filing of an appeal may suspend the punishment.[27] The statute has been held constitutional.[28]

The early case of *Magennis* v. *Parkhurst*[29] held that costs in contempt are not usually allowed, since the action is in its nature criminal. The allowance of costs in a criminal contempt case later became a settled doctrine in the Court of Chancery, and in *O'Rourke* v. *Cleveland*[30] this doctrine was affirmed by the Court of Errors and Appeals. Similarly, counsel fees were awarded to neither party, even though successful, in criminal contempt proceedings. In *O'Rourke* v. *Cleveland,*[31] it was stated that the power to award counsel fees was purely statutory and, in the absence of a statute, the court declined to impose a counsel fee upon the party held guilty of contempt. In 1910, Section 91 of an act concerning the Court of Chancery was amended so that by construction counsel fees may be awarded.[32] In *Hilton* v. *Hilton,*[33] Lane, V.C., in an opinion which reviews the authorities, granted counsel fees against the adjudged contemnor.

VALIDITY OF COVENANTS BY VENDORS AND EMPLOYEES IN RESTRAINT OF COMPETITION— Covenants in restraint of competition naturally divide themselves into two general types: (1) those entered into by a vendor of a business with his vendee, whereby the former agrees not to engage in a similar line of business within a certain area for a specified time; and (2) those entered into by an employee as part of his original contract of employment, agreeing that he will not, after the termination of his employment with his covenantee, work or engage in a similar business for a certain period of time within a prescribed area. Different economic and social considerations applicable to the two classes would seem to dictate the application of different tests to determine the validity of covenants of each class. The New Jersey courts have not, however, recognized any basis for differentiation, although substantial justice seems to have been reached in almost every case.

The attitude of the courts toward the validity of covenants in restraint of competition has undergone a broadening development roughly

---

[27] Bijur Motor etc. Co. v. International Association of Machinists, 92 N.J. Eq. 183, 111 Atl. 642 (Ch. 1921).

[28] Bijur Motor etc. Co. v. International Association of Machinists, 92 N.J. Eq. 644, 114 Atl. 802 (E&A 1921); Staley v. South Jersey Realty Co., *supra,* note 1.

[29] 4 N.J.Eq. 433 (Ch. 1844).

[30] 49 N.J.Eq. 577, 25 Atl. 367, 31 AM. ST. REP. 719 (E&A 1892).

[31] *Supra,* note 29.

[32] The section was amended to read: "In any cause, matter or proceeding in the Court of Chancery the Chancellor may make such allowance by way of counsel fee to the party or parties obtaining the order or decree as shall seem to him to be reasonable and proper and shall direct which of the parties shall pay such allowances."

[33] 89 N.J.Eq. 422, 105 Atl. 65 (Ch. 1918). See also Re United Hatters, *supra,* note 21.

corresponding with the growth and expansion of commerce and industry. In the early common law, when trade and artisanship were geographically and financially limited, the courts held all such contracts void as against public policy.[1] Later the view-point shifted to permit the enforcement of certain restrictive covenants according to arbitrary rules of selection. Where a restraint was unlimited as to both time and space, and where it was limited as to time, but unlimited as to space, it was absolutely void as against public policy. Where limited as to space, and unlimited as to time, or where limited as to both, the covenant might be found valid, but there seems to have been a presumption against its validity which had to be overcome by the showing of the party seeking to enforce it that the limits were reasonable and necessary.[2]

The case of *Mitchell* v. *Reynolds*[3] is generally said to be the first case in England holding a partial restraint valid, on the theory that a restrictive covenant was enforceable if it could be shown to have been given for a fair and adequate consideration and to constitute a restraint designed only to protect reasonably the covenantee in the enjoyment of the good-will of the business he had purchased.[4] The two earliest reported cases in New Jersey appear to cling to the old presumption against validity and to the arbitrary rules of the English decisions.[5]

In more recent years the courts of this state have taken a much more liberal point of view. It may safely be said that if any presumption now exists at all, it is in favor of the validity of such restrictive agreements. There has been a shift of emphasis from the covenantor to the covenantee as the party needing the protection of a court of equity. The view is generally adopted that where a vendor has received adequate consideration for the sale of his business and its good-will, he should be bound by the terms of his agreement not to compete and not be enabled, by violating it under claim of invalidity due to public policy, to appropriate the good-will he had conveyed to the vendee and still retain the consideration paid to him.[6] Indeed, an

---

[1] 13 C.J. 468, and cases there cited.

[2] 13 C.J. 468-470, and cases there cited.

[3] I P. Wms. 181 (1711).

[4] Over one hundred years later this decision was seconded by another leading case decided on the same principle, though still apparently indulging in a presumption against the validity of restrictive covenants. Horner v. Graves, 7 Bing. 735 (1831).

[5] Brewer v. Marshall, 19 N.J.Eq. 537 (E & A 1868); Mandeville v. Harman, 42 N.J.Eq. 185 (Ch. 1886). The latter case is partly explainable on the old rule in this state that the good-will of a physician is personal to himself and cannot be transferred or assigned with a sale of his practice, and therefore the inclusion of a restrictive covenant in a contract of employment of a young doctor that he will not engage in practice in the area of his employment after its termination is unenforceable since the covenantee has no good-will capable of appropriation or protection. *Cf.* Marvel v. Jonah, 8 N.J.Eq. 369 (Ch. 1913), *rev'd.* 83 N.J. 299 (E & A 1914).

[6] Fleckenstein Bros. Co. v. Fleckenstein, 76 N.J.L. 613, 617 (E & A 1908). Artistic Porcelain Co. v. Boch, 76 N.J.Eq. 533, 536 (Ch. 1909).

innuendo may be gathered from these decisions that the burden is cast upon the defendant to demonstrate that the covenant in question is manifestly unreasonable.

The broad criterion now applied in this type of case is simply whether the restriction imposed by the covenant is reasonably necessary, in point of time or territory, for the protection of the covenantee-vendee. This test has been reiterated in numerous decisions in one form of language or another.[7] Since its application must necessarily vary with the circumstances of each particular case and the scope of the business sought to be protected, the validity of any specific covenant will be determined by the view which the court takes of the facts in each instance. Therefore, the cases on this topic are of little substantial value as precedents, aside from their use in support of underlying principles, even where the covenants being compared contain essentially identical terms.

Certain liberalizing trends should, however, be noted. A very broad restraint will be upheld if it appears in any degree reasonable or if no sufficient evidence is introduced to show that it is not necessary adequately to protect the vendee.[8] In fact, one case goes to the rather dubious extreme of enforcing a covenant forbidding the engaging in the retail candy and tobacco business in a small town during the entire lifetime of the covenantor.[9]

Likewise, there are two strong *dicta* in the reports that a covenant by a vendor is enforceable in its entirety which restrains competition not only in the area where business is being done at the time of the execution of the covenant, but also in that additional area to which the enterprise is reasonably likely to grow and extend during the restricted period[10] although covenants covering such an additional area were expressly disapproved in an earlier case.[11] Such an extension seems just in view of the normal presumption that every business will develop and expand, but the adoption of such a principle makes for indefiniteness in the contract and may work a hardship on a vendor.

In a recent decision,[12] there is a strong indication that our courts

---

[7] Ellerman v. Chicago Junction Railways Co., 49 N.J.Eq. 217 (Ch. 1891); Carll v. Snyder, 26 Atl. 977 (Ch. 1893); Trenton Potteries Co. v. Oliphant, 56 N.J.Eq. 680 (Ch. 1898) *rev'd.* in part 58 N.J.Eq. 507 (E & A 1899).

[8] Carll v. Snyder, *supra* note 7; Scherman v. Stern, 93 N.J.Eq. 626 (E. & A 1922). This extended view is in line with the general trend of authority elsewhere which even goes to the extent of holding world-wide or unlimited restraints valid. Oakdale Manufacturing Co. v. Garst, 18 R.I. 484, 28 Atl. 973, 23 L.R.A. 639 (1894). Diamond Match Co. v. Roeber, 106 N.Y. 473, 13 N.E. 419 (1887); Hall Manufacturing Co. v. Western Steel and Iron Works, 227 F. 588, L.R.A. 1916C 620 (1915); Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. (1894) A C 535; Rousillon v. Rousillon, 14 Ch. Div. 351; 2 PAGE, CONTRACTS 787.

[9] Scherman v. Stern, *supra* note 8.

[10] Trenton Potteries Co. v. Oliphant, *supra* note 7; Fleckenstein Bros. Co. v. Fleckenstein, *supra* note 6.

[11] Vreeland v. Althen, 36 Atl. 479 (Ch. 1897).

[12] Bogardos v. Chacalos, 109 N.J.Eq. 5 (Ch. 1931).

will be more liberal in finding breaches of valid covenants; also that they will not permit a covenantor to adhere colorably to the letter of his agreement while violating its spirit by becoming connected with similar enterprises in an alleged menial capacity whereby he may none the less damage his vendee by giving the competing enterprise the advantage of his presence and personal good-will. This is especially true where the business sold was of a nature which involved close personal contact with customers.[13]

The more liberal attitude of the New Jersey courts toward vendor's restrictive covenants is convincingly shown by those cases upholding covenants in part which, if recognized in their entirety, would be too broad and unreasonable because of their geographical limitations.[14] The courts have gone a long way to find such agreements to be divisible or to have been intended by the parties to be. For example, it has been held that a covenant not to engage in a competing business "within any state in the United States" may be construed to have been intended to embrace each state disjunctively described, and therefore is enforceable with respect to New Jersey alone, although it would be too broad if construed to extend over any larger area.[15] Again a covenant not to compete "within five hundred miles from the city of Jersey City, N. J." has been interpreted to mean "either in the City of Jersey City or within five hundred miles from that city," and so valid and enforceable with respect to that city though unreasonable beyond that very limited area.[16]

Such construction involves a considerable stretching of unambiguous language to obtain a result which the court feels is just. A more fundamental objection is that the court is making a new and different contract for the parties, even though it is not as extensive as the one upon which they had agreed. As a practical matter under this view, the enforceability of excessively broad restrictive covenants may depend on whether the language employed is sufficiently loose and inartistic to permit a court so inclined to find the described area divisible.[17] In the ultimate analysis, almost any combination of words could be construed to have been intended to permit division as to area, and the feeling of the court toward the merits of the case as a whole will probably determine whether it will or will not find the covenant divisible. Thus similarly worded covenants may produce results varying with "the length of the Chancellor's foot."

Different considerations are applicable to covenants in a contract

---

[13] Langberg v. Wagner, 101 N.J.Eq. 383 (Ch. 1927).

[14] Trenton Potteries Co. v. Oliphant, *supra* note 7; Fleckenstein Bros. Co. v. Fleckenstein, *supra* note 6; R. H. Perry & Co. v. Burns Bros., 101 N.J.Eq. 409 (Ch. 1927).

[15] Trenton Potteries Co. v. Oliphant, *supra* note 7.

[16] Fleckenstein Bros. Co. v. Fleckenstein, *supra* note 6.

[17] *Cf.* Wyder v. Milhomme, 96 N.J.L. 500 (E & A 1921), where the court said that the language used admitted of no selective or divisible construction.

of employment whereby the prospective employee agrees not to engage in a competing business, or be employed therein for a certain period of time, or within a prescribed area, after the termination of his employment. Real questions of public policy are here involved, since the restrictions of such an agreement may deprive an ordinary wage-earner of an opportunity to earn a livelihood for himself and his family in the only trade or occupation in which he is skilled. An employee generally receives no adequate additional consideration for such a covenant and, in most instances, he has no alternative but to accept it or lose the chance of employment. The employer always holds the whip-hand in the bargaining and may easily impose conditions which are disproportionately oppressive in comparison with any real or imaginary benefit he may seek to guarantee to himself.

The reported cases in this state on such covenants do not express this distinction, and generally apply the same test of reasonableness under the circumstances to determine validity as in the case of vendor's covenants.[18] The results reached by our courts indicate, however, that substantial justice has not been denied to employee-covenantors.

An exception to this stereotype approach is found in the leading case of *Sternberg* v. *O'Brien*[19] where the court held, in a well-reasoned opinion, that the employer-covenantee had an adequate remedy at law for the breach of such an agreement by an employee, since it was evident that the complainant had suffered or would suffer no irreparable injury. The court carefully analyzed the kind of work the covenantor had done and the opportunities he would have to harm his former employer by working in the same capacity for a rival.

On the other hand, the New Jersey courts have been strict in enforcing such covenants where an employee has been in a position to learn trade secrets and private business methods, or to come into intimate contact with the trade of the former employer.[20] It would seem that the former employer in such cases would be entitled to an injunction restraining the use of secrets or forbidding the solicitation of his customers, irrespective of a covenant, on the theory that an intangible property right of his was being appropriated or destroyed by another who had enjoyed a confidential relationship with him. The granting of an injunction strictly on the basis of the covenant, ignoring the property right theory of relief, and without testing the covenant of the employee in the light of the considerations which have been previously set forth, serves unnecessarily to create precedents for the strict point of view. *Sternberg* v. *O'Brien*[21] more nearly attains the ideal approach to this type of covenant than the criterion of reasonableness applied in the vendor cases.

---

[18] A typical case adopting this approach is Sarco v. Gulliver, 3 Misc. 641 (Ch. 1925) *aff'd* 99 N.J.Eq. 432 (E. & A. 1926).

[19] 48 N.J.Eq. 370 (Ch. 1891).

[20] Owl Laundry Co. v. Banks, 83 N.J.Eq. 230 (Ch. 1914); A. Fink & Sons v. Goldberg, 101 N.J.Eq. 644 (Ch. 1927); Ideal Laundry Co. v. Gugliemone, 107 N.J.Eq. 108 (E. & A. 1930).

[21] See *supra* note 19.