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VALIDITY OF CONTRACTS IN RESTRAINT OF
TRADE.

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ORDINARILY, persons who are competent to contract are permitted to determine for themselves what obligations they will assume. It is only to prevent injury to the public, that the law interferes with this freedom of contract. The promotion of the public welfare is the first consideration of the law. It is the duty of all courts of justice to keep their eye steadily upon the public interest, even in the administration of commutative justice. Therefore, any action founded upon a contract, although not expressly prohibited by positive law, which in its operation would injure the public, or which contravenes any established interests of society, or conflicts

with the morals of the times, cannot be maintained. Thus, one cannot by contract bargain away his life (Wharton's Criminal Law, (8th ed.) sec. 145; 1 Wharton on Cont., sec. 430), restrain his right to liberty,¹ or destroy or materially impair his industrial usefulness: *Dakin v. Williams*, 11 Wend. 67; *Whitney v. Slaton*, 40 Me. 224. Likewise, one cannot, for any consideration whatever, make a binding contract to abandon his customary calling and never to engage in it again anywhere. Such a contract operates as a restriction upon the freedom of trade. Restraints of this nature will be considered in this article.

I. ORIGIN AND HISTORY.—The law of these contracts, as it exists to-day, originated in England. It is said to have sprung from the English law of apprenticeship; 2 Parsons on Cont. (7th ed.) p. 751. This doctrine was also a principle of the Roman law (Puff., lib. 5, c. 2, sects. 3, 21, H. VII. 20, cited in *Mitchel v. Reynolds*, 1 Smith's Lead. Cas. 709; s. c. 1 P. Wms. 181) (1811); but whether it is recognised in the jurisprudence of any other country, we are unable to state; yet it is certain that no such principle prevails in France: *Roussillon v. Roussillon*, L. R., 14 Ch. Div. 351; s. c. 19 Am. Law. Reg. 748, and note. Originally the apprenticeship law of England was unreasonably oppressive. By it no one could exercise any regular trade or handicraft except after a long apprenticeship, and, generally, a formal admission to the proper guild or company was required. For one to relinquish his trade or mystery, therefore, "was to throw himself out of employment; to fall as a burden upon the community; to become a pauper:" 2 Parsons on Cont. (7th ed.) p. 751. Hence it can easily be perceived why the earlier judges "frowned with great severity on such contracts."

(a) *Early English Cases*.—The first reported case on this subject arose during the reign of Henry V. (1415), more than four centuries ago. Here a dyer bound himself not to exercise his trade for half a year, and in an action for its enforcement, Judge HULL, as soon as he heard the bond read, flew into a passion, swore upon

¹ "What consideration can a man have received adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement; yet the principle is, in both cases, the same:" per TILGHMAN, J., in *Smith v. Commonwealth*, 14 S. & R. (Penn.) 69; Whart. on Crim. Pl. & Pr., sec. 351.

the bench, and expressing himself with more fervor than decency, declared in bad French, that if the plaintiff were in court he should go to prison until he had paid a fine to the king: "*Per Dieu, si le plaintiff fut icy, il irra al prison tang il ut fait fine al Roy*"—By God, if the plaintiff were in court he should go to prison till he had paid a fine to the king;—Year Book, 2 Henry V., fol. 5, pl. 26, cited in *Mitchel v. Reynolds*, 1 P. Wms. 181; *Lange v. Werk*, 2 Ohio St. 526, 527; *Beard v. Dennis*, 6 Ind. 202. And as late as the eighteenth century (1711), Chief Justice PARKER, in referring to this judge's great displeasure, said that he could not "but approve the indignation that judge expressed, though not his manner of expressing it:" *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711).

The next case in point of time is *Colgate v. Bachele*r, Cro. Eliz. 872, Owen 143, where one bound himself to abstain from the use of his trade of haberdasher, for a certain time. ANDERSON, J., affecting much surprise that one should be so foolish as to give such a bond, put the absurdity of the undertaking thus: "I might as well bind myself not to go to church."

(b) *Growth of Opinion.*

1. *First Relaxation of the Old Rule.*—Hence, the old rule was that all contracts in restraint of trade, however limited in their operation, were void. But as English civilization advanced, commerce extended, the avenues of trade and employment multiplied, competition increased, the severity of the apprenticeship law abated, thus the reasons for the stringency of the old rule had in a large measure disappeared, and that fact very soon received judicial recognition. The first innovation on the old rule was made in *Rogers v. Parry*, 2 Bulstr. 136, where it was expressly declared that one may well bind himself to abandon his trade "for a certain time and in a certain place."

2. *Rule in the beginning of the Seventeenth Century.*—This modification was very soon adopted in other cases. As early as the year 1621 the principle is thus announced: "Upon a valuable consideration one may restrain himself that he will not use his trade in such a *particular place*; for he who gives that consideration expects the benefit of his customers; and it is usual, here in London, for one to let his shop and wares to his servant, when he is out of apprenticeship, as also to covenant that he shall not use that trade in such a shop or in such a street; so, for a valuable consideration, and voluntarily, one may agree that he will not

use his trade for *volenti non fit injuria*:" *Broad v. Jollyfe*, Cro. Jac. 596. See, in this connection, *Jelliet v. Broad*, Noy 98; *Prugnell v. Gosse*, Aleyn 67; *Clerk v. Tailors of Exeter*, 3 Lev. 241.

3. *The Modern Rule*.—From time to time, as the social condition changed, a more liberal view has been applied to these kinds of contracts. And it is not because they are any more legal and enforceable at this time than they were in the days of Henry V., but because the courts look differently at the question as to what is a restraint of trade: *Presbury v. Fisher*, 18 Mo. 50; *Long v. Towl*, 42 Id. 545; *Shrainka v. Scharringhausen*, 8 Mo. App. 525. The leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181; s. c. 1 Smith's Lead. Cas. 705, contains a very thorough exposition of the whole subject, and has been substantially followed in most all subsequent cases. (See, also, Parsons on Cont. (7th ed.) 751; 2 Addison on Cont. (1883), B. V. Abbott's notes, bottom page 737; 2 Wharton on Cont., sect. 430; Smith on Cont. (5th ed.) 180; 2 Chitty on Cont. 982; *Davis v. Mason*, 5 T. R. 118; *Bun v. Guy*, 4 East 190; *Gale v. Reed*, 8 Id. 80; *Hayward v. Young*, 2 Chitty 407; *Bryson v. Whitehead*, 1 Simmons & S. 74; *Homer v. Ashford*, 3 Bing. 322; *Chappel v. Brockway*, 21 Wend. 157). In *Mitchel v. Reynolds*, it was decided that a bond conditioned not to exercise a certain trade "within a particular parish" was good; but, observed Chief Justice PARKER, who delivered the opinion, "where it is given not to exercise a trade *throughout the kingdom*, it is bad." This last remark has not escaped criticism. CHRISTIANCY, J., of the Supreme Court of Michigan, in an elaborate opinion, clearly shows that the observation of the learned English judge is not always infallible; that there may have been much reason for making such a declaration more than a century and a half ago, but he seriously questions whether such a principle was ever applicable to our condition: *Béal v. Chase*, 31 Mich. 519, 520. Judge HOWE, of the Supreme Court of Wisconsin, has also taken the same advanced ground: *Kellogg v. Larkin*, 3 Pinney (Wis.) 123; s. c. 3 Chandler (Wis.) 133. And Judge COOLEY has expressed himself likewise: Article in Am. Ry. Age, April 26th 1884, on "The Popular and Legal View of Railway Pools." But whatever different views may prevail as to the propriety of allowing these contracts, the general rule, as deduced from the cases, is that

all contracts in restraint of trade whose operation is general, are unenforceable (see authorities, *supra*, and also *Thomas v. Miles's Adm.*, 3 Ohio St. 274 (1854); *Hedge v. Lowe*, 47 Iowa 137 (1877); *Lange v. Werk*, 2 Ohio St. 519 (1853); *Mossop v. Mason*, 18 Gr. Ch. (Ont.) 453 (1871); s. c. 17 Id. 360 (1870); s. c. 16 Id. 302 (1869); *Kennedy v. Lee*, 3 Mer. 440-452 (1817); *Caswell v. Gibbs*, 33 Mich. 331 (1876); *Gale v. Reed*, 8 East 80 (1806); *Hinde v. Gray*, 1 M. & G. 195 (1840); s. c. 1 Scott N. R. 123; *Peltz v. Eichele*, 62 Mo. 171 (1876); *Saratoga Co. Bk. v. King*, 44 N. Y. 87; *Curtis v. Gokey*, 68 Id. 300 (1877); s. c. 5 Hun 555 (1875); *Pierce v. Fuller*, 8 Mass. 223; s. c. 5 Am. Dec. 102); but to this general rule there are a few exceptions which will be hereafter noticed.

II. FOUNDATION OF THE DOCTRINE.—The reasons of the rule may well be inferred from what has already been said. Public policy is its corner-stone. The public demands that there shall be no restraints upon industry. The industrial maxim, that "competition is the life of trade" is the foundation of the doctrine; "therefore," say those who believe implicitly in the maxim, "whatever destroys or even relaxes competition is injurious if not fatal to it." "The general principles which govern contracts in restraint of trade," said the Supreme Court of California: in *Wright v. Ryder*, 36 Cal. 342, 357 (1868), "are well settled both in England and the United States. They proceed upon the theory that the public welfare demands that private citizens should not be allowed, even by their own voluntary contracts, to restrain themselves unreasonably from the prosecutions of trades, callings, or professions, or from embarking in business enterprises, in the promotion and encouragement of which the public has an interest." The Supreme Court of the United States, in *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 67 (1873), per BRADLEY, J., states the reasons of the rule as follows: "There are two principal grounds upon which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the injury to the public of being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and family. It is evident that both of these evils occur, when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire

realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy."

The individual as well as the public would suffer injury by the enforcement of such contracts. The loss to society of a valuable member is a great public injury. The capacity of an individual to produce, constitutes his value to the public. That branch of industry in which he has been educated and to which he has devoted his energies, is supposed to be the one in which he can render the greatest profit, both to himself and the public. The fruits of his labors belong immediately to himself, but mediately to the public, and go to swell the aggregate of national wealth. "Therefore," as Judge HOWE once remarked (*Kellogg v. Larkin*, 3 Pinney, (Wis.) 124, 150): "the law says to each and every tradesman, you shall not, for a present sum in hand, alien your right to pursue that calling by which you can produce the most, and add the most to the public wealth, and compel yourself to a life of supineness and inaction, or to labor in some department less profitable to the state. And if a man, mindful of his own gain alone, but not of the public good, will bargain with you to that effect, you are held discharged from such bargain, because of the advantages that will arise to the public from so holding." "Competition in trade," remarked the Supreme Court of New Jersey, "is encouraged by the law, and to allow any one to use means established and intended for the public good to promote unfair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted." *Messenger v. The Pennsylvania Rd. Co.*, 3 N. J. Law (8 Vroom) 531 (1874).

BACON declared that such a contract was "against the public good, deprived the party of his means of livelihood, enabled masters to lay hardships upon their servants and apprentices; and tends to oppression." 2 Bacon's Abridg., p. 299.

CHAPMAN, J., of the Massachusetts Supreme Court, said: "The law has always regarded monopolies as hostile to the rights and interests of the public. One method of obtaining them in early times was by a grant from the sovereign to a particular individual of the sole right to exercise a particular trade. The mischief arising from these monopolies became so intolerable that the practice was suppressed by a clause in *Magna Charta*. * * * *

Another method by which these monopolies were sought to be obtained, was by private contracts, in which one of the parties agreed not to engage in some specified trade or business. *Taylor v. Blanchard*, 13 Allen 370 (1866).

Judge MORTON, in the leading American case of *Alger v. Thacher* 19 Pick. (Mass.) 50, s. c. 31 Am. Dec. 119, with note, in an exhaustive and thoroughly considered opinion, states the reasons of the rule as follows: "1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions; and they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employments and capacities, of which they may be most useful to the community as well as themselves. 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill. 4. They prevent competition and enhance prices. 5. They expose the public to all the evils of monopoly." This case is followed in 36 Cal. 342; 54 N. H. 519; 42 Mo. 549; 40 Me. 230. Chief Justice PARKER, in the great case of *Mitchell v. Reynolds*, says, "the contracts work mischief," 1st, to the party by the loss of his livelihood, and the subsistence of his family; and 2d, to the public, by depriving it of a useful member. "Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who were perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible; as, likewise, from masters who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom when they come to set up for themselves." 3d. "Because, in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England,—for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." 1 P. Wms. 181 (1711). In commenting upon the first reason assigned by PARKER, C. J., in holding these contracts void, Judge HOWE, in *Kellogg v. Larkin*, 3 Pinney 139, observed: "The opportunities for employment are so abundant (in this country), and the demand for labor on all sides so pressing

and urgent, and the supply so limited, that I much question, were we to consider the question as *res integra*, if we should feel authorized to hold that a man had endangered his own livelihood and the subsistence of his family by an agreement which merely excludes him from exercising the trade of a blacksmith or a shoemaker, leaving all the other departments of mechanical, agricultural and commercial industry open to him. And, while we have no privileged classes here, but little individual and less associated capital, and while our resources are so imperfectly developed, while the avenues to enterprise are so multiplied, so tempting, and so remunerative, giving to labor the greatest freedom from competition with capital, perhaps, that it has yet enjoyed, I question if we have much to fear from attempts to secure exclusive advantage in trade, or to reduce it to few hands. While so much remains to be done that all hands can do, I question if the better way to foster individual effort be not to secure it the greatest possible freedom, either to direct it to any particular calling or to abandon that calling to another for an equivalent."

And, in referring to the 3d reason of PARKER, C. J., Judge HOWE continues: "I apprehend it would be thought a dangerous precedent were the court to annul any other voluntary bond for which a voluntary consideration had been received, upon the ground that it was of no use to the obligee. * * And certainly I do not understand why that should be called a certain loss on one side, when, for what the party has abandoned, he has received an ample equivalent. If the loss is supposed to arise from a total want of consideration, or from its inadequacy, these are distinct grounds of interference." *Kellogg v. Larkin*, 3 Pinney 124.

III. INTERESTS OF THE PARTIES.—Thus far it will be seen, that the interests of the parties have been considered in determining the validity of these contracts. But whether their interests should be taken into account, there is a contrariety of opinion.

(a) *Affirmative View*.—Judge MORTON, in the leading case of *Alger v. Thatcher*, 19 Pick. 51, declared that such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families; they tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose such person to imposition and oppression." Lord MACCLESFIELD spoke

of them as working mischief "to the party by the loss of his livelihood and the subsistence of his family." *Mitchell v. Reynolds*, 1 P. Wms. 181. BACON denounced them, because they "deprived the party of his means of livelihood, enabled masters to lay hardship upon their servants and apprentices, and tended to oppression." 2 Bac. Abr. 299.

(b) *Negative View*.—But CHAPMAN, J., of the Massachusetts Supreme Court, asserts that the law "protects trade for the sake of the public, and not for the sake of the parties engaged in it." *Taylor v. Blanchard*, 13 Allen (Mass.) 370 (1866). And SELDEN, J., of the Supreme Court of New York, regards the idea of considering the interests of the parties as absurd. "The principles of public policy," says he, "which lie at the foundation of this rule, would seem to be too obvious, and yet we find it urged in many of the cases as an objection to the contract, that it tended to deprive the person bound of the means of obtaining a livelihood, as though the personal interest of the contracting party had something to do with the doctrine. * * * It is clear that the validity of the contract does not depend, in the slightest degree, upon the question whether it is beneficial or otherwise to the party bound. The interests of the public alone were considered in the adoption of the rule." He says the rule is founded upon the importance of the freedom of every citizen to engage himself "in that department of labor in which his personal efforts will be likely to add most to the aggregate productions of the country," and upon the requirement of public convenience—"that all the various trades and employments of society should be pursued each in its due proportion, a result with which the exclusion of any individual from his accustomed pursuits has a tendency to interfere." *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641 (1851). This may be considered a leading case.

(c) *Injury to the Party works Mischief to the Public*.—But whichever of the above views we adopt, it is clear that a contract which is detrimental to the interests of the parties, as above indicated, is also detrimental to the interests of the public. For if any individual, by contracts, disposes of his means of subsistence and that of his family, society feels the consequences. He and his family become subjects of public charity, and the public is deprived of the fruits of his labor. The policy of the courts is to give as much freedom as possible to the individual. "Let men make their

own bargains," is the doctrine. It is not often that men wilfully and deliberately enter into contracts prejudicial to their own interests. And, when they do, courts never interpose solely for the interests of the parties directly concerned, but because of the injury to the state. These contracts take the party from his trade, thus depriving himself and the public of the skill which he has acquired in his business; and we should remember that as large a number of skilled men as possible is a desirable element in a country which strives for commercial supremacy. Therefore, it is clear, that when Judge BRADLEY assigned as one of the reasons why these contracts should not be sustained, that "the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and family," he means that the parties by bringing mischief upon themselves, affect the public injuriously, and this is the reason why such contracts are against public policy.

(d) *When Interests of the Parties considered.*—On the other hand, we shall hereafter see that the interests of the parties are not always wholly disregarded, although subservient to that of the public. Thus contracts contemplating the same restraint may be valid or invalid, according to the circumstance which induced the parties to enter into them, and merely because the interests of the covenantees required them. But here, as in all contracts of this nature, the public welfare is first considered, and if it is not involved, and the interests of either party will be better promoted by them, the agreements will be enforced; whereas, if their interests do not demand them, the courts will declare the contract void. *Whittaker v. Howe*, 3 Beav. 383, 394 (1841); *Beal v. Chase*, 31 Mich. 490 (1875); *Roussillon v. Roussillon*, L. R. Ch. Div. 351 (1879); s. c. 49 L. J. Ch. (N. S.) 339; 42 L. T. (N. S.) 679; 28 W. R. 623; *Presbury v. Fisher*, 18 Mo. 50; *Callahan v. Donnolly*, 45 Cal. 152 (1872); *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 67 (1873).

IV. MODERN VIEWS.—As has already been indicated, in referring to the origin and history of the law governing these contracts, a more liberal view is steadily growing in favor of them, and able judges have questioned the reasons for holding them void. The maxim, "competition is the life of trade," is the foundation of the

doctrine. To the common people and to those who have implicit faith in the axiom, the reasons for pronouncing such contracts void have lost none of their original vigor. Their instinctive hate of monopoly still prevails. But learned judges have doubted that competition always advances commercial enterprises. Judge MAULE once remarked that, were the question *res integra*, he should strongly incline to doubt whether the interests of commerce be really promoted by the prohibition of such contracts. "Many persons who are well informed upon the subject, entertain an opinion that the public would be better served if, by permitting restrictions of this kind, encouragements were held out to individuals to embark large capital in trade, and that it would be expedient to allow parties to enter into any description of contract for that purpose that they might find convenient." *Proctor v. Sargent*, 2 Scott N. R. 289, 302 (1840); s. c. 2 Man. & G. 20; see, to same effect, *Palmer v. Stebbins*, 3 Pick. (Mass.) 188 (1825).

(a) *Views of CHRISTIANCY, J.*—In referring to the objection that such contracts, if sustained, fostered idleness, Judge CHRISTIANCY, of the Supreme Court of Michigan, remarked that, in this country, at this time, where a change of occupation is too common to excite remark,—where merchants become manufacturers, and lawyers farmers, and farmers traders,—not because they receive a consideration for doing so, but because, with larger opportunities for observation than they had at first, they have fully satisfied themselves that such changes will be for their advantage, as oftentimes they prove to be,—any rule of law which should assume that one who for a consideration bargains not to follow his previous business, thereby bound himself to idleness and penury to the detriment of the state, would be a rule absurd in itself and contrary to general experience and observation. "On the contrary," says he, "where such a contract is the result of fair bargaining, the reasonable presumption is, that each party, in view of all the circumstances which are within his own intimate knowledge, was able to see how the bargain was to result to his advantage, and that the party resigning the business did not do so without being fully satisfied that he was receiving full equivalent, which would be more advantageous to him than the property and the business sold. And where a man has fully decided to sell his business to take up another, can there be any reason of state policy, why he should be precluded from bar-

gaining for the additional consideration he can obtain, by agreeing not to engage in the same business? If a man can sell his business for ten thousand dollars only, but the purchaser will give twice as much in case the seller will agree not to engage in a ruinous competition with him, what interest has the public in denying to the seller the right of selling for this additional sum, or in releasing him from his bargain, if, after he has received it, he shall coolly repudiate this portion of the contract, while he keeps the consideration he has received for it? * * * And it certainly can be no sufficient objection to such a contract, that it may possibly result in one party going beyond the state limits to engage in the same business anew. What if it shall do so? Are our interests as a state so petty or exclusive and our policy so narrow and invidious, that we frame rules to keep people within the state contrary to their inclination, or when it would be for their interest to go elsewhere? Yet this narrow, illiberal and exclusive policy must certainly be relied upon, if the tendency of a contract to induce a contracting party to leave the state is to defeat the contract. If such a position is sound, then a contract made in this state for the services of a citizen at Chicago, or any other point outside the state, should be treated as void here, because depriving the state of the benefit that might flow from the industry of one of its citizens! Or, to take a case still more exactly parallel: Partners in trade at Superior City might divide their stocks, and one, for a consideration, agree that he would remove his share across the river to Duluth, and not again engage in the business at Superior City; but this agreement, though perfectly reasonable, considered with reference to the individual only, would, on this doctrine, be void, because a state policy which has come down to us from semi-civilized or less enlightened times, when governments were accustomed to prohibit artizans from leaving the realm, and gold and silver from being exported, is supposed to be violated by the transfer of the industry and capital of a citizen across a river into another state." *Beal v. Chase*, 31 Mich. 490.

(b) *Views of HOWE, J.*—In referring to the maxim that "Competition is the life of trade," Judge HOWE, of the Supreme Court of Wisconsin, remarked: "But I apprehend that is not true, that 'competition is the life of trade.' On the other hand, that maxim is one of the least reliable of the host that may be picked up in every market place. It is, in fact, the shibboleth of mere gambling