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Osborne Allen v. Rose Park Pharmacy : Brief of Respondent

Utah Supreme Court

Robert S. Richards; J. Richard Bell; Jacque Bell; Attorneys for Plaintiff;

7672

In the Supreme Court
of the State of Utah

OSBORNE ALLEN,
Plaintiff and Respondent,

vs.

ROSE PARK PHARMACY,
Defendant and Appellant.

Case No. 7672

BRIEF OF RESPONDENT

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STATUTES

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In the Supreme Court
of the State of Utah

OSBORNE ALLEN,
Plaintiff and Respondent,
vs.
ROSE PARK PHARMACY,
Defendant and Appellant.

Case No. 7672

BRIEF OF RESPONDENT

STATEMENT OF THE FACTS

Because the statement of facts as set forth in appellant's brief is not all inclusive, it is respondent's desire to apprise the court of certain facts he deems important that have been excluded from appellant's brief.

In the early fall of 1949 plaintiff approached the owners of defendant corporation about going to work for them as a pharmacist and manager of their new drugstore and pharmacy at 4th North and Oakley

Streets (between 11th and 12th West) in Salt Lake City, Utah. (R. 31) Negotiations ripened into an agreement whereby plaintiff was to manage the store and share in the net profits and thereby acquire stock in the corporation to the extent of 25% ownership. (R. 34) Meantime plaintiff was working as a pharmacist for Walgreens, but immediately proceeded to work for defendant in his off-hours in helping the Geurts brothers, the owners of the defendant corporation, purchase equipment, supplies and merchandise for the new store. This he did for a period of four or five weeks before he was put on defendant's payroll, which occurred November 18, 1949. At the same time he was terminated at Walgreens. Undenied is plaintiff's testimony that:

> ". . . I went out 100% to help these fellows. I didn't insist on receiving any salary for this at all because my whole heart was in the store. So I put in all this time with Ted without receiving any pay to the time I terminated from Walgreens. . . ." (R. 34 & 35)

According to plaintiff's testimony it was not until after Christmas, over two months from the time he started to work for defendant, that the Geurts brothers presented him with a copy of the written contract to sign, which included a provision permitting defendant to terminate the contract without cause on 30 days notice, and the following negative covenant:

> "8. Osborne agrees that in the event of termination of this contract for any reason, he shall fully account for all funds, inventory, assets

> and equipment and he shall not directly or indirectly compete, as an employee or principal, in the operation of a drug store or pharmacy within a radius of two miles of this drug store for a period of five years thereafter. Breach or threatened breach of the terms of employment shall entitle this Pharmacy to injunctive relief in addition to other remedies." (R. 5 & 6)

There had been no discussion of these provisions with plaintiff before this time, and, of course, having already given up his employment at Walgreens, and worked for defendant for over two months, he signed the contract. (R. 35 & 36)

Plaintiff employed his wife, and together they worked sixteen to eighteen hours a day in order to build up the business which grew to a "fairly good volume". (R. 36 & 37) Plaintiff and his wife lived near the drug store and had many friends and neighbors who patronized the store because of their close friendship. (R. 38) Plaintiff's employment continued for about a year when on November 14, 1950, plaintiff was served with a notice of termination. (R. 44 & 45) There was no explanation or allegation of cause for termination, and, in fact, defendant's officers gave plaintiff an excellent letter of recommendation and a good "pat on the back". (R. 46)

Plaintiff brought this action asking the court to declare that the negative covenant in the contract was unenforceable. At the trial plaintiff introduced in evidence as exhibit "A" a map of Salt Lake City with a circle drawn in red to denote the two-mile area and

showing the locations of the defendant's drugstore and all other drugstores within the area. (R. 27) This evidence and plaintiff's testimony regarding it indicated there were eight other drugstores operating within the area during the time plaintiff continued in employment with defendant. (R. 40)

Concerning the territory over which the defendant's business extended plaintiff testified as follows:

> "Q (By Mr. Richards). Can you tell us the greatest distance to which you and your employees delivered prescriptions?
>
> "A. Yes, I can give a fairly reasonable distance on that simply because I was doing the majority of delivering, and I was using my own car on that because I remember, and I can go by our prescription business, because the majority of our prescriptions have the patients' address. The furthest east on prescriptions, and there was one only, was at Second West and North Temple.
>
> "Q. How did you come to deliver that?
>
> "A. I went up at about twelve-thirty in the morning, and the doctor had called me, and the store was closed, and asked me if I would send up the prescription to him. The doctor that called there was a very close friend of mine, and he was giving me his prescription volume for that reason. He asked me if I would take it up to them, and it was Dr. Harvey Moore.
>
> "Q. Would you say that you delivered many prescriptions east of Eighth West?
>
> "A. The prescription volume which we were doing out there was mostly pediatric work, children, simply because the prescription volume was coming from just about Rose Park people.

"Q. How do you know that?

"A. Because the type of prescription. You can tell whether it is for a child or an adult, and from the type of physician that calls, and also because of the thickly populated area in Rose Park for children.

"Q. Can you tell from the addresses?

"A. I would say that the volume of our prescription business was located in Rose Park proper.

"Q. Specify please, if you can, were many prescriptions delivered east of Eighth West?

"A. Very few east of Eighth West.

"Q. Were very many delivered south of North Temple?

"A. Why, I remember delivering one out there in a late evening on the same call for Dr. Moore. I went down as low as Ninth South on one of them, one only.

"Q. One only?

"A. Yes.

"Q. Would that be the only prescription south of North Temple that you delivered?

"A. To my knowledge, yes." (R. 39-40)

With respect to the profits in the new business plaintiff gave the following testimony:

"Q (By Mr. Richards). Now, did you notice any appreciable increase in the volume of prescriptions during the time you were there?

"A. Yes, our opening day we had three prescriptions on record. At the time of termination we had filled 5,248 new prescriptions, 1,740 refills, a total of 6,988 prescriptions. And that figured out for the number of days that I had worked in this drug store, 20.6 prescriptions per day.

"Q. That is an average over the whole year?

"A. That is an average at the time I was employed, from the time of first employment until the time of termination.

"Q. Do you have any idea of the average number of prescriptions the last month of your employment per day, the number per day?

"A. It would be a greater percentage than this because naturally your business just builds up as you go along. So for an average of twenty prescriptions for the last month of operation, I imagine, the prescriptions would average up around thirty or forty. That is including new prescriptions and refills.

"Q. You stated awhile ago that the drug store operated at a loss, I believe, the first few months.

"A. When we took our first inventory which was in June, Martell and I worked very closely together.

"Q. Who is Martell?

"A. Martell was employed as a bookkeeper. I managed the drug store.

* * *

"Q. Did you have discussions with him with respect to the profits and loss and increase and decrease in business, etc.?

"A. Yes, discussions and reports.

"Q. What were those discussions?

"MR. PUGSLEY: We object to that as hearsay.

"THE COURT: I don't know that it would be hearsay, but it might not be the best evidence. You are trying to show whether the company operated at a profit. They would be entitled to see the Profit and Loss Statement.

"Q (By Mr. Richards). Did you see the Profit and Loss Statement?

"A. Yes. Not only saw them, but I was given a record of the report. Those were given out to Theodore, William T. Geurts, and myself. Three reports were made out.

"Q. What did they show generally for the first few months?

"A. They showed we operated at a loss for the first six months.

"Q. When did they begin showing a profit?

"MR. PUGSLEY: We object to that as immaterial.

"THE COURT: Overruled.

"A. They showed a profit from the July statement on.

"Q (By Mr. Richards). Was that considerable profit?

"A. It was substantial profit, enough so that if the store continued on that operation it would show an overall profit for the year, taking care of the first six months' loss." (R. 41-43)

At the conclusion of the trial the court announced its decision in favor of the plaintiff as set forth in appellant's brief and made findings to the effect that there was no proper consideration to support the plaintiff's negative covenant, that the 30 days notice was too short a period to constitute mutuality of obligation to support said covenant and was an unreasonable restraint of trade. The court found further that although the five-year period of non-competition was reasonable, the interdicted area described by a two-mile radius was unreasonable, and that plaintiff while working for defendant had acquired nothing in

the nature of trade secrets. (R. 15-16) Appellant designates these findings and the court's judgment declaring paragraph 8 of the contract unenforceable as points of error. (R. 19-20)

STATEMENT OF POINTS

I.

THE NEGATIVE COVENANT WAS UNREASONABLE WITH RESPECT TO SPACE.

II.

THE NEGATIVE COVENANT WAS NOT SUPPORTED BY A PROPER CONSIDERATION NOR WAS THERE MUTUALITY OF OBLIGATION.

III.

IN CONTRADISTINCTION TO CASES CITED BY APPELLANT PLAINTIFF HEREIN ACQUIRED NO TRADE SECRETS.

IV.

THE QUESTION OF ESTOPPEL CANNOT FIRST BE RAISED ON APPEAL.

ARGUMENT

I.

THE NEGATIVE COVENANT WAS UNREASONABLE WITH RESPECT TO SPACE.

It was once generally the law of England that all contracts containing negative covenants of the sort in plaintiff's contract of employment were invalid and unenforceable as against public policy. Every man had the right to work, and to restrict him in any degree was to limit his ability to gain a livelihood, which meant that he and his dependents may become public charges. As communication and transportation

has become more available and as men have become more educated and trained and more flexible in their ability to engage in more than one trade, the law has relaxed somewhat in favor of the principle of freedom of contract. See Williston on Contracts, Revised Edition, Volume 5, page 4578, Section 1635. The law is relaxed to that point that as long as the restraint in length of time and area of space is reasonable the negative covenant is enforceable and valid, but if the restrictions are more than are necessary to the reasonable protection of the employer, *or* if they are unduly oppressive to the employee courts of equity have refused to enforce them by injunctions.

There is a great field of law on the subject, and the cases, of course, go both ways depending upon the peculiar facts and circumstances of each case. In *Wisconsin Ice & Coal Co. v. Lueth,* et al. (1933), 213 Wis. 42, 250 N.W. 819 plaintiff employed defendant to deliver ice and solicit business with a negative covenant from the defendant not, for a period of two years after leaving the employ of plaintiff, to deliver ice or solicit business either on behalf of himself or any other person or company, in a certain territory in the city of Milwaukee, which territory was specifically and particularly set forth in the contract by its streets boundaries. The court found that the defendant voluntarily quit the plaintiff's employ. It was held that in spite of this fact, and because of the unreasonableness of the restrictions the contract was unenforceable. The court said:

"So, in the case of the employee, the restrictive covenant must bear some relation to the activities of the employee. It must not restrain his activities in a territory into which his former work has not taken him or given him the opportunity to enjoy undue advantages in later competition with his employer."

* * *

"* * * * The principal difficulty arising, however, where the contract of employment containing the restrictive covenant initiates the relation of employer and employee. There the employee, at the time of executing the contract, has as yet no established route which will form a reasonable limit to the scope of the restrictive covenant. He may be assigned to work at any place within the territory actively canvassed by his employer. May the employer, in such a situation, designate a territory less than the entire territory covered by its business but greater than that which will be worked at any one time by the employee, and perhaps greater than ever will be worked by the employee during the course of his employment, and designate this territory as that to which the noncompeting agreement is applicable? There is no question, from an examination of the record, that the territory described in the contract here involved is more extensive than that in which defendant worked for the Kilbourn Company. It is larger than that in which defendant, subsequent to the making of the contract, worked for the plaintiff; in fact, it was large enough, according to the evidence, to be cared for by some forty-five drivers, and larger than the defendant could work, unless his employment for the plaintiff extended over a very long period of time."

Plaintiff in the principle case testified that the interdicted area extends way beyond the trade area of defendant drugstore. The court in the Wisconsin case concludes:

> "It is our conclusion that this restriction was broader than was called for by the necessities of the case, and that, while the contract might in other respects be proper and valid, it cannot be enforced.
>
> "For the foregoing reasons it follows that the judgment must be reversed."

The court refused to grant an injunction in *The Samuel Stores v. Abrams* (1919), 94 Conn. 248, 108 A. 541, 9 A.L.R. 1450, restraining the defendant from engaging in a business similar to that of plaintiff notwithstanding defendant had previously entered into an employment agreement with plaintiff in November of 1918, agreeing not to so engage in such business directly or indirectly for 5 years after the termination of his employment, and who on December of the same year voluntarily quit his employment with the plaintiff to so enter and engage in the same business and in the same city where plaintiff operated a store. The court in discussing the difference between restrictive covenants in connection with employment contract and restrictive covenants ancillary to sale of business contracts, makes the following observation:

> "Under the law, restrictive stipulations in agreements between employer and employee are not viewed with the same indulgence as such stipulations between a vendor and 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 negotiation of agreement between employer and employee"
>
> "The reasonable and fair protection of the plaintiff's business does not require such an extended restriction of the defendant's field of employment. Public policy requires that the defendant's liberty of action in trading or employment shall not be unduly restricted. To enforce the sweeping terms of this restriction would be a useless, unnecessary, and undue curtailment of the defendant's liberty of trading and employment, and an unjustified restraint on competition."

There appears an extensive annotation to the *Samuel Stores* case in 9 A.L.R. 1456 concerning restrictive covenants in employment contracts. It is apparent from this annotation that the law is fairly well settled to the effect that the enforceability of these covenants depends upon the reasonableness of the terms of the covenant as to time and space. A general statement of the law as found at page 1467 reads as follows:

> "The validity of such contracts, however, is more directly presented in the second class of cases, i.e., covenant by the employee not to engage for himself or for others in a competing business for a definite period of time, and generally within certain prescribed boundaries. The denial of relief for the breach of such covenants

> is generally based upon the ground, either that the contract is violative of public policy and hence invalid, that there is an adequate remedy at law, or that the contract is oppressive and imposes undue hardship upon the employee. While the same general principles of law apply to covenants of the latter class that apply to similar covenants ancillary to the sale of a business, nevertheless covenants of this kind by employees are more carefully scrutinized by the courts, and relief more readily denied, since the courts, generally, realize that a too ready enforcement of them may result in depriving the covenantor of the means of livelihood, and perchance cause him to become a charge upon the public."

There are many cases cited in this annotation and in result they run about fifty-fifty—half of them hold the covenants reasonable and enforceable and the other half hold them unreasonable and unenforceable. This indicates that each case must be decided upon its own facts. This annotation has been supplemented in 20 A.L.R. 1363, 67 A.L.R. 1002, and 98 A.L.R. 963. Each citing many new cases considering this problem.

In *Herreshoff v. Boutineau* (1890), 17 R.I. 3, 8 L.R.A. 469, 33 Am. St. Rep. 850, 19 Atl. 712, the defendant employee took a position in a school of languages as a teacher of French and German for a period of 6 months. In contracting for this employment, he agreed not to teach French or German in the State of Rhode Island during one year after the end of his employment. At the end of employment he proceeded to teach these languages in the city of Providence

in violation of the contract. In holding the contract unenforceable, the court makes the following observations:

> "Is the contract unreasonable? Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract; yet, when it is a restriction upon individual and common rights, which only oppresses one party without benefiting the other, all courts agree that it should not be enforced."
>
> "In many undertakings, with modern methods of advertising and facilities for ordering by telegraph or mail, and sending goods by railroad or express, it would matter little whether one was located at Providence or Boston or some other place. In such cases a restriction embracing the state, or even a larger territory, could not be said on that account to be unreasonable; for without it the seller might immediately destroy the value of what he sold and was paid for. But it is unreasonable to ask courts to enforce a greater restriction than is needed. So it has been uniformly held that restrictions which go too far are void. As was said in the note of the Law Quarterly Review, above cited: '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 lost all.'
>
> "In the present case, we think the restriction is unreasonable. Not as a rule of law because it extends throughout the state, *but because it extends beyond any apparently necessary protection which the complaintant might reasonably require, and thus, without benefiting him, it oppresses the respondent, and deprives*

> *people in other places of the chance which might be offered them to learn the French and German languages of the respondent.''* (Italics by respondent)

From the above annotation in 9 A.L.R. is taken the following comment at page 1477:

> ''In Pearks v. Cullen (1912), 28 Times L. R. (Eng.) 371, the court refused to restrain the breach of a covenant by a shop assistant not, for two years after termination of his contract of employment, to engage in a similar business within 2 miles of the place of employment, or to solicit from any of the customers of his employer. This covenant was held not reasonably necessary for the protection of the employer's business, it appearing that clauses of this character were unusual, and not necessary for protection against shop assistants.

The writer does not have available the original report of *Pearks v. Cullen,* and is therefore unable to give any more facts about the case.

In a leading English case, *Atwood v. LaMont* (1920), 3 K.B. (Eng.) 571, the plaintiff carried on a business as a draper, tailor, and general outfitter. When he employed the defendant, the defendant agreed that upon the termination of his employment, he would never engage in the trades of tailor, dressmaker, general draper, millinery, hatter, habber dasher, etc. etc., at any place within a radius of 10 miles of the plaintiff's store, nor to trade with any persons within that radius in opposition to the plaintiff. After working for the plaintiff as a tailor for 10 years, defendant left

the plaintiff's employ and engaged in the tailoring business outside the 10 mile radius but served customers from within the 10 mile radius and who were previously customers of the plaintiff. The plaintiff sought an injunction restraining this trade and the court held that the contract was in restraint of trade and unenforceable. Younger, L. J., discussed among others three points in connection with this problem. First, that the covenantee has the burden of proving that the restriction goes no further than is reasonable for the protection of his business. Second, that the restraint must also be reasonable so far as the restriction upon the employee is concerned. That it must not be unduly oppressive to the employee. Thirdly, he explains the distinction in the law between the case of a covenant ancillary to the sale of a business and the case of a covenant by an employee as follows:

> "There are at least two reasons for this distinction. An employer may not, after his servant has left his employment, prevent that servant from using his own skill and knowledge in his trade or profession, even if acquired when in the employer's service. That skill and knowledge are only placed at the employer's disposal during the employment. They have not been made a subject of sale after that employment has ceased."
>
> "Accordingly covenants against competition by a former servant are as such not upheld; and the permissible extent of any covenant imposed upon a servant must be tested in every case with reference to the character of the work done for the employer by the servant while in

> his service and by the consideration whether in that view the covenant taken from him goes further than is reasonably necessary for the protection of the proprietary rights of the covenantee. "The reason, and the only reason," says Lord Parker in Morris v. Saxelby (3) 'for upholding such a restraint on the part of an employee is that the employer has some priorietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business.'"

In *Kadis v. Britt* (1944), 224 N. C. 154, 29 S. E. 2d 543, 152 A.L.R. 405, plaintiff was engaged in the clothing store business. Defendant had been employed for years as a delivery man and bill collector. After years of employment defendant entered into a contract with plaintiff whereby plaintiff could terminate plaintiff's services anytime and defendant was restricted from competing in the county or any adjoining county for 2 years following the termination. After two more years plaintiff fired the defendant, and when the defendant went to work in a similar establishment plaintiff brought an injunction. In denying the injunction the court said,

> "The restrictive negative covenant in a contract of this sort, to be legally effective, must be ancillary to a valid affirmative covenant, and examination by the court is necessarily directed to the substance and validity of this covenant.

> When the contract is defective for want of legally protectible subject or because its practical effect is merely to stifle normal competition, it is as much offensive to public policy as it ever was in promoting monoply at the public expense and is bad. Hence, the trend of discriminating decision is away from the latitude by which contracts in restraint of employment have been upheld almost as a matter of course, or upon a merely plausible showing of some shadowy right to which the negative covenant is ancillary. The grave consequences of unemployment demand that the principle affirmative promise, and its basis or subject be examined and weighted with care."

Defendant at the trial failed to sustain the burden of showing the reasonableness of plaintiff's negative covenant, and it would have to have accomplished that before the court could have found for the defendant. The cases clearly place this burden on the covenantee. *Roy v. Bolduc* (1943), 140 Me. 103, 34 Atl. 2d 479, 149 A.L.R. 630, 633, *Thomas W. Briggs Co. v. Mason,* 217 Ky. 269, 289 S.W. 295, 52 A.L.R. 1344. In the *Kadis v. Britt* case, supra, the court placed this burden squarely upon the covenantee. Quoting from 17 CJS, Contracts, sec. 240, the court said:

> ". . . . Contracts in partial restraint of trade do not escape the condemnation of public policy unless they possess qualifying conditions which bring them within that exception. They are still contrary to public policy and void "if nothing shows them to be reasonable.' Benjamin on Sale, 7th Ed, p 535; id., p 538, quoting Tindal, C. J. in Horner v. Graves, 7 Bing. 743. They must be

supported under the rule which places the burden upon those who would avail themselves of an exception—at least to the extent that their reasonableness must be made to appear."

As a concluding resume of the law with respect to the enforceability of negative covenants the terms of which are unreasonable sections from Corpus Juris Secundum and the Restatement are quoted herein.

17 C.J.S., Contracts, Sec. 254, page 636.

"Restrictive covenants contained in a contract of hiring are tested by the same standard of reasonableness of the restraint as are similar covenants in a contract of sale, but covenants of the former sort are not viewed by the courts with the same indulgence, and a smaller scope for restraint is permitted.

"Generally, while one may not be restrained from following all vocations for which he is fitted, or from doing productive work useful to the community, it is the rule in the absence of contrary statute, that agreements by which an employee as part of his contract of employment undertakes not to enter into a competing business on leaving his employer's service are sustained if they are not wider than reasonably necessary for the protection of the employer's business, and do not impose undue hardship on the employee, due regard being had to the interests of the public. Under this rule contracts have frequently been upheld whereby salesmen, agents, canvassers, and other employees who come into personal contact with their employer's customers agree not to engage in a competing business within a limited time or area after leaving their employer's service. *The*

restraint imposed by contracts of this character, however, is invalid if wider than reasonably required for the protection of the employer's business.'' (Italics by respondent)

Restatement of Contracts, Volume 2, page 987, Sec. 514.

"A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it

(a) is greater than is required for the protection of the person for whose benefit the restraint is imposed, or

(b) imposes undue hardship upon the person restricted, or

(c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially or

(d) unreasonably restricts the alienation or use of anything that is a subject of property, or

(e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment."

II.

THE NEGATIVE COVENANT WAS NOT SUPPORTED BY A PROPER CONSIDERATION NOR WAS THERE MUTUALITY OF OBLIGATION.

The lower court's theory with respect to this point is that defendant's promise to employ plaintiff for an indefinite length of time, terminable at the will of the defendant, is not adequate consideration to support plaintiff's negative covenant and that the said

covenant cannot be enforced at law, nor can it be enforced in equity because there is a lack of mutuality of obligation. Plaintiff could have worked for defendant one day and defendant under this contract could have terminated the employment. Certainly such execution of defendant's promise could not have justified enforcement of plaintiff's promise not to compete within a two mile radius for a period of five years. The fact that he worked for a year doesn't change the result that an employment contract terminable at the will of the employer is not an adequate consideration or mutual obligation to support the employee's negative covenant. In fact in this particular case, that he was terminated after only one year of employment is one of the elements that makes this negative covenant not to compete for five years invalid and unenforceable. It will be pointed out below that many cases cited by appellant can be distinguished on this ground.

In *Schneller v. Hayes* (1934), Wash. 115, 28 Pac. 2d 273, the plaintiff, an optician, employed defendant who brought his family from Montana to Walla Walla, Washington to accept said employment, on a week to week arrangement at $35.00 p[redacted]week. Defendant agreed to a restrictive covenant prohibiting him from competing in Walla Walla and one mile outside. The court held the covenant unenforceable as unreasonable and against public policy and also as not being supported by sufficient consideration and refused an injunction. When insufficiency of consideration was argued because of lack of mutuality, it was suggested that ex-

perience and training gained by defendant during the employment was consideration for the negative covenant. The court said:

> "He, (the defendant) was a licensed optician, employed by a large optical organization, and presumably was thought competent for employment by appellant. There is no suggestion that he entered upon an apprenticeship."

The court discussed the difference between enforcing these covenants in law and in equity, and cited *Meuer Steel Barrel Co. v. Martin* (C.C.A.), 1 Fed. 2d 687, in which it is stated:

> "If, for instance, an entirely valid contract contain a provision for its termination by one party on notice to the other, though enforceable at law, courts of equity will not, because of such provision, enforce it by granting equitable relief, as specific performance, but will leave the aggrieved party to his remedy at law. This is because the court will not grant equitable relief on a contract where one party can nullify its action by exercising his reserved power to terminate it."

The Meuer Steel Barrel case, though it involved the question of mutuality of obligation because of a bilateral executory contract terminable at will of one of the parties, did not involve a negative covenant ancillary to an employment contract as did the *Schneller v. Hayes* case. The court in the latter case, regardless of its discussion of the distinction, brought out in the Meuer Steel Barrel case, still insisted that even at law a contract such as this would be without sufficient consideration. Here is the court's language:

> "But if we assume the contract of the parties to be bilateral and based upon mutual executory promises, appellant would not be entitled to injunctive relief. Appellant's promise of employment could be terminated at his pleasure, and would not be a sufficient consideration for the promise of the respondent."

The annotation in 9 A.L.R. at page 1481 makes reference to the case of *Gilbert v. Wilmer* as follows:

> "In Gilbert v. Wilmer (1918), 102 Misc. 388, 168 N.Y. Supp. 1043, injunction was denied to restrain the breach of a covenant of this character, on the ground that the provisions were too inequitable to justify a court of equity in enforcing it, the agreement in effect binding the employee to work as a window cleaner for the plaintiff as such places and in such manner as he was directed, his employment to continue as long as he gave satisfaction, the employer being the sole judge of the character of the work. The court pointed out that the plaintiff could have discharged the defendant after one hour's service, and according to the plaintiff's construction of the contract, the defendant would have been prevented from working at his business as window cleaner in that city for the period of one year."

And see *Oppenheimer v. Hirsch* (1896), 5 App. Div. 232, 38 N.Y. Supp. 311, as referred to in 9 A.L.R. at page 1475 where the court considered the fact that the employer reserved the right to discharge the employee within a week after he began his employment as a further ground for refusing to enjoin the breach of the employees negative covenant. See also *Ridley v. Krout,*

(1947), 63 Wyo. 252, 180 Pac. 2d 124, *Iron City Laundry Company v. Leyton* (1913), 55 Pa. Super Ct. 93, 9 A.L.R. at page 1481, and *Smith Baking Co. v. Behrens* (1933), 125 Neb. 718, 251 N.W. 826.

That there is a lack of consideration in these cases is supported by the case of *May v. Lee* (1930), (Tex. Civ. App.), 28 S. W. 2d 202. In this case the defendant in the injunction suit had gone to work for plaintiff as an engineer under a contract which gave either party the right to terminate at will and which restricted defendant from working for any of plaintiff's clients within one year after termination. In holding that the negative covenant was unenforceable because of lack of consideration and mutuality, the court said:

> "After finishing his work for appellant with Clarke & Courts, appellee elected to quit the service of appellant, and two and one-half months thereafter entered the service of Clarke & Courts. The contract, except in so far as it was executed, is, we think, an unilateral agreement, and there being no consideration for the performance by appellee of the unexecuted provisions of the contract, such provisions cannot be enforced against him.
>
> * * *
>
> "This agreement furnishes an apt illustration of an unilateral contract which is unenforceable by either party, except to the extent it has been executed. Appellant was bound to pay appellee the amounts specified in the agreement for the services rendered by appellee, and, so long as appellee continued in the service of appellant, he was bound to properly perform his

> work and to further the interest of appellant. But when the execution of the contract ceased, its unilateral character rendered its unexecuted portion unenforceable for lack of consideration. . . ."

In the principal case where the employer's promise was terminable at will, we have the added fact that it was the employer who terminated the employment, not the employee. It is submitted that this should be considered seriously in determining whether or not the negative covenant is enforceable. In other words, the contract not only lacked sufficient consideration, but also there was not sufficient performance on the part of defendant to justify the enforcement of the restriction. The inverse of this is illustrated in the case of *Clark Paper & Mfg. Co. v. Stenacher* (1919), 108 Misc. 399, 177 N.Y. Supp. 614, Affirmed in (1920) 193 App. Div. 924, 184 N.Y. Supp. 914, where the court granted an injunction on the ground that the employee had enjoyed several years of employment and voluntarily terminated, but stated that the situation would be different had the employee been fired before he had worked a length of time commensurate with the term of the restriction.

In fact a premature termination by the employer has in some cases been considered a breach of the contract by the employer, and for that reason, the courts have refused to grant an injunction against the employer. In *Economy Grocery Stores Corp. v. McMenamy* (1935), 290 Mass. 549, 195 N.E .747, the contract of employment was terminable at the will of either party, and

after fifteen months the employer discharged the employee without cause. The court considered such action arbitrary and unreasonable *and as a failure of performance such as to make the employer's appearance in court without clean hands, and an injunction was refused.* See also *Dutch Maid Bakeries v. Schleicher* (1942) 58 Wyo. 374, 131 Pac. 2d 630.

In the principal case plaintiff has shown that defendant pharmacy employed him under the contract for the specific purpose of building up a good business and trade at said pharmacy and that he, as any reasonable person would, believed that his employment would extend for as long as his work was satisfactory. Then, to be arbitrarily discharged smacks of breach of contract and certainly places defendant in a poor position to seek to enforce the negative covenant.

As is admitted by the respondent in its brief, page 13, plaintiff was not a mere "soda jerk" or clerk. Plaintiff was to act not only as a pharmacist but also as a manager and in addition, he was to acquire a proprietary interest in the business itself through a stock-bonus program. But until there were profits the promise was a mere incentive—a hope. The plaintiff called upon all of his managerial ability and labored long hours, and as shown by the evidence there was a net profit within six or seven months. Now the hope could materialize into stock. Shortly after this position was gained the defendant dismissed the plaintiff without cause, thereby denying him from realizing this expected benefit and fruits of his work. This type of future

promise has been called a "seductive promise." In the case of *Super Maid Cook-Ware Corp. v. Hamil,* 50 Fed. 2d 830, the court stated:

> "Without guaranteeing to the defendants one day's regular work, without the obligation of the appellant to employ them or pay them anything, upon a seductive promise of the disclosure of information upon which they may hope to build a profitable line of sales, the appellees are induced to sign a paper which, while it has the general appearance of a contract, but keeps the promise to the ear while it breaks it to the hope. Such a contract, wanting in mutuality, presenting no equitable considerations, a court of equity will not enforce."

The contract under consideration here does not guarantee the employee one day's regular work. It does guarantee him 30 days' notice of termination which indirectly assures him of not less than 30 days work. To discharge the plaintiff without cause, in view of the circumstances already discussed, is to keep "the promise to the ear while it breaks it to the hope."

The "seductive promise" type of case is distinct and separate from the two types of cases cited by the defendant, i.e., one type involving the usual employer-employee relationship where the employee leaves of his own free will, and often with ulterior motives, or where the employee is discharged for cause.

The case of *Ridley v. Krout,* 180 P2 124 (Wyo.) (1947), cited by the defendant, recognized the distinction, citing as support the Super Maid Cook-Ware case among others:

> "A number of courts have held that in cases in which an employee is not guaranteed employment for any great length of time, as for instance, when he may be dismissed on short notice, the contract not to go into competitive business thereafter has been held to be void. Dockstader v. Reed, 121 App. Div. 846, 106 N.Y.S. 795; Gilbert v. Wilmer, 102 Misc. 388, 168 N.Y.S. 1043; Iron City Laundry Co. v. Leyton, 55 Pa. Super Maid Cook-Ware Corp. v. Hamil, 5 Cir., 50 F. 2d 830; Schneller v. Hayes, 176 Wash. 115, 28 P 2d 273; Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32; Byram v. Vaughn, D.C., 68 F. Supp. 981; May v. Lee, Tex. Civ. App., 28 S.W. 2d 202."

In 1946 the District Court for the District of Columbia had an opportunity in *Byram v. Vaughn,* 68 F. Supp. 981, to consider this type of case. In denying the injunction, the above passage from the Super Maid Cook-Ware case was quoted and approved. The discussion by the court of this doctrine is particularly illuminating and applicable hereto.

> "An employer, who seeks to subject a former employee to such severe and drastic restrictions on his activities, should at least extend to him some assurance of financial security for a reasonable time. Otherwise, the employee may find himself completely at his employer's mercy. Such a result would seem inequitable and at times even contrary to the dictates of humanity. One who seeks to restrict another's freedom of action, should be willing to surrender his own independence to a corresponding degree. If the employer prefers to leave himself free to terminate the employment at will in his own discre-

tion, he should not be accorded the drastic and far reaching remedy by way of an injunction to enforce a stipulation that would exclude the former employee from an opportunity freely to engage in the same business."

III.

IN CONTRADISTINCTION TO CASES CITED BY APPELLANT PLAINTIFF HEREIN ACQUIRED NO TRADE SECRETS.

The plaintiff's services and the defendant's business are not of such a character as would involve the acquisition of special business secrets. The people come to a drugstore to trade. The store does not go to to them or in any way solicit personal orders. The so-called trade secrets listed by the defendant do not in any way come under the legal definition of such and surely are not analogous to any protected by the courts in any of the cases cited by the defendant. *Ridley v. Krout,* supra, states:

> "A process commonly known in the trade is not a trade secret and will not be protected by an injunction, a trade secret being a tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it." Victor Chemical Works v .Iliff, 299 Ill. 532, 132 N.E. 806, 811; Process Laundry Co., 208 Ky. 248; Bristol v. Equitable Life Assurance Soc., 132 N.Y. 264.
>
> "If a so-called secret process is known to others in the trade, no one will be enjoined from using it." Hopkins on Unfair Trade, p. 158.

> "Trade secrets may not be construed as consisting of knowledge and efficiency which defendant obtained or procured through his experience." Inboden v. L. W. Hawker, Ohio App., 41 N.E. 2d 271, 277.

The pharmaceutical prescriptions are not the store's secrets but are brought to each store by the customer and could in no way be transferred to a competitor. There is nothing secret about the ingredients used; in fact Section 78-12-15, Utah Code Annotated 1943, 79-12-15, provides that every drugstore shall provide itself with the latest edition of the United States Pharmacopœia and National Formulary which list the standard strength, quality and purity of all preparations sold or dispensed and Section 79-12-16 provides that unless otherwise prescribed for or specified by the customer all pharmaceutical preparations should be according to the specifications listed in this book. The narcotic records are records that are required by federal regulations and past records surely would not be of value to a competitor even if the plaintiff had them in his possession, which he does not. There were no methods of buying that could be considered secrets as the store was new and any methods used were, and are, the plaintiff's. Credit programs and mark up certainly are not of a secretive nature; if they were, there would be no use for them. Trade preferences are granted to each store and could not be transferred by an employee to a competitor. Hence, there is no alternative but to proceed on the conclusion that there is nothing in this case that could be catagorized as "trade secrets."

The defendant says that the plaintiff was "not a mere 'soda jerk' or clerk" and surely this is so. He was, and has always been represented as such, a manager. But the plaintiff did not acquire any trade secrets in that capacity.

In *Kaumagraph Co. v. Stampagraph Co.* (1921), 197 App. Div. 66, 188 N.Y. Supp 678 the Court refused to enjoin defendants from engaging in the die and printing business notwithstanding when employed by plaintiff they agreed never to do so. The court insists that for such negative covenant to be enforceable, the employee must have had an opportunity to learn certain trade secrets. Here is the language of the Court:

> "Covenants ancillary to a contract of employment restricting the employees' right to labor along the same line, either for themselves or others, upon the termination of their employment, are not favored by the law, and will not be enforced, unless there are special circumstances that render the restriction a reasonable protection to the employer's business, to prevent the employee from using knowledge that he has acquired in the course of his employment, of the secrets of the trade, methods, or processes of the employer. If the covenant, taking these circumstances into consideration, is not more extensive as to time or space than will afford a reasonable protection to the employer's business, it will be enforced . . . . *Where, however, the employee brings to the employment skill previously acquired, and does not obtain, in the course of his employment, knowledge of methods and processes which are exclusively*

within his employer's control and right to use, it cannot be said that such a restraint is reasonably necessary to the employer's protection.'' (Italics added)

And in the *Samuel Stores v. Abrams,* supra, in determining that the terms of the covenant were unreasonable and against public policy, the court says the following:

> ''This stipulation provides, in effect, that the defendant, for five years after he leaves the employ of the plaintiff, shall not either directly or indirectly connect himself with any firm engaged in business of the plaintiff in any city where the plaintiff conducts one of its branch stores.
>
> ''It appears from the complaint that the services of the defendant contracted for by the plaintiff are not peculiar or individual in their character, nor purely intellectual, nor are they special or extraordinary services or acts.
>
> ''The defendant's services and the plaintiff's business are not of a character to involve the acquisition of special business secrets of the plaintiff by the defendant. The agreement relates merely to services in a local retail business, and primarily aims to restrict competition.
>
> ''The plaintiff conducts a local retail clothing business in which the defendant was employed as manager. The situation of manager could have been filled by any person of sufficient business capacity.''

A distinction must be made between a case where an employee comes into an established business green and learns trade secrets and trade practices, and the trained employee who brings to a new business his pro-

fessional experience as was done in the principal case. The plaintiff here had lived in the community for more than a year before going to work for defendant as the evidence shows, and a good share of the patronage and clientele of the drugstore consisted of friends and acquaintances of plaintiff and his wife. Furthermore, the fact that plaintiff may have gained a personal influence over other customers is not reason for holding this covenant enforceable. In *Ridley v. Krout,* (1947), 63 Wyo. 252, 180 P2 124, the recent Wyoming case above cited in discussing this same problem said:

> "Everyone who lives any length of time in any community, as an employee, is bound to make acquaintances and friends and if that mere fact would authorize an injunction such as prayed herein we fear, as stated in Club Aluminum Co. v. Young, supra (363 Mass. 223, 160 N.E. 804) there would be left but "a shadow of the general rule against the validity of restrictive covenants upon individual liberty of action as to one's trade or calling, and would establish in its stead what has hitherto been treated as an exception." The court in Love v. Miami Laundry Co., supra (118 Fla. 137, 160 So. 32) stated in connection with the driver of a laundry truck that the employer acquired no property interest in the former's God given or self cultivated, ingratiating personality. * * * * There is also some testimony of personal solicitation on his part. The sum and substance of that testimony as we read it is that he solicited business from former cutomers of his own and from people he had known all his life. Defendant at the time of trial of this case was 52 years old and he stated he had lived in

> Sheridan all his life. He had engaged in the repairing of bicycles and automobiles before entering the services of the plaintiff."

Appellant cites the following 7 cases to show the enforcement of negative covenants where they are necessary to protect the employer against the employee's use of trade secrets. The factual situations are a far cry from the one in issue; the main discrepancy that in all cases where the covenant is enforced there were true trade secrets which in the hands of a competitor would harm the employer. The type of businesses involved in these cases are those that actively solicit customers outside their main offices, while in the case at hand the customers themselves contact the drugstore. Even with these aggravating conditions the courts refused to enforce the negative covenants in 4 of the 7 cited cases. Also, in 6 cases the employee voluntarily left the employment and in the 7th he was fired because of intemperate habits.

Ideal Laundry Co. v. Gugliemone, 151 A. 617, appellant's brief page 13, held that employment alone is sufficient consideration where the employee gains knowledge of business methods and secrets the disclosure of which to a rival would result in irreparable injury to the employer. The secrets here were actually unique and secret methods used by the employer in his laundry business. The employee was floor supervisor in the float-iron department and the company had recently expended $20,000 in employing these new methods and processes of which he knew. He voluntarily left

the employer's laundry to work for a competitor to whom knowledge of these secrets would be valuable to the detriment of his employer. So the determining factors here were the actual trade secrets, employee voluntarily leaving, and an element of bad faith, all of which are absent in the case under consideration.

The court refused to enforce the negative covenant in *Bond Electric Corporation v. Keller,* 166 A. 341, appellant's brief p. 13, even though it was a contract ($3,000 if he wouldn't disclose any knowledge of trade customers or policies nor work for competitors) that was made after termination of employment. The language of the court could be applied to the instant case as they said:

> "A contract, the sole object of which is to restrain competition is void as in restraint of trade . . . . No restraint of trade can be enforced unless the covenant is merely ancillary to the main purpose of the main contract and necessary to protect the employer in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of the unjust use of those fruits by the other party."

The covenant in this case fits perfectly under this statement as it is not ancillary to the main purpose of the contract and is not made to protect the employer from the disclosure of any trade secrets but is pure restraint of trade. If $3,000 is insufficient consideration, surely the court will not in this case find that mere employment, without disclosure of trade secrets is sufficient consideration.

The Eastman Kodak Co. v. Powers Film Co., 179, N.Y.S., 325, appellant's brief p. 13, case was later reversed. Here there were true trade secrets involved and the lower court granted the injunction. The employer manufactured raw film products and employed chemists to perfect the processes which he guarded and kept secret from competitors. The employee was given knowledge of these processes and formulæ and his agreement not to disclose them or compete with the employer when enforced by the court in the first case. In the second Kodak case the court held that the enforcement of the negative covenant was not necessary for the protection of the employer (even though secret processes were involved and also here a competitor was offering higher wages to get him to leave, but said that they would grant an injunction to restrain the disclosure of secrets of manufacture only and that they would not enforce the negative covenant in the contract to stop him working for a competitor. The employee voluntarily left and was not fired, and the second defendant in the case was a competitor who was trying to entice the employee away, impliedly because he wanted to gain these trade secrets. The strongest language of the court in the first Kodak case was:

> "An employer can require as a part consideration of one being employed such agreement as will properly protect his trade secrets."

This is not applicable in our case, there being no trade secrets involved. The plaintiff's contention is

supported by the second Kodak case wherein the court said:

> "The common law prohibited such contracts and this rule has been modified only to a certain extent."

The court also cited *Strobridge Litho Co. v. Crane,* 12, N. Y. Supp. 898, 899, which held:

> "As a general rule equity will not interfere to restrain by injunction a violation of a restrictive covenant in relation to personal services."

Then the court said that there are cases where the covenant against entering the employ of another was enforced, where the employee violated his contract by leaving before the expiration of his employment, indicating that the moving cause for the enforcement was the employee's violation of contract, which is a strong equitable consideration not involved in the instant case.

In the *Davey Tree Expert Co. v. Black,* 244 N.Y.S. 239, appellant's brief p. 14, case the employee had obtained scientific and confidential information on tree surgery through instructions given him by his employer. The agreement, which they held him to, was that he would not work for another within a year after he severed his employment. Undoubtedly if the employer had done the severing, as in our case, the court would not have allowed the injunction.

The extenuating circumstances in *Elbe File and Binder Co. v. Fine,* 242 N.Y.S. 632, are that the employee learned all he knew about the business from the em-

ployer and also became acquainted with real trade secrets. Also, the employee was given a 3 year contract of employment which the court held was valid consideration for the negative covenant saying:

> "the period of time of employment without fear of discharge at will of the employer constitutes sufficient consideration."

Also, further bad faith was shown when they proved that the employee entered the contract believing the covenant to be unenforceable.

In *Stoneman v. Wilson,* 192 S.E. 816, appellant's brief p. 14, the employee owned stock in the hardware store in which he worked. The negative covenant was part consideration for the selling of said stock. Further, the employee was discharged for cause, namely intemperate habits. Even with all these circumstances the court refused to enforce the injunction.

Chandler, Gardner & Williams v. Reynolds, 145 N.E. 476, 250 Mass. 309, cited on page 14 of appellant's brief, differs from this case because there the court found that the employer had sufficient cause to discharge the employee because he refused, failed and neglected to properly perform his work. Moreover, the employer agreed to teach the employee its secret methods of embalming and one of the purposes of the contract was to prevent the employee from taking advantage of this given knowledge. There was no teaching by the defendant of secret methods to use in the drug store, the plaintiff being in full charge.

Another example where the employee was dismissed for cause, cited by defendant, is *Wahlgren v. Bausch & Lomb Optical Co.*, C.C.A. Ill., 68 F. 2d 660, affirming, D. C., *Bausch & Lomb Optical Co. v. Wahlgren,* 1 F. Supp. 799. There was evidence of an unauthorized taking of money by the employee and the employer had asked for the employee's resignation due to such conduct and personal habits detrimental to the employer's interests. There was also evidence of a general connivance to leave the business of his employer and enter into a competing business. The court said:

> "We conclude that the master was justified in finding Oscar (defendant in the case) was one of the co-conspirators in the unlawful enterprise which was conceived by his brother in violation of that gentleman's written agreement."

The court in justifying its decision spoke of attempts to conspire to wrongfully injure the employer's business and of an "enticing away", all of which are elements of bad faith on the employee's part which are entirely lacking in our case.

Once again in *Tolman Laundry Co. v. Walker,* 187 A. 836, 838, 171 Md. 7, appellant's brief p. 15, the employee ". . . voluntarily severed his connection with the laundry pursuant to a provision in his contract." The court said:

> "The testimony is conclusive that when the defendant severed his relation with his master on Aug. 17, 1935, he became the servant of another corporation which was engaged in the same business as his former master."

The appellant cites at page 15 *Durbow Commission Co. v. Donner,* 229 N.W. 635, 201 Wis. 175. The defendant in this case demurred to the complaint asking for an injunction and the court overruled the demurrer. Although the court discussed the general law, the case only held that the demurrer to the complaint should have been sustained on the basis that the plaintiff had not pleaded sufficient facts.

Eigelbach v. Boone Loan and Investment Company, 287 S.W. 225, appellant's brief p. 15, can be distinguished from the case in issue in that the employee voluntarily left the employer's service and was not summarily discharged after having been led to believe his employment was of a permanent nature as the plaintiff was in this case. Also, there was a true trade secret involved in the cited case. The defendant had a customer list in his possession through which a competing loan company could make contacts. A loan company solicits customers whereas the customers come to a drug store and the store does not go to them.

When an employee of a clothing business took with him customer lists, statistical data, and records which had been collected at great expense to the employer, the court in *Moskin Bros. Inc. v. Swartzberg,* 155 S.E. 154, 199 N.C. 539, appellant's brief p. 15, the court prevented him from injuring his former employer by working for a competitor.

In *Grand Union Tea Co. v. Walker,* 195 N.E. 277, 203 Ind. 245, 98 A.L.R. 958, appellant's brief p. 15, although the court discussed several of its own deci-

sions dealing with injunctions where the sale of a business had been involved, the court noted that they had never decided a case involving the employer-employee relationship; consequently they turned to the decisions of other jurisdictions. The court relied on several cases but quoted rather extensively from two. They said the case of *Deverling v. City Baking Company* (1928), 155 Md. 280, 141 A. 542, 545, 67 A.L.R. 993, involved very similar facts to the case in the decision. In that case the employee left the employment of the company and within a few days entered the employment of a competing company. The court then noted that this was a case where the employee violated the negative covenant in order to sell his services to a competitor at a higher wage. The other case was the *Chandler* case, supra, and as already noted the employee was fired for cause and moreover the employer had instructed him in his own secrets of embalming as a part of his employment.

The court held in *May v. Young,* 2 Atl. 2d 385, appellant's brief p. 15, that unless they enforced the negative covenant the employee would be making use of his knowledge acquired during his employment to the detriment of his employer. But in this case it involved an engineering firm and the employee had in his possession a confidential list of clients the firm contacted, a list of prospective clients and confidential records; none of which exist in the instant case.

The court granted an injunction in the case of *Granger v. Craven,* 52 A.L.R. 1356, appellant's brief

p. 16, but here they were dealing with the unique profession of doctoring. The employee was hired as an assistant to an established doctor. The court repeatedly emphasized that the reason for enforcing such an injunction in this case was because of the confidential relationship existing between a doctor and his patients and the fact that the patients treated by the employee would be so likely to follow him to a new location. A drugtsore manager cannot in any way be compared to a doctor and his patients in that the drugstore customers do not buy his knowledge and advice but his products. The court pointed out a doctor's professional status by using such phrases as:

> "... a professional man ... giving the other access to the confidence of his clients ... and would attract a number of the employer's patients. ...
>
> "A specialist may be presumed to acquire as firm a hold upon patients as the drivers of a laundry wagon. ... Different conditions attend professional employment from those which go with the more conventional relation of master and servant."

The reasons for the court's decision of granting an injunction in *Davey Tree Expert Co. v. Ackelbein,* 25 S.W. 2d 62, 233 Ky. 115, appellant's brief p. 16, are obvious when the factual situation is noted. The employee received a three month course of instruction from the employer in the art or science of tree surgery and was paid during this period of instruction. Soon after that the employee voluntarily left the employer's business and went into a competing

business for himself. The court also pointed out that he left without justification.

In *Hydraulic Press Mfg. Co. v. Lake Erie Engineering Corp,* et al. (1942), 2nd Circuit, 132 Fed. 403, the situation is somewhat similar to that in the instant case except that the employee was hired as a designing engineer rather than as a pharmacist and manager of a drug store. His work consisted of designing hydraulic presses. He was under the supervision of the head engineer. He exercised his own talents and ingenuity and had access to the files of the plaintiff and all its engineering data and methods of practice. It was held that the lower court properly found that the employee was not in possession of any trade secrets belonging to the plaintiff and further that the nature of his employment with the plaintiff did not make it reasonably necessary for the protection of plaintiff in its business to restrict him from entering the employ of plaintiff's competitors after leaving plaintiff's employment. The court said that this situation must not be confused with the situation of that of a salesman "whose acquaintance and personal relationships with customers of the plaintiff might enable him to divert their trade unfairly to a competitor."

And in *Roy v. Bolduc,* supra, where it was held that a real estate salesman's negative covenant was unenforceable, the court said:

> "It is accordingly held that while an employer, under a proper restrictive agreement can prevent a former employee from using his trade

> or business secrets, and other confidential knowledge gained in the course of the employment, and from enticing away old customers, he has no right to unnecessarily interfere with the employee's following any trade or calling for which he is fitted and from which he may earn his livelihood and he cannot preclude him from exercising the skill and general knowledge he has acquired or increased through experience or even instructions while in the employment."

Appellant cites at page 11 of its brief the recent Utah case of *Valley Mortuary v. Fairbanks* (1950), ... Ut. ....., 225 Pac. 2d 739, which is not in point. The courts have always differentiated between contracts involving the sale of business and their good will and a contract which involves only an employer-employee relationship. In the latter case the courts are more cautious in granting injunctions. Moreover, this case is not in point for the further reason that the question of the contract being an unreasonable restraint of trade was not even raised by the appellant in his brief nor was it considered by the court.

The court in the *Valley Mortuary* case was keenly aware of the fact that the case involved the sale of a business, stating:

> "Furthermore, where an established business has been sold with its good will and there is a valid covenant not to compete in a certain territory, the breach of such a covenant entitles the injured party to injunctive relief practically as a matter of course." (Citations omitted.)

This is the only situation considered by the court in that case and it does not touch on the situation involved here—the employer-employee relationship.

IV.

THE QUESTION OF ESTOPPEL CANNOT FIRST BE RAISED ON APPEAL.

Appellant's argument that respondent is estopped from attacking the negative covenant because of having accepted benefits of the contract seems out of order at this time. At no stage in the proceedings in the lower court was the question raised. A failure to assert a defense of nonperformance of a condition precedent to bring suit cannot be urged for the first time on appeal. 4 C.J.S. 448. This rule has been applied to a lack of tender, *Los Angeles Inv. Co. v. Home Savings Bank of Los Angeles,* 182 Pac. 293, 180 Cal. 601, 5 A.L.R. 1193. Furthermore, as a general rule a party cannot for the first time on appeal raise the question of estoppel. 4 C.J.S. 451.

Appellant claims that respondent should have made a tender to do equity. Would appellant require that respondent return all the salary he received while employed, or just the salary for the last 30 days during which time he was not required to report for work? If the former, the claim is ridiculous, for appellant received its quid pro quo for every bit of salary it paid respondent up to the day he was asked not to report back to work. If the latter, the claim is likewise ridiculous for the reason that it has nothing to

do with this action for a declaratory judgment. 2 Pomeroy on Equity Jurisprudence, 5th Ed. 59, section 387 says that the maxim, "he who seeks equity must do equity" does not apply where the relief sought by the plaintiff and the equity sought by the defendant belong to or grow out of two entirely separate and distinct matters. Furthermore, according to Lawrence on Equity Jurisprudence, Sec. 1090, the maxim does not require that the plaintiff tender any particular act, or offer to do equity, though to incorporate such an offer in a bill might be good practice.

CONCLUSION

Plaintiff accepted employment with defendant, went into an absolutely new store building and as manager and pharmacist for defendant stocked the store and started the business. He had lived in the neighborhood for over a year and had many friends and acquaintances. These people, as well as friends of the owners of defendant pharmacy, to be sure, patronized the store. The fact that plaintiff's contract provided for his participation in the profits and other things led him to believe his employment would be comparatively permanent. After one year of operation when the business was beginning to show a profit, defendant discharged plaintiff for no reason and without cause. Now defendant threatens to enforce a negative covenant that would restrict plaintiff from competing with defendant either as principal or employee within a radius of two miles for five years. According to the cases cited, said area is unreasonably large for the reason that it is larger than is necessary to the protection of the defendant. Furthermore, a five year period of restriction is certainly not consistant with his having worked there for just one year and a contract guaranteeing no more than 30 days employment certainly lacks mutuality. To the unreasonableness of these provisions, add the fact that plaintiff's covenant was not supported by consideration and it will be evident that to restrict plaintiff from working in the two mile area for five years would be a gross injustice.

For these reasons we urge the court to affirm the judgment of the lower court which granted equitable relief to the plaintiff in declaring that the said negative covenant is invalid and unenforceable.

Respectfully submitted,

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