1910

New Doctrine Concerning Contracts in Restraint of Trade

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THE NEW DOCTRINE CONCERNING CONTRACTS IN RESTRAINT OF TRADE.

IS a covenant in restraint of a particular trade and unlimited as to space against public policy and therefore void and unenforceable? Long ago an English judge, in speaking of the making of contracts, protested against arguing too strongly upon public policy. "It is a very unruly horse, and, when once you get astride it, you never know where it will carry you."[1] Right he was and is, and the judge who would keep his saddle must be a good rider, for the horse shies badly on the way at every new condition in trade and commerce, occasioned by recent developments in steam and electricity and their increasing use as agencies in communication and transportation. A rule of law is no sooner announced on the subject of public policy than we find by judicial determination that the rule is no longer adapted to the altered condition of things.

No class of contracts illustrates this more forcibly than contracts in restraint of trade. The decisions of courts upon the policy of the law regarding such contracts and as to what is and what is not a reasonable limitation as to time and space are truly bewildering. We do not intend to discuss, or even refer to many of the older cases—and there are many on the subject—but to observe the judicial tendencies in the last few years in relation to the contracts in restraint of trade wherein the restraint is practically unlimited as to space, and to note how far the courts have veered away from rules long regarded as settled law; and followed what has been termed the "new doctrine."

Until quite recently it was the settled rule in England and this country that the restraint might be unlimited as to time but could not be unlimited as to space, and that a contract not to carry on a particular trade anywhere within the Kingdom of England was unlimited as to space and therefore unreasonable. By analogy it has been repeatedly held in this country that a covenant not to carry on a particular trade any where in a given state is unreasonable and void.

The policy of the law—served by requiring that the covenant in restraint should be limited as to space is found stated in the resolution of the court in the leading case of *Mitchel* v. *Reynolds*,[2]

[1] Burrough, J. in Richardson v. Mellish (1824), 2 Bing. 229.

[2] 1 P. Williams 181; 1 Smith's Leading Cases 172.

wherein the reasonableness of a covenant not to carry on the trade of a baker within a given parish for five years was before the court. The covenant was sustained. PARKER, C. J., later Lord Macclesfield, in speaking of the policy involved in contracts in general restraint of trade said: "General restraints are all void whether by bond , covenant, or promise, with or without consideration, and whether it be of the parties own trade or not." The reasons given for this rule are: "The mischief which may arise from them; first, to the party by the loss of his livelihood and sustenance of his family; second, 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 are perpetually laboring for exclusive advantages in trade and to reduce it into as few hands as possible. * * * A contract not to trade in any part of England, though with consideration, is void; for there is something more than presumption against it, because it can never be useful to any man who restrains another from trading in all places, though it may be to restrain him from trading in some, *unless he intends a monopoly which is a crime.*" We quote these doctrines for they sound reasonable and wholesome and that we may not forget them in considering recent cases. *Mitchel* v. *Reynolds* is no longer good law, since the decision handed down in the *Nordenfelt* case.[3] The facts of this case are too well known to call for any extended discussion of them. Nordenfelt, in consideration of 237,000 pounds in cash paid, and 50,000 pounds of paid up shares in a company, had covenanted with the company that he would not, during the term of twenty-five years, "engage, except on behalf of the company, either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gun powder explosives or ammunition, * * * * * carried on by the company." The question came before the House of Lords on appeal from an order of the Court of Appeals granting an injunction against a violation of the covenant. The judgment appealed from was affirmed. It was argued that the covenant, being in general restraint of trade and unlimited in respect to area, was therefore void. The House of Lords held that the covenant, though unrestricted as to space, was not wider than was necessary for the protection of the company nor injurious to the public interests of the country, and was therefore valid. LORD HERSCHELL conceded that it had been regarded as the established common law of England that such a

[3] (1894) 19 App. Cas. (H. L.) 535.

general covenant could not be supported. He then said: "My Lords, it appears to me that a study of LORD MACCLESFIELD'S judgment will show that, if the conditions which prevail at present had existed in his time, he would not have laid down a hard and fast distinction between general and particular restraint, for the reasons by which he justified that distinction would have been unfounded in point of fact. Whether the cases, in which a general covenant can now be supported, are to be regarded as exceptions from the rule, which I think was long recognized as established, or whether the rule is to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that, whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether the existence of it is necessary for the protection of the covenantee. The distinction between general and particular restraints ceases to be a distinction in point of law. I think that a covenant entered into in connection with the sale of the good will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser." * * * * *

It seems to be impossible to doubt that it is shown that the covenant is not wider than is necessary for the protection of respondents. The facts speak for themselves. If the covenant embraces anything less than the whole of the United Kingdom, it is obviously nugatory. The only customers of the respondents must be found amongst the governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another."

It is evident that the peculiar and unusual facts of this case render it of little value as a precedent in ordinary trade contracts, but the Lords discussed at length the law of the subject and announced a new doctrine based on recent changes in industrial conditions.

LORD ASHBOURNE said: "Each case has had to be considered on its own facts. It is really impossible to divide all cases into the two categories of covenants in general and partial restraint of trade requiring distinct treatment and needing different policies. However it is accomplished, the law must work in harmony with the requirements of the times and must advance and develop with the growth of our national life and institutions. * * * I do not regard the distinctions of any practical importance, because, as in the present case, the inquiry as to the validity of all covenants in restraint of trade must, I am disposed to think, now ultimately turn upon

whether they * * * exceed what is necessary for the fair protection of the covenantees."

LORD MORRIS expressed himself on this point as follows: "The weight of authority up to the present time is with the proposition that general restraint of trade, where unnecessary, is void. It appears, however, to me that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement either in general or in particular restraint of trade."

This decision has been followed in recent cases in England.[4] In the case of *Lamson Pneumatic Tube Company* v. *Phillips*[4] the defendant had agreed that he should not engage for five years in the Eastern Hemisphere in any business similar to the business then or which might at any time during the continuance of that agreement, or any extension thereof, be carried on by the plaintiff company. In view of the nature of the business and its possibilities, the restrictive covenant was sustained.

It was conceded that the limitation as to space in this kind of contracts is valid whether the limitation be general or particular, provided it be no more than is necessary to afford the covenantee reasonable protection.

It seems to be the established rule in England that, a person in a contract of sale of his business and its good will may bind himself by a covenant not to carry on the business anywhere, provided the court decides that such a covenant is necessary to the protection of the property purchased and its business possibilities. The monopolistic tendencies of such a covenant are no longer regarded seriously.

The courts of New York have, in the past few years, gone further than the courts in any other of the United States in sustaining this class of contracts. In *Noble* v. *Bates*[5] the court held a covenant in restraint of trade, generally throughout the state, to be void, but otherwise of a covenant not to trade in a particular place, and for a particular time. This is not the law of that state since the decision in the *Diamond Match Company case.*[6] In this case the defendant, who was engaged in the manufacture and sale of friction matches in New York and throughout the states and territories, sold his manufactory, stock, and good will of the

[4] Dowden v. Pook [1904], 1 K. B. 45. Lamson Pneumatic Tube Company v. Phillips (1904), 91 L. T. R. 363 . Edmundson v. Render (1906), 93 L. T. R. 124.

[5] (1827), 7 Cow. 307.

[6] (1887), Diamond Match Company v. Reeber, 106 N. Y. 473.

business to a purchasing corporation and covenanted with the purchaser and its assigns that he would not engage in such manufacture or sale except in the service of the purchasing company within the states and territories, except Nevada and Montana. In an action to restrain the defendant from engaging in the manufacture or sale of friction matches in violation of his covenant, the court held that the doctrine of the common law that contracts in general restraint of trade are void had been modified, if not abrograted, and intimated that a covenant in general restraint of trade, where the restraint was coextensive only with the interests to be protected and the benefits to be conferred, was not against the policy of the law. ANDREWS, J. said: "The boundaries of the state are not those of trade and commerce, and business is restrained within no such limits. The country as a whole, is that of which we are citizens and our duty and allegiance are due both to the state and to the nation. Nor is it true that, as a general rule, a business established here cannot extend beyond the state nor that it can be successfully established outside of the state. There are trades and employments, which from their nature are localized, but this is not true of the manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana are colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make the contract in general restraint of trade, when upon its face it is only partial."

To the objection that the object of this contract was to create a monopoly it was said that "such contracts do not create monopolies. They confer no option of exclusive privileges. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling and prevent him from becoming a competitor with the covenantee."

From the facts stated in the opinion it appears that in this case the plaintiff, a Connecticut corporation, bought defendant's business in the City of New York at some $46,000. Part of the consideration was paid in cash and the balance in stock in the Diamond Match Company. The transaction was a part of a scheme to give to the company a monopoly of the match business, and the covenant in question was to strengthen and render the scheme

more effective. The court, however, declined to see the monopolistic purpose.

A similar contract with the same company came before the Supreme Court of Michigan in the case of *Richardson* v. *Buhl*.[7] The Diamond Match Company bought of the Richardson Match Company of Detroit its business of manufacturing matches and paid for the same in the stock of the Diamond Match Company. In the contract of sale the Richardson Company had covenanted to and with the Diamond Match Company "that it will not at any time within twenty years from the date hereof, directly or indirectly, engage in the manufacture or sale of friction matches, * * * * in the state of Michigan or any where else where its doings so may conflict with the business and interests of the Diamond Match Company." The question before the court arose out of differences between the plaintiffs and the defendants as to their rights as between themselves, arising out of this contract. Of its own motion the court took up the consideration of this contract of merger of corporate interests; reviewed the origin and business methods of the Diamond Match Company and denounced the contract in no uncertain terms.

CHAMPLAIN, J. said: "There is no doubt that all the parties to this suit were active participants in effecting the combination called the Diamond Match Company and that the present dispute grew out of that transaction and was the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company. Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition and control of prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests with the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful and against public policy. In his opinion in this case SHERWOOD, J. writes along the same line a scathing arraignment of the Diamond Match Company and its attempt through contracts in restraint of trade to destroy competition and to secure a monopoly of one of the necessities of life. It is no answer to say that the price of a commodity has

[7] (1889), 77 Mich. 632.

been reduced through combination and that thereby the public has been benefited. It is power in the hands of a few to control the supply and demand and the price of necessities, that menaces the public and is destructive to individual enterprise and against the policy of the law. The Diamond Match Company in New York and the Michigan case involving the contracts of the same company are interesting by way of comparison. The contracts relate to the same subject matter, are quite alike in their provisions and each contains a covenant that the covenantor shall not engage in the business of the manufacture or sale of matches within certain territories. In the New York case the restraining covenant applies to the entire United States except the territories of Montana and Nevada, a colorable attempt to comply with a well known rule of law. In the Michigan case the covenant was not to engage in the manufacture or sale of matches in the State of Michigan or any where else, "where the doing so may conflict with the business interests" of the covenantee. This covenant in itself and alone is more reasonable than the former. Its operation is confined to the good will of the business of the covenantor, which by stipulation may pass as an incident to the sale of any business. In the former case, however, the restraining clause applies to the entire United States except Montana and Nevada without reference to the territory covered by the business sold. It was an attempt to secure by contract the business developed by the covenantor and to remove him as a competitor, not only from the field then occupied by him, but also from any other field into which he might enter anywhere within the United States. This covenant was unreasonable in that it extended far beyond the adequate protection to the business purchased, unless it be conceded that the monopoly of all possibilities of business development is lawful. Later cases in New York are in accord with the *Diamond Match Company* case.[8]

The early rule of law on this subject in the State of Massachusetts, and the reason for it were clearly stated in *Alger* v. *Thacher*,[9] The defendant had given his bond, conditioned that he should never carry on or be concerned in founding iron. MORTON, J., in speaking of the unreasonableness of contracts in general restraint of a particular trade or business, said "1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They

[8] Leslie v. Lorillard, 110 N. Y. 519. Wood v. Whitehead, 165 N. Y. 545. Cummings v. Union Blue Stone Company, 164 N. Y. 401. See Angelica Jacket Company v. Angelica (1906), 121 Mo. App. 226.

[9] (1831), 19 Pick. 51.

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 man in the employment and capacity in which they may be most useful to the community as well as to 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 monopolies and this is especially applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivals, monopolize business and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void." It is difficult to see just how the improved conditions of modern times in trade and commerce have rendered these objections less forceful. This case was the law of Massachusetts for over fifty years. In *Bishop* v. *Palmer*[10] a covenant not to carry on business in manufacturing or dealing in bed quilts or comfortables for five years, without any limitation as to space, was adjudged to be illegal and void, as being in restraint of trade, and for the reasons stated in *Alger* v. *Thatcher,* supra. It is said that recent changes in business conditions render the old rule inapplicable. In the *United Shoe Machinery Company* v. *Kimball*[11] the defendants, engaged in manufacturing and dealing in needles, awls, drivers, and similar articles, sold out their business to the plaintiffs and covenanted not to engage in the business any where for fifteen years. Speaking of this covenant, KNOWLTON, C. J., said: "The law on this point as laid down in early times has been materially changed by recent decisions. Formerly it seems to have been held that a provision for the general restraint of any person in his trade was necessarily invalid. But in this commonwealth and in other jurisdictions this is no longer the law." Then after stating the modern rule, he adds: "Under this rule in conceivable cases a covenant may be valid which is unlimited both in time and space. This is held by unanimous decisions of the House of Lords in *Nordenfelt* v. *Maxim Nordenfelt Guns and Amunition Company* (1894) 19 A. C. 535. The reasoning in the later American cases leads to the same result."[12]

[10] (1888), 146 Mass. 469. Gamewell Fire Alarm Company v. Crane, 160 Mass. 50.

[11] (1907) 193 Mass. 351.

[12] Citing the following: Leslie v. Lorillard, 110 N. Y. 519. Wood v. Whitehead Brothers Company, 165 N. Y. 545. Gibbs v. Consolidated Gas Company, 130 U. S. 396, 409. Oakdale Manufacturing Company v. Garst, 18 R. I. 484. Bancroft v. Union Embossing Company, 72 N. H. 402. National Enameling & Stamping Company v. Haberman, 120 Fed. 415.

In answer to the objection that such contracts tend to create monopolies it is said in this case: "The mere fact that a contract looks to the withdrawal of the competition of one of the parties to it does not render the contract invalid. Ordinarily, with the present methods of conducting business and the freedom of communication between centers of trade and industry, such a contract does not create a monopoly to the danger of the general public. * * * * * If it appears that such a contract was made with the purpose of obtaining a monopoly and would have a direct tendency to that result, it would be looked upon with less favor." It will be observed from this case that a contract must be for the expressed purpose of creating a monopoly before it is in serious danger of judicial condemnation. The old rule of public policy that it is not the contract but its tendency which the court strikes down is either overlooked or disregarded in Massachusetts.

The federal courts have approved of the new doctrine. In *Oregon Steam Navigation Company* v. *Winsor*[13], before the Supreme Court of the United States, Justice BRADLEY, speaking of the rule, said: "This country is substantially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular state." The contract before the court was sustained, notwithstanding it contained in a contract of sale of a boat a stipulation in restraint of trade, covering waters of the State of California and the Columbia River and its tributaries.

Again in *Fowle* v. *Park*[14] Chief Justice FULLER said: Public welfare is first considered and, if it is not involved and the restraint upon one party is not greater than the protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable. In the federal courts[15], a restrictive covenant, which is unlimited as to time, in area covers the entire United States, is ancillary to the main contract, being in part consideration of the payment of good will sold, and is not broader than is necessary to save the covenantee the rights and privileges for which he has paid, is valid and enforceable. The distinction between partial

[13] 20 Wall 67.

[14] (1888), 131 U. S. 96.

[15] U. S. v. Addyston Pipe & Steel Co., 85 Fed. 271. National Enameling & Stamping Company v. Haberman, 120 Fed. 415. See also Fleckenstein v. Fleckenstein (1908), (N. J.) 71 Atl. 265; Cowan v. Fairbrother, 118 N. C. 406; McCurry v. Gibson, 108 Ala. 451.

and general restraints is no longer helpful in determining the reasonableness of the restraint. If the covenant is to be avoided it must be upon some other ground.

Many courts in the Central and Western States still follow the old rule of law, modified somewhat; but not to the extent of approving the new doctrine.

In *Hubbard* v. *Miller*[16] the complainant sold his business of well driving for a consideration and agreed "not to keep well driver's tools or fixtures and not to engage in the business of well driving thereafter. there was no express limitation as to time or space in the restrictive clause of the agreement, but the court found that the facts justified the conclusion that the parties intended that the restraint should apply only to Grand Haven and the "adjacent vicinity." This rendered the contract unobjectionable. In speaking generally, however, of a contract in restraint of trade CHRISTIANCY, J., said: "Whether it can be supported or not, depends upon matters outside of and beyond the abstract fact of the contract or the pecuniary consideration; it will depend upon the situation of the parties, the nature of their business, the interests to be protected by the restriction, its effect upon the public; in short, upon all the surrounding circumstances; and the weight or effect to be given these circumstances is not to be affected by any presumption or against the validity of the restriction; if reasonable and just, the restriction will be sustained, if not it will be held void."

A few years later the case of *Beal* v. *Chase*[17] came before the same court and an opportunity to apply the foregoing principle arose. For many years prior to 1869 Chase had been engaged in the printing and publishing business in Ann Arbor, Michigan. During this time the business had grown until it extended over the Northwest and to many foreign countries. In 1869 Chase sold this business, including the printing establishment, building, machinery, and copyrights, to Mr. Beal, and agreed not to engage directly or indirectly in the business of printing and publishing in the state of Michigan, so long as Beal should remain in the business of printing and publishing in Ann Arbor. In a few years thereafter Chase broke the covenant by setting up a rival business in Ann Arbor. In a suit for an injunction to compel an observance of this contract, Chase defended on the ground that the covenant in restraint of trade was void. The court sustained the covenant, holding that it was not unreasonable in view of the nature and

[16] 27 Mich. 15.
[17] 31 Mich. 490.

extent of the business sold and the consideration paid. CAMPBELL, J., wrote: "Concerning the validity of the agreement, we concur in regarding it as not unreasonable in fact, and as based on full consideration. One of us has doubted whether it could probably include the whole state; but considering the rule to the contrary as somewhat arbitrary, we concur in maintaining the agreement." At the time this decision was rendered it was regarded as a departure from established rules governing contracts in restraint of trade. The question came before the court again in *Western Wooden Ware Association* v. *Starkey*,[18] a Michigan firm engaged in manufacturing tables and chairs, sold its stock and material to an Illinois corporation engaged in a similar business in that state, and agreed not to engage in the business again for the period of five years in Michigan, Illinois, and six other neighboring states named, nor to allow their property in Michigan to be used for that purpose, nor to sell their property to any one for the business. In a suit to enjoin a violation of this contract the case of *Beal* v. *Chase*, supra, was relied on, but the court said of that case that the business sold was to be carried on as Chase had carried it on and the property purchased devoted to the business in which it had theretofore been used. In that respect it differed materially from the case at bar. Of the contract before the court it was said: "The interests of the parties alone are not the sole consideration here. It is the duty of the court to see that the public interests are not in any manner jeopardized. The state has the welfare of all its citizens in keeping, and the public interest is the pole-star of all judicial inquiries." Attention was then called to the fact that by this contract people are thrown out of employment and deprived of a livelihood and that no other of the citizens of Michigan are called in to take their places and that the business is no longer to be carried on within the state, but to be removed out of the state. This contract was held to be void in that it was prejudicial to the public interest in the State of Michigan and was therefore an unreasonable restraint of trade.

In *Clark* v. *Needham*[19] plaintiffs were copartners, carrying on a manufacturing business in Connecticut; the manufacture of chaplets used in making cast iron boilers and heavy castings. The defendants were copartners carrying on a like business in Detroit, Michigan. Plaintiffs and defendants had made an agreement, the plain object of which was to close plaintiff's business of manufacturing

[18] (1890), 84 Mich. 76.
[19] (1900), 125 Mich. 84.

chaplets and to give defendants a monopoly of it. The agreement contained a covenant to cease the manufacturing of certain articles for one year. The restraint was unlimited as to territory. The court held that the covenant was part of a scheme to create a monopoly and was therefore void on the ground of public policy. The case was distinguished from *Beal* v. *Chase,* supra, and the *Nordenfelt* case, supra, in that the evident purpose of the contract involved was to close up an established business and transfer a business activity to another state to the prejudice of the citizens of Michigan.[20]

In *Consumers' Oil Company* v. *Nunnemaker*[21] a contract, by which one engaged in selling oil in one city bound himself to refrain from carrying on his business in the state of Indiana, with the exception of one city, was adjudged to be unreasonable and void. It is frequently contended that such a covenant does not tend to create a monopoly as it withdraws from competition only the covenantor and does not affect others. In reply to this the court answered: "If appellant could buy out appellee and restrict in this manner, it might proceed to do so to each other person in the whole state engaged in a similar business, and eventually reduce the sale of oil in the state to comparatively few hands or possibly to its absolute control, and thus virtually stifle legitimate competition.[22]

Perhaps the most forceful objections to the new doctrine are found in the opinion of MINSHALL, J., in *Lufkin Rule Company* v. *Fringeli,*[23] wherein it was held that where a person sells his business and good will and agrees not to engage in the same business in the state of Ohio nor in the United States for a period of twenty-five years; such an agreement is void because it necessarily tends to create a monopoly. Even though the covenant in restraint of trade is reasonably necessary to the enjoyment of the good will purchased, the public interest is in the non-enforcement of such an agreement. The *Diamond Match Company* case was referred to and disapproved of. The monopolistic tendency of this kind of contracts is noted: "No more effectual method could be devised for the creation of a monopoly in any business. * * * * Among the various methods adopted for the purpose of engrossing a par-

[20] (1908), Grand Union Tea Company v. Lewitsky, 153 Mich 244; Detroit Salt Co. v. National Salt Co., 134 Mich. 103; Anderson v. Shawnee Compress Co., 17 Okla, 231, 15 L. R. A. (N. S.) 846, note; Southworth v. Davison (1908), — Minn. —, 118 N. W. 363; Pocahontas Coke Co. v. Coal & Coke Co., 60 W. Va. 508, 10 L. R. A. (N. S.) 268 note.

[21] (1895), 142 Ind. 560.

[22] See Andrews v. Kingsbury, 212 Ill. 100 (1904).

[23] (1898), 57 Oh. St. 596.

ticular business this seems to have become a quite favored one, when the business may be, and generally is, carried on by individuals on a limited capital; for the reason, no doubt, that in such cases, it is easier to accomplish the desired result in this way than by the formation of a *trust* through which an entire business may be carried on—each separate owner as a beneficiary of the trust receiving its, or his, proportion of the net earnings. To say in such cases that the vendor should be bound not to carry on his business because he has received adequate consideration for his agreement, is no answer to the objection that the agreement tends to foster the formation of a monopoly and is therefore against public policy." The new doctrine is reviewed by the court at some length with the conclusion that the changed conditions on which this doctrine is based tend the more strongly to convince the court that in the interest of a wise public policy, the old rule of law should be more firmly adhered to.[24]

The new doctrine, recognized as an abandonment of an old rule of law, is based on new industrial and trade conditions, but it is doubtful whether the new conditions lessen or increase the evils which the rule is intended to prevent. Is not the spirit and reason of the law still present and intensified by the increased facilities for doing the wrong thing? We may hark back to the old cases of *Mitchel* v. *Reynolds* in England and *Alger* v. *Thacher* in Massachusetts. It is as easy now as then for a person to lose his livelihood and the subsistence of his family through an improvident contract in general restraint of a particular trade. He could turn his attention to some other line of industry then more easily than now. Formerly it was not uncommon for a good man to be a "jack of all trades," but in modern times every successful member of society must specialize in some business or calling. If he does not he will have no business worth buying, and if he does specialize he will be wholly unfit for any other than the one he has chosen for his life work. It is said, however, that courts should not interfere with the freedom of contract on any vague notions of public policy; but freedom of contract does not involve the right to agree not to contract at all, nor should it justify industrial suicide.

Again by reason of the business methods of many corporate entities, possessed of great power through large aggregations of capital, a covenant of the kind under consideration, is more oppressive than formerly, but for another reason. Now a corpora-

[24] To the same effect are Jones v. Jones (1908), 70 Atl. 88; Clemons v. Meadows (Ky.), 94 S. W. 13; Tuscaloosa Ice Manfg. Company v. Williams, 127 Ala. 110; Anderson v. Jett, 89 Ky. 375.

tion, engaged in some trade or manufacture and seeking to control the output and prices in a line of business, frequently approaches a manufacturer engaged in a rival business and, with a club in one hand and a persuasive consideration in the other, demands that he sell out the business he has developed, together with its good will, and threatens him with business depression and losses through ruinous competition and other oppressive measures, unless he complies with the demand. One of the stipulations of the contract of sale generally insisted upon in these cases is that the manufacturer shall not for a series of years again engage in a similar business anywhere, or practically so. Without this stipulation the primary purpose of the contract might be defeated. The individual manufacturer yields to the pressure, receives the consideration, and retires from business. In many jurisdictions a court of equity will enforce an observance of this stipulation and enjoin its breach. Is not the public more interested in the breach than in the observance of such a contract?

It is one thing to sell the good will of a business as an incident and it is quite another to agree not to engage in a line of business anywhere or in states where no good will of any appreciable value has been established. Business possibilities in undeveloped territories ought not to be a subject of sale.

One of the reasons given in support of the old rule was that corporations were perpetually laboring for exclusive advantages of trade and to reduce it into as few hands as possible. Have conditions changed in this respect? The popular agitation and unrest of today make answer. There is much unwise and unfounded apprehension, but corporate greed for trade advantages is as strong as ever. By means of the increased facilities of communication and transportation of today monopolies are more easily created and fostered than in former times, and the decisions of our courts show that in effecting a monopoly there is no more common trade stipulation than the objectionable contract in general restraint of trade.[25]

A reading of recent cases discloses the growth of a few judicial notions—we say notions advisedly, for the ideas handed down can not be regarded as established principles.

1. A covenant in general restraint of a particular trade, unlimited as to both time and space, is not necessarily void. Much depends on the nature of the business involved. If it be a profession or trade necessarily local in character, then a covenant not to carry

[25] See Oakdale Manufacturing Company v. Garst, 18 R. I. 484; Anchor Electric Company v. Hawkes, 171 Mass. 101.

on such profession or trade anywhere within a given state is unreasonable and void, but, if the trade or business be general in character, extending over several states and territories, then a covenant not to carry on such business anywhere within the area covered by the good will of the business sold is not necessarily against the policy of the law. The question is not concluded by any artificial boundaries such as state lines.

2. If, however, the contract discloses a purpose on the part of the contracting parties to close up a business in a particular state and to remove it to some foreign state, and this contract contains a covenant not to carry on the business within the former state, in most jurisdictions, such a contract is against the policy of the law.

3. If the covenant in restraint of trade is part of a scheme to create a monopoly, then in some jurisdictions the covenant is void. The difference in the decisions upon this point arises from the fact that some courts readily see the tendency of such a covenant, while others do not discover it, or, if they do, it is said that courts are not concerned with the motives of contracting parties. In the words of ANDREWS, J., "we are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may regularly purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties." This is well enough where only the rights of the contracting parties are involved, but when a question of public policy arises the motive of the contracting parties is of primary concern. It is a fundamental principle in public policy that where the object of a contract is innocent, *but is designed to further an illegal purpose,* the contract is void if both parties knew of the illegal purpose at the time the contract was entered into.[26]

4. Formerly the courts declined to enforce a contract in restraint of trade that was not upon an adequate consideration. It is now said that adequacy of consideration is not important but the facts, in many of the cases decided, show that the enormous consideration paid for the covenant questioned has largely influenced the court in sustaining it, notwithstanding the principle that a valuable consideration, however large, does not make a bad promise good. Under the new conditions we fear that, too frequently, public policy, that unruly horse, is up to the highest bidder.

[26] Anson's Law of Contracts, 11th Ed., §264.

Courts are inclining to the disposition to leave the question of public policy in trade contracts to legislative determination, and upon the subject there are many statutes in force, both federal and state. The objection to this is that such restraining statutes are strictly construed, and are frequently evaded and invaded. The public would be more adequately protected against wrong doing by some consistent application of fundamental principles of the common law, wherein the spirit and reason of the law is more carefully guarded than its letter. There is occasion for regret that the new doctrine has secured so firm a hold in the jurisprudence of our country. The only remedy, unsatisfactory as it is, must be found in statutory regulation.

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