they have not shifted to the accused the onus of proving their truth, that therefore there is no evidence to go to the jury and the accused must be discharged.

Case dismissed.

S.C.O.A. LIMITED v. KELLER

Supreme Court (Purcell, C.J.): July 7th, 1924

[1] **Contract — illegal contracts — agreements contrary to public policy — agreements in restraint of trade — unreasonable restraints illegal and void — covenant preventing use of employee's personal skill in competition with employer unreasonable, unless designed reasonably to protect employer's trade secrets or other interests:** A covenant in restraint of competition is enforceable only if it is reasonable in the circumstances, and although it may be reasonable for an employer to impose such a covenant upon his employee in order to protect trade secrets or to prevent him from exercising his influence to attract customers away from his employer, a covenant which does not protect any such interest but is designed only to prevent the employee from using his personal skill in competition with his employer, is unreasonable and therefore illegal and void (page 96, line 27—page 99, line 12).

[2] **Employment — restraint of competition — unreasonable restraints illegal and void — covenant preventing use of employee's personal skill in competition against employer unreasonable, unless designed reasonably to protect employer's trade secrets or other interests:** See [1] above.

[3] **Trade and Industry — restraint of trade — reasonable restraints enforceable — covenant preventing use of employee's personal skill in competition with employer unreasonable and void unless designed reasonably to protect employer's trade secrets or other interests:** See [1] above.

The plaintiffs brought an action against the defendant in the Circuit Court claiming damages for breach of contract and an injunction to restrain the defendant from further breaches.

The plaintiffs employed the defendant under an agreement which provided *inter alia* that during the two years following the termination of the employment the defendant should not take part in any business in the Colony or Protectorate which was similar to the plaintiffs'; and that he would be liable to pay liquidated damages should he do so.

About six months after leaving the plaintiffs' employment the

defendant set up his own business in the Protectorate at a considerable distance from the place at which he had worked for the plaintiffs. His trade was similar to that carried on by the plaintiffs. They brought the present proceedings in the Circuit Court claiming damages for breach of the agreement and an injunction to restrain the defendant from further breaches.

The case was transferred to the Supreme Court where the defendant contended that since the agreement was designed, not to protect the plaintiffs' interests, but merely to prevent him from using his own personal skills in competition against the plaintiffs, the restraint was unreasonable and therefore illegal and void.

The plaintiffs' suit was dismissed.

Case referred to:

(1) *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688; [1916—17] All E.R. Rep. 305, *dicta* of Lord Parker of Waddington applied.

PURCELL, C.J.:

This case was transferred to the Supreme Court of Sierra Leone from the Circuit Court holden at Makeni in the Northern Province of the Sierra Leone Protectorate.

The plaintiffs' claims as set forth in the writ of summons read as follows:

(i) Liquidated damages for breach of an agreement dated September 29th, 1920 whereby you undertook, in consideration of the plaintiffs employing you, not to be engaged or concerned in any capacity whatsoever within two years after leaving the plaintiffs' service in any business carried on in the Colony or Colonies or the Protectorate of the Colony or Colonies where you should have been employed by the plaintiffs at the time of or within one year before leaving their service and being a business competing with or similar to the plaintiffs' business:
12,960 frs. at 65 frs. per £1 = £199.0s.9d.

You quitted the plaintiffs' service on or about September 15th, 1922 and on or about the month of April 1923 you commenced on your own account a business in the Protectorate of the Colony of Sierra Leone competing with and similar to the plaintiffs' business.

(ii) An injunction restraining you from carrying on in the Colony or Protectorate of Sierra Leone within two years from November 15th, 1923 any business similar to or competing with the plaintiffs' business.

Article 10 of the agreement in question reads as follows:

"The employee is formally interdicted to take part during the two years following his departure from the Society (whatever be the cause of his departure) in any capacity whatever (interested or employed) in any enterprise carrying on business similar to the Society in the Colony, or Colonies and Protectorate which are attached thereto, where he was employed at the time of his departure or less than a year before his departure at the least without being first authorised in writing. Every infraction of the present clause renders the employed as a matter of right to pay an indemnity twelve times his salary received from the Society during the last month without prejudice to more ample damages."

The defendant has submitted that this restraint as sought to be imposed on him under this agreement is unreasonable and bad in law and therefore void and that is the question that the court has to decide in this case.

The leading case on this subject is *Herbert Morris, Ltd.* v. *Saxelby* (1), in which all the other cases are reviewed and is obviously the authority which the court will feel itself bound to follow. I have read the judgments in this case very carefully and I cannot do better than quote a portion of the speech of the late Lord Parker of Waddington, in order to make it quite clear what view is taken by the House of Lords ([1916 1 A.C. at 706; [1916—17] All E.R. Rep. at 315):

"My Lords, in the case of *Nordenfelt v. Maxim Nordenfelt Co.* [1894] A.C. 535 Lord Macnaghten considered most if not all of the prior cases relating to contracts in restraint of trade and came to certain conclusions. I had to consider them in the case of *Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co.* [1913] A.C. 781, and I adhere to everything I then said. As I read Lord Macnaghten's judgment, he was of opinion that all restraints on trade of themselves if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party

alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another.

It will be observed that in Lord Macnaghten's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public.

. . . .

My Lords, it appears to me that Lord Macnaghten's statement of the law requires amplification in another respect. If the restraint is to secure no more than "adequate protection" to the party in whose favour it is imposed, it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required. Otherwise it would be impossible to pass any opinion on the adequacy of the protection.

In the *Nordenfelt Case* . . . that which it was required to protect was the goodwill of a business transferred by covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on. Under the particular circumstances of the case a world-wide covenant against competition was held no more than adequate for the purchaser's protection. It was argued before your Lordships that no distinction can be drawn between the position of the purchaser of the goodwill of a business taking such a covenant from his vendor and the case of the owner of a business taking such a covenant from his servant or apprentice. In both cases it was said that the property to be protected was the same and the dangers to be guarded against the same. I am of opinion that this argument cannot be accepted. The distinction between the two cases is, I think, quite clear, and is recognized both by Lord Macnaghten and Lord Herschell in the *Nordenfelt Case*. . . . The goodwill of a

business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.

It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The goodwill of his business is, under the conditions in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of this employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained."

Now the question the court has to decide is whether in view of the authority I have just quoted the restraint sought to be imposed on the defendant is reasonable.

I am satisfied that in the present case the defendant went to trade in a part of the Protectorate at some considerable distance from any place where the plaintiffs were carrying on their business and there certainly has been no evidence given in the case to indicate that the defendant filched any of the plaintiffs' customers. In fact the way trade of this kind is carried on in the Protectorate would more or less negative such a possibility. Protectorate natives would, as I believe, probably go to the nearest store and that is

what probably happened in this case, and it must be observed that in the present case no question of goodwill or trade secrets arises. It seems to me that all the defendant took with him when he went into the Protectorate were, as described by Lord Shaw of Dunfermline ([1916] 1 A.C. at 714; [1916—17] All E.R. Rep. at 313) — "a man's aptitudes, his skill, his dexterity, his manual or mental ability — all those things which in sound philosophical language are not objective, but subjective. . . they are not his master's property; they are his own property; they are himself." For these reasons I have come to the conclusion that the restraints sought to be imposed on this defendant were unreasonable and bad in law and therefore void. I therefore dismiss the plaintiffs' claim and give judgment for the defendant with costs.

Suit dismissed.

LANGLEY v. YEKINNY RENNER, WILLIAMS, TYJAN RENNER and TIRU RENNER

Full Court (McDonnell, Ag. C.J., Sawrey-Cookson and Butler-Lloyd, JJ.): December 1st, 1924

[1] **Civil Procedure — appeals — death of appellant — does not cancel final leave but invalidates bond for costs — appellant's personal representative can continue appeal and respondent may request execution of new bond:** A personal representative may continue proceedings begun by the deceased, but although the death of an appellant does not cancel final leave to appeal already granted it invalidates his bond for the costs of the appeal and the respondent may move the court to make the execution of a new bond a condition of leave to the personal representative to continue the proceedings (page 102, lines 1—7).

[2] **Civil Procedure — costs — security for costs — bond for costs on appeal nullified by death of appellant — respondent may request execution of new bond as condition of leave to appellant's personal representative to continue appeal:** See [1] above.

[3] **Ecclesiastical Law — conduct of religious services — irregularities — celebrant not priest — court may grant injunction to prevent celebration of services by person not a priest:** When a religious trust imposes a duty upon the trustees to permit only priests to conduct religious services in their mosque, the court may grant an injunction to prevent the celebration of services by a person who is not a priest, despite earlier minor breaches of trust by the trustees (page 103, lines 24—28; page 103, line 34— page 104, line 21; page 106, lines 15—18).