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## Good Will As Property

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## GOOD WILL AS PROPERTY.

Good will as defined by Lord Eldon is "nothing more than the probability that the old customers will resort to the old place."<sup>1</sup> This definition has been criticised as being too narrow, but it suggests the underlying idea of good will. In "Story on Partnership" it is defined as "the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."<sup>2</sup> This definition is more explicit in that it mentions some of the numerous things that go to create good will. As now understood good will may be said to include everything which contributes to the establishment of custom or trade, or to the maintenance of it when established.

Good will is property. The long line of judicial decisions which have so recognized it and protected it leave no possible doubt as to its being property which is subject of transfer by sale,<sup>3</sup> mortgage,<sup>4</sup> or assignment.<sup>5</sup> But it is property of a very peculiar nature. As was said in *Metropolitan National Bank v. St. Louis Dispatch Co. et al.*<sup>6</sup>

"Now, while the good will of a business is property that may be sold or mortgaged, yet it is property of a very peculiar and exceptional character. It is intangible property, which in the nature of things, can have no existence

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1. *Cruttwell v. Lye*, 17 Vesey, Jr., 335.

2. *Story on Partnership*.

3. *Haugen et al. v. Sundseth et al.*, 106 Minn. 129.

4. *Metropolitan Nat. Bank v. St. Louis Dispatch Co. et al.*, 36 Fed. 722.

5. *Haugen et al. v. Sundseth et al.*, 106 Minn. 129.

6. 36 Fed. 722.

apart from a business of some sort that has been established and carried on at a particular place; and it cannot be sold by judicial decree or otherwise unless it be in connection with a sale of the business upon which it depends.”

This case expresses the general rule, which is that the good will of a business can be transferred only in connection with the business to which it is attached.

Some cases lay down the rule that there can be no such thing as good will in any calling requiring personal skill.<sup>7</sup> The reason upon which such decisions rest is that the confidence of people in the skill of another cannot be bought and sold. Upon the same reasoning doubt has been expressed as to whether or not good will can exist in connection with the professional practice of a lawyer or physician, both of which professions require the highest degree of skill and good faith. But it is held that the good will of a lawyer's or physician's practice is property and subject to sale.<sup>8</sup> Certainly such sales are very common, and they are recognized as valid. In such cases the element of locality, which requires that the good will of a business be sold only in connection with the premises or other property used in the business, is not present. The good will attaches to the person of the practitioner instead of to his office premises, and it is held that the practice may be sold without a sale of the premises.

There is, indeed, no very good reason why the sale of the good will of the practice of a lawyer or physician should be held invalid. It is true that the confidential nature of the professions makes it uncertain that the clients or patients of the established practitioner will consult the man to whom he sells his practice, but in no case of the sale of the good will of a business is the continued patronage of the customers a certainty. The purchaser must be presumed

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7. *Acme Harvester Co. v. Craver*, 110 Ill. App. 413.

8. *Maxwell v. Sherman*, 172 Ala. 626.

to take into consideration the nature of the thing which he buys.

One who purchases the good will of another's practice does get something of value if he gains nothing more than the absence of competition of the established practitioner from whom he purchases. But the sale of a practice to a person is generally followed by consultation of the purchaser by the clients or patients of the vendor. Such sale is regarded by many as an implied recommendation of the purchaser by the vendor as worthy of trust, and in many cases the retiring practitioner issues an express recommendation of his successor.

It is held that there can be no forced sale of the good will of a profession.<sup>9</sup> The general rule with regard to all other business is that the good will may be sold on execution in connection with other property to which it is incident.<sup>10</sup>

In partnerships the good will of the firm is very important. It is regarded as one of the firm assets, and upon the death of one partner and the consequent dissolution of the firm, or upon dissolution for any other reason, the good will of the firm is sold as part of the property belonging to the partnership.

As to the right of a person who has sold his business and the good will thereof to another, to re-engage in that business there is a conflict of authority. Where the parties enter into an agreement by which the vendor binds himself not to again engage in the business within a certain district for a certain time, there is no difficulty. Such agreements will be enforced, and upon breach the vendee may recover damages or he may secure an injunction against the carrying on of such business. This is the uniform rule in cases of this kind. Such agreements must, of course, be such as

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<sup>9</sup> *Slack v. Suddoth*, 102 Tenn. 375.

<sup>10</sup> *Metropolitan Nat. Bank v. St. Louis Post-Dispatch Co. et al.*, 36 Fed. 722.

not to impose a restraint upon trade and so be held void on grounds of public policy, but where the restriction is reasonable as to the territory covered and the time, it will be enforced. Such agreements are held to be assignable, even though they do not run to the vendee, his successors and assigns. And the assignee of such agreement is held to be entitled to the same protection in the enjoyment of the good will as the original purchaser.<sup>11</sup>

It is in the cases where there are no contracts against competition that the conflict occurs. A few cases hold that the sale of a business, even in the absence of a mention of the good will thereof, carries with it an implied agreement not to do anything to injure that business. The underlying principle of these cases is that the good will of the business goes with it as a necessary result of the fact that it cannot exist except in connection with the business. This is the view of the Massachusetts court in the case of *Upham v. Old Corner Book Store, Inc.*<sup>12</sup> Upham started as a clerk in the Old Corner Book Store and later became a partner. From 1872 until 1902 he carried on the business, some of the time alone, and some of the time with a partner. He dealt largely in religious books. In 1902 he sold to his partner, Moore, "all stock in trade and all other assets of the firm and of the business." Moore organized the plaintiff corporation and assigned to it all the stock in trade and all other assets of the firm. In 1905 Upham organized a corporation for the sale of religious and other books, and sold shares to his old customers. In dealing with the case the Court said:

"—when a man voluntarily sells the good will of a business he thereby precludes himself from setting up a competing business which will derogate from the good will which he has sold."

And:

"In each case where the good will of a business is sold

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11. *Haugen et al. v. Sundseth et al.*, 106 Minn. 129.

12. 194 Mass. 101.

and the vendor sets up a competing business it is a question of fact whether, having regard to the character of the business sold and that set up a new business does or does not derogate from the grant made by that sale.”

It would appear that under this rule it would be perfectly lawful for the vendor to open up again in the business so long as the new business does not derogate from the old one which he has sold. While this rule seems to be just, there is great difficulty in the practical application of it.

The great majority of cases hold that in the absence of an agreement not to compete, the vendor of a business may re-engage in that business, and solicit trade and advertise. He must not, however, so solicit or advertise as to leave the impression that he is still in the old business, for no man will be allowed to sell his own goods as those of his rival. It is held that he cannot directly solicit the patronage of his former customers,<sup>13</sup> but he may sell to them when they come to him to purchase.

This rule allows the vendor to openly deal with his former customers after he has sold his business. The purchaser of a business should take care to secure an agreement that his vendor will not re-engage in the business in the district for a certain time. This is always the safest course. Such an agreement will be enforced in those few jurisdictions which give protection to the vendee in the absence of a stipulation against competition, and in the other jurisdictions such an agreement is necessary, if the vendee is to be protected.

The remedies available to the vendee where the vendor has injured the good will of the business he has sold are injunction against the continuance of the business by the vendor, and action for damages.

“Where parties agree for a consideration not to engage

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13. *Ranft v. Reimers*, 200 Ill. 386.

in a given business for a definite time in a certain locality the violation of the agreement entitles the parties injured to injunctive relief."<sup>14</sup>

Or, the injured party may sue for damages. In such cases he is entitled to recover what he has lost by the competition of the vendor.<sup>15</sup> Of course the damages are very difficult of computation in such cases, and accuracy is almost impossible. The plaintiff must show facts sufficient to enable the loss to be computed, and if he cannot do so he can recover only nominal damages.<sup>16</sup> It is certain that the measure of damages is not what the vendor has gained in his new business. The vendee's loss would ordinarily be less than the profits derived by the vendor from his competing enterprise. It is of course possible that the vendor's gain and the vendee's loss might in a few rare cases be exactly equal, but it is obvious that the amount which the vendee is to recover is not to be measured by the profits of the vendor, for there are generally other circumstances to be taken into consideration beside the fact that the vendor has been competing with the vendee. In such cases stipulated damages would be helpful, in doing away with a great deal of necessarily inaccurate computation.<sup>17</sup>

JOHN E. HALE, '25.

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14. *Wills et al. v. Forester et al.*, 140 Mo. App. 321.
  15. *Shaw v. Jones, Newton & Co.*, 133 Ga. 446.
  16. *Breeding v. Tandy*, 143 Ky. 345.
  17. *Wills et al. v. Forester et al.*, 140 Mo. App. 321.