The purpose of the article is to survey the law of non-negotiable instruments for comparison with that of negotiable instruments. Among the topics discussed are the requirements for transfer of non-negotiable instruments, the rights and liabilities of the various parties to such instruments, warranty liabilities of transferors, the various equities and defenses attaching to transferred instruments, and severance of ownership and waiver of defenses.

Professor Willier takes issue with the draftsmen of the Uniform Commercial Code for not adding certainty and uniformity to non-negotiable instrument law by broadening the definition of Section 3-805 to include all instruments resembling negotiable instruments insofar as they contain promises or orders to pay money and are intended by the original parties to be transferable, although deficient in meeting the formal requirements of negotiable instruments.

RONALD E. OLIVEIRA

CONTRACTS

EMPLOYEE AGREEMENTS NOT TO COMPETE, by Harlan M. Blake, 73 Harv. L. Rev. 625 (February 1960)

In this article Professor Blake begins with a historical discussion of the judicial treatment of covenants in which an employee agrees not to compete with his employer after termination of the employment. The author examines the present status of such agreements and analyzes the factors determining their enforceability. He suggests advice for counsel in drafting effective postemployment restraints for employees who during their employment have access to valuable confidential information or have special relationships with clients with respect to whom the employer has a dominant claim.

A foundation for an understanding of the modern law of postemployment restraints is laid by comprehensively analyzing its history in England, using as a focal point the landmark case of *Mitchel v. Reynolds,* in which the rule of reason was formulated. The development of the law in America closely parallels that in England. By the end of the nineteenth century the courts in both countries had firmly settled on the reasonableness approach and completely abandoned the mechanical distinction between general and partial restraints.

Recent developments in the law are considered, the article pointing out the balancing of interests involved in formulating the permissible limits of employee restraints. On the one hand, there is the potential social, political, and economic harm that may result to the employee; on the other, the necessity that business organizations be able confidently to entrust important business information to certain employees. Most recent cases impliedly require the employer to show special circumstances making it unfair for him to bear all the risk of putting an employee in a position in which a breach of confidence would be costly. If this showing is made the courts will generally enforce the restraining covenant.

General knowledge, skill, or facility gained through training or experience during employment does not give the employer a sufficient interest to support a restraining covenant, absent special circumstances. However, the difficulty of drawing the line between, on the one hand, general knowledge and skill, and on the other, training which imparts information pertaining especially to the employer's business is the central problem. A substantial risk either to the employer's relationships with his customers or with respect to confidential business information must be presented before a restraint will be enforced.

The article points out the employer and employee interests to be balanced in the area of customer relationships, and the fact that the courts have given greater weight to the arguments of the former employee. It is a general rule that, absent an express contract, the employee may not be restrained either from competing with his former employer or from soliciting his customers. This is followed by a discussion of the customer-list doctrine and the memory exception. An enforceable employee covenant not to compete can provide the employer with protection denied under the general rule. Most courts have upheld such a restraint where the employee's relationship with customers presents a substantial risk that he may be able to divert all or part of their business. This is called the "customer contact" basis. The author gives a detailed analysis of the most important factors governing the enforceability and scope of such restrictions: (1) frequency of employee's contact with customers, (2) locale of contact, and (3) nature of employee's functions. A discussion is had of the problems involved where employees bring customers with them when employed or where they are the principal factor in the securing or retaining of customers.

A second type of enforceable restraint is that which protects against disclosure of confidential business information. A review is had of the applicability of the concept of the trade secret, and its inadequacies in the light of today's complex business technology. The practical difficulties in drawing a contract describing the confidential information to be protected are also discussed and the conclusion is reached that the most effective protective device is an enforceable employee covenant not to compete.

Consideration is given to the problem of the scope and reasonableness of the restraint as far as the dimensions of activity, time and area are concerned. If the court finds the restraint unreasonable it may use the blue-pencil theory of severability to tailor it to a reasonable scope. Severance presents problems as to good faith of employers in drafting broad restrictions, and on the other hand, the difficulty of drafting covenants to fit the particular requirements of an individual employee.

There is a brief treatment of the problem of the employee who enters employment with unusually extensive experience or professional training.

Since an attorney's skill in draftsmanship and the employer's demonstrable good faith are essential elements in determining whether a particular covenant will be enforced by the court, Professor Blake's article contains much sound practical advice for attorneys called upon to draft employment contracts and is worthy of close study by such practitioners, as well as by students in this area of the law.

JOSEPH P. WARNER
Case Editor

CORPORATIONS

ACQUISITION OF ASSETS OF A SUBSIDIARY: LIQUIDATION OR REORGANIZATION? by Kenneth F. Seplow, 73 Harv. L. Rev. 484 (January 1960).

An examination is made of the treatment accorded under the 1939 and 1954 Internal Revenue Codes and earlier tax statutes to transactions in which parent corporations acquire assets of subsidiaries. After analyzing the transactions, it is concluded that to characterize them as reorganizations is improper. Amendment of the 1954 code is advocated to require recognition of a parent's stock investment in its subsidiary in all cases.

The steps a parent will take in absorbing a subsidiary are frequently dictated by the federal-income-tax consequences. Emphasis will be placed on avoiding recognition of gain accrued in the investment in the separated business. Paying a tax at this point may offset the advantages of unified management because it may entail a withdrawal of part of the investment to pay the tax. If, however, there has been a diminution of the investment in the separated business, an immediate recognition of loss will probably be desirable although, in appropriate circumstances, postponement until the loss can better be utilized to offset capital gains may be more beneficial.

A corporation meeting the requirements of Section 332 of the 1954 Internal Revenue Code can avoid recognition of gain or loss by having the subsidiary liquidate with a distribution of its assets to its shareholders in cancellation or redemption of their stock. This method is, however, unsatisfactory if the parent is not the distributee of a sufficiently large enough portion of the assets to enable it to receive operating facilities intact.

Can these objectives be attained through a tax-free reorganization between a subsidiary and parent pursuant to Section 368 of the 1954 Code and its companion Sections 354 and 361?

As Mr. Seplow points out, this problem was presented to the Tax Court, and, on appeal to the Second Circuit under comparable sections of the 1939 Code, in the recent case of *Bausch & Lomb Optical Co.* The problem posed for decision was the intricate one of determining which of two apparently overlapping tax concepts—reorganization or liquidation—best described the asset acquisition, and should, therefore, have governed the transaction. It is contended that neither opinion conclusively resolves