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## TRADE RESTRAINTS - COVENANTS RESTRICTING OWNER'S USE OF HIS PREMISES

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TRADE RESTRAINTS — COVENANTS RESTRICTING OWNER'S USE OF HIS PREMISES — Plaintiffs and defendant were competing theatre proprietors, owning buildings on opposite sides of the street in X city. For a monetary consideration defendant covenanted to discontinue forever the use of his building as a public theatre. Plaintiffs sought an injunction upon defendant's breach, and defendant demurred on the ground that the covenant was in restraint of trade and not ancillary to any property interest conveyed and requiring protection. *Held*, injunction granted, for in Ohio a contract in reasonable restraint of trade is enforceable though not incidental to some other independent contract or conveyance; and, if such transaction is necessary, it was present here in a diminution of defendant's normal ownership rights. *Robey v. Plain City Theatre Co.*, (Ohio 1933) 186 N. E. 1.

Such covenants, if valid, have dual aspects. They burden the land, especially if enforceable against covenantor's transferees, and they tend to restrict competition. Positing the economic desirability of free competition,<sup>1</sup> American courts in general refuse to enforce them unless the assumed social harm involved is outweighed by other considerations of policy.<sup>2</sup> Thus was evolved the rule that the restrictive covenant must be "reasonable" and ancillary to some primary transaction, such as a sale or lease of property, or some other independent interest which the covenant is made to facilitate or protect.<sup>3</sup> Liberalizing, yet observing the letter of the rule, a few courts have construed bare covenants not to compete as primarily "sales" of good will, the restrictive element being subordinate, thus satisfying the requirement.<sup>4</sup> Similarly in the principal case the court found in the covenant itself a "transfer" of a property interest as the essence of the con-

<sup>1</sup> 3 WILLISTON, CONTRACTS, sec. 1635 (1920); KALES, CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE, sec. 1 (1918); Carpenter, "Validity of Contracts not to Compete," 7 OR. L. REV. 127 at 136 (1928).

<sup>2</sup> 3 WILLISTON, CONTRACTS, sec. 1636 (1920); 6 N. C. L. REV. 214 (1928); cases collected, 3 A. L. R. 250 (1919). The early objection that such contracts tend to deprive the promisor of a means of livelihood no longer obtains with force.

<sup>3</sup> Cases collected, 3 A. L. R. 250 (1919). See 14 COL. L. REV. 151 (1914); *United States v. Addyston Pipe and Steel Co.*, (C. C. A. 6th, 1898) 85 Fed. 271 at 282, *aff'd* 175 U. S. 211, 20 Sup. Ct. 96 (1899); and *Shapard v. Lesser*, 127 Ark. 590, 193 S. W. 262, 3 A. L. R. 247 (1917).

"Reasonableness" formerly depended upon whether a restraint was general or merely partial. The tendency among many recent decisions is to abolish such distinctions and to hold a restraint valid "if it is no more extensive than the legitimate interests of the promisee demand." Carpenter, "Validity of Contracts not to Compete," 7 OR. L. REV. 127 at 135 (1928).

<sup>4</sup> Cases collected, 3 A. L. R. 250 at 254 (1919). See especially *Mapes v. Metcalf*,

tract, since its effect was to cut down the covenantor's normal ownership rights.<sup>5</sup> Such reasoning suggests that these courts have discarded or at least questioned the assumption that free competition is the optimum for every situation. Contrary to the pronouncement of Taft, J., in the leading case of *United States v. Addyston Pipe and Steel Co.*,<sup>6</sup> these courts are apparently willing to enforce covenants whose sole purpose is to restrict competition, for their attempts to conjure up any other construction of such contracts are obviously forced and artificial. The progressive solution may be either to permit at least a factual showing of non-harmful effect or else to enforce such covenants without equivocation unless social detriment is affirmatively shown, not merely assumed.<sup>7</sup> This would seem to be the next logical step for courts to take which so ingenuously find pretexts to satisfy the old rules. Should such a stand be taken, another instance would be presented of a desirable adaptability of the common law to changing economic conditions.<sup>8</sup>

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10 N. D. 601, 88 N. W. 713 (1901), and *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357 (1901).

<sup>5</sup> *Robey v. Plain City Theatre Co.*, (Ohio 1933) 186 N. E. 1 at 3.

<sup>6</sup> " . . . no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and is necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." (C. C. A. 6th, 1898) 85 Fed. 271 at 282, aff'd 175 U. S. 211, 20 Sup. Ct. 96 (1899). The Justice objected to the "shifting, vague and indeterminate" standard involved in any less definite rule. *Ibid.*, p. 284.

<sup>7</sup> See for cases approaching this: *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842 (1900); *The Age Publishing Co. v. The Times Publishing Co.*, 4 Ohio App. 13 (1914); *Rubel Bros. v. Dumont Coal and Ice Co.*, 110 Misc. 32, 180 N. Y. S. 662 (1920); *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153 (1873); *Horany v. Treese*, 91 Okla. 264, 217 Pac. 396 (1923); *Mapes v. Metcalf*, 10 N. D. 601, 88 N. W. 713 (1901); and *Vandiver v. Robertson and Son*, 125 Mo. App. 307 (1907).

Cases such as *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 28 So. 669, 50 L. R. A. 175 (1899), and *Clemmons v. Meadows*, 29 Ky. 619, 94 S. W. 13, 6 L. R. A. (N. S.) 847 (1906), reach opposite conclusions from those above, but fall within the suggested principle, since in each the court does not arbitrarily hold the covenant unenforceable merely because not ancillary, but finds from extraneous facts that the contracts would in fact be socially harmful.

<sup>8</sup> The discussion has purposely been limited to common law principles, for the federal situation under the statutes has too many ramifications in view of recent legislation.