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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

FEDERAL COURT'S SUPERVISORY POWER OVER THE FEDERAL LAW AGENCIES

Petitioner, in Rea v. United States, was indicted for the unlawful acquisition of marihuana in violation of the Internal Revenue Code, 26 United States Code,


(298)
section 2593 (a). The indictment was based on evidence obtained by a search warrant issued by a United States Commissioner, as authorized by Rule 41 (a) of the Rules of Criminal Procedure. The petitioner, Rea, moved pursuant to Rule 41 (e) to suppress the evidence on the ground that the search warrant was improperly issued in that it was insufficient on its face, no probable cause existed, and the affidavit was not based on sworn statements. The motion to suppress was granted and the indictment dismissed. The petitioner could not recover the illegally obtained evidence from the government because it was contraband and not returnable.

2. 26 U.S.C. §2593 (a): “It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by the section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).”

3. FED. R. CRIM. P. 41(a). “A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.”


5. FED. R. CRIM. P. 41(e). “A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.”

6. FED. R. CRIM. P. 41(c) provides in relevant part as follows: “A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof.

7. INT. REV. CODE, 28 U.S.C. §2463, provides as follows: “All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.” Also see 26 U.S.C. §2698, 26 U.S.C.A. §2698.
Subsequently a federal narcotics agent filed a complaint before a New Mexico judge and caused the arrest of the petitioner. The petitioner was then charged with being in possession of narcotics in violation of the New Mexico narcotics law. The case against the petitioner in the New Mexico court is based entirely on the testimony of the federal agent and the evidence which was illegally seized pursuant to the faulty search warrant. The petitioner brought a proceeding to enjoin the federal agent from testifying in the state court. The district court denied the motion to enjoin and the court of appeals affirmed. However, in a five to four decision by the United States Supreme Court, with Justice Douglas writing the decision, it was decided that, pursuant to the federal government's "supervisory powers over its federal law agencies", the Supreme Court could and should prevent the federal agent from testifying in the New Mexico state court. Justice Douglas said that there was no question of the interplay of the fourth and fourteenth amendments to the United States Constitution and that the district court was not asked to enjoin a state official from testifying or in any way interfering with state agencies. He continued to say that the only relief asked for was against a federal agent, and this could not be interpreted as either directly or indirectly interfering with the state authorities in the administration of their state justice. Since the search and seizure of the federal agent had not been made in the manner that is guaranteed by the fourth amendment to the Constitution of the United States, it was the duty of the federal court to police the federal rules of procedure relating to search and seizure, and to make certain that they were observed. This idea was expressed in the principal case as follows:

To enjoin the federal agent from testifying merely to enforce the federal rules against those owing obedience to them.°

The fact that there was a five to four decision shows that there is ample room for disagreement as to the propriety of the theories of and result reached by the majority. It is the purpose of the writer to discuss the authorities supporting the divergent views.

The dissenting justices very strongly asserted that prior to the decision of the case at bar they were not aware that any such "federal supervisory power over federal law agencies" existed. The dissent stated further that this so-called supervisory power was lodged in the executive branch of the government and not in the judiciary and also asserted that the injunction did operate to stultify the state prosecution and did so as effectively as if it had been issued directly against the New Mexico officials.

Great emphasis was placed on the case of Steffanilli v. Minard by the dissent, in the case reviewed, as standing for the proposition that the federal government

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would not interfere with the state proceedings and that the present case is a departure from the Stefanilli case. However, as was pointed out in the dissenting opinion, there is one big difference in the Stefanilli case and the case at bar, that being that the evidence which was illegally obtained in the former was so obtained by New Jersey officials and not by federal agents. Stefanilli petitioned the federal district court to enjoin the use of this evidence illegally seized but made no attempt to suppress it in the New Jersey courts because, despite its being illegally obtained, it was still admissible under the New Jersey law. The theory of the petitioner, Stefanilli, was that the decision of Wolf v. People of State of Colorado would be invoked. The precise holding of that case was that in a state prosecution for a state crime the fourteenth amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. But it went on to say that the security of one's privacy against arbitrary intrusion by police—which is the core of the fourth amendment—is basic to a free society, therefore it is implicit in "the concept of ordered liberty" and as such entitled to be enforced against the states through the due process clause. The Wolf decision stated further that were a state affirmatively to sanction such police intrusion into privacy it would run counter to the guaranty of the fourteenth amendment.

Arguing from this language, Stefanilli asserted that the fourteenth amendment forbids unreasonable searches and seizures by the states, and that such a search and seizure by the New Jersey state police subjected him to a deprivation of a right, privilege, or immunity secured to him by the constitution for which redress is afforded. However, the United States Supreme Court held that the federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence even when claimed to have been seized by unlawful search and seizure. This was referred to as the power of the federal court (or any court with equity jurisdiction) to exercise discretion in the exercise of its equitable powers. This is the first case which has suggested that the federal government has this so-called supervisory power which is really founded upon an equitable power that requires the exercise of discretion in its application. The majority put great emphasis upon the special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law. The importance of this separation of authority was pointed out by the historic concern of the legislative branch of the federal government through congressional enactment. The United States Supreme Court, speaking through Justice Stone in Douglas v. City of Jeannette, said:

Congress, by its legislation, has adopted the policy, with certain well
defined statutory exceptions, of leaving generally to the state courts the
trial of criminal cases arising under state laws, subject to review by this
court of any federal questions involved. Hence, courts of equity in the
exercise of their discretionary powers should conform to this policy by
refusing to interfere with or embarrass threatened proceedings in state
courts save in those exceptional cases which call for the interposition of a
court of equity to prevent irreparable injury which is clear and
imminent.14

The majority, in the case at bar, cited McNabb v. United States15 as the
basis from which stems this "supervisory power over the federal law agencies."
The dissent said that this case did not stand for such a proposition. Consequently
this case should bear closer scrutiny. The case entailed the question of evidence
obtained under questionable procedure and its admissibility.16 Without that
evidence the federal authorities had no case. The United States Supreme Court
held that the evidence so obtained was inadmissible.

Justice Frankfurter, speaking for the majority in the McNabb case, said:

Judicial supervision17 of the administration of criminal justice in the
federal courts implies the duty of establishing and maintaining civilized
standards of procedure and evidence. Such standards are not satisfied
merely by observance of those minimal historic safeguards for securing
trial by reason which are summarized as "Due process of law" and below
which we reach what is really trial by force. Moreover, review by this
court of state action expressing its notion of what will best further its
own security in the administration of criminal justice demands ap-
propriate respect for the deliberative judgment of a state in so basic an
exercise of its jurisdiction.18

Even though Justice Frankfurter mentions the judicial supervision over federal
criminal justice he still recognized the need for giving respect to the state exer-
cise of jurisdiction. However, Justice Frankfurter continues to say:

The principles governing the admissibility of evidence in federal criminal
trials have not been restricted, therefore, to those derived solely from the
Constitution. In the exercise of its supervisory authority19 over the
administration of criminal justice in the federal courts . . . , this court
has from the very beginning of its history, formulated rules of evidence
to be applied in federal criminal prosecutions.20

14. Id. at 163.
15. 318 U.S. 332 (1943).
16. The federal authorities had received information that the McNabb brothers,
a clan of illiterate Tennessean mountaineers, were going to sell "moonshine"
whiskey one night. A trap was set for them which resulted in one of the federal
agents being killed. The McNabb brothers were arrested and taken to the
Federal Building in Chattanooga, Tenn., and were not brought before a judge
or commissioner. They were placed in a detention room and questioned for about
fourteen hours continuously by six officers. They were kept in ex communicado
and the questioning continued for approximately two days until finally admissions
were made by the McNabb brothers.
17. Italics are those of author.
19. Italics are those of the author.
Still later Justice Frankfurter says in substance that the court, in holding the admissions of the McNabb brothers inadmissible, *confine themselves to their limited function as the court of ultimate review* of the standards formulated and applied by federal courts in the trial of criminal cases. He said that their concern was that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under illegal means.

There appears to be some confusion from the language chosen by Justice Frankfurter in his opinion for the majority in the McNabb case. Though it isn't clear what was the basis of the decision of the majority, it is certainly possible that the court meant to assert a supervisory power and thereby control the federal law agencies, as early in the opinion Justice Frankfurter twice makes reference to the judicial supervisory power and the duty of the federal court in curtailing the federal law agencies so as to maintain standards of procedure. From whence such supervisory power is derived is not stated too clearly but it certainly received a great amount of emphasis as the possible basis upon which the McNabb case was decided, if it was not in fact the actual basis upon which the case was decided. It is arguable that the basis for the majority opinion in the McNabb case was not a "supervisory power" but that the admissions obtained from the McNabb brothers were involuntary and thus were not admissible because of the violation of the fourteenth amendment. The dissenting justices in the case were concerned with this, as they pointed out that the decision did not state whether the admissions were voluntary or involuntary.

In the case at bar the Civil Rights Act was not mentioned but it might be worth while to consider it in connection with this suggested supervisory power and see what effect, if any, it has upon the problem. The Civil Rights Act was in issue in the case of *Screws v. United States*. The facts of that case are not important for our purposes, but it does support the idea that the Civil Rights Act should be so construed so as to respect the proper balance between the states and the federal government in law enforcement. Justice Douglas, in the *Screws* case, said that our national government is one of delegated powers alone and under our federal system the administration of criminal justice rests with...

21. Civil Rights Act §2, 14 STAT. 27 (1866): "That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any state or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

22. Italics those of author.

23. 325 U.S. 91 (1945).
the states except as Congress has created offenses against the United States. It is only state action of a particular character that is prohibited by the fourteenth amendment and against which the amendment authorized congress to afford relief.

Throughout the cases reviewed in this comment the idea of "laissez faire" is existent with regard to the federal government interfering with the state officials in their criminal prosecutions, yet for some reason the majority in the case at bar felt compelled to exercise their discretion and enjoin the federal agent from testifying in the case in the New Mexico court. The cases reviewed bear out the power of the federal courts to exercise equitable power but likewise they show a marked trend toward the court's exercising discretion in refusing to act when their actions would directly or indirectly interfere with a state's criminal procedure, i.e. the court in most all of the cases reviewed have applied a "hands-off" doctrine where possible. It appears to the author that, after close scrutiny, it is hard to find in the McNabb case the basis of this supervisory power. It is clear enough that this power is mentioned in the McNabb case but its origin is not stated therein.

The real question presented by the case at bar is whether the decision changes the policy of the federal courts, i.e. whether the federal courts are no longer going to apply a "hands-off" policy with reference to the state criminal prosecution, but are going to keep a controlling hand on state court agencies through their control over the federal law agencies. If this case sets a precedent, then the states may well expect a limited curtailment of the freedom to which they have heretofore been accustomed. Although this is within the realm of possibility, the writer feels that the United States Supreme Court was compelled to decide the present case as it did upon these particular facts and that a new and different policy as heretofore seen has not been formulated by this decision.

JERRY S. ESTES

PUBLIC POLICY AND THE RESTRICTED COVENANT PREVENTING THE USE OF LAND FOR BUSINESS PURPOSES

Missouri has taken the position that, generally speaking, restrictions in derogation of the fee are not favored. However, restraints against the use of land for business purposes are generally upheld where the object of the restriction

1. Mathews Real Estate Co. v. National Printing & Engraving Co., 330 Mo. 190, 48 S.W.2d 911 (1932); Dean v. Monteil, 361 Mo. 1204, 1209, 239 S.W.2d 337, 340 (1951): "Since restrictions on the use of land are repugnant to trade and commerce, contrary to the well recognized business policy of the country, and in derogation of common law, negative easements or conditions, or covenants or limitations, restricting the use of property, are not favored in law." 26 C.J.S., Deeds, p. 508, § 162b (cited in Dean v. Monteil).
is to create a wholesome residential district. The fact that the property has become more suitable for business purposes rather than for residential purposes is not in itself ground for nullifying a covenant restricting the use of the property to dwellings.

The problem presented here is the extent to which either party to a deed, or their successors in title, is bound to the terms of a restrictive covenant restraining either the land granted or the land retained from any use which would compete with the use made of the land benefited by the covenant.

In *Shepherd v. Spurgeon,* the Missouri Supreme Court held that a covenant in a deed to a 300-acre farm prohibiting the use of the land for any business purposes whatsoever was void on the grounds that it tended to create a monopoly; was in general restraint of trade; and was contrary to public policy.

In the *Shepherd* case, the facts were as follows. Prior to 1941 the land was held by Reeves and his wife. On September 4, 1941, they conveyed the land to Shepherd by warranty deed, reserving to themselves, their heirs and assigns, "the right to the possession, use, income, and benefit" of a one-acre plot "for a term of one hundred years, with full right to alienate and convey the same." The deed further recited that, "As part of the consideration hereof it is agreed that no building, booth, or enclosure within the lands herein conveyed shall ever be used for business purposes, and none shall be erected or leased for such purposes."

The 300-acre farm lies in Schuyler County, Missouri. Its north line is approximately one mile in length and is parallel with the boundary line between the states of Missouri and Iowa. The northern boundary of the farm is separated from Iowa by a public highway, called the Iowa Line Road, running east and west and serving rural communities lying east and west of the farm. U.S. Highway 63 is the principal north-south highway in Schuyler County and divides the farm

2. This note deals with only a single facet of the restrictive covenant problem, viz, where the covenant restrains the use of the land in such a way as to actually or potentially restrain trade, or create in one of the parties a monopoly, or both, with the express or implied purpose of preventing competition.

The cases dealing with restrictive covenants contained in a deed are often cited as authority in cases dealing with restrictive covenants in such varied situations as employment contracts, the sale of chattels, or the sale of businesses. The reverse is often true. There is no satisfactory heading in the digests under which all the cases are grouped for easy access. (See note 7, infra) It is the purpose here not to discuss the cases with a view to discovering or commenting upon some new or novel rule of law—in fact the rules relied on by the courts seem generally to be the same—but rather to lay before the reader a cross-section of the cases so that he can draw his own conclusions as to the factual elements which prompted the courts in giving situations to declare the covenant reasonable or unreasonable.

5. 291 S.W.2d 162 (Mo. 1956).
introduce two parcels so that approximately one-fourth of the tract, having a frontage of one-fourth of a mile, lies on the west side of the highway, and three-fourths, having a frontage of three-fourths of a mile, lie on the east side.

The one-acre plot, which Reeves reserved to himself in the deed, lies in the northeast corner of the southwest quadrant formed by the intersection of U.S. Highway 63 and the Iowa Line Road. The farm lies miles from any town in a territory devoted to agricultural pursuits, and the only nearby buildings are farm buildings. On the one-acre plot Reeves had a frame building in which he engaged in selling 3.2 per cent beer and operating a filling station, restaurant, and neighborhood grocery store.

Subsequent to his conveyance to Shepherd, Reeves conveyed the one-acre plot to Spurgeon. Spurgeon improved the property by tearing down the frame building and erecting a larger building from which he has engaged in operating a filling station, restaurant and public dance hall, and from which building he sells at retail groceries including oleomargarine, cigarettes, 3.2 per cent beer, fireworks, gasoline, oil, and automobile accessories. Due to the strategic location of the business, it attracted not only the local farmers and tourists, but also the citizens of Iowa, who found it convenient to drive down to Missouri to purchase certain commodities which were either prohibited or heavily taxed in Iowa.

Shepherd realized that a valuable business was being operated on his farm, and in an attempt to share in it he began this suit to try title to determine whether the balance of the farm was effectively restricted. The court held that the covenant contained in the deed from Reeves to Shepherd was void as it tended to create a monopoly, was in general restraint of trade, and was contrary to public policy.

The Shepherd case is the latest decision by the Missouri Supreme Court on the question of the validity of restrictive covenants where their effect is to operate on the land in such a way as to restrain competition. However, it does not stand alone. The earliest case, and the only other Missouri case precisely in point, is Dean v. Monteil, decided five years previously.

In the Dean case Rumble owned a five-acre plot and a 75-acre tract separated by U.S. Highway 69 running in a northeasterly-southwesterly direction. A development company owned the tract immediately north of the five-acre plot, and this tract had been platted as a subdivision. However, no further improvements had been made on this tract. The development company purchased the five-acre plot

6. Iowa imposes high license fees, taxes, and other statutory regulations on the sale and consumption of oleomargarine, cigarettes, fireworks, beer, and gasoline. See 291 S.W.2d 162, at p. 163 (1956), cited in note 5, supra.
7. 361 Mo. 1204, 239 S.W.2d 337 (1951). Although there are some differences in the facts of the Dean case and the Shepherd case, supra, the holdings are practically identical; nevertheless the Dean case is digested under Covenants while the Shepherd case is digested under Perpetuities.
from Rumble. The deed contained certain restrictions as to roadhouses and the sale of liquor, but was otherwise unrestricted as to businesses. The avowed purpose of the development company was to secure the five-acre plot for the erection of business buildings. At the same time, Rumble recorded an instrument restricting the use of the north 35 acres of the 75-acre tract lying southeast of U.S. Highway 69 to residential purposes. Thereafter the plaintiff acquired the 75-acre tract from Rumble, and the defendant acquired the five-acre plot at a bankruptcy sale (the development company being bankrupt). This action was to declare the instrument placing the restrictions on the 35-acre tract void as a cloud on title.

The court held that the primary purpose of the restrictions on the 35-acre tract was not to create a residential district, but was to restrict the use of the land so as to prevent its use in competition with the five-acre plot. The tendency of the restriction was to create a monopoly, and before such a restriction should be upheld it should clearly appear that no monopoly is created by it.

Some seventy years ago the Virginia court had occasion to consider much the same problem as arises in both the Shepherd and the Dean cases, and its decision was followed by the Missouri court. In Tardy v. Creasy, the grantor conveyed five acres of land at the junction of two railroads, retaining the surrounding 368 acres. The deed contained a covenant whereby the grantee "was to have the exclusive mercantile privilege, and all rights pertaining thereto, at, in, and around said junction," and the grantor agreed to forfeit $500 for any breach by him. In a subsequent warranty deed, made for the purpose of more fully perfecting the intention of the parties, the grantor gave the grantee the exclusive right to sell wares, goods and merchandise; to keep houses of public entertainment or refreshment; to establish warehouses, factories, foundries and shops on said tract of five and one-half acres, or on any lands or lots subsequently purchased by the grantee or on any part of the lands now owned by the grantor at or adjoining said five and one-half-acre tract.

The grantor (Tolbert) then conveyed one acre of the 368-acre tract to Roach by a general warranty deed, "restricting, however, the said Roach from any mercantile privileges, the same having been heretofore conveyed to A. H. Tardy" (the grantee), Roach then conveyed by general warranty deed, without mention of the restrictions, to Creasy. Creasy established a mercantile business on the land. Tardy then filed this suit to enjoin Creasy from "selling goods, wares, and merchandise on said parcel of one acre of land, or from otherwise trespassing" on the alleged rights of Tardy.

The court held that the covenant was not merely in partial restraint of trade, for while it was only on one piece of land, it embraced all businesses which

could be carried on. As the covenant was in general restraint of trade, it was void as against public policy.\textsuperscript{9}

In \textit{Norcross v. James},\textsuperscript{10} the Massachusetts court refused an injunction against violation of a restrictive covenant contained in a deed under the following circumstances. The grantor conveyed to the grantee a six acre quarry, bounded by other land of the grantor, with a covenant in the deed whereby the grantor promised on behalf of himself, his heirs and assigns that, "I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm. . . ." The plaintiff acquired title through the grantee, and the defendant acquired title through the grantor. The defendant opened a quarry on his land, and the plaintiff instituted a suit in equity to enjoin him from so doing under the terms of the covenant. The court in denying relief held that this covenant did not run with the land; that it merely tended indirectly to increase the value of the plaintiff's quarry by excluding a competitor from the market for its products; and while this could have been done had plaintiff owned the whole tract, it does not follow that it could be done under a covenant of this type. Although the court refused relief, it did not expressly hold that the covenant was invalid.

In \textit{Brewer v. Marshall and Cheeseman},\textsuperscript{11} the New Jersey Court of Errors and Appeals refused an injunction to restrain the sale of marl from the premises covered by a restrictive covenant. Cheeseman, the owner of a farm rich in marl, conveyed a part of it to Lamb. The deed contained a covenant reading as follows: "Also the said George Cheeseman, his heirs and assigns, are not to sell any marl, by the rood or quantity, from off his premises adjoining the above property." Lamb subsequently conveyed his land to Brewer. Marshall acquired title to part of the farm from Cheeseman. Both Cheeseman and Marshall violated the covenant, and Brewer sought an injunction. The court refused to grant relief, among other reasons, on the ground that the covenant upon which the suit rested was illegal in itself, and absolutely void. However, it should be noted that the court construed the covenant as not being a restriction upon the use of the land, but upon the sale of the marl after it had been dug up. The covenant was held to be in restraint of trade, and all general restraints of trade are illegal. In this case the court found that the restraint was general as to time, place and persons.\textsuperscript{12}

\textsuperscript{9} Two judges dissented. Since Greasy purchased the land with notice of the covenant, it was their opinion that he should not be allowed to use the land to the damage of Tardy. They did not think that the covenant was illegal on the ground that it was in restraint of trade, since it was not general, but related to certain enumerated privileges on a particular parcel of land, and was, therefore, reasonable.

\textsuperscript{10} 140 Mass. 188, 2 N.E. 946 (1885).

\textsuperscript{11} 19 N.J. Eq. 537, 97 Am. Dec. 679 (1863).

\textsuperscript{12} Brewer was also seised of a second tract of land under a covenant similar to that mentioned above, except that it was limited to thirty years. The court expressed no opinion as to the validity of this covenant since no marl had been taken off of this land by Brewer.
In *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, the owners of a 2000-acre tract in an oil producing territory granted the plaintiff "the exclusive right of way and privilege to construct and maintain one or more lines of tubing for the transportation of oil, water or other liquids along, through and under lands owned by the undersigned..." The court held that plaintiff should be denied an injunction against the defendant who was erecting a pipe line on part of the original 2000-acre tract which he had acquired from the original grantor. The covenant was held to be sufficient to grant a right of way to the plaintiff, but the fact that it was an exclusive right of way would not bar defendant from also constructing a pipe line, since in this respect the agreement was inoperative, null and void as contrary to public policy, being an attempt to impose an unreasonable restraint upon trade.

In *Chippewa Lumber Co. v. Tremper,* the company platted a village, inserting in the deeds of all lots sold the following clause: "This conveyance is made upon the express condition that the said party of the second part, his heirs and assigns or lessees, shall not, for the term of thirty years from and after [the date of the conveyance] sell, give, or dispose of, in any way whatsoever, upon said premises or any part thereof, intoxicating liquors or drinks of any kind whatsoever..." The deed provided for forfeiture if the covenant was breached. One Wyman, the secretary and manager of the corporation, testified that this was for the benefit of the company in that it would keep the employees from getting drunk and causing trouble. However, it appeared that the corporation allowed H. P. Wyman & Co. (any interest in which the corporation denied) to sell liquor in the village. The company had conveyed a lot to Gales, who in turn conveyed it to the defendant. Defendant operated a saloon on the premises, and the company brought this action of ejectment. The court held that while liquor is not a necessity like bread, it could see no reason why a monopoly on the sale of liquor would be any more valid than a monopoly on the sale of bread. The company had in effect restrained trade and created a monopoly in themselves, and this monopoly was contrary to public policy.

The court did, however, recognize the fact that "the right to insert such a condition as the one in this case, for an honest and beneficial purpose, cannot be denied, and is within the public policy of this state." But it added that such conditions, inserted for a dishonest purpose and to the end that the grantor may thereby obtain a monopoly in any business, and all others be restrained therefrom, would not be enforced by the court regardless of whether the business is looked upon by the community with general favor or disfavor.

In *Burdell v. Grandi,* the plaintiff platted the town in much the same way as in the *Chippewa* case. The deed contained a restrictive covenant with a for-

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14. 75 Mich. 36, 42 N.W. 532 (1889).
15. 152 Cal. 376, 92 Pac. 1022, 14 L.R.A. (n.s.) 909 (1907).
feiture clause of the same general content as that in the Chippewa case, except it provided that before liquor could be sold permission had to be obtained from the plaintiff. Defendant violated the covenant, and plaintiff brought an action of ejectment. The court held that the covenant was void as creating a monopoly in the plaintiff and as against public policy. The court found that the plaintiff's purpose was to reserve and create solely in himself a monopoly of the sale of liquor within the town.16

Many of the preceding cases were cited by the Missouri court in support of its decision in either the Dean case or the Shepherd case.17 Those which were not cited could have been.

The result reached in the Shepherd case is, I think, correct. Since the covenant attempted to prevent the use of the retained land for any business whatsoever, it had the effect of virtual sterilization. Aside from the element of monopoly, this in itself would be a sufficient violation of public policy to justify striking down the covenant.

However, the case leaves an impression which might lead to an unjustifiable conclusion, that is, that merely because the restraint may tend to create a monopoly it will be declared void as against public policy even though its disabling effects are not so complete as they were in the Shepherd case. Suppose that the court had construed the real but unexpressed intent of the covenant to have been only to prevent competition on the retained land with the particular type of business conducted on the one-acre tract. If this were the express or implied intent, the question then becomes whether or not this would create a monopoly within the meaning of that word as used in the Shepherd case. An affirmative argument might be made from the general tenor of the case, especially in view of the fact that the court cited the Chippewa case and the Burdell case. While these cases involved this sort of a non-competitive covenant, it should be noticed that in each case a whole town was restricted. Justification for the decision in both of these cases can be found in that the area involved was unreasonably large. It is true that the area restricted in the Shepherd case is probably greater than in either the Chippewa case or the Burdell case. But when the location is taken into consideration, it is immediately apparent that the relative area restrained is far less. In the Shepherd case (1) a similar business could conceivably have been established either one-fourth or three-fourths of a mile south of the one-acre tract (depending upon which side of U.S. Highway 63 one preferred); (2) the area is farm land lying miles from the nearest town; and (3) the majority, if not all, of the patrons of any business conducted in the area would drive there in an

16. This decision might well have been written by the Michigan court. The only case cited is the Chippewa Lumber case, supra note 15, and it is extensively quoted by the California court.
17. The Tardy case, the West Virginia Transportation Case, the Chippewa Lumber Co. case, and the Burdell case were cited in either the Dean or the Shepherd case.
automobile so that the added inconvenience of driving an extra one-fourth or three-fourths of a mile would be negligible. If the covenant in this case had been more carefully drafted so as to restrain only competitive uses, I think the following cases indicate that a conclusion contrary to that reached by the court might well have prevailed.

In Hitchcock v. Anthony, Anthony was the lessee of a dock in the town of Detour, Michigan, and was engaged in the coal and fish business. He sold land adjacent to the dock to Hitchcock, Hitchcock promising not to engage in the coal or fish business or do anything that will conflict with the coal and fish business of Anthony for a term of seven years. The court recognized the transaction as a means of preventing competition to Anthony, but held that it must be construed as restricting the use of this particular piece of land only, and did not bind the promissor not to compete anywhere in the town of Detour. As to the land covered by the transaction, the promise was valid and was not in general restraint of trade.

In Dick v. Sears-Roebuck & Co., the plaintiff, owner of a furniture business, conveyed to the grantee the lot across the street. The grantee covenanted on behalf of himself, his heirs and assigns that he would not permit a retail or wholesale furniture business to be established thereon for fifteen years. Defendant came into possession of the land and violated the covenant. The court granted an injunction restraining the defendant, holding that restriction on the conduct of a certain business on a particular piece of land for reasonable purposes and covering a reasonable period of time does not violate public policy.

In Lampson v. Caporale, plaintiff was engaged in the lumber business. He owned the land adjacent to that upon which he conducted his business, and he conveyed it to the defendant, the deed containing a restrictive covenant wherein the grantee agreed not to use the described premises as a motor vehicle junk yard, nor for the sale of used cars or parts, nor for any other occupation usually deemed unwholesome, noxious or offensive, and “further, during such time as the Grantor or its successors and assigns shall be engaged on the adjoining premises now owned by it or any part thereof in the wholesale or retail lumber or building materials business, Grantee and his heirs and assigns shall not engage in a business that will compete or conflict therewith except that Grantee’s engaging in the business of tile and floor covering, including the stocking of medicine cabinets, rubber tile, all kinds of floor covering, tile and tile fixtures, will not be in violation thereof.” The defendant threatened to breach the covenant by manufacturing windows. Plaintiff sued for an injunction, and the court granted relief. This, said the court, was not a case of a contract between a vendor and vendee of a business nor one between an employer and employee. This pertains to a transfer

18. 83 Fed. 779 (6th Cir. 1897).
of property with a restriction, and "such covenants are usually sustained as being reasonable even though they may prevent competition and even though they involve no transfer of good will." The restraint on real property is less likely to affect public interest adversely than a restraint on the activities of an individual, but it must, to be within public policy, not be an unreasonable restraint. Plaintiff would not have sold the premises, thought the court, if the restriction had not been included, and it was fair to assume that the price of the property was affected thereby. Here it would be inequitable to allow the defendant to have the property free of the restriction. The covenant does not give any unfair protection to the plaintiff, since it is limited (by the court's construction) to the land conveyed by him, and does not unduly interfere with the interests of the public. "It is, therefore, not against public policy."

In *Langenback v. Mays*, Mays conveyed to Langenback a small tract of land upon which were situated some tourist cabins. As a part of the transaction, Mays orally agreed that he would not use his remaining 168 acres lying adjacent to the tract conveyed for competitive tourist camp purposes, so that the only tourist camp in the immediate vicinity would be the one purchased by Langenback. Subsequently Mays built and began operating a tourist camp. Langenback brought suit, and Mays was permanently restrained. Mays thereupon leased the tourist cabins to his daughter who began operating them. Langenback again sued, and the trial court held that the daughter had the right to operate the cabins. On appeal, the Supreme Court of Georgia held that the agreement was a "valid, binding, and enforceable restrictive covenant made by them [Mays] respecting a prohibited use of their property which equity would enforce."

In *Natural Products Co. v. Dolesse & Shepard Co.*, the grantor, engaged in the limestone quarrying, crushing, and selling business, conveyed part of its land to the grantee, who operated a nursery. The deed contained a restrictive covenant providing that no part of the estate conveyed nor the stone thereof should ever be used for the purpose of producing crushed stone. The grantee then formed a corporation under the name of Natural Products Co. and deeded that land to it without the restriction. The newly formed corporation then brought this suit to remove the covenant as a cloud on the corporation's title, basing their suit on the ground that the covenant was null and void in law and equity as against public policy. The court found that this was a valid covenant running with the land and not void as against public policy, there being neither public interest nor public necessity for such construction of the covenant since the supply of limestone in Illinois was practically inexhaustable.

In *Hodge v. Sloan*, one Null owned 40 acres of land containing sand. Sloan wanted to buy one-half acre of this land, but Null would not sell, because he

22. 309 Ill. 230, 140 N.E. 840 (1923).
23. 107 N.Y. 244, 17 N.E. 335 (1887).
feared it would hurt his business. However, after further negotiations, Null finally did sell the one-half acre to Sloan, and a warranty deed was given which contained a covenant by the grantee “not to sell any sand off of said premises.” Sloan later conveyed to the defendant by deed containing no reference to the covenant in the deed from the plaintiff (Null). The covenant was violated. The court found that there was nothing in this covenant which violated any rule of public policy, and added, “Assuming, with the respondent, that the covenant is in restraint of trade, it is still valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it. . . .”

The court felt that since Sloan was not a dealer in sand and wished to purchase the land on the best terms to him, there was no reason why it should hold that the covenant was void. There were two dissenting judges who felt that the covenant was a personal one and therefore should not bind the subsequent grantee.

If the Missouri court were faced with a restriction where the time was reasonable and the covenant limited to a specific enterprise, the court might follow this last group of cases and hold the restriction valid, finding no violation of public policy. Perhaps the doctrine of the Shepherd case will be limited to those instances where the breadth of the restraint in effect dries out the land commercially. If so, the argument might very well prevail that a careful distinction should be made between a covenant which prevents a person from carrying on any business (except in the case of a residential area type of restriction) and a covenant which prevents a particular piece of land from being used to carry on a particular business, there being within the area other land not so restrained. It is submitted that such a set of circumstances, while technically tending to create a monopoly, would not create such a restraint as to confound trade and commerce, nor such a monopoly as to offend the public policy of the state.

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