[HIGH COURT OF AUSTRALIA.]

LINDNER . . . . . APPELLANT;
DEFENDANT,

AND

MURDOCK'S GARAGE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1950.

ADELAIDE, *Oct.* 2, 3.

SYDNEY, *Nov.* 21.

Latham C.J., McTiernan, Webb, Fullagar and Kitto JJ.

*Restraint of trade—Agreement between employer and employee—Area covenant—Reasonableness.*

M., a firm carrying on the business of garage proprietors at Crystal Brook and Wirrabara, two country townships in South Australia about thirty miles apart, entered into a service agreement with L. After providing for a rate of pay and making provision for determination on either side by twenty-one days' notice, the agreement provided: "The workman will not during his employment or within one year from the determination thereof in any way carry on or be engaged concerned or interested . . . in the business of garage proprietors . . . or in any other similar business now and hereafter carried on by the employers within the same area". A schedule to the agreement provided: "This agreement shall apply to the sales territory for motor cars, trucks and tractors etc. of M.—Crystal Brook and Wirrabara". The sales territory consisted of two areas, one surrounding Crystal Brook and the other about Wirrabara, the shortest distance between them being ten miles. The agreement did not fix any period of employment and did not state in what capacity or at what place L. was to be employed. After working for some years as leading hand in charge of the workshop at Crystal Brook where he had come into contact with a substantial number of M.'s customers, L. left M.'s employment and obtained employment at another garage at Crystal Brook some two or three hundred yards away from M.'s.

*Held*, by *McTiernan*, *Webb* and *Kitto* JJ. (*Latham* C.J. and *Fullagar* J. dissenting), that the restrictive provision was void on the ground that the area it encompassed was wider than was reasonably necessary for the protection of M.'s business; also, since under the agreement L. could have been employed in either area and the validity of the provision must be determined

as at the date of the agreement, the restrictive provision could not be upheld as two distinct and severable restrictions, one in respect of the Crystal Brook area and one in respect of the Wirrabara area.

*Per McTiernan* J.: The restrictive covenant enforced by the judgment was void also because it was detrimental to the public interest, not reasonable in reference to the defendant's interest and in excess of what was reasonable to protect the plaintiff and was imposed only to protect the plaintiff from competition.

*Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co. Ltd.*, (1894) A.C. 535; *Haynes* v. *Doman*, (1899) 2 Ch. 13; *Mason* v. *Provident Clothing & Supply Co. Ltd.*, (1913) A.C. 724; *Herbert Morris Ltd.* v. *Saxelby*, (1916) 1 A.C. 688; *Attwood* v. *Lamont*, (1920) 3 K.B. 571; *Dewes* v. *Fitch*, (1920) 2 Ch. 159; *Bowler* v. *Lovegrove*, (1921) 1 Ch. 642; *Putsman* v. *Taylor*, (1927) 1 K.B. 637; *McPherson* v. *Moiler*, (1920) 20 S.R. (N.S.W.) 535; and *Stephens* v. *Kuhnelle*, (1926) 26 S.R. (N.S.W.) 327; 43 W.N. 67, referred to.

Decision of the Supreme Court of South Australia (*Napier* C.J.): *Murdock's Garage* v. *Lindner*, (1950) S.A.S.R. 220, reversed.

APPEAL from the Supreme Court of South Australia.

Murdock's Garage was a firm carrying on at Crystal Brook and Wirrabara, two country towns in South Australia about thirty miles apart, the business of a dealer in second-hand motor vehicles and of a garage proprietor and service station.

On 10th August 1946, Lindner, a motor mechanic, entered into the employment of Murdock's Garage under a written service agreement which after providing for a rate of pay and making provision for determination on either side by twenty-one days' notice, contained the following clause: "The workman will not during his employment or within one year from the termination thereof in any way carry on or be engaged concerned or interested either personally or as a partner or as a servant or employee of any other person or company in the business of garage proprietors, motor and general engineers, agents for the distribution of or dealers in motor accessories or in any other similar business now and hereafter carried on by the employers within the same area either personally or by his agent or by letters, circulars or advertisement in any way compete with the employers in any of the employer's business nor in any way interfere with the employer's customers nor solicit their custom nor use any information concerning the employers, their business or customers which may have been acquired by him through his employment for his own benefit or any person other than the employers or to the detriment or the intended detriment of the employers".

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The schedule to the agreement provided: "This Agreement shall apply to the sales territory for motor cars, trucks and tractors etc. of Murdock's Garage—Crystal Brook and Wirrabara". The two areas referred to were well defined and quite separate; one surrounding Crystal Brook, the other surrounding Wirrabara. The nearest points of the two areas were not less than ten miles apart.

The agreement did not fix any period of employment and did not state in what capacity or at what place Lindner was to be employed.

Lindner was employed as a leading hand in the workshop at Crystal Brook from 6th August 1946 until 4th February 1950, when he left Murdock's employ. A few weeks later he obtained employment at another firm carrying on a business similar to that of Murdock's Garage and situated at Crystal Brook some two or three hundred yards from the premises of Murdock's Garage.

During his employment with Murdock's Garage, Lindner had been employed only at Crystal Brook where he had come into contact with a large number of his employer's clients. He was never employed at Wirrabara.

Murdock's Garage brought an action in the Supreme Court of South Australia to enforce the entire agreement. At the trial of the action, however, they claimed only an injunction to prevent Lindner from engaging as principal or employee in any business similar to their business at or within five miles of Crystal Brook. The trial judge, *Napier* C.J., upheld the validity of the contract and made an order restraining Lindner for a period of one year from being employed by any person or company in any business similar to that of Murdock's Garage within five miles from the latter's premises in Crystal Brook.

From that decision Lindner, by special leave, appealed to the High Court.

*J. F. Brazel* (with him *M. P. O'Callaghan*), for the appellant. The contract is prima facie void as being contrary to public policy. The respondent can rebut that presumption if the contract were reasonable as between the parties and if it were reasonably necessary to protect the respondent's proprietary rights. This agreement is directed against competition *per se*, and as such, is illegal. Further, it is insufficient to show that the employee has been brought into contact with customers; it must also be shown that there is a possibility that he will misuse his knowledge of these customers. To be valid, the contract must be in the interest of both parties. This contract is not, in that it gives the employer more than

adequate protection. Whether the covenant is reasonable must be determined at the time it is made, having regard to the best estimate the parties can make of the future at that time (*Mason* v. *Provident Clothing and Supply Co. Ltd.* (1); *Herbert Morris Ltd.* v. *Saxelby* (2); *Attwood* v. *Lamont* (3); *Putsman* v. *Taylor* (4)). The covenant cannot be enforced if it is too vague.

[LATHAM C.J. Cannot the covenant be severed?]

No. Looking at the contract as at the time it was made it is impossible to say where the appellant would be employed. There is no severability unless there are, in effect, several separate and distinct covenants (*British Reinforced Concrete Engineering Co. Ltd.* v. *Schelff* (5)). In the present case, there were no proprietary rights to be protected, and, even if there were, the area covered by the contract is too wide.

*F. Villeneuve Smith* K.C. (with him *B. B. Harford*), for the respondent. Employers are entitled to safeguard proprietary interests against possible loss to an employee who gets to know the employer's customers. Mere personal contact, if such as to expose the employer's business to the risk of loss of customers, is enough: *Putsman* v. *Taylor* (6); *Haynes* v. *Doman* (7). The decisive test as to whether the area is too wide is whether it goes beyond the area of the covenantee's business: *Brightman* v. *Lamson Paragon Ltd.* (8). The covenant must be reasonably necessary to protect the employer's interests, although it may be a general restraint as distinguished from a prohibition of specific acts (*Attwood* v. *Lamont* (9); *Putsman* v. *Taylor* (10)). The present case is distinguishable from *Attwood* v. *Lamont* (11). In that case every departmental head was to be restrained from competing, and the restraint lasted for the lifetime of the employee. The covenant is not vague—the schedule must be read into the agreement for the agreement to make sense. In any event, the covenants are severable (*Attwood* v. *Lamont* (11); *Continental Tyre and Rubber (Great Britain) Co. Ltd.* v. *Heath* (12)).

*J. F. Brazel* in reply.

*Cur. adv. vult.*

(1) (1913) A.C. 724.
(2) (1916) A.C. 688.
(3) (1920) 3 K.B. 571.
(4) (1927) 1 K.B. 637.
(5) (1921) 2 Ch. 563.
(6) (1927) 1 K.B. 637.
(7) (1899) 2 Ch. 13.
(8) (1914) 18 C.L.R. 331, at p. 335.
(9) (1920) 3 K.B. 571.
(10) (1927) 1 K.B. 637, at pp. 641, 642, 648.
(11) (1920) 3 K.B. 571.
(12) (1913) 29 T.L.R. 308, at p. 310.

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The following written judgments were delivered :—

LATHAM C.J. In an action by a firm called Murdock's Garage against F. R. W. Lindner an injunction was granted restraining the defendant for a period of one year from 4th February 1950 from being employed by any person or company in any business similar to that of the plaintiffs' within five miles from the plaintiffs' premises in Crystal Brook. The judgment was founded upon an agreement in writing made between the plaintiff firm and the defendant on 10th August 1946 when the defendant became an employee of the plaintiff firm at its motor garage in the township of Crystal Brook, South Australia. The agreement provided for a rate of pay and for determination on either side by twenty-one days' notice, and contained the following clause :—" 3. The workman will not during his employment or within one year from the termination thereof in any way carry on or be engaged concerned or interested either personally or as a partner or as a servant or employee of any other person or company in the business of garage proprietors, motor and general engineers, agents for the distribution of or dealers in motor accessories or in any other similar business now and hereafter carried on by the employers within the same area either personally or by his agent or by letters, circulars or advertisement in any way compete with the employers in any of the employer's business nor in any way interfere with the employer's customers nor solicit their custom nor use any information concerning the employers, their business or customers which may have been acquired by him through his employment for his own benefit or any person other than the employers or to the detriment or the intended detriment of the employers ".

The meaning of the words " within the same area " is not clear if only the clause itself is considered, but there was a schedule to the agreement in the following terms : " This agreement shall apply to the sales territory for motor cars, trucks and tractors etc. of Murdock's Garage—Crystal Brook and Wirrabara ". Sales agreements appointing Murdock's Garage as agents for the sale of some ten brands of motor cars and trucks within specified areas were proved. The schedule, therefore, defines the area within which the restriction of clause 3 is to apply.

In February 1950, the defendant left the employment of the plaintiff and became an employee of East Bros., who had recently opened a motor garage at Crystal Brook two or three hundred yards away from the plaintiffs' garage. There is no doubt as to the breach by the defendant of clause 3, if it is valid.

By the injunction the first part of clause 3 is enforced but no case was made based upon the provision in the clause prohibiting solicitation of customers, no solicitation of customers by the defendant having been proved.

It was contended for the defendant that he was simply a garage hand and that the relevant part of clause 3, therefore, was directed towards protection of the plaintiff from mere competition. It was urged that no authority was to be found which could justify the upholding of a restraint upon trade in the case of such an occupation as that of a garage hand.

It is well established that prima facie all restraints upon trade are invalid, but that they may be upheld if the party seeking to enforce them shows that circumstances exist which make the restraint reasonably necessary for protection of a covenantee's business and that it is not contrary to public interests. A distinction is drawn between a restraint upon trade included in an agreement for the sale of a business and a restraint included in an agreement with an employee. The restraint is more easily upheld in the former than in the latter case. In the former case the purchaser is entitled to protect himself against competition on the part of the vendor, but in the latter case he cannot acquire such a right by agreement with the employee : *Herbert Morris Ltd.* v. *Saxelby* (1) ; *Attwood* v. *Lamont* (2). It is sometimes said as, for example, in *Attwood* v. *Lamont* (2) that a restraint of trade, in order to be valid, must be in the interests of both parties, the covenantor and the covenantee. The restraint in itself may obviously be advantageous to the covenantee. It is difficult to see how any restraint in itself can ever be advantageous to the covenantor, though it may be that he would not, in the case of employer and employee, have been able to obtain employment from the employer, or in the case of the sale of a business, have been accepted as a purchaser of the business, unless he had entered into the covenant. The true meaning of the proposition that the restraint must be in the interests of both parties is explained by *Isaacs* J. in *Brightman* v. *Lamson Paragon Ltd.* (3), and see *Herbert Morris Ltd.* v. *Saxelby* (4). Where an employee has access to trade secrets or other confidential information he may be restrained by agreement from communicating those secrets or such information to other persons, and particularly to competitors in trade with his employer. Again, an employee who is brought into personal contact with the customers of his employer may by agreement effectively bind himself to abstain after his term of service

(1) (1916) 1 A.C. 688.
(2) (1920) 3 K.B. 571.
(3) (1913) 18 C.L.R. 331, at p. 337.
(4) (1916) 1 A.C., 688, at p. 707.

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has been completed from soliciting the customers of his former employer. In these cases the covenant in restraint of trade is not a covenant against mere competition but is a covenant directed to securing a reasonable protection of the business interest of the employer, and in the circumstances is not unjust to the employee. The interest which can validly be protected is the trade connection, the goodwill of the business of the employer.

These propositions are established by many decisions. In *Mason* v. *Provident Clothing & Supply Company* (1), which was a case of a servant employed as a canvasser to obtain customers for his employers, it was held that if the employers had been " content with asking him to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within these limits " (2). The restraint which was under consideration in that case went beyond a restriction upon canvassing customers and was held to be bad. It will be observed that the learned lords were of opinion that a clause which was really directed towards preventing an employee, after his employment had ceased, from taking away customers from his employer was not necessarily invalid.

In *Herbert Morris Ltd.* v. *Saxelby* (3), the same principles were recognised and applied. In that case a covenant by a draughtsman not to enter into any form of employment with any person carrying on the manufacture and sale of particular machinery was held to be invalid because it was in the circumstances a covenant against what was described as " competition per se ". Lord *Atkinson* said (4) that the employer " is undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which may be of vast value. And that protection may be secured by restraining the employee from divulging these secrets or putting them to his own use. He is also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from all competition per se apart from both these things, however lucrative it might be to him, he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee ". Lord *Parker of Waddington* referring to covenants against competition by a servant, said (5) :—

(1) (1913) A.C. 724.
(2) (1913) A.C. 724, at pp. 731, 732; see also pp. 734, 741.
(3) (1916) 1 A.C. 688.
(4) (1916) 1 A.C., at p. 702.
(5) (1916) 1 A.C., at p. 709.

" Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his 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 ". Thus the acquisition of personal knowledge of, and of an influence over customers, is an element to be considered in relation to the possibility, " if competition were allowed ", of " taking advantage of an employer's trade connection ". It was said in *Mason's Case* (1) per Lord *Moulton*, that the first task of the court in dealing with a covenant in restraint of trade is to ascertain with due particularity the nature of the master's business and of the servant's employment therein.

In the present case there is no evidence that the defendant obtained or was expected to obtain any knowledge of trade secrets of his employers. He was, however, brought into close and daily touch with customers who brought in their cars for servicing and repairs, and in a small country town (the population of the district of Crystal Brook is some one thousand five hundred persons) he would develop relations of intimacy with the persons with whom he dealt on behalf of the plaintiffs. *Napier* C.J. heard evidence on behalf of the plaintiffs, the defendant calling no evidence. His Honour's finding on the nature of the work which the defendant did and the significance thereof in relation to the matter in issue between the parties was :— " If he should stay as he did—for a period of years, he might expect to qualify himself to set up in business on his own account, or to obtain other employment, in some similar capacity, but, from the plaintiff's point of view, the employment must necessarily bring the defendant into constant and intimate contact with the customers of the garage. He was a stranger in the district, but he would not only get to know the customers, but they would get to know him, and—if he stayed on—it would be on the footing that he had their trust and confidence. If he should then leave the plaintiffs' service, and set up in business on his own account or take other employment in the same neighbourhood, he would be in a position to take with him some part of the goodwill of the garage business, and it might well be a very substantial part. It seems to me that there is a difference, in this respect, between a garage in the city and a garage in a country township like Crystal Brook. Even in the city I

(1) (1913) A.C., at p. 742.

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think that the risk would be appreciable, but in a township like Crystal Brook I think that it would be manifest ". In my opinion these conclusions are supported by the evidence, which shows that all the customers of the plaintiff who required their cars to be serviced or repaired would normally deal with the defendant. I base my judgment upon these findings.

Where an employee is in a position which brings him into close and personal contact with the customers of a business in such a way that he may establish personal relations with them of such a character that if he leaves his employment he may be able to take away from his former employer some of his customers and thereby substantially affect the proprietary interest of that employer in the goodwill of his business, a covenant preventing him from accepting employment in a position in which he would be able to use to his own advantage and to the disadvantage of his former employer the knowledge of and intimacy with the customers which he obtained in the course of his employment should, in the absence of some other element which makes it invalid, be held to be valid. Reference has already been made to the right of an employer to protect his " trade connection "—a right recognised in cases in which covenants were held to be invalid because they went beyond what was reasonably necessary to protect such a connection.

Each case must be considered in relation to its own circumstances. An ordinary garage hand employed in manual work in a garage is not brought into such relation with customers as to make it possible to uphold a covenant restraining him from taking other similar employment after leaving an employer. But, when the employee is the foreman in charge of a repair shop, particularly at a country garage where the population is limited and the relations between the customers and persons with whom they deal are on a more personal basis than in the city, the position is very different.

In *Bowler* v. *Lovegrove* (1), upon which the defendant relied, it was held that a covenant restraining an employee who was an outside canvasser for a firm of estate agents was invalid because it was wider than was reasonably necessary for the protection of the plaintiff's business and was accordingly contrary to public policy. It was pointed out, however, that although the defendant came into personal contact with the plaintiff's customers that fact " lost its significance " when the duties of the defendant in connection with the business were considered (2). It was pointed out that in that case the plaintiff's customers with whom the defendant came into personal contact were not " the ordinary recurring customers such

(1) (1921) 1 Ch. 642. (2) (1921) 1 Ch., at p. 652.

as exist in most other businesses ". This was the point of distinction which prevented the covenant from being held to be valid. In the present case the plaintiffs' customers with whom the defendant came into personal contact were the ordinary recurring customers of the plaintiffs. In *Putsman* v. *Taylor* (1) the court considered a covenant by an employee of a tailor that he would not for five years be employed in any capacity with any tailor carrying on business in three areas—A or B or C. It was held that the restriction was valid as to A and should be enforced. The decision was founded upon the distinction between employees in general and an employee who is concerned with the management of a business in such a way as to bring him into direct relations with the customers of the business. *Salter* J. said (2):—" The relation between a master and the servant who manages his business for him is highly confidential. During the service he is in constant contact with the master's customers, and cannot fail to learn their names and addresses, their likes and dislikes, and something of their financial credit. Such knowledge can be used with effect, after the determination of the service, to induce such customers to transfer their custom to a new employer. Certain conduct of this kind will be restrained, as being in breach of implied terms in the contract of service: *Robb* v. *Green* (3), and *Louis* v. *Smellie* (4). Other conduct of this kind, though injurious to the late employer, will not be restrained in the absence of express agreement. Such agreement need not take the form of a covenant against solicitation. Such a covenant is difficult to enforce; it is difficult to show breach and difficult to frame an injunction. The master is entitled to protect himself by a covenant against competition, provided that it is not wider than is reasonably necessary to safeguard his proprietary interest against unfair use by the former servant of information gained during the service: see the judgment of Lord Sterndale M.R. in *Attwood* v. *Lamont* (5) ". In my opinion these principles apply to the present case. The defendant managed the repair shop, which was a most important section of the plaintiffs' garage, and was brought into close and intimate relations with the customers in such a way that when he left the employment he would be in a position to take away some, and perhaps a great deal, of the plaintiffs' business. I am therefore of opinion that the covenant, in its relevant terms, did not exceed what was reasonably necessary for the protection of the plaintiffs' interest in its business and is valid.

(1) (1927) 1 K.B. 637.
(2) (1927) 1 K.B., at pp. 641, 642.
(3) (1895) 2 Q.B. 315.
(4) (1895) 11 T.L.R. 515.
(5) (1920) 3 K.B. 578.

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It was argued that the area within which the covenant applied, namely Wirrabara as well as Crystal Brook, was too wide because the defendant in fact was employed only at the garage at Crystal Brook and not at the garage at Wirrabara. But this fact in my opinion cannot affect the validity of the covenant. The validity of the covenant must be determinable at the time when the contract is made. The defendant might consistently with the terms of the contract have been employed in work either at Crystal Brook or Wirrabara. I can see no reason for holding that the area of the restraint is too wide. A covenant in restraint of trade is not invalid by reason of the area to which it applies unless the area exceeds that " fairly covered by the business of the covenantee at the date of the agreement or which might at that date reasonably be expected to be covered by such business on the expiration of the agreement " (*Brightman* v. *Lamson Paragon Ltd.* (1) ). The two areas are about ten miles apart. In relation to a motor garage business in the country and in view of the great mobility of modern motor cars, the areas should in my opinion be regarded as being contiguous for all practical purposes. No attempt was made to show that at the time when the contract was made (which, as I have said, is the relevant time) no persons in the Wirrabara area went or were likely to go to Crystal Brook for service or vice versa. If such evidence had been tendered it would in my opinion have been irrelevant because the business of the plaintiff in which the defendant accepted employment was a business which extended to both Crystal Brook and Wirrabara and he might have worked at either place. The validity of the covenant cannot be affected by the fact that it happened that his services were used at Crystal Brook only. But, if for some reason the covenant is held to be invalid in respect of Wirrabara, that fact does not afford a reason for holding it to be invalid in respect of Crystal Brook. The covenant relates to two separate areas and may quite well be valid as to one and invalid as to the other : see *Putsman* v. *Taylor* (2) ; *Marquett* v. *Walsh* (3) ; *S. V. Nevanas & Co.* v. *Walker & Foreman* (4).

The plaintiffs, therefore, in my opinion, were entitled to an injunction applying to the areas covered by the sales agreements with respect to Crystal Brook and Wirrabara, or at least to Crystal Brook. They have been content to accept an injunction limited to an area within five miles of the plaintiffs' premises at Crystal Brook.

(1) (1913) 18 C.L.R. 331.
(2) 1927) 1 K.B. 637.
(3) (1929) 29 S.R. (N.S.W.) 298 ; 46 W.N. 71.
(4) (1914) 1 Ch. 413.

In my opinion the decision of the learned Chief Justice was right and the appeal should be dismissed.

McTIERNAN J. This is an appeal by special leave of this Court. The appeal arises out of an action in which the appellant was the defendant and the respondent the plaintiff.

It was an action instituted in the Supreme Court of South Australia to enforce restrictive covenants in an agreement made between the plaintiff and the defendant. The agreement was dated 10th August 1946 and signed on 11th August, 1946. The action was tried by *Napier* C.J., who made an order restraining the breach of one of the covenants in the agreement.

The plaintiff is a firm carrying on the business of garage proprietors motor and general engineers, distributors of and dealers in motor vehicles, spare parts and electrical goods. It carries on business in two townships, Crystal Brook and Wirrabara. These are thirty miles apart and are the centres of two districts with a total population of three thousand. The defendant had been employed in the plaintiff's workshop at Crystal Brook from 6th August 1946 until 4th February 1950. The defendant entered into the employment of a firm carrying on a business similar to the plaintiff's. This firm employed the defendant as a mechanic in its workshop at Crystal Brook. The plaintiff firm then brought the action.

The agreement upon which the action was based contains a covenant by the defendant that he would not while the plaintiff's employee and for a period of twelve months from the termination of the employment carry on or be an employee in a business similar to that of the plaintiff firm nor compete with it nor solicit its customers, nor use for the benefit of himself or any other person any information acquired in its employment: and another covenant not to divulge trade secrets and the like.

The geographical area encompassed by the restraint against carrying on or working in a rival business is indicated by the expression " the same area " which occurs in the contract. These words receive no other elucidation than that given by the statement which appears in the schedule to the agreement that it applies to the " sales territory for motor cars, trucks, tractors etc. of Murdock's Garage—Crystal Brook and Wirrabara ". This " territory " is to be ascertained by reference to two agreements, each of which is called a " Direct Dealer's Sales Agreement ". Under one of these the plaintiff firm was given by a company the right to sell its motor vehicles in a " territory " which is specified, and to sell spare parts " without territorial limitation "; and,

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under the other agreement the plaintiff firm was given by the same company the right to sell motor vehicles in another " territory ". Consensus as to geographical area depends upon the defendant having covenanted with reference to those agreements. It is by no means clear that he knew in what localities the plaintiff enjoyed these franchises to sell the company's vehicles and spare parts.

The plaintiff firm brought the action to enforce the entire agreement. At the trial it claimed only an injunction to prevent the defendant from engaging as principal or employee in any business similar to its business at or within five miles from Crystal Brook. This was only a small part of its sales territory but the workshop of the rival firm who was employing the defendant was within it. The Court made an order restraining the defendant for a period of one year from being employed by any person or company in any business similar to that of the plaintiff firm within five miles from the plaintiff's business in Crystal Brook.

The agreement was in restraint of trade and was for that reason prima facie illegal. The onus was on the plaintiff firm to prove circumstances showing that the restriction on the defendant's freedom to work was reasonable. It was argued for the defendant that the restriction was not reasonable in reference to his interests and was not necessary for the protection of the plaintiff's interests. I agree with this argument.

The restriction against " using " information is not enforced by the judgment. This restriction extends to knowledge acquired in the course of the employment by means of directions and instructions received from the plaintiff firm and by the exercise of the defendant's mental powers on what he heard and saw in the employment. The restriction is significant because it tends to show what the plaintiff firm from the first desired. In *Mason* v. *Provident Clothing & Supply Co. Ltd.* (1) Lord *Shaw* said that the mental and manual equipment of a workman which he owes to the faithful and industrious exercise of his powers becomes part of himself, and that " its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden ". This restriction is added to the restriction enforced by the judgment and to restrictions preventing competition, soliciting customers and divulging business secrets. The inclusion of this restriction on the use of the defendant's subjective knowledge tends to show that the plaintiff firm desired not only to protect its business connection and trade secrets but to sterilize the defendant's technical skill and knowledge for a period of twelve months if he lived within the

(1) (1913) A.C. 724, at pp. 740, 741.

geographical area encompassed by the restraint for a period of twelve months. The founder of the plaintiff firm, who made the agreement with the defendant, said in evidence that he told the defendant that " it prevented him from working for anybody else or against us in any shape or form for twelve months after leaving our employ ".

At the time this agreement was made it was notorious that there was a shortage of workmen with mechanical skill and knowledge and there was a shortage of homes for workmen. The defendant and his wife and children lived at Crystal Brook. They moved there shortly after he entered into the plaintiff firm's service. He entered into its employment in consequence of replying to an advertisement issued by the plaintiff firm. The defendant then lived in another locality. It must have been obvious at the time the plaintiff firm exacted the covenants from him that it would be necessary for him to move from there to Crystal Brook in order to work for the plaintiff.

By reason of the notorious labour shortage and the economic situation it was detrimental to the interests of the public to restrain the defendant from working at his trade for a period of twelve months after the termination of the employment. The defendant was not employed for a fixed term. In view of the shortage of homes, it was not reasonable in reference to the defendant's interests to impose upon him a restraint which, whenever the employment was terminated, would force him to move his home beyond the geographical area of the restraint in order to earn his livelihood at his accustomed trade.

Lord *Haldane* noticed in *Mason's Case* (1) that both Lord *Watson* and Lord *Macnaghten* said in the *Nordenfelt* v. *Maxim Nordenfelt Guns & Ammunition Co. Ltd.* (2), that " the standard of public policy must be the standard of the day ". In *Attwood* v. *Lamont* (3), *Younger* L.J. said that the branch of the law with which the Court was dealing has at all times been susceptible to influence from current views of public policy. There has been no development of public policy in Australia since that case which would incline the Court to regard with less jealousy covenants made by a workman in restraint of his freedom to work at his trade or to engage in employment.

There is not full scope for freedom of contract when an individual worker is making a contract of service with an employer. In the

(1) (1913) A.C., at p. 733.
(2) (1894) A.C. 535.
(3) (1920) 3 K.B. 571, at p. 581

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*Nordenfelt Case* (1), *Mason's Case* (2) and *Attwood* v. *Lamont* (3) the worker was regarded as having the lesser bargaining power. In the first case, Lord *Macnaghten* said (4) " there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employ ment ". In the second case, Lord *Shaw of Dunfermline* related this view to the matter of the difference between the validity of a seller's and a worker's restraint on his economic freedom. His Lordship said (5) " And in my opinion there is much greater room for allowing, as between buyer and seller, a larger scope for freedom of contract and a correspondingly large restraint in freedom of trade, than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work ". The tests propounded in those cases for determining the validity of a workman's restrictive covenant were moulded under the influence of that view. Current opinion on the relations between employer and employees has not moved away from that view. In *Mitchel* v. *Reynolds* (6), Lord *Macclesfield* regarded such voluntary restraints with disfavour, because of the mischief that may arise from them, " 1*st*, to the party, by the loss of his livelihood, and the subsistence of his family; 2*ndly*, the publick, by depriving it of an useful member ".

A workman's covenant in restraint of employment is not valid unless it is reasonable. It is a question for the Court whether it is reasonable. The old rule was that the covenant was reasonable if it gave a fair protection to the interest of the employer and did not unduly interfere with the interests of the public. This rule lost its sway after the *Nordenfelt Case* (7). In *Mitchel* v. *Reynolds* (8), Lord *Macclesfield* took into account the interests of the covenantor as well as of the covenantee; and in *Davies* v. *Davies* (9) *Fry* L.J. did likewise. He said " that no contract in restraint of trade which is unreasonable, which is larger than is necessary to protect the interests of contracting parties, is good ". The modern rule was stated by Lord *Macnaghten* in the *Nordenfelt Case* (10). His Lordship there said " The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves,

(1) (1894) A.C. 535.
(2) (1913) A.C. 724.
(3) (1920) 3 K.B. 571.
(4) (1894) A.C., at p. 566.
(5) (1913) A.C., at p. 738.
(6) (1711) 1 P.Wm. 181, at p. 190 [24 E.R. 347, at p. 350].
(7) (1894) A.C. 535.
(8) (1711) 1 P.Wm. 181 [24 E.R. 347].
(9) (1887) 36 Ch. D. 359, at p. 396.
(10) (1894) A.C., at p. 565.

if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public".

This doctrine was confirmed by Lord *Atkinson* in *Herbert Morris Ltd.* v. *Saxelby* (1). In *Attwood* v. *Lamont* (2), *Younger* L.J. said that the last mentioned case disposed of the "almost passionate protest of *Neville* J. in *Leetham* v. *Johnstone-White* (3) that no agreement was invalid, provided the restriction was reasonably necessary for the protection of the employer, however oppressive to the employee and fatal to his chance of obtaining his own living in this country it might be".

The principles which support a covenant which the Court would regard as reasonable and enforceable were stated by *Erle* C.J. in *Mumford* v. *Gething* (4). They are in this passage: "I entirely dissent from the notion thrown out by the defendant's counsel that agreements of this sort are to be discouraged as being contrary to public policy. On the contrary, I think that contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties; for, if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a *confidential* (the italics are mine) capacity, seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers and their mode of conducting business, and then transferring their services to a rival trader. It appears to me to be highly important that persons like this defendant should be able to enter into contracts of this sort, which will afford some security to their employers that the knowledge acquired in their service will not be used to their prejudice".

The agreement imposing the restraint, which is in question in the present case, was made about four days after the defendant entered into the plaintiff's employment. The plaintiff thereby agreed to employ him and he agreed to serve the plaintiff at a rate of remuneration "to be fixed between them from time to time

(1) (1916) A.C. 688, at p. 700.
(2) (1920) 3 K.B. 571, at p. 589.
(3) (1907) 1 Ch. 189, 194.
(4) (1859) 7 C.B. (N.S.) 305, at pp. 319, 320 [141 E.R. 834, at p. 840].

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but commencing at £7 per week of 48 hours ". It is important to notice that the agreement does not mention the specific capacity in which the plaintiff agreed to employ the defendant. The agreement refers to him as " the workman ". Another important fact is that the agreement does not fix any period of employment. It was a term of the agreement that either party could terminate the employment on giving twenty-one days' notice or paying or forfeiting twenty-one days' wages in lieu of notice. The restraint upon employment would operate even though the defendant served only for the minimum period for which the plaintiff was bound by the contract to employ him. If the plaintiff exercised his right to dismiss the defendant, with three weeks' wages, within a week from his entering the service or the defendant exercised his right to leave after three weeks, then, according to the terms of the restrictive provision which is in question, he was prevented for a period of twelve months from working whether as a mechanic, a labourer or at any other job in any motor garage in Crystal Brook and the district around it or in Wirrabara, which is thirty miles away, and the district around that town. The plaintiff exacted a covenant imposing a restraint which would operate for twelve months in that area even if the plaintiff exercised its right of dismissal or the defendant his right to retire before he was long enough in the employment to be acquainted with any of the plaintiff's customers or trade secrets. The plaintiff was not bound by the agreement to keep the defendant in any particular position in its workshop or to employ him in Crystal Brook rather than Wirrabara. If the defendant were disposed, in order to protect his own interests, to give notice of the termination of the employment, the restraint was likely to deter him from exercising his contractual right to give such notice. It could operate *in terrorem*. *Fry* J. said in *De Francesco* v. *Barnum* (1), " I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations . . . I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery ".

In *Mason's Case* (2), Lord *Shaw* in speaking of a restraint, the burden of which bore no proper relation to the period of employment, said that it was " a thing under the guise of a contract which is not protection for the employer, but a means of coercing and punishing the workman and putting him under a tyrannous and, therefore, a legally indefensible restraint ". " No workman ", his

(1) (1890) 45 Ch. D. 430, at p. 438. (2) (1913) A.C., at p. 741.

Lordship added, " could have the freedom to dispose of his own labour, or risk a movement towards his own advancement, under what might turn out to be the cruel operation of such a clause ".

It is against the policy of the common law to enforce a restraint on the liberty of a man to earn his living or exercise his trade except in cases where there are special circumstances to justify it. The onus of proving the circumstances rests upon the party alleging this. It is a question of law for the Court whether the circumstances do or do not justify the restraint.

The plaintiff adduced evidence about the nature of the defendant's employment and its business in order to justify the restraint which it asked the Court to enforce. In *Herbert Morris Ltd.* v. *Saxelby* (1) Lord *Parker* said, " For a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed ". A covenant in restraint of employment will not satisfy this test if it is imposed on the workman only to protect the employer against competition. In *Herbert Morris Ltd.* v. *Saxelby* (2) Lord *Parker* said " Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his 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 ".

The danger against which the plaintiff desired to be protected was the enticing away of customers or the divulging or use of any trade secret. The plaintiff was entitled to take a covenant imposing a reasonable restraint on the defendant's liberty to work in a business similar to that of the plaintiff for the purpose of protecting itself against that danger. Such a restraint would not be permissible if the Court were unable to conclude that, by employing the defendant, the plaintiff had reasonable grounds for apprehending that the plaintiff exposed its business to such danger.

In fact, the defendant was given the position of " leading hand " in the plaintiff's workshop in Crystal Brook. The contract of service did not secure him against regression or removal to another position in either of the plaintiff's garages. While he was in the position of " leading hand " his duties were to attend to the repair of motor cars brought to the workshop by the plaintiff's

(1) (1916) 1 A.C., at p. 707. (2) (1916) 1 A.C., at p. 709.

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customers, and to estimate the time which these jobs would take. The workshop was managed by the partners not by the defendant. He worked under their supervision. The defendant's duties were confined to the workshop. Customers who came to the garage to have any repairs done to their vehicles first spoke to a member of the firm: if it were necessary for the customer to go to the workshop, a member of the firm took him there. The customer's instructions were in this way given to the defendant. There is little or no evidence that he came into contact with any customer in the course of his employment in any other way. The evidence does not show that the defendant might gain any personal influence with any customers in the course of his employment. It shows only that he would meet customers. The evidence fails to show that through his acquaintance with them the defendant might be able to entice them from the plaintiff to a rival business.

The evidence is vague as to what were the trade secrets which the plaintiff desired to protect by imposing the restriction on the defendant's right to work when he left the employment.

If it had secret processes of manufacture or confidential documents the agreement expressly prevents the defendant from using or divulging them. There is no proof that the defendant has done or threatened either of these things.

The protection which the plaintiff claims against the employment of the defendant in the rival garage will not be given by enforcing the restraint on employment unless it is shown what are the interests of the plaintiff that are to be protected, and against what it is entitled to have them protected: See *Herbert Morris Ltd.* v. *Saxelby* (1). The makers' instructions for servicing cars are not secret processes of the plaintiff. It is not shown that the matter contained in the documents in the plaintiff's office was of such a kind that it was possible for the defendant " to carry it away in his head ". Compare *Herbert Morris Ltd.* v. *Saxelby* (2).

The defendant may be putting to use in the workshop of the plaintiff's rival in Crystal Brook the skill and knowledge (the subjective knowledge) acquired in the plaintiff's workshop. The plaintiff is not entitled to be protected from all competition *per se*. An employer must be prepared to face the competition of a former employee if it comes.

The onus was on the plaintiff to prove that it was reasonable for its protection that the restraint should apply to so wide an area as the two " sales territories " combined. In cross-examination, the senior partner admitted that the firm would be given " a good

(1) (1916) 1 A.C., at p. 701. (2) (1916) 1 A.C., at pp. 703, 712.

deal of protection " by an injunction enforcing the restraint within a radius of five miles from the garage in Crystal Brook. He further said " I think it would give us sufficient protection to be fair ". These admissions tend to prove that the covenant taken from the defendant encompassed an area that was wider than was reasonably necessary for the plaintiff's protection. Upon the whole of the evidence, I think it must be held that the area was unreasonably wide. For this reason also, the covenant was void. It cannot be saved by carving out of the area to which the parties agreed the restraint should apply, a smaller area within which it would be reasonable for the plaintiff to be protected (*Mason's Case* (1) per Lord *Moulton*).

In my opinion the appeal should be allowed.

WEBB J. I agree with the statement of the law in the judgment of the Chief Justice and with his Honour's interpretation of the agreement. More particularly I agree that the words " in the same area " in clause 3 should, because of the provision in the schedule at the end of the agreement, be taken to mean the sales territory of Crystal Brook and Wirrabara. But this provision in the schedule is not applicable solely to clause 3 : it is also applicable to clause 1 and delimits the area in which the appellant may be employed by the respondent i.e., the Crystal Brook and Wirrabara sales territory, which territory is in two parts.

As stated by the Chief Justice restraints of this kind are invalid, unless in the particular case the covenantee can show that the restraint is reasonably necessary for the protection of his business.

The towns of Crystal Brook and Wirrabara are thirty miles apart and the shortest distance between the two parts of the sales territory, of each of which parts one of these towns is a centre, is ten miles. For this reason I am unable to hold that it was reasonably necesssary for the protection of the respondent's business that the appellant should be restrained as to both parts if, as proved to be the case, the appellant should be employed only in one part. The nature of the appellant's duties and the extent of his contact with customers of the respondent did not call for his restraint in a part of the territory in which he was not employed by the respondent. But the effect of the agreement when it was made was that the appellant could be restrained as to a part in which he was not employed by the respondent and its legality is to be tested as at the date it was made : *Putsman* v. *Taylor* (2), per *Salter* J. To be legal it should have provided for a restraint in the part of the territory in which the

(1) (1913) A.C., at p. 745.

(2) (1927) 1 K.B. 637, at p. 643.

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appellant would be employed by the respondent, or in both parts if employed by the respondent in both. Legality cannot, I think, be given to the agreement merely by substituting for the words " the same area " in clause 3 the words in the schedule " the sales territory . . . and Wirrabara ", and by then striking out of the substituted words the two words " and Wirrabara ", as constituting a separate and severable covenant in respect of the Wirrabara part of the sales territory. If that is done the agreement then purports to enable the appellant to be employed by the respondent in either or both parts of the sales territory, but to be restrained in the Crystal Brook part, even if he should not work there. This was not necessary for the protection of the respondent's business in the Crystal Brook part when the agreement was made.

As I understand the position the remedy is not supplied in this case by striking out words as constituting a separate and severable covenant. Yet if the excess is to be removed in cases like this it can be done only by striking out words constituting such a covenant : it is not permissible under any circumstances to add words : see *Attwood* v. *Lamont* (1), per *Younger* L.J.

The words substituted in clause 3 cannot also be substituted in clause 1, and the words " and Wirrabara " then struck out so as to make both clauses cover the same area. Clause 1 is perfectly valid : no part is bad for excess. A new agreement confined wholly to Crystal Brook cannot be made for the parties. As already stated the legality of the agreement must be tested at the date it was made, without the assumption of any knowledge that the appellant would be employed only in Crystal Brook. If as at that date an excess appears, and it is the subject of a separate and severable covenant, it can be struck out ; but that is as far as the Court can go.

I would allow the appeal.

FULLAGAR J. In this case I agree with the judgment of the learned Chief Justice of South Australia.

The main argument before his Honour seems to have been based, as was the main argument before this Court, on certain passages in three of the leading cases which suggest that, in the case of an employee who is engaged to perform what may be called subordinate or merely mechanical functions, no covenant can be valid which, however narrow the limits of time and space, actually prohibits him within those limits from exercising a trade or calling. The argument began, of course, with the distinction which has been recognized for very many years between contracts of employment

(1) (1920) 3 K.B. 571., at p. 593.

and contracts for the sale of a business. It emphasised the many statements which are to be found in the reports to the effect that an employer is not entitled to protect himself against the future competition in business of an employee whom he engages. And it proceeded to the conclusion that there is at least a certain class of case in which what is sometimes called an " area covenant " cannot validly be imposed at all. To that class it was said the present case belongs.

The passages on which reliance was mainly placed are the following. In *Mason* v. *Provident Clothing & Supply Co. Ltd.* (1) Lord *Haldane* L.C. said :—" Had they been content with asking him to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within these limits ". In *Herbert Morris Ltd.* v. *Saxelby* (2) Lord *Atkinson*, referring to an employer, said : " He is undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which may be of vast value. And that protection may be secured by restraining the employee from divulging these secrets or putting them to his own use. He is also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from all competition per se apart from both these things, however lucrative it might be to him, he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee ". And in *Dewes* v. *Fitch* (3), *Warrington* L.J. said :—" . . . the employer is not entitled to require protection against mere competition. What he is entitled to protection against is the use by the employee against him in his business of knowledge obtained by him of his employer's affairs and the influence acquired by him over his customers in the course of an ordinary trade, and, in the case of a professional man, over what is more commonly called his clients ".

The passage in *Mason's Case* (4) is clearly explained by the fact that in that case the employee was employed in the capacity of a canvasser. And the other passages must clearly, I think, be read in the light of the facts of the particular cases. The reasonableness of a covenant in restraint of trade cannot be judged without considering, among other things, the nature of the interest which the

(1) (1913) A.C. 724, at pp. 731, 732.
(2) (1916) 1 A.C. 688, at p. 702.
(3) (1920) 2 Ch. 159, at p. 181.
(4) (1913) A.C. 724.

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employer has and which he may legitimately seek to protect. But the nature of the interest to be protected is one thing: the means by which it may be protected is another thing. The passages in question are, in my opinion, concerned with the former and not with the latter. The whole position is, I think, made clear by the passage which *Napier* C.J. quotes from the judgment of Lord *Sterndale* M.R. in *Attwood* v. *Lamont* (1). Referring to the passages which I have quoted, his Lordship said :—" It was argued on behalf of the appellant that the result of these statements was that no restraint could be good unless it were specifically stated to be limited to the acts described. I do not agree with this contention. I think it may be necessary to have a general restraint against trading in a certain area in order to avoid such acts on the part of the servant without specifying in the covenant the particular acts against which it is directed ". What is said by *Salter* J. in *Putsman* v. *Taylor* (2) is to the same effect and derives, I think, added force from the reasons for which the decision of the Divisional Court was upheld by the Court of Appeal: see (3).

I think it follows from what I have said that the main argument for the appellant fails. There may, of course, be cases in which the employer has no interest which can legitimately be protected by any covenant in restraint of an employee's trade. But, generally speaking, if there is an interest which may legitimately be protected —whether because the employee will learn trade secrets or because he will come into close relations with customers or for any other reason—that interest may be protected not merely by a covenant against the unfair use of an advantage as such but, within limits which will be jealously scanned to see that the restraint goes no further than is reasonably necessary, by a covenant restricting the actual carrying on of a trade or occupation.

With regard to the circumstances of this particular case, the effect of the evidence and the validity of the term of the contract which is in question I agree with *Napier* C.J. The only point which has caused me any difficulty is the fact that the contract of employment is made terminable on twenty-one days' notice on either side. That the period of the employment may be a relevant matter in such cases as the present can hardly, I think, be doubted, but there is authority for saying that what must be taken to have been actually contemplated by the parties may be taken into consideration along with the actual terms of the contract itself. Moreover,

(1) (1920) 3 K.B., at p. 578.
(2) (1927) 1 K.B. 637, at pp. 641 642.
(3) (1927) 1 K.B. 741.

it must always be borne in mind that an injunction is a discretionary remedy. In *Haynes* v. *Doman* (1), where the agreement was terminable by a fortnight's notice on either side, *Lindley* M.R. said: "Possible cases in which the the restriction would not be reasonable are suggested. One would have arisen if the defendant had left the plaintiff's employ within a very short time after entering it, and before the defendant could have acquired or carried away with him any knowledge of the plaintiff's mode of conducting his business. Such an event has not happened, and clearly was not contemplated. This objection, if sound, would invalidate all agreements of the sort determinable on short notice, unless some words were introduced excluding their application to cases never contemplated. Another case to which the restriction could not be reasonably applied would have arisen if the defendant had left business altogether, or had had no dealings with the plaintiff's rivals for twenty or thirty years, and had then resumed business and assisted them". *Romer* L.J. (2) agreed with the above observations of the Master of the Rolls. The case of *Haynes* v. *Doman* (3) was decided before *Mason* v. *Provident Clothing & Supply Co. Ltd.* (4) and *Herbert Morris Ltd.* v. *Saxelby* (5) but, when all the circumstances are regarded, I think that the decision is quite in line with *Dewes* v. *Fitch* (6), which was decided after the two leading cases in the House of Lords and in which a very similar covenant was held valid. In *McPherson* v. *Moiler* (7) where the agreement was terminable by a month's notice on either side, *Harvey* J. said: "I cannot altogether put out of consideration the fact that on the face of the agreement there was no security of employment for more than from month to month, though exactly what weight has to be given to that it is not easy in the present state of judicial authority to pronounce with any definiteness. The judgment of *Lindley* L.J. in *Haynes* v. *Doman* (8) and the judgment of *Eve* J. in *Dewes* v. *Fitch* (6) both show that the Court may to a certain extent take into consideration what was probable as to the intention of the parties as to the length of the engagement . . . Although the master has the power almost immediately to dismiss the employee, one has to look at the surrounding circumstances to see whether that was seriously in the contemplation of the parties as being likely to happen". It would not be right, I think, in this connection to overlook the notorious fact that the industrial situation in this country at this

(1) (1899) 2 Ch. 13, at p. 26.
(2) (1899) 2 Ch., at p. 30.
(3) (1899) 2 Ch. 13.
(4) (1913) A.C. 724.
(5) (1916) 1 A.C. 688.
(6) (1920) 2 Ch. 159.
(7) (1920) 20 S.R. (N.S.W.) 535, at p. 541; 37 W.N. 162, at pp. 163, 164.
(8) (1899) 2 Ch. 13.

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time is exactly the converse of that which is described by *Younger* L.J. in *Dewes* v. *Fitch* (1) where he refers to the respective bargaining positions of employer and employee. I do not think that the fact that the agreement in this case was terminable by twenty-one days' notice on either side affords any sufficient ground for differing from the view taken by *Napier* C.J.

The contract is concerned with two areas which may be described respectively as the Crystal Brook area and the Wirrabara area. The two areas are separate and distinct in this sense—that there is no territory common to both. I think that the covenant is severable in the sense that it could be held valid as to either area, even if it must be held too wide regarded as applying to both areas. Having regard to the fact that it was almost certainly contemplated that the defendant would serve the plaintiff in both areas, the covenant is, in my opinion, valid in respect of both areas. Since, however, the defendant was never employed in the Wirrabara area, an injunction should not be granted except in respect of the Crystal Brook area. The plaintiff did not in fact ask for more than an injunction relating to the Crystal Brook area only, and the injunction granted by *Napier* C.J. related only to that area.

In my opinion this appeal should be dismissed.

KITTO J. On 10th August 1946, the parties to this appeal entered into a written agreement for the employment of the appellant by the respondents. The respondents were at that time and still are carrying on business at Crystal Brook and Wirrabara, two towns in South Australia about thirty miles apart. The agreement described the appellant as a workman and the respondents as motor and general engineers. It did not state in what capacity or at which place the appellant was to be employed. In a schedule it provided that " this agreement shall apply to the sales territory for motor cars, trucks and tractors &c. of Murdock's Garage—Crystal Brook and Wirrabara " ; and I shall assume that the evidence tendered for the purpose of identifying the sales territory referred to was sufficient to establish that, as the respondents contended, that territory consisted of two defined areas, one surrounding Crystal Brook and the other surrounding Wirrabara. It was conceded before this Court that the two areas were quite separate, their nearest points being not less than ten miles apart.

The employment was not for a fixed period but was made determinable by either party on giving twenty-one days' notice or paying or forfeiting twenty-one days' wages in lieu of notice.

(1) (1920) 2 Ch., at p. 186.

The agreement contained a provision which, so far as material to this appeal, was in the following terms: "The workman will not during his employment or within one year from the termination thereof in any way carry on or be engaged concerned or interested either personally or as a partner or as a servant or employee of any other person or company in the business of garage proprietors, motor and general engineers, agents for the distribution of or dealers in motor accessories or in any other similar business now and hereafter carried on by the employers within the same area".

The question for decision on this appeal is whether the restrictive provision I have quoted should be held invalid as being in unlawful restraint of trade. Any contractual restraint of trade is prima facie unlawful and invalid. "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": *Herbert Morris Ltd.* v. *Saxelby* (1) per Lord *Parker of Waddington*; *Routh* v. *Jones* (2) per Lord *Greene* M.R.

The validity of the restraint must be decided as at the date of the agreement imposing it. "The question is not whether experience gained during the service has shown the restriction to have been excessive or insufficient. The question is whether the covenant was a reasonable one for the parties to agree to at the outset of the service on the best estimate which they could then make of the future": *Putsman* v. *Taylor* (3).

The work for which in fact the appellant was employed was variously described in the evidence as that of a mechanic, a mechanic in charge, a working foreman or a working head mechanic. His work might naturally be expected to bring him constantly into close touch with the respondents' customers who came to the place where he would be working from time to time, but it could not be expected to give him any association with or knowledge of the customers who attended only a place of business where he was not working.

In these circumstances it is necessary to consider what it was for which, and what it was against which, the respondents needed

(1) (1916) 1 A.C. 688, at pp. 706, 707.
(2) (1947) 1 All E.R. 758, at p. 763.
(3) (1927) 1 K.B. 637, at p. 643.

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protection: *Herbert Morris* v. *Saxelby* (1). The answer is that they needed protection for their business connection against the possibility of its being affected by the personal knowledge of and influence over the customers which the appellant might acquire in their employment (2). (I put on one side the preservation of trade secrets because on the evidence I do not think that there were any trade secrets that required protection). To adapt the words of Lord *Birkenhead* in *Fitch* v. *Dewes* (3), the respondents might claim for their protection that that business which was theirs, and to which they were admitting the appellant in the manner defined in the agreement, should continue to be theirs, and that if at any time the contract of employment between themselves and the appellant should come to an end, on such determination the latter should not be in a position to use "the intimacies and the knowledge" which he had acquired in the course of his employment in order to create or assist a competing business in the same area and by doing so undermine the business connection of the respondents. The knowledge referred to does not include the technical knowledge and skill which the appellant might acquire in the employment: *Sir W. C. Leng & Co. Ltd.* v. *Andrews* (4); *Mason* v. *Provident Clothing & Supply Co.* (5); *Herbert Morris Ltd.* v. *Saxelby* (6); for an employer cannot validly preclude his employee from competition *per se*, that is competition apart from the divulging or use of trade secrets and enticing away of old customers by solicitation or such other means: *Herbert Morris Ltd.* v. *Saxelby* (7), per Lord *Atkinson*. The knowledge which, because its use may deprive the employer of the business connection which he is entitled to preserve as his own, he may require his employee to abstain from using, is objective knowledge of customers, their peculiarities, their credit and so forth: (8); cf. *Routh* v. *Jones* (9). Against the prejudice likely to result from such "intimacies and knowledge" the respondents were entitled to protect their business by means of a contractual restraint of a width reasonable in reference to the interests of both parties: *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.* (10); *Herbert Morris Ltd.* v. *Saxelby* (11). But to be valid, such a restraint "must afford *no more than* adequate protection to the party in whose favour it is imposed": *Herbert Morris Ltd.* v. *Saxelby* (12); *Mason* v. *Provident Clothing and Supply Co.* (13).

(1) (1916) 1 A.C., at p. 708.
(2) (1916) 1 A.C., at p. 709.
(3) (1921) 2 A.C. 158, at p. 164.
(4) (1909) 1 Ch. 763, at p. 773.
(5) (1913) A.C. 724, at p. 740.
(6) (1916) 1 A.C., at pp. 703, 705, 710, 711.
(7) (1916) 1 A.C., at p. 702.
(8) (1916) 1 A.C., at p. 714.
(9) (1947) 1 All E.R., at p. 761.
(10) (1913) A.C. 781, at p. 795.
(11) (1916) 1 A.C., at p. 716.
(12) (1916) 1 A.C., at p. 707.
(13) (1913) A.C., at pp. 733, 742.

The provisions of the restrictive agreement which the respondents seek to enforce are not directed against the solicitation by the appellant of their customers with whom the appellant dealt while in their employment; other provisions of the agreement cover that and no breach of them is alleged to have been committed or to be feared. The provisions now in question are directed against what Lord *Atkinson* called enticing away old customers by "such other means"—an expression which may, I think, be explained in the language of the Full Court of Victoria in *Woodmason's Melrose Dairy Pty. Ltd.* v. *Kimpton* (1): "There are many methods of enticing away customers beside the method of direct solicitation impossible of detection, and only known by results. But, apart altogether from any conscious exercise by the former employee of such knowledge and influence as he may have acquired in his former employment, the employer is entitled to protect himself against loss which may otherwise arise from the mere existence of a personal relation between his customers and his former servant. That relation, when resulting from the employment, is an advantage accruing to the employer and properly exercisable for his benefit so long as the service continues. The same relation would become a source of injury to the employer if the former servant were permitted to accept the custom which might voluntarily flow to him upon his opening an opposition business in the old locality. This danger is quite reasonably met, in our opinion, by a provision against serving the old customers for a limited period. The same reasoning is, we think, fully recognized by the common acceptation of a covenant against carrying on a rival business at all in a given locality. Such a covenant has been repeatedly held to be reasonable, though it obviously has nothing to do with solicitation".

But in order that a restraint may be made reasonable in reference to the interests of the parties by means of a geographical limitation, the limitation must, I think, be such as will fairly approximate to a limitation expressed by reference to the employer's customers of whom the employee is likely to acquire special knowledge or with whom the employee is likely to be brought into a personal relation while in the employment: cf. *Coote* v. *Sproule* (2); *Empire Meat Co. Ltd.* v. *Patrick* (3). In *Brightman* v. *Lamson Paragon Ltd.* (4), *Rich* J. said: "No restraint is excessive unless the area exceeds that fairly covered by the business of the covenantee at the date of the agreement or which might at that date reasonably be expected

(1) (1924) V.L.R. 475, at pp. 480, 481.
(2) (1929) 29 S.R. (N.S.W.) 578, at p. 580; 46 W.N. 180, at p. 181.
(3) (1939) 2 All E.R. 85.
(4) (1913) 18 C.L.R. 331, at p. 335.

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to be covered by such business on the expiration of the agreement ". No doubt this proposition is accurate as applied to cases such as that with which his Honour was dealing, where the employment is to be co-extensive with the area of the employer's business, and the employee may be expected to form personal relationships with customers in all parts of that area ; but it should not, I think, be accepted as accurate in relation to cases where the employer carries on business in several areas, and the employment may be confined to one or some only of the areas and is of such a character that the employee while working in one area is unlikely to be brought into any significant degree of contact with customers in the others. In such a case a restraint upon the employee's becoming connected with a rival business after he leaves the employment will give the employer's business reasonable protection against the effects of the intimacies and knowledge to which Lord *Birkenhead* referred, if it is limited to the area or areas in which the employee in fact works within a reasonable time before the termination of his employment ; and a restraint which applies indiscriminately to all the areas in which the employer carries on business will exceed what is reasonably necessary to prevent the injury to his business against which he is justified in guarding.

The criticism to which I think, with all respect, that *Rich* J.'s proposition is open is that while it recognizes the limits of the subject of legitimate protection, it fails to take into account the limits of the danger against which protection is needed. In *Mason's Case* (1) Viscount *Haldane* said : " Had (the employers) been content with asking (the employee—a canvasser) to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within these limits ". Lord *Shaw of Dunfermline* said in the same case (2) : " A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour ". Lord *Moulton* said (3) : " A small district in London was assigned to him, which he canvassed and in which he collected the payments due, and outside that small district he had no duties. His employment was therefore that of a local canvasser and debt collector, and nothing more. Such being the nature of the employ-

(1) (1913) A.C., at pp. 731, 732.
(2) (1913) A.C., at p. 741.
(3) (1913) A.C., at p. 743.

ment, it would be reasonable for the employer to protect himself against the danger of his former servant canvassing or collecting for a rival firm in the district in which he had been employed. If he were permitted to do so before the expiry of a reasonably long interval he would be in a position to give to his new employer all the advantages of that personal knowledge of the inhabitants of the locality, and more especially of his former customers, which he had acquired in the service of the respondents and at their expense. Against such a contingency the master might reasonably protect himself, but I can see no further or other protection which he could reasonably demand ".

*Mason's Case* (1) had not been long decided at the time of *Brightman's Case* (2) and the difference between a vendor and purchaser case and a master and servant case in relation to restraint of trade had yet to receive the emphasis which *Herbert Morris Ltd.* v. *Saxelby* (3) was to give it. Since the latter decision it is not possible, I think, to uphold a restraint upon an employee in respect of engaging in a rival business if the restraint extends beyond the area to which the customers belong with whom the employee is likely to be brought into touch during the employment. In that case the employers had a business ramified over the United Kingdom but a restraint of similar geographical extent was held invalid. Lord *Parker of Waddington* said (4): " Had the restraint been confined to (the two places where the employee in fact worked) and a reasonable area round each of these centres, it might possibly have been supported as reasonably necessary to protect the plaintiff's connection, but a restraint extending over the United Kingdom was obviously too wide in this respect ".

The case of *Stephens* v. *Kuhnelle* (5) may be referred to in this connection. That case had to do with a covenant restraining a breadcarter from serving any person within a defined area who was during the employment a customer of the employer. After referring to certain decisions of the Court of Appeal given before the law on the subject had been laid down by the House of Lords in *Mason* v. *Provident Clothing & Supply Co.* (1) and *Herbert Morris Ltd.* v. *Saxelby* (6), *Harvey* C.J. in Eq. said: " The question, however, which I have to decide now, in view of the later decisions, is whether this agreement is more widely couched than is necessary for the protection of the employer against the knowledge which was acquired by the employee of his customers and of his master's trade while

(1) (1913) A.C. 724.
(2) (1913) 18 C.L.R. 331.
(3) (1916) 1 A.C. 688.
(4) (1916) 1 A.C., at p. 711.
(5) (1926) 26 S.R. (N.S.W.) 327, at p. 328; 43 W.N. 67, at p. 67.
(6) (1916) 1 A.C. 688.

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employed by him. In my opinion the agreement breaks down at the point where it restrains the employee from serving or causing to be served with bread or interfering with any customers of his employer who were customers during his employment. It may be that in some businesses and trades such an agreement would be proper where the knowledge of the employee did involve a knowledge of all his master's customers, or where he might possibly have had personal relations with all customers, such as in the case of some retail businesses; but in this case the evidence states, and it is uncontradicted, that each bread carter knows only the customers on his own run, and has no knowledge of the other customers and no dealings with them. There therefore can be no necessity to protect the employer against the employee soliciting or dealing with customers whom such employee is not serving".

In the present case the evidence did not establish that the appellant if working at Crystal Brook or at Wirrabara would not be brought into touch with customers from the area surrounding the other of those towns; but the onus lay upon the respondents to prove facts in the light of which it was reasonable for the parties, when framing the restrictive clause of the agreement, to expect that the appellant, if working in one area, would be likely to come into contact with customers of the respondents' business in the other area, and no such evidence was given. The probabilities, I should have thought, were all against such an expectation; in the ordinary course of events, persons whose vehicles require mechanical attention would be likely to take them to the nearer of the two towns. It is true that in evidence one of the respondents said, when describing what in fact occurred, that to a certain degree the appellant, who worked only at Crystal Brook, would know of the customers at Wirrabara, adding that at times they would come to Crystal Brook; but there was no evidence that this occurred to any substantial extent, or that it could be expected at the date of the agreement to occur to any substantial extent.

It is said that the restrictive clause should be regarded as combining two severable restrictions, one in respect of the Crystal Brook area and the other in respect of the Wirrabara area. But even if the clause had been confined to one of those areas, its validity would have had to be decided in the light of the fact that at the date of the agreement it was not known whether the appellant would be working in that area during such a period preceding the termination of his employment that his knowledge of and relation with customers in that area might, in the absence of a restraint, cause injury to the respondents' business. The service agreement

did not specify where the appellant was to be employed. It was quite consistent with the agreement that he might be employed at Wirrabara, for instance, either during the whole term of his employment or during so long a period before its termination that any acquaintance he may have had with customers of the Crystal Brook business would be too remote in time to warrant any restriction in relation to the Crystal Brook area.

In my opinion, therefore, severance of the restrictive clause of the agreement does not save it. In order to be valid it should, I think, have been so limited in respect of each area as not to operate therein unless the appellant should be employed by the respondents in their business in that area within some specified reasonable period preceding the termination of his service. Not being so limited, the clause, even if free from objection in any other respect, appears to me to exceed what was reasonably required in order to obviate the danger from which the respondents were entitled to obtain protection. Accordingly I am of opinion that the restrictive clause should be held invalid as being in unlawful restraint of trade.

I would allow the appeal, discharge the order of the Supreme Court and dismiss the action.

*Appeal allowed with costs. Judgment of Supreme Court discharged. Action dismissed with costs.*

Solicitors for the appellant, *Alderman, Brazel, Clark & Ward*, agents for *Hannan & O'Callaghan.*

Solicitors for the respondents, *Villenueve Smith & Harford.*

C. C. B.