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Covenants not to Compete in Kentucky

Maurine Sharp
University of Kentucky

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the state and b) out of business conducted within the state. The Kentucky Act is not so limited.

The distinction may best be pointed out by example. A, citizen and resident of Ohio, operates a motor sales agency in Kentucky. He negligently drives his automobile in Illinois so as to injure B. Under the terms of the Kentucky section, B could in suing A, serve the resident manager of A's motor sales agency while such service under the Iowa statute is invalid. The following situation in Kentucky would be valid service and invalid in Iowa: The accident occurs while the nonresident owner is on a pleasure trip in the state where the business is located, and service is had on the resident agent.

Does the fact that the scope of the Kentucky provision is not limited by its terms to causes of action arising within the state out of business conducted therein make it so unreasonable as to be an invalid exercise of police power? It is believed that it does, and that as applied to causes of action arising outside the state and or unconnected with the business carried on within the state it is unconstitutional. However, it should be regarded as severable, and valid as to causes of action arising within the state out of business carried on therein. It is urged that that conclusion, which is supported by Professor Scott,39 is the correct one, and should be adopted by the Kentucky Court of Appeals should this point rise again.

J. Paul Curry

COVENANTS NOT TO COMPETE IN KENTUCKY

Actions for damages for breach of contracts not to compete and suits for injunctions restraining the breach of such contracts reaching the Court of Appeals of Kentucky have been very numerous; and the decisions of that Court have shown a remarkable uniformity in the treatment of such cases. In its decisions, the court states that though the common law applying to contracts in restraint of trade is in force in this state3 the rigor of the early rule that any contract which tended to restrain trade was void has long since been relaxed; and that the rule governing such contracts may be stated as follows: Covenants in partial restraint of trade are valid when they are agreements by a seller of business not to compete with the buyer in such a way as to decrease the value of the business; by a retiring partner not to compete; by a retiring partner not to do anything to hinder the

39 Scott, Jurisdiction Over Nonresidents Doing Business Within a State (1919) 32 Harv. L. Rev. 871, 890. Scott is supported in his general conclusions by Beale, op. cit. supra n. 3, sec. 84.3, p. 363-4. See also Scott, Jurisdiction Over Nonresident Motorists (1926) 39 Harv. L. Rev. 563, 583. Cf. Beale, Progress of the Law (1919) 33 Harv. L. Rev. 1, 12; Stumberg, op. cit. supra n. 3, p. 95, n. 6. (Quoted in n. 14, supra); Restatement, Conflict of Laws (1934) secs. 84, 85. See also, Comment (1935) 48 Harv. L. Rev. 1433, 1434.

3 Scohee v. Brent, 185 Ky. 734, 216 S. W. 76 (1919); Elkins v. Barclay, 243 Ky. 144, 47 S. W. (2d) 945 (1932).
business of the partnership; by an assistant or agent not to compete with his master or his employer after the expiration of his term of service; by the buyer of property not to use it in competition with the business retained by the seller; or an agreement made by the lessor of property not to use it in competition with the business of the lessee. To this is added the proviso that such contracts should be (a) merely ancilliary to the main purpose of a lawful contract (b) 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) for a just and honest purpose, (d) reasonable as between the parties, (e) not prejudicial or specially injurious to the public interest, (f) or does not tend to suppress competition nor create a monopoly.

The majority of the cases arising out of these contracts in Kentucky have been in connection with the sale of a business or profession. The point of attack being that the contract was unreasonable as between the parties as being too extensive in territory and time covered, or, in a few cases, that the business sold was of a quasi-public nature, and that, therefore, such an agreement could not be entered into with respect to it because it would interfere with the owner’s duties to the public. A few cases have arisen out of the violation by an employee of an agreement not to compete after leaving the employ of the master, and in which the employee attempted to justify his breach because of the unreasonableness of the territory covered by the contract; and a few other cases have arisen in which clearly the agreement was solely for the purpose of creating a monopoly in one of the parties to the contract.

In considering whether or not these contracts are reasonable as between the parties, the Kentucky court has given very little attention to the time element, which has ranged from definite periods of one, two, five or ten years to “so long as” the covenantee remains in the business sold, the latter provision being the one most usually found, and the court has accepted these limitations as to time as reasonable. However, the reasonableness of the covenant in relation to the territory covered, both in the buyer-seller and employee-employer contracts

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2 Clemens v. Meadows, 123 Ky. 178, 29 Ky. Law Rep. 619, 94 S. W. 13, 6 L. R. A. (N.S.) 347, 124 Am. St. Rep. 339 (1906); Barrone v. Mosesley Bros., 144 Ky. 698, 139 S. W. 869 (1911); Nickell v. Johnson, 162 Ky. 520, 172 S. W. 938 (1915); Elkins v. Barclay, 243 Ky. 144, 47 S. W. (2d) 945 (1932); Johnson v. Stumbo, 277 Ky. 301, 126 S. W. (2d) 165 (1938). The reason for the rule is stated thus in Clemens v. Meadows: “Such contracts are intended to secure to the purchaser the good will of the trade or business, and as a guaranty the vendor agrees not to engage in like business or trade at that place for a specified time. In these cases the restraint to be valid must not be more extensive than is reasonably necessary for the protection of the vendee, in the enjoyment of the business which he has purchased. In this class of cases the court recognizes that the vendor has received an equivalent for his agreement to partially abstain from business at the place where his business was formerly conducted.”
(which seem to be governed by the same principles), has been the determining factor in these cases.

The test by which reasonableness of territory is determined may be stated in the words of the court in the case of Linneman & Moore v. Allison & Yates:

“A stipulation that another shall not pursue his trade or employment at such a distance from the place of business of the person to be protected that it could not possibly affect or injure him would be unreasonable. On the other hand, a stipulation is unobjectionable and binding which imposes a restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate two indispensable conditions—that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefits of his exertions.”

Applying this test, agreements in which the territory stipulated was a town; a county; four counties; “within 50 miles of the city of Covington;" over an established stage route; the state of Indiana; “in any city or state where or within which he shall have worked for party of the first part under this contract”; and “at any place in the United States or Canada which is within a radius of 100 miles of any city of which the Davey Company may at any time be maintaining an office for the conduct of its business,” were all upheld as being reasonable, when considered in connection with the business or employment intended to be protected by the contract. On the other hand, where the agreement was not to re-engage in the business “anywhere" while

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1 142 Ky. 309, 134 S. W. 134 (1911)
6 Nickell v. Johnson, 162 Ky. 520, 172 S. W. 338 (1915).
7 Kochenrath v. Christman, 180 Ky. 799, 203 S. W. 733 (1918) (Kochenrath was conducting a mail order liquor business in New Albany, Ind., which he sold to Christman, at the time agreeing not to again engage in the business in the State of Indiana for a period of five years. It was held that the contract was valid and that the restraint was not unreasonable as being over an entire state considering the nature of the business. It was reasonably necessary for the protection of the business. The court said: “By the agreement in controversy the seller disposed of the entire business, and the restraint imposed is ancillary to the contract of sale, and therefore the contract falls within the rule that the restraint imposed must be incidental to, and in support of, another contract or sale in which the purchaser acquires some interest in the business needing protection.”)
8 Thomas W. Briggs Co. v. Mason, 217 Ky. 269, 289 S. W. 295 (1926).
the vendee was engaged therein at Cadiz, it was interpreted by the court as being unlimited both in time and territory and as such unreasonable and void as against public policy.\textsuperscript{13}

The question of whether or not the court may cut down the territory, if it is too broad, and enforce it as to that which would be reasonable, was raised in the case of Ackelbein \textit{v. The Davey Tree Expert Co.}\textsuperscript{14} Ackelbein received special training in tree surgery, agreeing to work for the Davey Company for a period of 3 years and that during his employment and for a year thereafter he would not do tree surgery for any person for whom he had worked while in the employ of the company, or at any place in the United States or Canada which was within a radius of 100 miles of any city of which the Davey Co. may at any time be maintaining an office for the conduct of its business. He violated the contract and the company brought suit asking that he be enjoined from engaging in tree surgery within 100 miles of any city where Davey \& Company maintained an office. The chancellor, basing his decision on the opinion of Judge Dietzman given on a motion to discharge a temporary injunction, limited the injunction to territory within a radius of 100 miles of the cities of Cincinnati and Louisville, though he expressed the opinion that the Company was entitled to the full relief prayed for. The opinion of Judge Dietzman was to the effect that such an extent of territory was not necessary to protect plaintiff's business but that since the whole includes the part, "if the covenant is too broad, there is no reason why the parties should not receive protection to the extent of the reasonable part included in the whole." This judgment was affirmed by the Court of Appeals; but an appeal by the Company on the same record was taken by which the Company sought to have the contract upheld as to the entire territory, and the court said that considering that the business of doctoring trees necessarily covers extensive areas and that the Company had only two offices in Canada and three west of the Mississippi river in the United States, the covenant was not too broad, but was reasonably necessary for the protection of the company in the conduct of its business; the company's injunction should extend to the entire territory covered by the covenant. This is the only case in which this question of cutting down territory has been raised in Kentucky.

The question of whether or not the court will extend the territory covered by the covenant beyond the strict letter of the contract has arisen more often, and the court has been very generous to the covenantor in restricting the covenantor not only to that territory specified but to surrounding territory where operations within such surrounding territory interfered with the business of the covenantee. Thus, in the case of \textit{Johnson v. Stumbo},\textsuperscript{14} the agreement was that the parties "will

\textsuperscript{13} Torain \textit{v. Fuqua}, 175 Ky. 428, 194 S.W. 359, L.R.A. 1917 F. 251 (1917).
\textsuperscript{14} 233 Ky. 115, 25 S.W. (2d) 62 (1930).
\textsuperscript{14} 277 Ky. 301, 126 S.W. (2d) 165 (1938).
not own or operate a hospital by purchase or lease; or otherwise, in Floyd County, Kentucky, for a period of 10 years." Dr. Stumbo began the operation of a hospital in Knott county, about 300 yards from the Floyd County line in which he received patients from Floyd County. The Court of Appeals said that an injunction should issue enjoining Stumbo from operating a hospital in Floyd County, and from receiving in any hospital for treatment any person living or residing in Floyd County. "It is true that the letter of the contract in respect of location of the hospital was strictly observed. But . . . . the intent developed is alone material . . . geography is not important. The important thing was the protection against an unjust competitive encroachment upon the community being served and the business being received." To the same effect are the cases of Skaggs v. Simpson, Elkins v. Barclay and other cases as set out in the notes. In the case of Clemons v. Meadows, decided in 1906, the court had before it a contract between the owners of the only first class hotels in Fulton. By the contract, Meadows agreed to close his hotel for three years, Clemons to pay him $100.00 per month. Clemons failed to pay and action was brought by Meadows. The court held that the purpose of this contract was to create a monopoly in Clemons and was against public policy and void, stating in the opinion that a contract in restraint of trade may be valid where it is in connection with a sale of good will as that is a consideration for the contract, but here there was no such consideration; the court further stated that the hotel was a quasi-public institution and the owner owed a certain duty to the public to keep it open. After this case was decided, the point that the business was of a quasi-public nature was raised on several occasions but dis-

23 In Skaggs v. Simpson, 33 Ky. Law Rep. 410, 110 S.W. 251 (1908) the agreement was not to open up a marble shop in Murray for three years after the sale of the business. Within the three years, Simpson, the seller, opened up such a business 150 ft. outside of the city limits. In holding that plaintiff was entitled to an injunction restraining defendant from conducting his establishment and to damages the court said: "The only question in this case is whether or not the rights of the parties are to be determined and fixed by the strict letter of the writing." Simpson may at other places establish himself in business but "he must not do so in territory in which it may be presumed he would come into direct opposition with Skaggs, or in the territory in which he had been doing the business that he sold."

24 Elkins v. Barclay, 243 Ky. 144, 47 S.W. (2d) 945 (1932) (Elkins sold Barclay equipment and supplies of undertaking business and it was agreed that Elkins would not again engage in the business of undertaker or embalmer in the county so long as Barclay engaged in that business in that county. Elkins established business outside of county, but was called into and did business within that county. Plaintiff granted damages and injunction.)


26 Nickell v. Johnson, 162 Ky. 520, 172 S. W. 938 (1915); Torian v. Fuqua, 175 Ky. 428, 194 S. W. 359 (1917); Elkins v. Barclay, 243 Ky. 144, 47 S.W. (2d) 945 (1932).
posed of with no more comment than: "This was a quasi-public business but this fact does not authorize the appellant to interpose it to relieve him of his contract;" made in the case of Elkins v. Barclay, until the decision in the Johnson v. Stumbo case in which this point is discussed, along with the Kentucky cases involving businesses of a quasi-public character, and it is pointed out that where the agreement is in connection with a sale of the business and its good will, the fact that the business is of a quasi-public character does not affect the contract; but that where the contract is not in connection with such sale but is an independent or dissociated contract to suppress competition or create a monopoly, then the contract will not be upheld. However, in Kentucky, those cases arising under independent contracts made between rivals in business for the purpose of suppressing competition or creating a monopoly have uniformly been held void as against public policy, regardless of the nature of the business.

The extent to which the Kentucky court will go in carrying out the spirit rather than the letter of the contract is illustrated by the decision in Keen v. Ross. Ross and others were in the livery business as partners in Burkesville. Ross went out of the business, selling his interest to the others and agreeing never again to engage in the livery business in the town of Burkesville so long as any of the others engaged in the business. Later he became interested in the automobile business and operated an automobile for hire. The court granted an injunction against him restraining him from violating the contract saying:

"We know . . . that the transportation of members of the public for hire is now . . . performed with the use of the auto-

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1 Clemons v. Meadows, supra n. 18, where the contract was between owners of rival hotels, for the closing of one of the hotels; Anderson v. Jett, 39 Ky. 375, 12 S.W. 670, 672 (1889) in which an agreement between the owners of two rival steam boats on the Kentucky River not to compete with each other but to divide the net earnings of each between them was held void as against public policy, it destroying competition and creating a monopoly; Artic Ice Co. v. Franklin Co., 145 Ky. 32, 139 S.W. 1080 (1911) in which an agreement between rival ice companies whereby one agreed to sell all its output to the other which discontinued manufacturing ice and sold at higher prices than when the companies were competing was held void as against public policy; Brent v. Gay, 149 Ky. 615, 149 S.W. 915 (1912) (Contract between buyers of blue grass seed among themselves to control the market was held void); Jackson v. Sullivan, 276 Ky. 666, 124 S.W. (2d) 1019 (1939) (Defendant became member of association of contractors which consisted of 140 members. Association adopted N.R.A. code and entered into an agreement not to compete for building work to be done in Jefferson County except in competition with members of the association. Agreement provided for fine for violation of agreement. Defendant competed with bidder not member and association assessed a fine and this action was to recover the fine. Held: the provision of the contract was in unreasonable restraint of trade and void as being contrary to public policy.)

2 243 Ky. 144, 47 S.W. (2d) 945 (1932).

2 377 Ky. 301, 128 S.W. (2d) 165 (1933).

22 136 Ky. 256, 216 S.W. 605 (1919).
mobile, which has in great measure supplanted the old horse-drawn carriage. . . . It is therefore patent that the contracting parties in the instant case, at the time of the execution of the contract, intended to deprive the defendant of the right of performing any service for the public which was an essential part of that performed by one engaged in the livery business, and the fact that such service was performed in a different manner from the way it was formerly done will not excuse the defendant in violating the very purpose and object intended by the contract.

No particular form is required for these covenants. Thus, the mere memorandum, given in connection with the sale of a marble shop, in these words, "This is to certify that I will not open up a marble shop in the city of Murray in three years," and signed by the seller, was held sufficient. Neither is it essential that the covenant be in writing, if it is possible that it may be completed within one year, as when the contract is not to engage in business so long as one of the parties remains in business.

No case involving covenants not to compete has arisen in Kentucky in which the rights of either party to envoke the particular remedy asked for has been questioned. In some cases the plaintiff has sought damages for breach of the contract, in others he has asked for an injunction restraining defendant from breaching the contract, but in the majority of the cases, plaintiff has sought both damages and an injunction, which, of course, is permissible under our code procedure, and too well established to permit of questioning.

Maurine Sharp

OIL AND GAS—COMPARISON OF RESULTS UNDER OWNERSHIP AND NON-OWNERSHIP VIEWS

The law of oil and gas is an exclusive subdivision of property law. Because of its fugacious nature it has been likened to animals ferae naturae; but this is not absolutely correct if for no other reason than that animals ferae naturae are owned by the State, until a person brings them into possession, while oil and gas are not owned by the State. Another analogy has been advanced stating that oil and gas should be governed by the law of percolating waters. This is erroneous, because the owner of the land cannot use the water for commercial

—Dickey v. Dickinson, 105 Ky. 751, 49 S.W. 761 (1899) (A contract not to again engage in the newspaper business in the town of Glasgow is possible of performance within a year by the death of the obligor within that time, and not within the statute of frauds); Nickell v. Johnson, 162 Ky. 520, 172 S.W. 938 (1915).

In Ohio Oil Co. v. Ind., 177 U.S. 190 (1900), the Supreme Court recognizes the fallacy in the analogy of oil and gas and wild animals, and says that although they are similar they are not identical. See Roberts, Right of a State to Restrict Exportation of Natural Resources (1936) 24 Ky. L. J. 259, 266.