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp at too much, and so lose all."

If the employer in the *Colvin* case had attempted to assert his arbitrary powers, the court would no doubt have exercised the traditional discretion of equity to refuse to support an unconscionable action. And it is to be noted that the supreme court's decision did not enjoin defendant from entering a competing business, but merely sustained plaintiff's cause of action for damages. However, the court showed no concern over the unfairness of the employment contract, and would apparently have supported the employer's request for injunctive relief if that question had still been open.

problem of enforcement of employee noncompetition covenants is seen in the fact that the decisions granting relief to employers often rely for authority on decisions which have enforced the noncompetition covenant of the vendor in a sale-of-a-business contract.[55] While the two situations are similar in many respects, there are also significant differences which suggest that a vendor should be held more strictly to his covenant than should an employee.[56] In the sale of a going business, the good will of the business is usually an important part of the value which the vendee receives and for which he pays the purchase price. If the vendor then enters a competing business, he is likely to attract his old customers away from his vendee, thereby destroying a substantial part of that which he has sold to his vendee and for which he has received a separate payment.[57] On the other hand, the good-will factor in the ordinary employment contract is less important. The compensation paid by the employer is generally

55. In Di-Deeland, Inc. v. Colvin, *supra* note 35, at 484-85, the Tennessee Supreme Court quoted, in support of its decision that the employee's covenant was enforceable, a passage from an *American Law Reports* annotatiou which specifically deals with cases involving noncompetition covenants in contracts for the sale of a business. The court then concluded: "This reasoning applies equally to an employee who enters into such eontract in consideration of his employment and his knowledge of the work that he is doing for the employer." 347 S.W.2d at 485. Various other courts have sometimes taken the same position. See Annot., 43 A.L.R.2d 94, 110 (1955).

56. Samuel Stores, Inc., v. Abrams, 94 Conn. 248, 108 Atl. 541, 543 (1919): "Under the law, restrictive stipulations in agreements between employer and employce are not viewed with the same indulgence as sueh stipulations betwcen a vendor and a vendee of a business and its good will.

"In the latter case, the restrictions add to the value of what the vendor wishes to sell, and also add to the value of what the vendee purchases. In such cases also, the parties are presumably more nearly on a parity in ability to negotiate than is the case in the negotiation of agreements betwcen employer and employee.

"In a restrictive covenant between a vendor of a business and the vendee, 'a large scope of freedom of contract and a correspondingly large restraint of trade' is allowable. In a restrictive covenant between employer and employee on the other hand, there is 'small scope for the restraint of the right to labor and trade and a correspondingly small freedom of contract'." See Menter Co. v. Brock, *supra* note 45; Schmidl v. Central Laundry & Supply Co., *supra* note 44; Herreshoff v. Boutineau, *supra* note 54; May v. Lee, *supra* note 47; Betten Co. v. Brauman, 218 Wis. 203, 260 N.W. 456 (1935); Allen Mfg. Co. v. Murphy, 23 Ont. L. Rep. 467 (1911); Rakestraw v. Lanier, 104 Ga. 188, 30 S.E. 735 (1898); Note, 19 TEXAS L. REV. 352 (1941); RESTATEMENT, CONTRACTS § 515, comment *b* (1932); Annot., 43 A.L.R.2d 94, 111 (1955).

57. Mattis v. Lally, 138 Conn. 51, 82 A.2d 155, 156 (1951) ("Good will in the sense here used means an established business at a given place with the patronage that attaches to the name and the loeation. It is the probability that old customers will resort to the old place . . . . Having paid for 'good will' the plaintiff was entitled to have reasonable limitation placed upon the activity of the defendant to protect his purchase."); Menter Co. v. Brock, *supra* note 45; Baird v. Smith, 128 Tenn. 410, 161 S.W. 492 (1913); Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S.W. 1104 (1905) (the sale contract specified that $28,537 was paid for merchandise and fixtures, and $3,000 for the good will and the vendor's promise not to enter a competing business); Byers v. Trans-Pecos Abstract Co., 18 S.W.2d 1096 (Tex. Civ. App. 1929); WILLISTON, CONTRACTS § 1641 (rev. ed. 1937).

regarded as being for specific services rendered, rather than for the creation of good will for the business. A further distinction arises from the fact that a prospective vendor of a business is usually in position to choose freely whether he is willing to restrict his future business activities as a term of the sale;[58] he may either refuse so to restrict himself and wait for an opportunity to sell to another vendee, or he may demand greater compensation for the business because of the restriction he assumes. The employee, on the contrary, often is in such immediate need of work that he is in no position to bargain with his employer in this manner—and this is especially true of unskilled workers and employees rendering menial services.[59]

While the noncompetition covenant clearly has a legitimate function, and should be enforced in situations in which the employer actually needs its protection and the employee has been fairly compensated for assuming the restriction on his future employment, a reading of many opinions creates the impression that the courts have not been sufficiently discriminating in dealing with this problem. The policy that such covenants should be "cautiously considered, carefully scrutinized, looked upon with disfavor, strictly interpreted and reluctantly upheld,"[60] though frequently declared, may be too seldom applied.

IV. Jurisdiction of the Chancery Courts

In three recent decisions which involved no highly controversial issues or novel rulings, the Supreme Court of Tennessee further clarified the scope of the jurisdiction of the chancery courts.

In *National Burial Insurance Co. v. Evans*,[61] the insurer had filed a bill in chancery court to enjoin the prosecution of an action which had already been brought in the circuit court by the insured to collect benefits under two accident policies; cancellation of the policies on the ground of fraud was also sought. Relief was denied because the insurer was found to have an adequate remedy in the law court. Since there was already pending a law action in which the insurer could raise any defenses to the insured's claim that could be asserted in an equity suit, the court saw no justification for the interference of equity.

Because Tennessee chancery courts are vested, by statute, with jurisdiction over many types of legal causes of action, these courts are not generally deprived of jurisdiction by the existence of an adequate remedy at law in

58. Samuel Stores, Inc. v. Abrams, *supra* note 56.

59. See cases cited at note 46 *supra*.

60. Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 693 (Ohio C.P. 1952). See also Love v. Miami Laundry Co., *supra* note 43, at 34; Sternberg v. O'Brien, *supra* note 44, at 351; Kadis v. Britt, *supra* note 48, at 546; Byers v. Trans-Pecos Abstract Co., *supra* note 57, at 1098; Annot., 9 A.L.R. 1456, 1468 (1920).

61. 347 S.W.2d 34 (Tenn. 1961).

a case.[62] However, even under the statutory system providing concurrent jurisdiction of the law and equity courts in many cases, the chancellors have concluded, in accord with the *Evans* case, that they should not accept jurisdiction of a controversy which is already pending in a circuit court.[63] If, due to any circumstances peculiar to the specific case, the party seeking relief in equity can show that he cannot obtain complete protection of his rights in the circuit court, the chancery court may interfere even where a law action is pending.[64] In the *Evans* case, the insurer sought to qualify for equitable relief by asking for cancellation of the policy for fraud so that it could not be used by the insured as a basis for future claims for benefits. Since this type of relief is beyond the scope of legal remedies, the chancery court might well have taken jurisdiction on that basis. However, the court found that in the specific situation in issue, no special circumstances appeared which pointed to actual need of cancellation of the policy to protect the insurer. The refusal of equity to intervene leaves open the possibility that the insurer will be forced to return to the chancery court again later for protection against harassment by the insured, if he persists in bringing law actions on the policy even after the circuit court has once declared the policy invalid. Nevertheless, the remoteness of that possibility may have justified the reluctance of the chancellor to take jurisdiction when to do so would interfere with the power of the law court to try the case.

Two other decisions sustain the jurisdiction of the chancery court in uncertain areas. In *Evans v. Wheeler*,[65] it was held that while these courts ordinarily have no jurisdiction of eminent domain proceedings, yet when a complainant files suit for injunctive relief, the chancellor, though finding no injunction should issue, could retain jurisdiction for the purpose of awarding damages in so far as the suit evolved into an eminent domain proceeding. This result seems highly sensible, as it relieves the parties of the burden of bringing another action to resolve the controversy.[66] It may be hoped that the decision also represents an inclination of the court to repudiate the attitude taken in several earlier cases which strictly limited the power of the equity courts to award damages as substituted

62. See generally Smedley, *Equity—1961 Tennessee Survey*, 14 VAND. L. REV. 1281, 1293 (1961).

63. Robinson v. Easter, 344 S.W.2d 365 (Tenn. 1961); Georgia Ind. Realty Co. v. Chattanooga, 163 Tenn. 435, 43 S.W.2d 490 (1931); Dixon v. Louisville & N.R.R., 115 Tenn. 362, 89 S.W. 322 (1905).

64. Robinson v. Easter, *supra* note 63, at 366; The Sailors v. Woelfle, 118 Tenn. 755, 102 S.W. 1109 (1907); 1 GIBSON, *op. cit. supra* note 27 § 301.

65. 348 S.W.2d 500 (Tenn. 1961).

66. Earlier cases upholding this point of view are: Armstrong v. Illinois Cent. R.R., 153 Tenn. 283, 282 S.W. 382 (1926); Chambers v. Chattanooga U. Ry., 130 Tenn. 459, 171 S.W. 84 (1914).

legal relief when equitable relief is denied.[67] In a state in which the chancery courts have such unusually broad initial jurisdiction over legal causes of action, their power to retain jurisdiction of chancery cases in order to grant needed substituted or incidental legal remedies should be fully sustained.

In *Ferguson v. Moore*[68] it was held that statutes which vest the county courts with original jurisdiction over the granting of letters of administration, the settlements of accounts of executors and administrators, and with concurrent jurisdiction over applications for payment of legacies or distributive shares,[69] do not deprive the chancery courts of their inherent jurisdiction over the administration of estates. Since the suit in question related to the administration of an estate, and also involved a trust, accounting, discovery and injunction, it was clearly within the inherent equity jurisdiction, which has remained intact while the chancery courts' nonequity jurisdiction was being supplemented by statute.[70]

67. Tennessee Coal, Iron & R.R. Co. v. Paint Rock Flume & Transp. Co., 128 Tenn. 277, 160 S.W. 522 (1913); Union Planters Bank v. Memphis Hotel Co., 124 Tenn. 649, 139 S.W. 715 (1911).

68. 348 S.W.2d 496 (Tenn. 1961).

69. TENN. CODE ANN. § 30-1313 (1956).

70. TENN. CODE ANN. § 16-601 (1956). See 1 GIBSON, *op. cit. supra* note 27, §§ 21-24.