

1951

# Osborne Allen v. Rose Park Pharmacy : Brief of Appellant

Utah Supreme Court

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Pugsley, Hayes & Rampton; Attorneys for Defendant and Appellant;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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OSBORNE ALLEN,  
*Plaintiff and Respondent*

vs.

Case No. 7672

ROSE PARK PHARMACY,  
*Defendant and Appellant*

**FILED**

JUN 2 1951

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Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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PUGSLEY, HAYES & RAMPTON,  
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and Appellant.*

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# IN THE SUPREME COURT of the STATE OF UTAH

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OSBORNE ALLEN,  
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vs.

ROSE PARK PHARMACY,  
*Defendant and Appellant*

Case No. 7672

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## BRIEF OF APPELLANT

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### STATEMENT OF THE FACTS

The plaintiff, Osborne Allen, requested a declaratory judgment seeking to relieve himself from a negative covenant in his contract of employment with the defendant and appellant, Rose Park Pharmacy. No other part of the contract whereby he was hired as a pharmacist and manager has been attacked but only this single paragraph which reads:

8. Osborne agrees that in the event of termination of this contract for any reason, he shall fully account for all funds, inventory, as-

sets and equipment and he shall not directly or indirectly compete, as an employee or principal, in the operation of a drug store or pharmacy within a radius of two miles of this drug store for a period of five years thereafter. Breach or threatened breach of the terms of employment shall entitle this Pharmacy to injunctive relief in addition to other remedies.

After trial of the issues the District Court held, "The Court is of the opinion in this matter the parties dealt in good faith. The defendants, I feel, had no intention of making use of any skill that the plaintiff had and thereafter discharging him to his disadvantage. However, if people enter into a contract with good faith and good intentions, there isn't anything to prevent them from changing their minds later and employing a relative, and I think these people saw those possibilities, and that is the reason they had a contract permitting the termination of the contract on notice.

"I am of the opinion that the five years is a modest arrangement, that in a business that is starting up five years is usually necessary for protection, but the Court is of the opinion that the area is too broad, that from the pharmacy to the southwest involves such a heavily populated area that it is an undue restriction and constitutes a restraint of trade. The Court is further of the opinion that there is no mutuality in this contract, that it is a restraint of trade, for an employer to be able to employ a man and discharge him on a short notice and thereby

restrict him from practicing his profession for a period of time thereafter, because with a short time he would not have acquired any secrets, he wouldn't be able to do them any damage by anything that he learned in the establishment, and this contract has to be looked at to be enforced under any condition that may arise after it is signed. I am also of the opinion that there is no proper consideration in the contract. For lack of mutuality and lack of consideration, and because it is in restraint of trade, the Court finds that Paragraph 8 of the contract, which has reference to the competition that the plaintiff may give to the defendant, is unenforceable." (R. 93-94)

Based upon this oral opinion the Court made and entered Findings (R. 14) and a Judgment (R. 18) declaring that the said negative covenant was invalid and unenforceable.

The situation of the parties as of the time of making the Contract of Employment in November of 1949 was as follows. The Geurts Brothers, Theodore I., William T. and Heber J. had instituted a shopping area at 4th North Street and Oakley Street in Salt Lake City, Utah. This is in the extreme Northwest portion of the populated area of the City (see Exhibit A). They had built and were operating a grocery store on the North side of the street and were in the stage of completing a drugstore building on the other side of 4th North Street.

A corporation was finally formed, Rose Park Pharmacy, by these Geurts Brothers and their wives,

to operate the drug store. Negotiations were had to ascertain whether a lease, employment or other arrangement should be affected for operating the pharmacy.

The parties hereto entered into negotiations for the employment of the plaintiff to operate appellant's pharmacy as manager and pharmacist. The amount of salary was agreed to (R. 77). The plaintiff insisted upon being given a right to acquire an ownership interest in the defendant corporation (25%).

Q. Mr. Allen, would you have signed the contract presented to you if it hadn't had the provision for gaining an interest in the corporation?

A. No, that was—

MR. PUGSLEY: We object.

A. (Continuing)—the main purpose.

MR. PUGSLEY: We object as immaterial.

THE COURT: Overruled. You may answer.

A. Those were my terms when I negotiated the contract. There are other figures. That was my terms. I started out with 49 per cent working interest in the store. They readjusted it to 25 percent. That was one of the qualifications, or I would never have gone into the business.

Q. Why did you want to obtain a share in the business?

A. Because I was going to make it my life's work.

Q. Would you have signed the contract if you had known you were to be employed for only one year?

MR. PUGSLEY: We object to that as immaterial also.



THE COURT: Overruled.

A. No, I wouldn't have signed it. I would never have left my other job.

MR. RICHARDS: That is all.

CROSS-EXAMINATION

BY MR. PUGSLEY:

Q. You read over the contract before you signed it, did you not?

A. Yes, I did.

Q. And you accepted the 30-days notice and the pay for the 30 days, did you not?

A. Yes, I did.

MR. PUGSLEY: That is all (R. 92 and 93).

A reading of the contract, (Exhibit B) details the terms of employment, his bonus program to acquire stock and notice before termination, all of which were accepted and the benefits taken by plaintiff, except that he now seeks to squirm out of the negative covenant.

It is further pertinent that plaintiff lived in adjacent blocks in what is known as the "Rose Park" area and knew the people therein. (R. 33). As stated at the trial by Mr. William T. Geurts, one of appellant's officers:

Q. Will you state what your intention was so far as the permanency of Mr. Allen's employment when you formed the contract?

A. Our intention was to employ a pharmacist and manager to handle the full management and operation of the drug store, and when we selected Mr. Osborne, our intention was just that.

Q. Did you at that time believe that Mr. Osborne would be satisfactory for that purpose?

A. We had confidence he would be.

Q. Did you have any discussion as to the basis of the two-mile radius and the five-year period that is set forth in the contract?

A. Yes, my other two brothers and I discussed that phase of the thing. In the first place we knew that Mr. Osborne was residing in the Rose Park area. We also knew that he had at least made overtures to those people who were intending to develop the shopping center over in Rose Park, and we were not at that time sure whether or not Mr. Allen would want to remain with us. We were also not certain that competitors might not want to take away from us, Mr. Allen, and we felt it was necessary to safe-guard ourselves, since we were investing what we considered at least a considerable sum in the establishment of that business, and also in the initial stages of operations at least investing what loss we might sustain to develop good will. We wanted to protect those investments (R. 74-75).

Q. Now you testified as to some of your reasons for including the two-mile radial area in the contract. Will you state what the reasons were for including the time of five years?

A. Well, the time of five years, our reasoning was along this line, that a firm does not very readily build up good will. It is more or less flexible and fluid, it passes over a short period of time, whereas a longer period it becomes stable, and we felt that a five-year period would bridge us over any good will that might attach to individual employees and would become stable as the good will of the firm.

Q. Did you consider a two-mile radius of the drug store would be a reasonable radius.

A. Oh, yes, I do, because there is this situation. We are the most northwesterly drug store

in the recently developed area of Salt Lake City. The other drug stores mainly are between us and town, and, well, we presumed that the shopping habits of people might cause them to stop either going to or coming from town, and we felt that we should protect ourselves against that contingency.

Q. Do you consider that the five-year period of time is a reasonable period?

A. Yes, I think so. (R. 77-78)

The drugstore was a new business in the area, never opened before they hired plaintiff. As shown by the map, Exhibit A, it is the last such store in the Northwest section of Salt Lake City. Within the two-mile area there are eight drugstores as shown by the map, Exhibit "A" but within the entire Salt Lake City area as shown by the classified advertising in the current telephone book (Exhibit No. 1) there are 90 drugstores.

As the drug store was established and started business, the delivery of drugs constantly expanded. The plaintiff testified that he had delivered in the immediate area, to the Air Base Village and Redwood Road on the West, to 9th North on the North (R. 53), East to Second West and North Temple (R. 39) and South to Ninth South (R. 40). He had a "tremendous amount of deliveries" during the time of his employment (R. 54). Mr. W. T. Geurts, one of the owners of appellant corporation testified that he had delivered as far East as the Sugarhouse shopping area; "E" Street, "F" Street and First Avenue; South to 10th South and West Temple and 12th South and immedi-

ately East of Redwood Road (R. 77).

We find no affirmative testimony stating that either the two-mile radius or the five-year period prescribed by the employment contract are unreasonable or unduly restrictive. The only item thereon is the bald declaration by plaintiff that he desires to compete in the area, see Request for Admission (R. 10). He testified that he had not looked for employment in the two-mile area and had no offers of employment within that area and did not desire to be employed at a drug store scheduled to be constructed in the Rose Park area (R. 55-56).

As pharmacist and manager he had full access to the 6980 prescriptions of appellant's customers and felt at liberty to use or disclose these to others (R. 55), likewise as to the narcotics and poison list (R. 57), trade markups, bookkeeping, customers' names and similar confidential information.

## STATEMENT OF POINTS

### I.

THE CONTRACT OF EMPLOYMENT WAS FAIR AND REASONABLE.

### II.

THE RESTRICTIVE COVENANTS WERE REASONABLE AND FAIR.

### III.

THERE WAS MUTUALITY IN THE COVENANTS IN THE CONTRACT.

#### IV.

THE CONTRACT WAS SUPPORTED BY ADEQUATE CONSIDERATION.

#### V.

THE CONTRACT RESTRICTIONS ARE NOT CONTRARY TO PUBLIC POLICY AND SHOULD BE ENFORCED.

#### VI.

THE RESPONDENT ACCEPTED BENEFITS OF THE CONTRACT AND IS ESTOPPED FROM ATTACKING RESTRICTIONS.

### ARGUMENT

#### I.

THE CONTRACT OF EMPLOYMENT WAS FAIR AND REASONABLE.

#### II.

THE RESTRICTIVE COVENANTS WERE REASONABLE AND FAIR.

This was a negotiated contract of employment reached after the customary arms length dealing. Mr. William T. Geurts testified that they had discussed the employment first about Oct. 25, 1949 and presented the contract to respondent about a week to ten days later (R. 73) and respondent retained it for about a week before signing it (R. 73). Respondent emphatically stated on rebuttal, direct testimony that he had insisted upon an interest in the business, "Those were my terms when I negotiated the contract." (R. 92).

To roughly analyze the Contract of Employment (Exhibit "B") we find the following terms: in the

preamble respondent "upon the following terms and conditions" accepts the employment and agrees to perform. The first three paragraphs detail the employing and the duties. The next paragraph outlines his compensation of so much per week plus a bonus of ten per cent of the net profits which are computed in pursuance of the formula recited in paragraph five and by paragraph six to be accumulated for purchase of stock in appellant up to 25% ownership interest. Paragraph seven states that it is a continuing contract of employment requiring him to give 60 days notice and the appellant to give 30 days notice of intention to quit or discharge or five days notice in case of his breach of the contract. Paragraph eight is the one in controversy and requires him to account for all funds in the event of termination "for any reason" and that "he shall not directly or indirectly compete as an employee or principal, in the operation of a drug store or pharmacy within a radius of two miles of this drug store for a period of five years thereafter." Breach would entitle appellant to injunctive relief. The last paragraph provided for costs and attorneys fees to enforce the contract.

Plaintiff does not claim that he did not read or understand the contract. He admits that he has received the benefits, including compensation for 30 days after his discharge in lieu of 30 days notice. He does not tender back this benefit but only asks relief from his lack of foresight, as he puts it, in agreeing not to compete. The District Court found that the parties

dealt in good faith (R. 93).

The law relative to these restrictive covenants has undergone a change in the past one hundred years. There has been an abrupt and firm reversal of the old English rule that such agreements were against public policy and hence unenforceable. The law not only has been relaxed but now in the United States is clear that so long as the restraint in length of time and area of space is reasonable, the negative agreement not to compete is valid and enforceable, See: 17 C.J.S. 626 Par. 245 Contracts; Williston on Contracts, (Rev. Ed.) Vol. V, p. 4578, Sect. 1635.

The burden of proof now is upon the contracting party, who seeks to escape from his agreement, to show that the negative covenant is unduly restrictive or oppressive. Your Court has recently gone over this subject matter and rendered a decision in Case No. 7350, The Valley Mortuary vs. Lionel Fairbanks, 225 Pac. (2d) 739, ..... Ut. ....

By contract in 1945 the defendant agreed that for twenty-five years he would not operate a mortuary or funeral business in Provo, south of Provo in Utah County or in Juab County. This action was started in 1948 to enjoin future violations and for damages. The lower Court awarded damages and an injunction against future violations. The defendant then appealed and your Court, after an extensive review of the facts and law, sustained the injunction but remanded the case to the lower court only for additional evidence on the damages suffered.



Though this case involved the sale of a business and impliedly the good will thereof, still your Court felt no problem as to the area or time stated in the restrictive covenant. The interdicted area of Provo City, all of Utah County south thereof and all of Juab County was broader than the bounds of that defendant's former area of operation and such was specified "in the agreement to exclude competition by the defendant in a more wide-spread area than would have been excluded by the sale of the good will without the addition of the restrictive clause."

In short, the broad area and the 25-year period were held by your Court to be reasonable and the injunctive relief granted was affirmed on the appeal. Comparing this with the two-mile radius and the five-year period now before this Court, we feel that no hesitancy should exist in sustaining this modest time and area restriction.

The contract in our present case (Exhibit "B") reveals that this is more than an ordinary employer-employee relationship which has been created. A new pharmacy and drug store was being opened with the defendant's money risked in an area having no such facilities nearby. Plaintiff was to act not only as a pharmacist but also as manager and in addition, he was to acquire a proprietary interest in the business itself through a stock-bonus program. This gave him an interest in the good will and development of the business itself. He was in a position of direct, personal contact with the customers as manager and in his



professional capacity as a pharmacist.

There is nothing against public policy to impose reasonable restrictions upon an employee in such a key position as he is in a position to take from the employer part of the good will if he departs from his employment and sets up in competition. The trade secrets of defendant's pharmacy in the form of pharmaceutical prescriptions, narcotic records, etc., names of customers, methods of buying, credit program, mark-ups, trade preferences, and general policy were all available to the plaintiff and in danger of being passed on to competitors in the trade area or used by the plaintiff in the area to compete with defendant. This man was not a mere "soda jerk" or clerk.

We should like to refer you to 17 C.J.S. 254, p. 636. We have reviewed the decisions cited thereunder. Though there are several in which the restrictions have been held invalid, such in the main are instances where unlimited restrictions have been imposed or the employee is an ordinary salesman. Let us cite a few of the majority and distinctly typical decisions wherein the employee's negative covenant has been held valid:

Agreements not to engage in a competing business will ordinarily be held valid where necessary to protect the employer against employee's use of trade secrets confided to him during employment. N.J.—Bond Electric Corporation v. Keller, 166 A. 341, 113 N.J. Eq. 195. Ideal Laundry Co. v. Gugliemone, 151 A. 617, 107 N.J. Eq. 108. N.Y.—Eastman Kodak Co. v. Powers

Film Products, 179 N.Y.S. 325, 189 App. Div. 556, reversing Eastman Kodak Co. v. Warren, 178 N.Y.S. 14, 108 Misc. 680. Davey Tree Expert Co. v. Black, 244 N.Y.S. 239, 137 Misc. 702. Stoneman v. Wilson, 192 S.E. 816.

Prohibiting employee from engaging in undertaking business in city or vicinity for ten years. Chandler, Gardner, & Williams v. Reynolds, 145 N.E. 476, 250 Mass. 309.

Prohibiting general manager of optical company from entering into competing business for five years anywhere in the United States west of Detroit, Mich.—Wahlgren v. Bausch & Lomb Optical Co., C.C.A. Ill., 68 F.2d 660, affirming D.C., Bausch & Lomb Optical Co. v. Wahlgren, 1 F. Supp. 799, and Certiorari denied Wahlgren v. Bausch & Lomb Optical Co., 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 272 U.S. 615, 78 L.Ed. 1491.

“If an employer is engaged in a business which he carried on through agents or servants whose performance of their duties involves a confidential knowledge of the employer’s trade or business and brings them into such direct and personal business relation with the employer’s business and its patrons that the agents or servants commonly acquire the names and residence of customers, their requirements, credit and other trade or business information, or a personal following or clientele during the period of their service, then it is not injurious to the public, and it is reasonable to permit the employer and the agent or

servant to enter into an ancillary covenant in partial restraint of trade to protect the employer's business from the competition of the servant for a reasonable length of time throughout a definite area." Tolman Laundry Co. v. Walker, 187 A. 836, 838, 171 Md. 7.

Agreement relating to restraint on connection with business in county only covered such employment as would enable diversion of trade to subsequent employer.—Durbrow Commission Co. v. Donner, 229 N.W. 635, 201 Wis. 175.

Requiring general manager of loan and investment company, not to engage in same business in same city for one year following termination of employment.—Eigelbach v. Boone Loan & Investment Co., 287 S.W. 225, 216 Ky. 69.

Binding clothing store manager not to enter competing business for period of two years within stated territory.—Moskin Bros. v. Swartzberg, 155 S.E. 154, 199 N.C. 539.

Requiring head salesman not to engage in business of selling products similar to those sold by employer in certain territory, for eighteen months.—Grand Union Tea Co. v. Walker, 195 N.E. 277, 208 Ind. 245, 98 A.L.R. 958.

Restricting employees of industrial engineering firm for two years from entering into the employ of clients of employer. May v. Young, 2 A.2d 385, 125 Conn. 1, 119 A.L.R. 1445.

Restraining employee from engaging in competitive

advertising business in any city or state in which he worked for two years. *Thomas W. Briggs Co. v. Mason*, 289 S.W. 295, 217 Ky. 269, 52 A.L.R., 1344.

Requiring physician's employee, given access to the acquaintance and confidence of patients, not to enter into competition with physician for three years after termination of relationship. *Granger v. Craven*, 199 N.W. 10, 159 Minn. 296, 52 A.L.R. 1356.

Prohibiting employee of tree company for year, from engaging in tree surgery within the radius of one hundred miles of city in which company maintained office. *Davey Tree Expert Co. v. Ackelbein*, 25 S.W. 2d 62, 233 Ky. 115.

Let us keep in mind that the employer is not here suing out an injunction, but the employee, separated from his position in accord with the contract, now seeks to have this Court, by declaratory judgment, say that one phrase of his agreement, solemnly executed by him as a condition precedent to procuring his position, is invalid and unenforceable. The burden is on the plaintiff herein. The contract gave him the right to quit at any time after notice to defendant. He is in no different position now than if he'd exercised his right to terminate his employment so as to go into competition.

The most recent case in our neighboring state of Wyoming is *Ridley v. Krout*, 180 P. (2d) 124, (page 8). Therein the employment contract was for keymaking, bicycle repairs, etc. at Sheridan, Wyo. The negative covenant covered 17 years and encompassed Sheridan

County, Johnson County and Campbell County, all in Wyoming. The employee departed from his service and employer sought an injunction. The Wyoming Court denied the injunction, basing the same in part on the grounds that he was a general repairman and did not possess any trade secrets and that it was against public policy to require the people of the state 100 miles away in one of the restricted counties to travel such distances to procure repair of their bicycles, lawnmowers, etc. at Sheridan. (p. 133).

The instant case holds no such public disadvantage. By defendant's undenied answer it is shown that the plaintiff is now engaged as a pharmacist in Salt Lake City and hence, through use of telephone and delivery service, the public may procure his services and he may carry on his profession. He was working for Walgreens before the contract with appellant and now is so employed. However, appellant does not want him competing in the store's immediate neighborhood. He now seeks the court's approbation for competing in wilful violation of his covenant not to do so. There are many other drug stores available to the public, not only in the two-mile radius, but also many more in Salt Lake City proper. No unlawful restraint of trade can be claimed herein.

An understanding of the fact that this contract was executed prior to the opening of defendant's pharmacy and that plaintiff was afforded the opportunity of acquisition of ownership interest, differentiates this from any case cited in the general collection of authori-



ties in C.J.S. The parties here dealt at arms length and after mature consideration executed the restrictive covenant. This is not oppressive and imposes no undue hardship on the plaintiff, as is evidenced by his ready procurement of employment as a pharmacist just outside of the two-mile radial area at Walgreens.

In 9 A.L.R. 1467 is an annotation which purports to outline the reasons for sustaining or breaking these negative covenants. We quote in part

“The validity of covenants by employees not to engage in a similar or competing business for a definite period of time, following the termination of the contract of employment in which the covenant is incorporated, may be sustained, although the contract is recognized to be in restraint of trade. The test generally applied in determining the validity of such a covenant is whether or not the restraint is necessary for the protection of the business or good will of the employer, and, if so, whether it imposes on the employee any greater restraint than is reasonably necessary to secure to the business of the employer, or the good will thereof, such protection, regard being had to the injury which may result to the public, by restraining the breach of the covenant, in the loss of the service and skill of the employee, and the danger of his coming a charge upon the public.”

We have referred briefly to the reasonableness of the two-mile radial area. Let us now turn to the time of five years for consideration. In the Valley Mortuary case the Utah Sup. Ct. did not consider the *twenty-five* year period excessive and the covenant was

sustained. The map which plaintiff has presented for admission of facts shows that the pharmacy at issue is in the extreme Northwest portion of the populated area of Salt Lake City. The time period prescribed is reasonable to allow for the development of subdivisions and other population expansion in the vicinity pioneered by defendant and served through delivery service from the pharmacy.

The burden of proof is on the plaintiff herein to show any unreasonableness of restraint or any adverse affect on the public. If any invalidity arises it is only where the covenant offends public policy and not just if it limits one individual. We submit that the appellant, having had the fortitude to open up a pharmacy in the extreme Northwest portion of the city to serve the growing population there, should be entitled to protection from a former employee's competition in violation of his covenants. The defendant's foresight and care in protecting itself from just what plaintiff now seeks to do should be rewarded rather than be punished.

### III.

THERE WAS MUTUALITY IN THE COVENANTS IN THE CONTRACT.

### IV.

THE CONTRACT WAS SUPPORTED BY ADEQUATE CONSIDERATION.

The matter of mutuality and the adequacy of the employment contract can well be considered together.

Though each such element may be raised in relation to a contract we assert that in this instance both were present.

On the part of respondent, the employee, he agreed to perform services as pharmacist and manager, to give 60 days notice of intention to quit, to account for all funds and in the event of termination for any reason, not to compete for five years in a two-mile area.

On the part of the appellant, Rose Park Pharmacy, it agreed to employ him as pharmacist and manager, to pay him a stipulated weekly wage, to pay him a bonus from net profits, to permit him to acquire up to 25% of its stock, to give him 30 days prior notice of intention to discharge him. As an implied obligation, the Pharmacy had to maintain a building in which to operate the business, stock the store, provide employees to assist him, provide finances and payroll for the drug store's operation.

Let us first consider whether there exists that mutuality of obligation or remedy which may support this enforceable agreement not to compete. It is fundamental that such mutuality is never absent if a consideration moves from both parties. 17 C.J.S. 445. The present agreement is a bilateral contract, executed by both parties containing promises and obligations, one from another.

An early Utah case considered this matter, *Abba v. Smyth*, 21 Ut. 109, 59 Pac. 756. Therein plaintiff was employed by defendant to farm certain acreage in Weber County upon a share crop basis for the farming



seasons 1898, 1899 and 1900. Defendant was to provide the farm, seeds, implements, board and lodging and a helper. In April plaintiff started work, but in November of the first year defendant ordered him from the farm and prevented him from completing the seasons. Plaintiff sued for his damages sustained by breach of the contract. One defense raised was the lack of mutuality as to remedy. The Court stated:

“The rule invoked by the respondent that when only one of the parties signs the contract, such party only becomes bound thereby, does not apply here, as both parties signed the contract, and it was mutually binding upon both. By signing the contract both become obligated by its terms and consented to its provisions, and should be held bound by such reasonable construction as the contract implies. The agreement was not unilateral, but bound both parties to it. It was not void under the statute of frauds, as both parties executed the writing which imposed mutual obligations on each. But it is claimed that the testimony was inadmissible, and was rejected on the ground that it was irrelevant, immaterial, and incompetent; that it was unilateral and only bound the defendant; that it lacked mutuality, and was therefore void under the statute of frauds.

As already stated, we do not concur in this view.”

Citations supporting generally this rule of your Court may be found in 17 C.J.S. 443-6. Likewise it is well established that the mutuality may even be implied, see 17 C.J.S. 448.

In actuality, these employment contracts stand in a different area of approach than many types of agreement. The promise on each side is of a different character as one provides the skill and manpower and the other the facilities, materials and salary. It is true that a contract bearing a negative covenant must be supported by valuable consideration which appears on the face of the agreement. However, the adequacy of such consideration cannot be inquired into by the courts. See: 17 C.J.S. 641; Griffin v. Guy (Md.) 192 A. 359; and Danner v. Hoffman (Pa.) 26 Pa. Dist. 636. The earlier rule was that the restraint must be supported by a consideration equivalent in value to the restraint imposed. This doctrine has been repudiated. 13 C.J. 488.

Discussing contract principles recently, your Court in Van Tassell v. Lewis, ..... Utah ....., 222 Pac. (2d) 350 correctly stated that the words, "in consideration of" have a technical meaning in contract law denoting that which supports or gives validity to the contract; that which supports the meeting of the minds. (p. 353). Exhibit "B" in our present litigation, after the introductory paragraph reads, "In consideration of the covenants herein contained the Pharmacy hereby employs Osborne (respondent) upon the following terms and conditions and Osborne accepts such employment and agrees to perform the services specified."

## V.

THE CONTRACT RESTRICTIONS ARE NOT CONTRARY TO PUBLIC POLICY AND SHOULD BE ENFORCED.

## VI.

THE RESPONDENT ACCEPTED BENEFITS OF THE CONTRACT AND IS ESTOPPED FROM ATTACKING RESTRICTIONS.

In no portion of the record is there a single item of evidence which would import that the public could in any manner suffer from lack of respondent's services within the prohibited two-mile area. Other drug stores are available both within and without the said territory. Appellant is still operating its pharmacy and serving the entire area. Respondent is employed again at Walgreens and is not in danger of becoming a charge of the community because of being restricted from the area. He has not sought a job within the area and testified that he has no offers of employment within the same.

Respondent has taken and retained all of the benefits and advantages of the contract, including 30 days pay after his employment had been terminated, but seeks to renege on this one obligation not to compete in the limited area. His evident desire for equitable relief from his solemn covenant should be accompanied by some tender on his own part to do equity, but no such offer has ever been made.

Appellant respectfully submits that it entered into the agreement with respondent in good faith, after negotiations and study, and that it has faithfully performed its duties, agreements and obligations recited by the employment contract. The trial court erred in

holding that this restrictive paragraph of the contract was unenforceable.

We submit that the judgment of the lower court should be reversed and the appellant awarded its costs herein.

Respectfully submitted,

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