DEPARTMENT OF TRUSTS AND COMBINATIONS IN RESTRAINT OF TRADE.

EDITOR-IN-CHIEF,
H. LABARRE JAYNE, ESQ.,
Assisted by
GEORGE S. PATTERSON.

PERLS *v.* SAALFIELD.[1] ENGLISH HIGH COURT OF JUSTICE—CHANCERY DIVISION.

The defendant entered into an agreement with the plaintiff, his employer, that he would not accept another situation or establish himself in any business within fifteen miles of London, without the written consent of the plaintiff, for a period of three years after leaving the plaintiff's service; but such permission was not to be withheld if it could be proved to the satisfaction of the plaintiff that the situation sought or the business established was not for the sale of the same class of goods as those sold by the plaintiff.

Held, on a motion for an injunction to restrain the defendant from breaking the agreement, that the clause providing that the plaintiff's permission was not to be withheld unless the business in which the defendant engaged was in the same class of goods as the plaintiff's, showed that the restrictive clause was intended to apply to all kinds of business whatsoever, and was, therefore, wider than was necessary for the protection of the plaintiff, and void.

CONTRACTS IN RESTRAINT OF ORDINARY TRADES.

For the purposes of this annotation it will be convenient to divide the subject into: (1) The Rules of Law Governing these Contracts, and their Application to Contracts in Restraint of Ordinary Trades; (2) Contracts in Restraint of those Sorts of Business in which the Public has a Peculiar Interest; (3) Combinations to Form Monopolies by Restrictions on Competition and Production.

(1) Contracts in restraint of trade were originally void at common law on account of public policy, and they were opposed to public policy for two reasons, one being the injury to the public by being deprived of the restricted party's industry, and the other being the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and family: 2 Henry V., pl. 22; Colgate *v.* Bachelor, Cro. Eliz., 872; Oregon S. S. Company *v.* Winsor, 20 Wall, 64. See also Wright *v.* Ryder, 36 Cal., 342; Pollock on Contracts, 313; Parsons on Contracts, Vol. 2, 255.

The general rule at present with reference to these contracts would seem to be that they are valid provided that the restriction be reason-

[1] L. R., 1892, 2 Ch. Div., 149, May, 1892.

able, and founded upon a good consideration: Horner *v.* Groves, 7 Bing., 735; Mitchell *v.* Reynolds, 1 P. Wms., 181; Davies *v.* Davies, L. R., 36, Ch. Div., 348; Rousillon *v.* Rousillon, 14 Id., 351; Collins *v.* Locke, 4 Appeal Cases, 674; Oregon S. S. Co. *v.* Winsor, 20 Wall., 64; Watertown Thermometer Co. *v.* Pool, 5 Hun., 157; Coal Co. *v.* Coal Co., 68 Pa. St., 173; Ellerman *v.* C. J. R. & U. S. Y. Co, 23 Atlantic, 287; Mills *v.* Dunham, 91 Ch., 576; C. A. Perls *v.* Saalfield, 92, 2 Ch., 149 C. A.; and the burden of proof is on the person alleging the invalidity: Mills *v.* Dunham, *supra;* Perls *v.* Saalfield, *supra;* though the tendency of all the cases prior to these last two was to treat these contracts as being *prima facie* invalid. The question as to whether or not a given restraint is reasonable or not is a question of law: Mullan *v.* May, 11 M. & W., 548, and the test as to what constitutes reasonableness is the one furnished by TINDAL, C. J., in Horner *v.* Graves, 7 Bing., 735, and which has been followed in all the later cases. He says: "And I do not see how a better test can be applied to the question whether the agreement is reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either of the parties; it can only be oppressive, and if oppressive it is in the eye of the law unreasonable. Whatever is injurious to the interest of the public is void on the ground of public policy." Examples of contracts which have stood this test may be found in Mitchell *v.* Reynolds, 1 P. Wms., 181; Gale *v.* Read, 8 East, 80; Whitaker *v.* Howe, 3 Beavan, 383; Bunn *v.* Guy, 4 East, 190; Hitchcock *v.* Coker, 6 A. & E., 654; Davies *v.* Lowen, 64 L. Times, 655; Sternberg *v.* O'Brien, 48 N. J. Eq., 370; Martin *v.* Murphy, 129 Ind., 464; Ellerman *v.* C. J. R. & U. S. Y. Co., 23 Atlantic, 287; Kieth *v.* H. O. Co., 2 S. W., 777; Washburn *v.* Dorsch, 32 N. W., 551. While in the following cases the restraint was deemed unreasonable: Horner *v.* Graves, 7 Bing., 735; Ward *v.* Byrne, 5 M. & W., 548; Perls *v.* Saalfield, 92 2 Ch. 149, C. A. Mandeville *v.* Herman, 42 N. J. Eq., 185; Carroll *v.* Giles, 30 S. C., 412. See also cases cited *infra*.

It was the law in England for a long time that a restraint co-extensive with the limits of the country was, *ipso facto*, invalid, irrespective as to whether it was necessary for the protection of the promisee: Prugnell *v.* Gosse, Aleyn, 67; Parker, C. J., in Mitchell *v.* Reynolds, 1 P. Wms., 181; Parke, B., in Ward *v.* Byrne, 5 M. & W., 548; Hinde *v.* Gray, 1 Man. & Gr., 195; Sir John Wickens in Allsopp *v.* Wheatcroft, 15 Eq., 59; Cotton, L. J., in Davies *v.* Davies, 36 Ch. Div., 351; Sir Montague Smith, in Collins *v.* Locke, 4 Appeal Cases, 674. The rule at present in England would seem to be that such a restraint is valid, provided that it fulfills Tindall, C. J.'s, test as to reasonableness: Sir W. M. James, in Leather Cloth Co. *v.* Lorsont, L. R., 9 Eq., 345; Rousillon *v.* Rousillon, L. R., 14 Ch. Div., 551; Baron Bramwell, in Jones *v.* Lees, 1 H & N., 189; Whitaker *v.* Howe, 3 Beavan, 383; Mills *v.* Dunham, 91, 1 Ch., 576 C. A. It is not difficult to find a reason for

the existence of the old hard and fast rule that any restraint co-extensive with the limits of the country must be, *ipso facto*, invalid, because at the time the rule was first laid down there was no business whose operation extended throughout the entire country, and, therefore, such a restraint could not be necessary for the protection of the promisee, as it extended further than his business, or, as PARKER, C. J., said, in Mitchell *v.* Reynolds, "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 on the other." At the present day, however, thanks to the facilities of communication which the railroad, telegraph and telephone afford, the operations of a particular business may extend all over the country, and the reason for the rule having ceased owing to public policy no longer requiring its enforcement, it would seem that the sole test as to the validity of a restraint should be its reasonableness.

In the United States there are two artificial limits of space, the State and the United States, and the above strict rule might be applied in either one or two ways: (*a*) as to restraints covering any particular State; or (*b*) as to restraints extending throughout the United States.

(*A*) It was at one time thought that a restraint that would not permit a man to pursue his occupation, or trade anywhere in the State was, *ipso facto*, void, for "with regard to domestic interests each State is a separate community, and it is by no means the same thing to the people of a State whether an individual carries on its trade within or without its borders:" Lawrence *v.* Kidder, 10 Barb., 641; Chapel *v.* Brockway, 21 Wend., 157; Taylor *v.* Blanchard, 13 Allen, 375; Wright *v.* Ryder, 36 Cal., 312; and that is the law in Michigan at the present day: Western Wooden Ware Asso. *v.* Starkey, 84 Mich., 76. The later cases, however, hold that such a restraint is not, *ipso facto*, invalid: Oregon S. S. Co. *v.* Winsor, 20 Wall., 64; Beal *v.* Chase, 31 Mich., 490; Hereshoff *v.* Boutineau, 19 Atlantic, 712. See also cases cited *infra*.

(*B*) It is impossible to determine, in view of the difference of the authorities, whether a restraint co-extensive with the boundaries of the United States is, *ipso facto*, void. In Iowa, Pennsylvania, Massachusetts, Ohio, and possibly in the Federal courts, such a restraint would not be sustained. Mr. Justice BRADLEY, in Oregon S. S. Co. *v.* Winsor, 20 Wall., 64; Bishop *v.* Palmer, 146 Mass., 469; Handforth *v.* Jackson, 150 Id., 149; Taylor *v.* Sauerman, 110 Pa. St., 3; Lange *v.* Werk, 2 Ohio St., 519; Chaplin *v.* Brown, Iowa, 48 N.W., 806; while in New York, Missouri and Minnesota they would seem to follow the modern English rule: Diamond Match Co. *v.* Rouber, 106 N. Y., 473; Watertown Thermometer Co. *v.* Pool, 51 Hun., 157; Tode *v.* Gross, 127 N.Y., 464; Underwood *v.* Smith, 19 N. Y. S., 380; National Bank *v.* Union Hospital Co., 45 Minn., 272; compare FULLER, C. J., in Gibbs *v.* Baltimore Gas Co., 130 U. S, 396, and BRADLEY, J., in Oregon S. S. Co. *v.* Winsor, 20 Wall., 64.

The fact that the restraint is unlimited in point of time is no objection to its validity: Ward *v.* Byrne, 5 M. & W., 548; Mumford

v. Gething, 7 C. B. N. S., 317; Beard *v.* Dennis, 6 Ind., 200; Cook *v.* Johnson, 47 Con., 175; Bunn *v.* Guy, 4 East, 190; French *v.* Parker, 14 Atlantic, 870. Agreements in restraint of trade are divisible and may be valid in part and void elsewhere, as in Smith's Appeal, 113 Pa. St., 579, where a covenant not to engage in the manufacture of ochre "in the county of Lehigh or elsewhere," was held valid as to that county and void as to elsewhere. See also Mallan *v.* May, 11 M. & W., 653; Price *v.* Green, 16 Ibid., 346; Oregon S. S. Co. *v.* Winsor, 20 Wall., 64; Davies *v.* Lowen, 64 L. Times, 655; Lange *v.* Werk, 2 Ohio St., 519; *c. f.* More *v.* Bonnet, 40 Cal., 251; Bishop *v.* Palmer, 146 Mass., 469.

The Court will not inquire into the adequacy of the consideration necessary to support such a contract, and only such consideration; is required as is necessary to support any contract not under seal: Hitchcock *v.* Coker, 6 Ad. & El., 438; Pilkington *v.* Scott, 15 M. & W., 657; Guerand *v.* Daudelet, 32 Md., 561; Pierce *v.* Fuller, 8 Mass., 223; McClung's App., 58 Pa. St., 31; *c. f.* Baron PARKE in Young *v.* Timmins, 1 Tyrth, 226; and it has been held that the presence of a seal alone is not a sufficient consideration, on the theory apparently that as contracts in restraint of trade are *prima facie* invalid, and as this presumption can only be overcome by the existence of certain facts, among which is the presence of a good consideration, a seal alone will not rebut the presumption of invalidity: Hutton *v.* Parker, 7 Dowling, 739; Gompert *v.* Rochester, 56 Pa. St., 194. Whether this is the law at present or not is a mooted question, in view of the fact that the last two decisions in England have held that there is no presumption of invalidity in the case of contracts in restraint of trade and, therefore, the reason as given above would seem to have lost its force.

In Mills *v.* Dunham, '91 1 Ch. C. A., 576, Mr. Justice CHITTY lays down the following rule for the construction of those contracts. "When a covenant or agreement is impeached on the ground that it contains an unreasonable restraint of trade, the duty of the Court is first to interpret the covenant or agreement itself and to ascertain, according to the ordinary rules of construction, what is the fair meaning of the parties, and then to apply the rule as to reasonableness with reference to the extent of the impeached covenant, and then to see whether it goes too far:" see Talcott *v.* Brackitt, 5 Bradwell, 60; Ferry Co. *v.* Ferry Co., 72 Ill., 360. If the restraint be limited as to space, the contract itself prescribing no method for measuring that space, the distance shall be calculated "as the crow flies," and not necessarily by the usual means of approach: Dingman *v.* Walker, 1 Johnson, 440; Mouflet *v.* Cole, L. R., 7 Exch., 70. If the agreement be valid when made, subsequent circumstances, such as the promisee's retiring from business, do not affect its validity: Elves *v.* Crofts, 10 C. B., 241; Jones *v.* Lees, 1 H. & N., 189; Cook *v.* Johnson, 47 Con., 175; and such an agreement is assignable with the interest it protects: Hedge *v.* Lowe, 47 Iowa, 137; Gompert *v.* Rochester, 56 Pa. St., 198; Pemberton *v.* Vaughn, 59 E. C. L. R., 87. If the contract be reasonable when entered into, the Court is not bound to look for probable and extrava-

gant contingencies in order to invalidate it: Rannie *v.* Irving, 7 Man. & Gr., 969. The parties to the contract, however, must fix the terms of the restraint themselves, and a covenant to retire from business, "so far as the law allows," is too vague to be enforced: Davies *v.* Davies, L. R., 36 Ch. D., 348.

As a general rule if these contracts are valid at law, an injunction will lie to prevent their breach: Kimball *v.* Keane, 6 Sim., 635; Kimberly *v.* Jennings, Ibid., 640; Whitaker *v.* Howe, 3 Beavan, 383; Leather Cloth Co. *v.* Lorsont, L.R., 9 Eq., 345; Hall's Appeal, 60 Pa. St., 456; Beard *v.* Dennis, 6 Ind., 200; Smith's Appeal, 113 Pa. St., 579; but notwithstanding its validity at law a chancellor will not enforce such a contract if its terms are hard or even complex: Kimberly *v.* Jennings, 6 Sim., 640; Keeler *v.* Taylor, 53 Pa. St., 463.

The rule at common law was that if these contracts were unlawful they were only so in the sense that they could not be enforced either at law or in equity, and the formation of such a contract did not in itself constitute an indictable or actionable offence: Price *v.* Green, 16 M. & W., 346; Hilton *v.* Eckersley, 6 El. & Bl., 47; Mogul S. S. Co. *v.* McGregor, 23 Q. B. Div., 598; Hornly *v.* Close, L. R., 2 Q. B., 153; *c. f.*, CROMPTON, J., in Hilton *v.* Eskersley, and Lord ESHER, M.R., in Magul S. S. Co. *v.* McGregor. For the statutes on this subject see Stimson's American Statute Law, Vol. I, § 4130 B; Vol. II, § 8252, and §§ 9900–9905.

(2) Contracts in restraint of those sorts of business in the exercise of which the public has a peculiar interest; (*a*) if the policy of the law be to restrain the exercise of any particular business, contracts affecting such restraint are perfectly valid, as in the case of patents: Morse Twist Drill & Machine Co. *v.* Morse, 103 Mass., 73; Shade Roller Co. *v.* Cushman, 143 Mass., 353; Fowle *v.* Parke, 131 U. S., 88; Gloucester Isinglass & Glue Co. *v.* Russian Cement Co., 27 N. E., 1005; *c. f.* Berlin Machine Works *v.* Perry, 38 N. W., 82; restrictions on the use of trade secrets: Bryson *v.* Whitehead, 1 Sim. & Stu., 74; Leather Cloth Co. *v.* Lorsont, L. R., 9 Eq., 345; Pickery *v.* Welch, 19 Pick., 523; Tode *v.* Gross, 127 N. Y., 480; embargo bonds while in the Embargo Act was in force: Dixon *v.* U. S., 1 Brock., 177; and bonds not to engage in the sale of liquor in a particular State when the policy of the law in that State is to discourage its sale: Harrison *v.* Lockhart, 25 Ind., 112. (*b*) If it is the policy of the law that in any given business there shall be no restriction in the exercise thereof, then any restriction whatsoever will be void. Thus the grant of an exclusive right of way for a tract of land for the Oil Pipe Line is void, it being the policy of the law in West Virginia to promote such lines: Transportation Co. *v.* Pipe Line Co., 22 W. Va., 600; so also a contract by a railroad company granting to a telegraph company the exclusive use and occupation of its right of way for telegraph purposes is void: W. U. Tel. Co. *v.* A. U. Tel. Co., 65 Ga., 160; *sed. c. f.* C. P. Ry. Co. *v.* W. U. Tel. Co., 17 Can. S. C. R., 151; but a stipulation in a contract between a railroad company and a sleeping car company that the latter company should have exclusive right for fifteen years to furnish drawing room and sleeping cars for the former company's use is valid and will

be enforced: C., St. L. & N. O. R. Co. *v.* P. S. Car Co., 139 U. S., 79; and a Palace Car Company, which was chartered to engage in the business of transporting passengers in railroad cars constructed and owned by the said company cannot agree with a similar company that one of them shall lease all its corporate property to the other for ninety-nine years, and in the meantime the lessor shall go out of business, as such an agreement is in restraint of trade and opposed to public policy: Central Transportation Co. *v.* Pullman Palace Car Co., 129 U. S., 24. In Chicago Gas Light Co. *v.* People's Gas Light Co., 121 Ill., 530, a gas manufacturing company had been granted the exclusive privilege of supplying gas to the City of Chicago for ten years; at the expiration of the ten years another corporation was granted this privilege concurrently with the first; these companies divided the city and agreed not to compete with each other; the agreement was held void as being in restraint of trade and opposed to public policy. So also contracts between railroad companies under which they agree not to extend their lines so as to compete with each other are void, the object being to give one road a monopoly: H. & N. H. R. R. Co. *v.* N. Y. & N. H. R. R. Co., 3 Rob., 411; State *v.* H. & N. H. R. R. Co., 29 Con., 538; Denver & N. O. R. R. Co. *v.* A. T. & S. F. R. R. Co., 15 Fed. Rep., 650, but if the contract is between two parallel roads under which certain natural tributary territory is preserved for each where they can construct branch lines without competition from each other, the object of the contract is to prevent competition ruinous to both roads, then the contract will be enforced: Ives *v.* Smith, 3 N. Y. S., 645.

(3) *Combinations to form Monopolies by Restrictions on Competition and Production.*—Restrictions on competition in order to prevent its becoming excessive are perfectly valid provided they be carried into effect by proper means, that is, "by provisions reasonably necessary for the purpose:" per MONTAGUE SMITH in Collins *v.* Locke, 4 App. Cases, 674; BARRETT, J., in People *v.* North River Sugar Refining Co., 54 Hun., 354. If, however, the object be to obtain a monopoly of any particular business, and not merely to prevent ruinous competition, then the agreement is contrary to public policy, and will not be enforced; and by statute in some States, and in interstate commerce by Act of Congress (Act of July 2, 1890), such an attempt constitutes an indictable offence: Hooker *v.* Vandewater, 4 Denio, 349; Stanton *v.* Allen, 5 Denio, 434; India Bagging Asso. *v.* Kock, 14 La. An., 168; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St., 173; Arnot *v.* Pottstown and Elmira Coal Co., 68 N. Y., 558; Craft *v.* McConoughy, 79 Ill., 346; Salt Co. *v.* Guthrie, 35 Ohio St., 666; Hoffman *v.* Brooks, 23 AM. LAW REG., 648; Collins *v.* Locke, 4 App. Cases, 674; Mill and Lumber Co. *v.* Hayes, 76 Cal., 387; People *v.* North River Sugar Refining Co., 54 Hun., 354; Chaplin *v.* Brown, 48 N. W., 1074 (Ia.); Pacific Factor Co. *v.* Adley, 90 Cal., 110; DeWitt Wire Cloth Co. *v.* N. J. Wire Cloth Co., 14 N. Y. S., 277; Urmston *v.* Whitelegg, 63 Law Times, 455; Anderson *v.* Jett, 89 Ky., 375; P. C. Co. *v.* McMillan, 119 N. Y., 46; Emery *v.* Ohio Candle Co., 47 Ohio St., 320; More *v.* Bennett (Ill. Sup.), 29 N. E., 888; Strait *v.* National Harrow Co. (Sup.), 18 N. Y. S., 224; Judd *v.* Harrington