

May 1948

Injunctions--Covenants in Employment Contracts--Extent of Restriction

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Injunctions--Covenants in Employment Contracts--Extent of Restriction, 51 W. Va. L. Rev. (1948).

Available at: <https://researchrepository.wvu.edu/wvlr/vol51/iss2/8>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

169 Ark. at 590. It thus appears that there is a substantial split of authority among the states, now reflected in a single state by our court's simultaneous adherence to both rules. Another error charged against the indictment was its allegation that "defendant within one year from the finding of this indictment" (italics supplied) committed the offense. The state must allege that the offense was committed within one year prior to the finding of the indictment, *State v. Ball*, 30 W. Va. 382, 4 S. E. 649 (1887); *State v. Bruce*, 26 W. Va. 153 (1885), and the language used might literally mean either a year before or a year after the indictment. But the count further alleged that from the date of the offense to the finding of the indictment defendant unlawfully deserted his infant children and together these phrases indicated that the offense was committed before the finding of the indictment, and so that upon consideration of the whole count an offense committed within one year prior to the finding of the indictment was alleged. Where it can be understood from the indictment that the offense was committed at a time before the finding of the indictment, an allegation of a future impossible date will not invalidate the indictment. *Williams v. Commonwealth*, 18 S. W. 1024 (Ky. 1892); *Stevenson v. State*, 5 Baxt. 683 (Tenn. 1875). In the instant case there was almost no chance that defendant was misled or the error was prejudicial and no quarrel is had with the court's refusal to find the indictment bad because of an obviously clerical error. One may, however, regret the proposed distinction between misdemeanor and felony cases, which, while in line with a general attitude of greater liberality in misdemeanor cases, is wholly novel. The direct overruling of *State v. Runyon*, *supra*, would have had much to commend it.

L. H. B.

INJUNCTIONS—COVENANTS IN EMPLOYMENT CONTRACTS—EXTENT OF RESTRICTION.—Complainant small loan company employed defendant as representative and thereafter as office manager. On January 1, 1946, they executed a printed form contract wherein defendant agreed (1) that he would not within one year after leaving complainant's employment engage or become interested directly or indirectly in "any business the whole or any part of which is the lending of money in sums of \$500 or less" in Clarksburg or its trade area; (2) that he would not disclose complainant's "trade secrets"; (3) for liquidated damages in case of a breach. Two months later defendant voluntarily resigned and was immediately employed as manager of a bank "personal loan department" in Clarksburg. Complainant sought an injunction against the former employee and the bank and liquidated damages.

In July, 1946, the circuit court granted a temporary injunction as to (2). On August 1, the supreme court granted a temporary injunction as to (1). On August 28, the circuit court dissolved the supreme court's temporary injunction. Complainant appealed. *Held*, that on June 10, 1947, the question of actually enjoining (1) had become moot since the limitation of one year had expired, but complainant was entitled to liquidated damages if circuit court on final hearing should find in fact that the employee had broken his contract. The official syllabus merely reiterated that of *O. Hommel Co., Inc. v. Fink*, 115 W. Va. 686, 177 S. E. 619 (1934) that "A contractual covenant between employer and employee, restricting the employee from engaging in business similar to that of the employer within a designated time and territory after the employment should cease, will be enforced if the restriction is reasonably necessary for the protection of the employer and does not impose undue hardship on the employee." *Household Finance Corp. v. Sutton*, 43 S. E. (2d) 144 (W. Va. 1947).

Since the specific enforcement of the negative covenant had become moot, the court's comments on it were perhaps not necessary to the disposition of the case. Even so, in view of the court's previous grant of a temporary injunction, and counsel's theory of appeal, they certainly represent the court's considered opinion. The presence of a contract provision for liquidated damages in the event of breach does not preclude the grant of an injunction. *Personal Finance Co. v. Hynes*, 130 Neb. 547, 265 N. W. 541 (1936); *Foster v. White*, 248 App. Div. 451, 290 N. Y. Supp. 394 (1936), *aff'd*, 273 N. Y. 596, 7 N. E. (2d) 710 (1937). The instant case poses the problem of what power parties have to exclude by contract an employee from entering a different though related employment. It recognizes that the employee's covenant had a scope broader than just those businesses harmfully competitive to complainant's business. The contract defined the businesses in which the employee agreed not to engage and the court declared the restriction reasonably necessary without inquiry whether defendant bank's personal credit department was harmfully competitive with complainant. In determining whether a former employee should be restrained from breach of a restrictive negative covenant like that in this case, three sets of interests should be considered: Those of the employer, the employee, and the public at large. *Deuerling v. City Baking Co.*, 155 Md. 280, 141 Atl. 542 (1928). The employer has an interest in having his business protected, the employee an interest in earning a livelihood, and the public an interest in the benefits of the industry and energy of both employer and employee and in having the employee gainfully employed rather

than that he and his family become public charges. *Love v. Miami Laundry Co.*, 118 Fla. 137, 160 So. 32 (1934). The individual interests of "freedom of trade" and "freedom of contract" conflict. In their reconciliation the public has a real and vital concern. *Deuerling v. City Baking Co.*, *supra*. Generally, employees' covenants not to engage in a similar or competing business in a definite area for a specified time following termination of employment are specifically enforceable in equity, provided the restraint on the employee is not greater than necessary for the employer's protection, *O. Hommel Co., Inc. v. Fink*, *supra*; *Dyar Sales & Mach. Co. v. Bleiler*, 106 Vt. 425, 175 Atl. 27 (1934), enforcement does not impose undue hardship on the employee, *O. Hommel Co., Inc. v. Fink*, *supra*; *Smith Baking Co. v. Behrens*, 125 Neb. 718, 251 N. W. 826 (1933), and injunctive relief is not denied or limited by statute, *Holland Laundry v. Lindquist*, 173 Misc. 121, 16 N. Y. Supp. (2d) 140 (1939). Courts recognize that the covenanting employee is giving up valuable rights in agreeing to such restrictions and so are inclined to scrutinize these covenants carefully before issuing an injunction; most courts insist on a clear showing of the justice and necessity of an injunction. *Bakula v. Bakula*, 186 Minn. 483, 243 N. W. 703 (1932); *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312, 140 N. E. 708 (1923). Hence they require limitations on the restrictive covenant as to calling, time, and area. *Martin v. Hawley*, 50 S. W. (2d) 1105 (Tex. Civ. App. 1932). No one can by contract bind himself not to pursue at any time or place the calling by which he earns his livelihood for, if such contract were enforced, he may become a public charge. *Super Maid Cook-Ware Corp. v. Hamil*, 50 F. (2d) 830 (C. C. A. 5th, 1931), *cert. denied*, 284 U. S. 677 (1931). Equity will not restrain one from following all vocations for which he is fitted. *Stoneman v. Wilson*, 169 Va. 239, 192 S. E. 816 (1937); *Super Maid Cook-Ware Corp. v. Hamil*, *supra*. When this problem was first presented in West Virginia, the court was careful to point out that the prohibited employment was not the only means the defendants had of making a livelihood; enforcement of the covenant would not deprive defendants from engaging in the businesses they had learned before being employed by complainant, *O. Hommel Co., Inc. v. Fink*, 115 W. Va. 686, 689, 177 S. E. 619, 620 (1934). No showing of such an element appeared in the instant case. The court merely observes that if there be "possible hardship upon the employee, it is to be remembered that in this instance the employee voluntarily terminated his own employment . . .", 44 S. E. (2d) 149, and seems to have inadequately considered the possible consequences upon the employee and the public of the injunction. Some courts have considered restrictive

covenants after termination of employment as analogous to the restrictions on the seller in a contract of sale of a business and good will and applied like principles as used in evaluating covenants in contracts for the sale of a business. *Eureka Laundry Co. v. Long*, 146 Wis. 205, 131 N. W. 412 (1911). Better considered cases distinguish the types of covenants and examine covenants in an employment contract more critically than those between seller and buyer of a business. Cf. *Samuel Stores, Inc. v. Abrams*, 94 Conn. 284, 108 Atl. 541 (1919); *Carpenter v. Southern Properties*, 299 S. W. 440 (Tex. Civ. App., 1927) declaring that breach of covenant in an employment contract "does not so readily indicate irreparable injury to the employer" as does breach of a covenant in the sale of a business. *Menter Co. v. Brock*, 147 Minn. 407, 180 N. W. 553 (1920). They therefore put on complainant the burden of proving some irreparable injury done or threatened by defendant's breach. *Menter Co. v. Brock*, *supra*; *May v. Lee*, 28 S. W. (2d) 202 (Tex. Civ. App., 1930); *Peterson v. Johnson Nut Co.*, 204 Minn. 300, 283 N. W. 561 (1939). *Contra: Dyar Sales & Mach. Co. v. Bleiler*, *supra*. On complainant's failure to show irreparable injury by the employee's continued violation of the covenant, equity will refuse its aid and leave complainant to his action at law, especially where a suit for liquidated damages affords full and adequate relief. *May v. Lee*, *supra*. Other courts, looking with more favor upon such restrictive covenants, do not require complainant to show irreparable or even actual injury but only that such violation may result in damage to the employer. *Capital Laundry Co. v. Vannozzi*, 115 N. J. Eq. 26, 169 Atl. 554 (1933). Where employee's work was such as to enable him to learn complainant's business secrets, e.g., customer lists or business methods, complainant need not show actual injury. *Srotowitz v. Roseman*, 263 Pa. 588, 107 Atl. 322 (1919); *Matthews v. Barnes*, 155 Tenn. 110, 293 S. W. 993 (1927). While courts today sustain such restrictive covenants when reasonable under the circumstances, they tend to construe such contracts favorably to the employee in recognition of the fact that the employee, having little but his labor to sell, is often in urgent need of selling that and in no position to object to the restrictive terms in the employment contract offered him. This caution in enjoining former employees from violation of such restrictive covenants rests on solid grounds and the instant case must not be interpreted as committing our court against its exercise in cases when the matter is actually presented for decision.

INSURANCE—FORMATION OF THE CONTRACT—SUBROGATION.—*A*, the owner of land in fee, mortgaged it to *B* bank to secure a \$2,500 loan,