the ship left the dock the electric connection from the shore had to be removed, and Gray then told Relf that he had better set the ship's dynamo working as the shore connection would be no longer available. It turns out, though there is no evidence that Gray knew this, that the ship's wire connection from the dynamo was not in order. The result was that the work in the engine-room was done with lighted candles. The only workman examined, Chen Pao Sho, a Chinaman, was quite explicit as to this. He said that only candles were used when the ship left the dock, that Relf told him to use the candles and gave him the candles to use, and that he took instructions from Relf in the engine job and from no-one else. Gray had left the ship the night before the fire, and did not even know that Relf had ordered the workmen back to complete the small matters in the engine-room.

The learned trial Judge seemed to think that the fact that the work was charged for by the respondents was conclusive that for the purpose of liability the servants were the servants of the respondents. This is not so. The truth is that no one circumstance is a complete test. Payment and the power to dismiss are cogent circumstances and often help to determine the question, but neither circumstance is conclusive. Their Lordships are of opinion that the law on the matter was accurately laid down by Bowen, L.J., in the case of *Donovan* v. *Laing*, 1893, 1 Q.B. 629. His Lordship there said—"We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago in *Sadler* v. *Henlock* (4 E. & B. 570) in the form of the question, 'Did the defendants retain the power of controlling the work?' Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and the end being prescribed the means of arriving at it may be left to him. Or he may contract in a different manner, and not doing the work himself may place his servants and plant under the control of another—that is, he may lend them, and in that case he does not retain control over the work. . . . I have only to add that I agree that no difference can arise whether the lending of the servant to another person is in consideration of some reward or not. Such a distinction obviously cannot affect the reasoning on which I have based my judgment."

The question here really turns on whether the work was Gray's work supervised by Relf—which is what the trial Judge thought—or was Relf's work performed by Gray's servants, whose services had been given over to Relf for a consideration. This latter is the view that their Lordships take. The order that led to the mischief was directly Relf's. Gray had provided electric light while the ship was in dock, and had particularly told Relf to get his dynamo working for the period after the shore attachment was no longer available. Relf being in command of the gang of workers allowed them and enjoined them to use candles. He had been told by the captain to get the work done, and he was acting as the agent of the owners of the ship.

Their Lordships accordingly think that the trial Judge was right in entering judgment for the defendants and respondents, although they reach the result rather as indicated than by upholding a plea of *volenti non fit injuria*. They will humbly advise His Majesty to dismiss the appeal with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—Hewitt, K.C.—Hon. Sir M. Macnaghten, K.C.—Gideen. Agents—Wadeson & Malleson, Solicitors.

Counsel for the Respondents—Barrington-Ward, K.C.—Murphy. Agents—Stephenson, Harwood, & Company, Solicitors.

HOUSE OF LORDS.

Thursday, June 2, 1921.

(Before the Lord Chancellor (Birkenhead), Lords Cave, Sumner, Parmoor, and Carson.)

FITCH *v.* DEWES.

Contract—Restraint of Trade—Agreement not to Practise as a Solicitor within a Limited Area—No Time Limit—Validity.

The respondent sought to enforce against the appellant an agreement whereby the latter was prevented from practising as a solicitor within a certain area. *Held* that the reasonableness of the restriction was the test, and that the fact that the restriction was life long did not render it unreasonable.

Decision of the Court of Appeal (1920, 2 Ch. 159) *affirmed.*

The respondent's counsel were not called upon.

The *facts* appear from the Lord Chancellor's judgment.

LORD CHANCELLOR (BIRKENHEAD)—This is an appeal from an order of the Court of Appeal dated the 4th May 1920 which affirmed a judgment of Eve, J., in favour of the respondent. The question which requires decision at your Lordships' hands is whether or not an agreement, to which I will more particularly refer in a moment, in restraint of practice entered into by a solicitor upon his engagement by another solicitor as his managing clerk is valid. The facts in the case are either admitted or have been the subject of concurrent findings in the courts below, and so far as I think them material I will very shortly summarise them

The respondent has been for more than

twenty years a solicitor practising at Tamworth, in the county of Warwick. In the year 1899 the appellant, who was then a youth of some fifteen years of age, entered into the employment of the respondent in the capacity of a junior clerk, and he continued in that employment until the month of June 1914. In May 1903, when the appellant was about nineteen years of age, he was articled to the respondent, and the articles contained in anticipation of the time when the former would be in a position to practise a stipulation in restraint of such practice, upon which I do not think it necessary to dwell, inasmuch as further stipulations were made at a later date. On the 22nd January 1908 an agreement entered into between the respondent and the appellant provided that if the appellant was successful in his final examination he should serve the respondent as managing clerk, and that agreement also contained a stipulation in restraint of practice by the appellant, with which equally and for the same reason I think it unnecessary to deal.

By an agreement dated the 17th August 1912 the appellant undertook to serve the respondent as managing clerk for a term of three years from the 31st December 1911, or for such longer period as was contingently contemplated in the instrument. It is not necessary that I should trouble your Lordships with the further provisions of that agreement, but clause 8 which falls to be construed is in the following terms—"The said Thomas Birch Fitch hereby expressly agrees with the said John Hunt Dewes that he will not on the expiration or sooner determination of the same term of three years or any extended term as herein provided, either alone or jointly with any other person or persons, directly or indirectly be engaged or manage or be concerned in the office, profession, or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth, but nothing herein contained shall at any time prevent the said Thomas Birch Fitch from carrying on the legal business of the North Warwickshire Miners' Association at Tamworth or within the aforesaid radius thereof."

The appellant impeaches the clause which I have just read on the ground that it is against public policy as being in restraint of trade.

The controversy is the old one between freedom of contract and certain considerations of public policy which have received much attention at the hands of the courts in the last few years. It is sufficient for me to say here that the contract was entered into between two solicitors; that at the time this particular agreement was entered into the appellant had reached the age of twenty-seven years; he had been for some thirteen years employed in a solicitor's office, and it is reasonable to infer from the promotion which he had received and from the evident appreciation which his employer had formed of his services that he was a young man alert and very competent both to understand aud to safeguard his own interests. The agreement then into which he entered, and in respect of which he has accepted for a lengthy period the consideration which was to move from the covenantee towards himself, is to stand unless he satisfies your Lordships that it is bad as being in restraint of trade.

What, then, is said by the appellant under that head? He does not complain of the restriction of space, and indeed it would have been very difficult for him to do so. The clause only restricts him from being directly or indirectly engaged in the office, profession, or business of a solicitor within a radius of seven miles of the Town Hall of Tamworth. We need not, therefore, trouble ourselves with any question of the restriction in respect of space, but may confine ourselves to the complaint which is made that the agreement cannot stand because the restriction in respect of time is unlimited and is against the public interest. But it is to be noticed here, as has been said in more than one of the earlier cases, that guidance may be derived in dealing with a restriction relating to time from an examination of the restriction which is made in respect of space. And the converse remark is, of course, equally true. For instance, if the restriction in respect of space is extremely limited, it is evident that a very considerable restriction in respect of time may be more acceptable than would otherwise have been the case.

The courts have been generous in elucidating these matters by the enunciation of general principles in the course of the last few years, and I am extremely anxious not to add to their number to-day, therefore I say plainly, and I hope simply, that it has for long now been accepted that such an agreement as this, if it is impeached, is to be measured by reference to two considerations. First, Is it against the public interest? And second, Does that which has been stipulated for exceed what is required for the protection of the covenantee? It might perhaps be more properly stated, as it has sometimes been with the highest authority stated, does it exceed what is necessary for the protection of both the parties? But the impeachment which is in fact made in this case demands the consideration of this question only, Does the restriction which is attacked exceed that which was reasonably necessary for the protection of the covenantee?

The answer to these questions is to be found in an examination of the circumstances, and Mr Clayton was undoubtedly right when he said towards the close of his argument that in order to determine whether or not in a particular case such a restriction did exceed that which was so reasonable it became necessary to understand the facts of the particular case.

What then are the facts here? A boy of the age of fourteen is taken from a humble employment in the office of the local co-operative society, and he is trained in the office of a solicitor of position in this particular neighbourhood. He is plainly competent to acquire information with facility; he is presented with his articles by his employer; one agreement succeeds to another until he finds himself in a position

within the town both of influence and of importance. Under these circumstances, the agreement is entered into which contains the restriction which is now the subject-matter of litigation. What then is it in respect of which on such facts the covenantee is entitled to be protected? Because it is not until we reach a conclusion upon this point that we shall be in a position to decide whether or not this particular restriction does in fact exceed that which is so required. I conceive that the covenantee is entitled to this. He is the founder, or at least the possessor, of the business of an attorney. Such a business depends upon the existence of good will—upon the association and the intimacy which exist between him who carries on that business and the clients of the firm—an intimacy founded upon many complex considerations not easily to be defined but very easily to be understood. Such a covenantee is taking into his employment in his firm a young man in circumstances which make it quite certain that the latter will acquire a close and intimate personal acquaintance with the clients of this firm, from whom, and from whom alone, of course, the business of the firm arises. How intimate were the opportunities given to the appellant in this case of acquiring a close acquaintance with the clients of the firm is made abundantly plain by some figures which were presented in evidence, and to which Mr Clayton made reference, which distributed into percentages the number of interviews which took place in the office with the appellant and respondent respectively. The table which has been produced shows that in the year 1910 the respondent had 942 interviews and the appellant 322, the percentage of the appellant's interviews being twenty-five; in 1911 the proportions were respondent 944, appellant 464—the appellant's percentage 33; in 1912, respondent 960, appellant 900—the appellant's percentage 48; in 1913, respondent 915, appellant 1014—the appellant's percentage 52; in 1914, in the period of six months in relation to which we are told the appellant only attended three days a week, the respondent interviewed 519, the appellant 248—so that the appellant's percentage was 32. It is therefore clear that if you take the period between 1910 and 1914 it is not a very great exaggeration to say that half the people who came to this office, perhaps not particularly caring whom they saw, but merely asking to consult somebody who represented the business, were shown in to the appellant, so that under the ægis of the firm he either originally made or continued their business acquaintance. And this circumstance enables me to answer without the slightest ambiguity, so far as I myself am concerned, the question which I proposed a moment ago—What was it that in such a case the protection of the covenantee rendered reasonable? He might claim in my judgment for his protection that that business which was his, and to which he had admitted the appellant in the manner defined by the successive agreements should continue to be his, and that if at any time the contract of employment between himself and his employee came 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 a practice of his own in that same place, and by doing so undermine the business and the connection of the respondent. I have only to ask myself whether the restriction which is contained in clause 8 is excessive for that purpose, because I dismiss in this connection the contention which was not seriously argued by Mr Clayton that there is anything in such a clause which is in conflict with the public interest. Indeed I am of the opinion that it is in the public interest that a proper restrictive agreement of this kind between an established solicitor, possibly an elderly man, and a younger man should be allowed. It is in the public interest, because otherwise solicitors perhaps carrying on their business without a partner would be extremely chary of admitting competent young men to their offices and to the confidential knowledge to be derived by frequenting those offices. There is therefore nothing in the clause which I have read which conflicts with public interest unless of course it exceeds what is necessary for the protection of the covenantee, in which case the excess itself would be against the public interest.

It is not contended that there is anything which is open to attack in clause 8 except that part of the clause which for all time excludes the appellant from carrying on practice within seven miles of Tamworth. Are we then to say that such a restriction so unlimited goes farther than is permitted in relation to the standard which I have re-stated? I am of opinion that it does not go too far. One of your Lordships asked Mr Clayton in the course of his argument, what period in his judgment would be a reasonable period, and Mr Clayton replied that he thought that ten years might be a reasonable period. Why? Why is it to be said that ten years is a reasonable period? I can quite easily understand that at the end of a period of ten years the appellant in this case, who by this very clause is not prevented from maintaining and even developing his business acquaintance with the clients of the firm so long as he does not practise within a range of seven miles, might have retained all these circumstances of special and, as I think, of illegitimate advantage for the purpose of competing with the business of the respondent, and then might come forward and do that very thing against which in my judgment the covenantee is abundantly entitled to be protected. Therefore I should dismiss a period of ten years, and I should even say of twenty or thirty years that it was quite impossible to be dogmatic as to what was in each individual case the proper period. Some men live very long lives, and it might easily be that in a case in which two men were both tenacious of life the very same danger which applies at this moment in this case would present itself in a more striking and formidable shape at the end of twenty years or at the end of an even longer period.

I have no doubt that it is for this reason that the courts long since determined that they would lay down no hard and fast rule either in relation to time or in relation to space, but that they would treat the question alike of time and of space as one of the elements by the light of which they would measure the reasonableness of the restriction taken as a whole.

I am therefore, for the reasons I have stated, of opinion that the attack which has been made upon this restriction fails. I find that it is not opposed to the public interest, and that it does not exceed what is reasonably required under the circumstances of this case for the protection of the covenantee. It is to be observed that a similar question was discussed in *May* v. *O'Neill* (44 L.J., Ch. 660) by the then Master of the Rolls, Sir George Jessel, in 1875. The restriction in that case was far more oppressive than the one under consideration in the present case. The defendant bound himself to a London solicitor by articles for a certain term, and covenanted that he would not at the expiration of the term or any term thereafter directly or indirectly practise the business of an attorney or a solicitor within the city of London or the counties of Middlesex or Essex. It may be, as Mr Clayton said, that the outlook of the courts upon these doctrines has somewhat developed of recent years, though I do not find that the form in which the rules have been defined has differed very much over a considerable period, but it is worth noticing that the then Master of the Rolls upheld a restriction as rigorous as that which I have indicated. He says — "I think this case quite within both limits, However numerous the plaintiff's clients may be, there must be plenty left for the defendant if he can gain their confidence, and there is nothing against the public interest in a clerk's agreeing not to take away the clients from his master"; and so he granted an injunction. I must not be taken as necessarily assenting to the view taken by the then Master of the Rolls upon a restriction so extremely wide as that with which he was dealing; it will be time enough for this House to pronounce upon it if and when such a case arises. But confining myself to the restriction which is under consideration in this case, in my judgment the attack upon it fails. It was a restriction reasonable under all the circumstances of the case, and in no way opposed to public policy.

LORD CAVE—This is a contract in restraint of trade, and the question which we have to consider is this—whether the contract is so unrestricted in space or time, or both, as to render it unreasonable in reference either to the interests of the contracting parties or to the interest of the public. That the contract in this case is reasonably restricted as regards space is not in dispute. The restriction is confined to a radius of seven miles from the Town Hall at Tamworth, and only excludes the covenantor from practising in an area containing a population of about 20,000. No one would say that that is an unreasonable restriction. As regards time, there is no limit other than the life of the person entering into the contract, and the question is whether the clause is for that reason unreasonable from either point of view. But in considering that question we must not entirely put out of sight the limit of space, which may have a bearing upon the question arising as to the limit of time.

It has been settled, I think, since *Hitchcock* v. *Coker* (1837, 6 A. and E. 438) that where there is a goodwill to be protected, a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantee himself, but also to his successors in business, and this although it may be necessary for the purpose to impose a restriction upon the covenantor for the remainder of his life. Here the practice to be protected is that of a solicitor, to which a goodwill is no doubt attached. It is manifest that a person employed in such a practice as managing clerk must in the course of his duties acquire a knowledge of the affairs, the documents, and the disposition of the clients of the business such as to give him a special equipment which he could, if not restrained by contract, use in obtaining employment as their legal adviser, and so in impairing or perhaps destroying the goodwill of the business of his employer. Now the object being to protect the employer's business against the use of that special advantage, was it unreasonable to extend this covenant to the life of the employee? I think not. It is, I think, impossible to say that there must in every case be some specified limit of time defined by a figure. Nor can we say that the contract ought to be confined to the life of the covenantee, for he might die in the next year or so, and the goodwill might then be lost to his successors.

It was, no doubt, thought necessary to continue the protection throughout the period during which the covenantee and his successors in interest might carry on the practice, and for that purpose to bind the appellant (so far as the limited area was concerned) for the remainder of his life. I cannot think that in the circumstances of this case the restriction imposed was unreasonable from any point of view, and accordingly I agree that the appeal fails and should be dismissed.

LORD SUMNER concurred.

LORD PARMOOR—I concur in the motion which has been made, and I agree that on both tests the agreement in restraint is in this case reasonable.

The first question to be asked is whether the covenant is reasonable in the interests of the parties, and the only test of reasonability between the parties is whether the covenant affords any more than adequate protection for the party in whose favour it is imposed. It is not a question of consideration between the parties, but whether the party in whose interests the restriction is imposed is seeking to obtain more than adequate protection.

As regards the area of limitation, the limitation is no more than is required. As regards the limitation of time, it appears to me, having regard to the business of a solicitor, that a restriction during the lifetime of the appellant is not too wide a restriction. It is in fact no more than adequate protection for a solicitor who desires to protect his professional secrets and to protect his clients from being enticed away by a former clerk who has had access to all his papers and has been in direct personal relation with a number of his clients. I should adopt myself the words used by Younger, L.J., who says that the covenant does no more than protect the professional connection of the respondent, who is a solicitor.

I think there is no public interest involved.

LORD CARSON concurred.

Counsel for the Appellant—Clayton, K.C. —Harman. Agents—Sharpe, Pritchard, & Co., for James, Barton, & Kentish, Birmingham, Solicitors.

Counsel for the Respondent—Maughan, K.C.—Johnston. Agents - Andrew, Wood, Purves, & Sutton, for J. H. Dewes, Tamworth, Solicitor.

HOUSE OF LORDS.

Friday, June 24, 1921.

(Before Lords Buckmaster, Sumner, Parmoor, Wrenbury, and Carson.)

THOMSON & COMPANY *v.* MACKAY.

(APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.)

Master and Servant—Dock Pilot—"Workman"—Amount of Remuneration—Accident after only a Few Weeks' Work—Total Earnings at Time £6 per Week—Concurrent Contracts—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13, *Sched.* 1, 2 (*b*).

The respondent after the war resumed work as a member of the Barry Dock Pilots Association, his remuneration being a fixed share in the pool made up from the payments by the various shipowners for services rendered by the pilots. On the 23rd July 1919 after he had been working for a short time he met with an accident while getting on board the steamship "Cramond" and claimed compensation from her owners, the present appellants. The claim was resisted substantially on the ground that the respondent was not a "workman" within section 13 of the Act. It was agreed at the hearing (1) that the respondent had resumed his occupation as dock pilot since the war within ten weeks of the happening of the accident and that his earnings during that period were £6 a-week; that the amount earned by the members of the association amounted to £6 per week, and that the average amount earned by persons in the same grade and employed at the same work was £6 a-week. The arbitrator held that the respondent's remuneration did not exceed £250 a-year and made an award in his favour, and his award was affirmed by the Court of Appeal. *Held* that as there was no evidence before the County Court Judge beyond the fact that the respondent had been earning £6 a-week and that men similarly engaged had received that sum during the previous year, it was open to him to consider the possibility that the employment might become irregular and that the rate of earnings might fall; that the question was one of fact, and that accordingly there being evidence on which the arbitrator could decide as he did, the award could not be disturbed.

Decision of the Court of Appeal (reported *sub nom. Mackay* v. *Owners of the Steamship "Cramond,"* 123 L.T.R. 794) *affirmed.*

Appeal by the employers from an order of the Court of Appeal affirming an award of His Honour JUDGE HILL KELLY of the County Court at Barry.

LORD BUCKMASTER—It is not necessary that we should hear counsel for the respondent in this case. In order that the appellants can succeed they must show either that the arbitrator has misunderstood what it was that he had to decide or that the decision at which he has arrived has no basis of fact on which it can be supported, and they have not been able to discharge either of those obligations.

The circumstances of the case are these—It appears that in the port at Barry there are a number of boatmen from whom there are selected a group of pilots thirty in number, this group of pilots being from time to time engaged in moving from place to place the various vessels that came into Barry Dock. The course of business was this—The agents of a ship desiring a pilot communicate with the representative of the pilots, and the pilots go out one after the other, watch after watch, until when the work is done the last man received the money earned. This is then brought back and divided in equal shares among all the pilots. The plaintiff in this case was one of these thirty men, and on the 23rd July he was called upon to take his place in connection with piloting a vessel owned by the present appellants. He seems to have slipped and hurt himself, and there is no dispute that the injury he then received was an injury that arose out of and in the course of his employment. The claim that he made for damages in consequence of this accident is not resisted upon the familiar ground that the accident did not so arise, but upon the ground that by virtue of the definition in section 13 of the Workmen's Compensation Act 1906 the appellant was not a "workman," since he was a person who was not engaged in manual labour and whose remuneration exceeded £250 a-year.

The facts with regard to the receipts of the plaintiff do not appear to be in dispute.