food items served in connection with the meal is desirable.[18] This liability may be justified for the same reason that one who chooses to engage in an ultra-hazardous activity is held absolutely liable.[19]

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[18] The rule laid down in the Year Books recognized an insurer's liability upon taverners, victuallers and the like. "For if I come into a tavern to eat and the taverner *gives* and *sells* me beer or goods which is corrupt, by which I am put to great suffering, I shall clearly have an action against the taverner on the case even though he makes no warranty to me." Year Book 9 Hen. VI 53. (Writer's Italics) This liability arose from the calling or trade of the seller and as the result of old criminal statutes bottomed on public policy. *Burnby* v. *Bollett*, 16 M. & W. 644, 153 Eng. Rep. 1348; AMES, LECTURES ON LEGAL HISTORY, p. 137; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, pp. 385, 386, 447, 448; MELICK, note 8, *supra*. The same reasons for the enforcement of the rule exist with even greater force today.

[19] *Parks* v. *Yost Pic Co.*, 93 Kan. 334, 144 Pac. 202 (1914). See 25 Yale L.J. 679 (1916).

TRADE REGULATIONS

EMPLOYER PROTECTION FROM EMPLOYEE COMPETITION AFTER A TERM OF EMPLOYMENT

In the comparatively recent case of *Curry* v. *Marquart*,[1] the Supreme Court of Ohio had occasion, for the first time, to consider the extent to which Ohio employers can protect themselves from the competition of former employees. Plaintiff's business was that of dealer in milk at wholesale, for whom the defendants operated a route. No written lists of customers passed from employer to employees, nor did the employer exact of these routemen covenants not to compete after the termination of the employment. After a period of a few months, the defendants broke off the relationship to establish a similar business, competitive to the extent that their new route covered a portion of that previously operated by them for the plaintiff. Faced with this threat of competition at the hands of those familiar with his customers, plaintiff sought the aid of a court of equity. Ohio doctrine seemed to favor his suit, for in *French Bros. Bauer Co.* v. *Townshend Bros. Milk Co.*[2] the Court of Appeals for the First District had, despite the absence of a written list of customers, enjoined similar employee competition on the basis of a tort of unfair competition. But the Court of Appeals ruled contrariwise in the instant litigation. Taking the case on a certification of conflict, the Supreme Court adopted the view espoused by this latter appellate court.

[1] 133 Ohio St. 77, 11 N.E. (2d) 868 (1938).
[2] 21 Ohio App. 177, 152 N.E. 675 (1925).

Although this view represents the weight of authority in the United States today,[3] its logical foundations are none too secure. For if the absence of a written list is thought to gain its significance from equitable considerations, the answer is that equity has not been hesitant in the protection of intangible property rights, and that the right to carry on a business free from unfair competition has often been termed a property right sufficient to satisfy equity's demand.[4] Functionally viewed, the employer's economic interest is no different where the identity and knowledge of his customers is carried away in the employee's memory than when the appropriation is *via* a written list. On the other hand, if equity's refusal to relieve is based on the fact that the employer can point here to nothing that belongs to him, the same must generally be true even though a written list has changed hands. Surely the challenge to orthodox conceptions of what is the property of the employer and what of the employee cuts deeper than the form of the transaction between employer and employee.

The failure of the Supreme Court of Ohio to accord to the employer the maximum protection judicial legislation has devised for the situation where no express covenant is involved, renders all the more pertinent an examination of the extent to which such protection can be secured, under present Ohio authorities, through dependence upon contract rather than tort. Into this area the Supreme Court has never yet gone; the decisions of the inferior state courts must continue to provide the answer.

In *Jewel Tea Co.* v. *Wilson*[5] the covenant of a tea and coffee salesman not to compete in the city of Cleveland for one year after leaving the plaintiff's employ was held valid by the Circuit Court of Cuyahoga County, although injunctive relief was denied because of the wrongful discharge of the salesman. The court regarded as immaterial the fact that the employee disclosed no confidential information nor solicited any of the plaintiff's customers, contenting itself with the statement that the enforceability of such a contract is "too well established to require discussion." In support were cited several leading decisions of the Ohio Supreme Court, including *Lange* v. *Werk*[6] and *Lufkin Rule Co.* v. *Fringeli*.[7] But these cases approved promises connected to the sale of a business or the dissolution of a partnership; not one considered an employer-employee covenant. By reliance upon such cases as precedent

[3] 23 A.L.R. 423 (1923); 34 A.L.R. 399 (1925); 54 A.L.R. 350 (1928); RESTATEMENT, AGENCY, sec. 396(b).

[4] *Dehydro, Inc.* v. *Tretolite Co.*, 53 Fed. (2d) 273 (D.C. Okla. 1931); *Hill Grocery Co.* v. *Carroll*, 223 Ala. 376, 136 So. 789 (1931).

[5] 20 Ohio C.C. (N.S.) 233 (1912).

[6] 2 Ohio St. 520 (1853).

[7] 57 Ohio St. 596, 49 N.E. 1030 (1898).

the court must be understood to have meant that a restriction which is reasonable when attached to the sale of a business and its goodwill is also reasonable if ancillary to a contract of employment. Although, at the time *Jewel Tea Co.* v. *Wilson*[8] was decided, little, if any, specific authority advocated a distinction between these types of covenants, there was increasing recognition of their economic dissimilarity, especially in England, where courts were becoming more reluctant to uphold employment covenants than sale covenants. This attitude was the result of a realization that, with the sale of a business, a promise not to compete and its fulfillment is ordinarily essential for an adequate delivery of the goodwill to the purchaser; but that this is not true where the promisor sells his services. The attempt of an employer to do more than protect his business from inroads which his former employee is enabled to make by virtue of a confidential relation or knowledge of trade or business secrets is to seek a special advantage which is not rightly his. An additional factor, increasingly apparent, was the inequality of bargaining power which is ordinarily characteristic of employment contracts, but not of vendor-vendee contracts. The tendency in England to draw this distinction as a rule of law culminated just four years after the *Jewel* case in *Morris* v. *Saxelby*,[9] in which the House of Lords held that a covenant exacted by the purchaser from the vendor on a sale of the goodwill of a business should be differentiated from a covenant exacted by an employer against his employee, and that, in the latter case, where there is no violation of the employer's business secrets, a covenant against competition will not be enforced. This rule has been generally followed in Great Britain.[10] Its narrowing effect is well brought out in an article by Farwell, *Covenants in Restraint of Trade as between Employer and Employee.*[11]

The doctrine of *Morris* v. *Saxelby*[12] has been slow to penetrate the United States; it made virtually no inroads in this country until the depression dramatically increased the acuteness of the problem of employee restrictions. No doubt Williston's criticism of *Morris* v. *Saxelby*[13] was influential in the reluctance of the American courts to adopt its principles. In the 1920 edition of his work on *Contracts*[14] Williston referred to this differentiation as "unadvisable as a positive rule

[8] 20 Ohio C.C. (N.S.) 233 (1912).
[9] 1 A.C. 688 (Eng. 1916).
[10] *Attwood* v. *Lamont*, 3 K.B. 571 (Eng. 1920); *Dossor* v. *Monaghan*, N.I. 209 (Eng. 1932).
[11] 44 L.Q. Rev. 66 (1928).
[12] 1 A.C. 688 (Eng. 1916).
[13] *ibid.*
[14] WILLISTON, CONTRACTS, sec. 1643 (1920).

of law." In 1937, in the Revised Edition of the same work,[15] the above statement is reiterated, but it is conceded that "there is a tendency in the United States to follow the English courts in differentiating between contracts in restraint of trade and contracts in restraint of employment." As a consequence of this depression infiltration the law in the United States is in a state of flux. This is vividly revealed by the treatment of the matter in the *Restatement of Contracts*. Section 516 (f) apparently adopts the Williston theory that a bargain by an employee not to compete with his employer is valid and enforceable. Yet the comment on clause *f* states that such a promise will not ordinarily be enforced so as to preclude the employee from exercising skill and knowledge acquired in his employer's business even if the competition is injurious to the latter, except so far as to prevent the use of trade secrets or lists of customers, or unless the services of the employee are of a unique character. The comment thus sounds more in terms of the English doctrine of *Morris* v. *Saxelby*.[16]

That the general confusion on this subject has not escaped Ohio is well portrayed in *Federal Sanitation Co.* v. *Frankel*.[17] There a contract restraining a salesman from competing with his employer within a certain territory for twelve months after the termination of his employment was held valid by the Court of Appeals for the Eighth District.[18] After discussing *Lange* v. *Werk*[19] and *Lufkin Rule Co.* v. *Fringeli*[20] and drawing no distinction between those vendor-vendee covenants and the employer-employee covenant under consideration, the court, paradoxically enough, quoted a passage from an annotation to the Connecticut case of *Samuel Stores* v. *Abrams*.[21] The *Samuels* case expressly recognizes and approves *Morris* v. *Saxelby*,[22] and the paragraph of the annotation quoted leans decidedly toward the English point of view, stressing the importance of the confidential and personal nature of the employment. The obvious ambiguity of the decision renders it of negligible value as authority for either the older or the *Morris* v. *Saxelby* rule.

The decision in *Electric Co.* v. *Kendall*,[23] also by the Court of Appeals for the Eighth District,[24] represents, on the other hand, a clear-

[15] WILLISTON, CONTRACTS, (Rev. Ed.) sec. 1643 (1937).
[16] 1 A.C. 688 (Eng. 1916).
[17] 34 Ohio App. 331, 171 N.E. 339 (1929).
[18] Judges Middleton and Mauck of the Fourth and Judge Hauck of the Fifth Districts sitting in place of Judges Sullivan, Vickery, and Levine, of the Eighth District.
[19] 2 Ohio St. 520 (1853).
[20] 57 Ohio St. 596, 49 N.E. 1030 (1898).
[21] 94 Conn. 248, 108 Atl. 541 (1919), in 9 A.L.R. 1450, at p. 1468.
[22] 1 A.C. 688 (Eng. 1916).
[23] 27 Ohio L. Rep. 679 (1928).
[24] Before Judges Sullivan, Vickery, and Levine.

cut adherence to the older view. The defendant was placed in charge of the plaintiff's service department under a contract prohibiting him from engaging in similar business in the same county for a specified length of time. The contract was approved, the court again citing *Lange* v. *Werk*[25] as the governing rule in Ohio. The Court of Appeals for the Ninth District demonstrated a similar attitude in *Null* v. *Guilliams*.[26] There a covenant was enforced which precluded the defendant, who had formerly operated plaintiff's retail milk route, from soliciting, not only the patronage of the customers previously served by him, but also everyone else living along the line of the route. The breadth of the decree necessitates its being viewed as an illustration of the old rule. The most recent Ohio case in point, *Individual Damp Wash Laundry Co.* v. *Myers*,[27] emanating from the Hamilton County Common Pleas Court, is of little or no help here, since the relief sought and granted—an injunction against defendant's diverting the route customers of his former employer for one year—was so modest that it would be obtainable even under the English rule.

The employee restriction problem, emphasized by the depression, has been met by most American courts through the use of equitable and other discretionary devices, rather than by resort to the English method of limitation. This technique, like the English rule, tends to narrow the restraint available to the employer, but not necessarily with the same results. A covenant, unenforceable under the English rule because it involves no business secrets, may not be subject to attack by any of these equitable or discretionary devices. Conversely, a contract which is valid under *Morris* v. *Saxelby*,[28] in the light of its substantive restraint, may not be enforceable when tested by American limitations. One of these limitations which has been invoked to justify a refusal of relief is the doctrine of "clean hands."[29] This doctrine has been used in Ohio where the employer has breached the contract which he seeks to enforce,[30] but any further extension of it has apparently been rejected.[31] In fact, the inverse application of the "clean hands" doctrine might be inferred from the attitude of the court in *Null* v. *Guilliams*,[32] where the employee left

[25] 2 Ohio St. 520 (1853).
[26] 22 Ohio L. Abs. 602 (1936).
[27] 26 Ohio L. Abs. 142, 10 Ohio Op. 517 (1938).
[28] 1 A.C. 688 (Eng. 1916).
[29] *Economy Grocery Stores Corp.* v. *McMenamy*, 290 Mass. 549, 195 N.E. 747 (1935); *Carpenter* v. *Southern Properties*, 299 S.W. 440 (Tex. Civ. App. 1927).
[30] *Jewel Tea Co.* v. *Wilson*, 20 Ohio C.C. (N.S.) 233 (1912).
[31] In *Red Star Yeast Products Co.* v. *Hague*, 25 Ohio App. 100, 157 N.E. 393 (1927), it was declared immaterial whether or not the defendant's discharge was justifiable, since the covenant was to apply on defendant's leaving the employer's service for "whatsoever cause."
[32] 22 Ohio L. Abs. 602 (1936).

the plaintiff's service without notice. Another of these equitable concepts is that of gross inadequacy of consideration. Its application relegates the employer to his remedy at law when the degree of inequality of benefits under the contract shocks the conscience of the court.[33] Still another limitations, closely analogous to that of gross inadequacy of consideration, is the illusory contract doctrine, under which contracts terminable at will have been declared void, although a reasonable period of performance under such contracts has generally rendered them enforceable.[34]

A decision by the Court of Appeals for the Eighth District, *Red Star Yeast Products Co.* v. *Hague*,[35] has been cited as an example of an illusory contract made enforceable by "part performance."[36] The covenant of a salesman not to compete within a certain area for six months after leaving the plaintiff's service was held valid, the court relying on the *Jewel* case as the controlling authority. The court here declared that, had not the record revealed extended performance under the contract, which was on a monthly basis, it would have been unenforceable, because four weeks of employment is inadequate in comparison with six months of restraint. It is submitted that this does not demonstrate that the court treated the case as one of "part performance" of an illusory contract, for the contract here was not terminable at will. Rather did the court, in determining whether or not the contract was reasonable, include balance of consideration as an essential element. Such a theory was partially relied upon back in 1711, in the leading case of *Mitchell* v. *Reynolds*.[37] For over one hundred years after that decision it was unsettled whether legal consideration or balanced consideration was necessary to support this type of contract. In 1837 the doubt was finally resolved in *Hitchcock* v. *Coker*,[38] which ruled that valuable consideration was sufficient. It is demonstrative of the divergency between the recent English and American development that *Morris* v. *Saxelby*[39] specifically repudiated the use of the balance of consideration concept as a solution of the problem of employee restraint.

Save for the *Frankel* case's flirtation with the rule of *Morris* v. *Saxelby*[40] and the suggestion in the *Red Star* case of a revival of the balanced consideration theory, the Ohio cases to date appear to follow the

[33] *Love.* v. *Miami Laundry Co.*, 118 Fla. 137, 160 So. 32 (1935).
[34] See Note, *The Enforceability of a Promise Not to Compete after an Employment at Will*, 29 Col. L. Rev. 347 (1929).
[35] 25 Ohio App. 100, 157 N.E. 393 (1927).
[36] WILLISTON, CONTRACTS (Rev. Ed.) sec. 1643 (1937).
[37] 24 Eng. Rep. 347 (1711).
[38] 112 Eng. Rep. 167 (1837).
[39] 1 A.C. 688 (Eng. 1916).
[40] *ibid.*

old rule. But even were Ohio courts in general to espouse one or both of these limitations the Ohio employer would still stand to gain more protection through the use of an express covenant than by reliance upon an implied covenant, as the latter has been restricted in *Curry* v. *Marquart*.[41] JOHN R. YOUNG

[41] 133 Ohio St. 77, 11 N.E. (2d) 868 (1938).

TRUSTS

RESERVATION OF POWERS IN A LIVING TRUST

The Supreme Court of Ohio has recognized the validity of living trusts in a recent case which represents a complete reversal of the court's former attitude toward these devices.[1] Due to the great number of living trusts now existing in this state, as well as elsewhere, and to the great degree of convenience that may be achieved through the continued recognition thereof, a discussion of the development of the problem in Ohio does not seem inappropriate. To attempt a review of all the decisions in this country dealing with the subject would result in a work too lengthy for the purposes for which this article is intended. This discussion, therefore, shall be directed chiefly to the development of the law in Ohio and references to authority outside the state shall be made only for the purpose of comparison and contrast.

In October of 1913, one Thomas H. White conveyed certain real and personal property to the Cleveland Trust Co., giving the trust company broad powers in the matter of investment and reinvestment and unrestricted power to manage as if the absolute owner, but retaining for himself the net income for life and such of the principal as the trustee should deem necessary. White was to have free use of the realty and was to pay the taxes thereon, was to have the right to demand from the trustee a transfer of voting rights in certain stocks, and was to have the right, subject to the trust company's approval, to revoke the trust. The agreement further stipulated that after the death of White the property was to be held in trust for certain named individuals. On the same day, White executed a will devising all of the property to the trust company to be disposed of according to the terms of the trust agreement. Mr. White died in 1914. In January of 1934, the trust company brought an action under section 10504-66 of the General Code for a construction of the so-called trust agreement. The Common Pleas court of Cuyahoga County held the trust agreement was testamentary in

[1] *Cleveland Trust Co.* v. *White*, 134 Ohio St. 1, 15 N.E. (2d) 627 (1938).