THE LIBRARY
OF
THE UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW

Dom^c Gorney

CASES ON

CONTRACTS
AND
COMBINATIONS
IN RESTRAINT OF TRADE

SELECTED FROM THE DECISIONS OF
ENGLISH AND AMERICAN COURTS

By ALBERT M. KALES
Professor of Law in Harvard University

IN TWO VOLUMES
VOLUME I

CHICAGO
CALLAGHAN AND COMPANY
1916

PREFATORY NOTE

Some experience with anti-trust litigation, some contact with men in the industrial world who were spending days upon the witness stand relating the ways and means by which great business enterprises had been built up, and some knowledge of the trials and tribulations of business men in conducting their business according to law, caused me to conclude that a subject of the last importance to the business interests of the country was that of the law relating to contracts and combinations in restraint of trade.

An examination of the curricula of American Law Schools convinced me that the subject had been by them largely, if not wholly neglected. Students were graduated who had no knowledge of or opinions about such cases as the Northern Securities Case, or the Standard Oil Case—to say nothing of the principles governing labor and business combinations and methods of competition.

Finally, I met the amused contempt of eminent practitioners for law school authorities who for ten years had ignored a subject of such vast importance developing in the view of all with clamorous publicity.

I, therefore, undertook at once to do what I could to introduce the subject into the law schools by preparing this case book and offering a course based upon it.

A. M. K.

CONTENTS

CHAPTER I

THE COMMON LAW

CHAPTER II

THE SHERMAN ANTI-TRUST ACT

CHAPTER III

CHAPTER IV

TABLE OF CASES

Names of cases which make up the body of the collection and the pages on which the decisions may be found are printed in italics.

[REFERENCES ARE TO PAGES]

[REFERENCES ARE TO PAGES]

[REFERENCES ARE TO PAGES]

[REFERENCES ARE TO PAGES]

[REFERENCES ARE TO PAGES]

[REFERENCES ARE TO PAGES]

[REFERENCES ARE TO PAGES]

[REFERENCES ARE TO PAGES]

CASES ON

CONTRACTS IN RESTRAINT OF TRADE AND ILLEGAL COMBINATIONS

CHAPTER I

THE COMMON LAW

Section 1

CONTRACTS ACCOMPANYING THE SALE OF A BUSINESS

MITCHEL v. REYNOLDS

(King's Bench, 1711. 1 Peere-Williams, 181.)

Debt Upon a Bond. The defendant prayed *oyer* of the condition, which recited that, whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's Holborn, for the term of five years: now if the defendant should not exercise the trade of a baker within that parish during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. *Quibus lectis & auditus,* he pleaded, that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, *per quod* he did trade, *prout ei bene licuit.* Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, Parker, C. J., delivered the resolution of the court.

The general question upon this record is, whether this bond, being made in restraint of trade, be good?

And we are all of opinion, that a special consideration being set forth in the condition, which shews it was reasonable for the

parties to enter into it, the same is good; and that the true distinction of this case is, not between promises and bonds, but between contracts *with* and *without* consideration; and that wherever a sufficient consideration appears to make it a proper and an useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by and by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavour to state the law upon this head, and to reconcile the jarring opinions; in order whereunto, I shall proceed in the following method:—

First. Give a general view of the cases relating to the restraint of trade.

Secondly. Make some observations from them.

Thirdly. Shew the reasons of the differences which are to be found in these cases; and

Fourthly. Apply the whole to the case at bar.

As to the cases, they are either, first, of involuntary contracts, against, or without, a man's own consent; or secondly, of voluntary restraints by agreement of the parties.

Involuntary restraints may be reduced under these heads:—

First. Grants or charters from the crown.

Secondly. Customs.

Thirdly. By-laws.

Grants or charters from the crown may be—

First. A new charter of incorporation to trade generally, exclusive of all others, and this is void. 8 Co. 121.

Secondly. A grant to particular persons for the sole exercise of any known trade; and this is void, because it is a monopoly, and against the policy of the common law, and contrary to *Magna Charta.* 11 Co. 84.

Thirdly. A grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 Jac. 1, cap. 3, sec. 6, to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.

Restraints by custom are of three sorts:—

First. Such as are for the benefit of some particular persons, who are alleged to use a trade for the advantage of a community, which are good. 8 Co. 125; Cro. Eliz. 803; 1 Leon. 142; Mich. 22 H. 6, 14; 2 Bulst. 195; 1 Roll. Abr. 561.

Secondly. For the benefit of a community of persons who are not alleged, but supposed to use the trade, in order to exclude foreigners. Dyer, 279b; W. Jones, 162; 8 Co. 121; 11 Co. 52; Carter, 68, 114, held good.

Thirdly. A custom may be good to restrain a trade in a particular place, though none are either supposed or alleged to use it; as in the case of Rippon, Register, 105, 106.

Restraints of trade by by-laws are these several ways:—

First. To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty. Carter, 68, 114; 8 Co. 125.[1] But where there is no precedent custom, such by-law is void. 1 Roll. Abr. 364; Hob. 210; 1 Bulst. 11; 3 Keb. 808.[2] But the case in Keble is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

Secondly. All by-laws made to cramp trade in general, are void. Moor, 576; 2 Inst. 47; 1 Bulst. 11.

Thirdly. By-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases,[3] (viz.) if they are for the benefit of the place, and to avoid public inconveniences, nuisances, etc. Or for the advantage of the trade, and improvement of the commodity. Sid. 284; Raym. 288; 2 Keb. 27, 873; and 5 Co. 62b, which last is upon the by-law for bringing all broad-cloth to Blackwell Hall, there to be viewed and marked, and to pay a penny per piece for marking: this was held a reasonable by-law; and indeed it seems to be only a fixing of the market; for one end of all markets is, that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there.

1—Wolley v. Idle, 4 Burr. 1951. (Rep.)

2—Vide Harrison v. Godman, 1 Burr. 12; Hesketh v. Braddock, 3 Burr. (Rep.)

3—Wannell v. Chamber of the City of London, 1 Stra. 675; The King v. Harrison, 3 Burr. 1322; Pierce v. Bartrum, Cowp. 269. (Rep.)

In 2 Keb. 309, the case is upon a by-law for restraining silk-throwsters from using more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties, are either:—

First. General, or

Secondly. Particular, as to places or persons.

General restraints are all void, whether by bond, covenant, or promise, etc., with or without consideration, and whether it be of the party's own trade, or not. Cro. Jac. 596; 2 Bulst. 136; Aleyn, 67.

Particular restraints are either, *first,* without consideration, all which are void by what sort of contract soever created. 2 H. 5. 5. Moor, 115, 242; 2 Leon. 210; Cro. Eliz. 872; Noy, 98; Owen, 143; 2 Keb. 377; March, 191; Show. 2 (not well reported); 2 Saund. 155.

Or *secondly,* particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136, Rogers v. Parry. Though that case is wrong reported, as appears by the roll which I have caused to be searched, it is B. R. Trin. 11 Jac. 1; Rot. 223. And the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy, 98; W. Jones, 13, Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general, and restraints particular, and with or without consideration, which stands upon very good foundation; *Volenti non fit injuria;* a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place.

Palm. 172, Bragg v. Stanner. The entering upon the trade, and not whether the right of action accrued by bond, promise or covenant, was the consideration in that case.

Vide March's Rep. 77, but more particularly Aleyn's, 67, where there is a very remarkable case, which lays down this

distinction, and puts it upon the consideration and reason of the thing.

Secondly. I come now to make some observations that may be useful in the understanding of these cases. And they are:—

First. That to obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law.

Secondly. That when restrained to particular places or persons (if lawfully and fairly obtained), the same is not a monopoly.

Thirdly. That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful.

Fourthly. That it is lawful upon good consideration, for a man to part with his trade.

Fifthly. That since actions upon the case are actions *injuriarum,* it has been always held, that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it injuriously.

Sixthly. That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

Seventhly. That no man can contract not to use his trade at all.

Eighthly. That a particular restraint is not good without just reason and consideration.

Thirdly. I proposed to give the reasons of the differences which we find in the cases; and this I will do.

First. With respect to involuntary restraints, and

Secondly. With regard to such restraints as are voluntary.

As to involuntary restraints, the first reason why such of these, as are created by grants and charters from the Crown and by-laws, generally are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of the subject.

Secondly. Another reason is drawn from *Magna Charta,* which is infringed by these acts of power; that statute says, *nullus liber homo,* etc., *disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis,* etc., and these words have been always taken to extend to freedom of trade.

But none of the cases of customs, by-laws to enforce these

customs, and patents for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is *lex loci,* and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented arts, nobody can be said to have a right to that which was not in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry.

I shall shew the reason of the differences in the cases of voluntary restraint.

First. Negatively.

Secondly. Affirmatively.

First. Negatively; the true reason of the disallowance of these in any case, is never drawn from *Magna Charta;* for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his pleasure.

Secondly. Neither is it a reason against them, that they are contrary to the liberty of the subject; for a man may, by his own consent, for a valuable consideration, part with his liberty; as in the case of a convenant not to erect a mill upon his own lands. W. Jones, 13, Mich. 4 Ed. 3, 57. And when any of these are at any time mentioned as reasons upon the head of voluntary restraints, they are to be taken only as general instances of the favour and indulgence of the law to trade and industry.

Thirdly. It is not a reason against them, that they are against law, I mean, in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense, are reducible under one of these heads.

First. Either to do something that is *malum in se,* or *malum prohibitum.* 1 Inst. 206.

Secondly. To omit the doing of something that is a duty. Palm. 172; 12, Norton v. Sims.

Thirdly. To encourage such crimes and omissions. Fitzherb. tit. Obligation, 13; Bro. tit. Obligation, 34; Dyer, 118.

Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as

in 1 Inst. 206, a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer:—

First. That where there may be a way found out to perform the condition, without a breach of the law, it shall be good. Hob. 12; Cro. Car. 22; Perk. 228.

Secondly. That all things prohibited by law, may be restrained by condition; and therefore these particular restraints of trade, not being against law, in a proper sense, as being neither *mala in se,* nor *mala prohibita,* and the law allowing them in some instances, as in those of customs and assumpsits, they may be restrained by condition.

Secondly. Affirmatively; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, *first,* the mischief which may arise from them, *first,* to the party, by the loss of his livelihood, and the subsistence of his family; *secondly,* to the public, by depriving it of an useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring 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.

Thirdly. 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. The *Roman* law would not inforce such contracts by an action. See Puff.[4] lib. 5, c. 2, sec. 3; 21 H. 7, 20.

Fourthly. The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade; or in case of an old man,

4—The instances there mentioned are, that if any should agree not to wash their hands, or change their linen, for such a time, there could be no need to trouble a magistrate on the breach of such agreements, which would tend to no consequence when put in execution. (Rep.)

who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

Fifthly. The law is not so unreasonable, as to set aside a man's own agreement for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void. Barrow v. Wood, March's Rep. 77; Mich. 7 Ed. 3, 65; Aleyn, 67; 8 Co. 121.

But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case?

Resp. I do not see why that should not be shewn by pleading; though certainly the law might be settled either way without prejudice; but as it now stands the rule is, that wherever such contract *stat indifferenter,* and for ought appears, may be either good or bad, the law presumes it *prima facie* to be bad, and that for these reasons:—

First. In favour of trade and honest industry.

Secondly. For that there plainly appears a mischief, but the benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be over-borne by the apparent mischief.

Thirdly. For that the mischief (as I have shewn before) is not only private, but public.

Fourthly. There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, every body is affected thereby; for it is to be observed, that though it be not shewn to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds on that reason (viz.) as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

As *first,* That all contracts, where there is a bare restraint of trade and no more, must be void; but this taking place only where the consideration is not shewn can be no reason why, in cases where the special matter appears so as to make it a rea-

sonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will inforce these latter contracts, but not the former.

Secondly. It answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a *nudum pactum,* but every contract must have a consideration, either expressed, as in assumpsits, or implied, as in *bonds* and *covenants,* but these latter, though they are perfect as to the form, yet may be void as to the matter; as in a covenant to stand seized, which is void without a consideration, though it be a complete and perfect deed.

Thirdly. It shews why a contract not to trade in any part of England, though with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain 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.

Fourthly. This shews why promises in restraint of trade have been held good; for in those contracts, it is always necessary to shew the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shewn. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of Judge Hall in 2 H. 5, fol. *quinto;* for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare, that he would not follow it any more, etc., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner of expressing it.[5]

5—Hall expressed himself thus: *A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre common ley, & per Dieu si le plaintiff fuit icy, il irra al prison tanq; il ust fait fine au Roy.* (Rep.)

Surely it is not fit that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement itself is good, but when it is reduced into the form of a bond, it immediately becomes void; but for what reason, see 3 Lev. 241. Now a bond may be considered two ways, either as a security, or as a compensation; and—

First. Why should it be void as a security? Can a man be bound too fast from doing an injury? which I have proved the using of a trade contrary to custom or promise, to be.

Secondly. Why should it be void as a compensation? Is there any reason why parties of full age, and capable of contracting, may not settle the quantum of damages for such an injury? Bract. lib. 3, c. 2, § 4.

It would be very strange, that the law of England, that[6] delights so much in certainty, should make a contract void, when reduced to certainty, which was good when loose and uncertain; the cases in March's Rep. 77, 191, and also Show. 2, are but indifferently reported, and not warranted by the authorities they build upon.

First Objection. In a bond the whole penalty is to be recovered, but in assumpsit only the damages.

Resp. This objection holds equally against all bonds whatsoever.

Second Objection. Another objection was, that this is like the case of an infant, who may make a promise but not a bond, or that of a sheriff who cannot take a bond for fees.

Resp. The case of an infant stands on another reason (viz.) a general disability to make a deed; but here both parties are capable; neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, since there a surety would be liable; but it is otherwise here.

Also the case of a sheriff is very different; for at common law he could take nothing for doing his duty, but the statute has given him certain fees; but he can neither take more, nor a chance for more, than that allows him.

6—Post Grantham v. Gordon, 1 P. Wms. 612, 614. (Rep.)

Third Objection. It was further objected, that a promise is good, and a bond void, because the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this case?

Resp. First. It is to be tried whether upon consideration of the circumstances the contract be good or not? and that is matter of law, not fit for a jury to determine.

Secondly. It is to ascertain the damages; but *cui bono* (say they) should that be done? is it for the benefit of the obligor?

Resp. Certainly it may be necessary on that account for these reasons:—

First. A bond is a more favourable contract for him than a promise; for the penalty is a re-purchase of his trade ascertained before hand,[7] and on payment thereof he shall have it again; he may rather choose to be bound not to do it under a penalty, than not to do it at all.

Secondly. However it be, it is his own act.

Thirdly. He can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave.

Fourthly. Restraints by custom may (as I have proved) be inforced with penalties which are imposed without the party's consent, nay by the injured party without the concurrence of the other; and if so, then a *fortiori* he may bind himself by a penalty.

Objection. It may perhaps be objected, that a false recital of a consideration in the condition may subject a man to an inconvenience, which the law so much labours to prevent.

Resp. But this is no more to be presumed than false testimony, and in such a case, I should think the defendant might aver against it; for though the rule be, that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise, as in the case of an usurious contract.

The application of this to the case at bar is very plain: here the particular circumstances and consideration are set forth, upon which the Court is to judge, whether it be a reasonable and useful contract.

7—Sed vide Hardy v. Martin, 1 Bro. Cha. Rep. 419, note. (Rep.)

The plaintiff took a baker's house, and the question is, whether he or the defendant shall have the trade of this neighborhood; the concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration (viz.) the term of five years.

To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstance, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

For these reasons we are of opinion, that the plaintiff ought to have judgment.[8]

HITCHCOCK v. COKER

(King's Bench and Exchequer Chamber, 1837. 6 Adolphus & Ellis, 438.)

Assumpsit. The declaration stated that, before and at the time of making the agreement and the promise of defendant thereinafter mentioned, the plaintiff was a druggist, and had taken defendant into his service as an assistant in his said trade, at a certain annual salary, upon condition (amongst other things) that defendant should enter into and observe and perform the agreement thereinafter contained: that, in consideration of the premises, and in performance of the said condition, to wit, on 12th of April, 1832, by a certain agreement then made by and between defendant of the one part and plaintiff of the other (after reciting that plaintiff had taken defendant into his service as an assistant at a certain annual salary, upon condition,

8—So Chesman v. Nainby, 2 Stra. 739, and 3 Bro. Parl. Ca. 349, S. C. (Rep.)

See Hursen v. Gavin, 162 Ill. 377 (sale of livery business by one partner to the other with contract not to engage in the same business in the city where the partnership business was carried on); Gilman v. Dwight, 13 Gray, 356 (sale by physician of his practice in a village with covenant that no other person would in four years establish himself as a physician in that village).

amongst other things, that defendant should enter into and observe and perform the agreement thereinafter contained) the defendant did, in and by the said agreement, promise and agree to and with the plaintiff that, if defendant should at any time thereafter, directly or indirectly, either in his own name or in the name of any other person, use, exercise, carry on, or follow the trades or businesses of a chemist and druggist, or either of them, within the town of Taunton, in the county of Somerset, or within three miles thereof, then defendant, his executors, etc., should or would, on demand, pay plaintiff, his executors, etc., £500, as and for liquidated damages; and the said agreement being so made as aforesaid afterwards, to wit on etc. (mutual promises to perform the agreement): and, although etc. (allegation of performance by plaintiff), yet defendant hath not performed the said agreement on his part, but, on the contrary, afterwards, and after the making the said agreement, to wit 21st of April, 1832, defendant in his own name used and exercised, carried on and followed, the trades and businesses of a chemist and druggist within the said town of T., in the said county of S., contrary to the said agreement: and, although plaintiff afterwards, to wit 20th January, 1835, demanded of defendant the said £500, yet defendant, not regarding etc., hath not as yet paid etc. Plea, non assumpsit.

On the trial, before GURNEY, B., at the Somersetshire Spring assizes, 1835, the jury, by agreement of the parties, found a verdict for the plaintiff, assessing the actual damages at £500, whether the £500 in the agreement mentioned was to be considered as liquidated damages or a penal sum. In *Easter* term, 1835, Erle obtained a rule, in the Court of King's Bench, to shew cause why judgment should not be arrested.

Bompas Serjt. and Crowder shewed cause in Easter term last. [April 30, 1836, before LORD DENMAN, C. J., LITTLEDALE, PATTESON, and COLERIDGE, JJ.] The agreement recites that the plaintiff had taken the defendant in consideration of his performing the agreement; and then there are mutual promises to perform, which are the consideration for each other. The promise alleged in the declaration to be broken is, therefore, on the whole, upon an executory consideration. It is not as if the defendant had promised in consideration of the plaintiff having taken him. The general question is, whether the restraint of trade here be

larger than the law will sanction. Some cases are collected in Com. Dig. Trade (D 3.), and in note (1) to Hunlocke v. Blacklowe [2 Wms. Saund. 156]. The leading case is Mitchel v. Reynolds, [1 P. Wms. 181. See notes on S. C. in 1 Smith's Leading Cases, p. 181]. There a bond not to carry on the trade of a baker within a parish was held good; and PARKER, C. J., said that, whether by promises or bond, a general restraint was bad, but a restraint as to a particular place good, if there appeared a sufficient consideration. Many parishes are larger than the space to which the present contract extends. In Wickens v. Evans [3 Y. & J. 318], parties mutually agreed to abstain from interfering with each other in large districts of England, and it was held good. In Horner v. Graves [7 Bing. 735], an agreement not to practise as a dentist within 100 miles of York, without the plaintiff's consent, while the plaintiff should be practising as a dentist, was held bad, on the ground that the restraint was larger than was needed for the plaintiff's protection. [COLERIDGE, J. Here the agreement restrains the defendant, though the plaintiff should leave the place, or quit practice, or die.] The agreement would probably be construed as a personal contract, expiring with the lives of the parties. Besides, the plaintiff might choose to bargain for a restraint enabling him to sell his practice, or to bequeath it. Many of the agreements which have been held good were in this form. In Davis v. Mason [5 T. R. 118], a bond conditioned that the defendant, who had been taken as assistant to the plaintiff, a surgeon and apothecary, should not practise within ten miles of Thetford, was held good. There the consideration was like that in the present case, even if it be held executed. In that case there was no limitation of the contract to the duration of the plaintiff's practice or life: and there was none such in Chesman v. Nainby [2 Str. 739. S. C. 2 Ld. Raym. 1456. S. C. in Error, in Dom. Proc. 1 Bro. P. C. 234. (2d ed.)], or in Haywood v. Young [2 Chitt. 407], where the restraint extended over twenty miles. In Young v. Timmins [1 C. & J. 331. S. C. 1 Tyrwh. 226], the restraint was held to be bad, as being without adequate consideration, the one party being restrained from working without the consent of the other, who was not bound to find work, and was expressly allowed to employ others, and rescind the agreement at three months' notice. When it is said that there

must be adequate consideration, it is not meant that the Court will inquire whether the party submitting to the restraint made a judicious contract. There must be a legal consideration to support the promise; and the cases decide that the taking into service is such. In Mitchel v. Reynolds, [1 P. W. 190, 191, 192], one test put is the advantage to the party who imposes the restraint. In Homer v. Ashford [3 Bing. 322], it was held sufficient, on general demurrer, that the declaration stated the covenant to be "for the considerations therein mentioned." This shews that the magnitude of the consideration moving the party promising is not to be weighed by the Court, if there be some legal consideration.

Erle and Kinglake contra. No consideration appears for the agreement itself, except that the plaintiff had taken the defendant into his service: that is an executed consideration, and without a request. Mutual promises form a good consideration, where the agreement itself is good; but, according to the cases, an agreement in restraint of trade must itself be upon good consideration. It makes no difference that the agreement states the plaintiff to have taken the defendant on condition that the latter would perform an agreement not then existing. But, independently of this objection, there is no consideration unless the plaintiff part with, or the defendant receive, some advantage. Here the plaintiff is bound to nothing, and the defendant gets nothing. At all events the consideration is not adequate to the restraint. In Mitchel v. Reynolds [1 P. W. 186], Parker, C. J., says, "Where a contract for restraint of trade appears to be made upon a good and *adequate* consideration, so as to make it a proper and useful contract, it is good." In Gale v. Reed [8 East, 86], Lord Ellenborough says, "The restraint on one side meant to be enforced should in reason be coextensive only with the benefits meant to be enjoyed on the other;" and he adds that the Courts will so construe the agreements as to make, if possible, the benefits coextensive. Therefore a mere technical consideration is not enough. In an *Anonymous* case in Moore [Moore, 115, pl. 259), it was held that no action lay on a bond, by an apprentice of a mercer of Nottingham to his master, not to exercise the trade in Nottingham for four years. In another *Anonymous* [Moore, 242, pl. 379, S. C. 2 Leon.

210] case in the same book, a bond conditioned not to exercise the trade of a blacksmith in South Mims was held bad. No consideration appeared in these cases; and the Court presumed none, though the contracts were under seal. In Chesman v. Nainby [2 Str. 739, S. C. 2 Ld. Raym. 1456. S. C. in Error, in Dom. Proc. 1 Bro. P. C. 234. (2d ed.)] the Court thought there was ground for inferring a covenant to instruct for three years. In Horner v. Graves [7 Bing. 735] the Court adverted to the question of the slenderness of consideration as a proper test, though the decision was principally on another point. Further, an agreement of this sort, to be good, must not be oppressive; which it is, if it impose a restraint greater than is necessary for the plaintiff's protection. [Per Curiam, in Horner v. Graves, 7 Bing. 743.] Here the time during which the defendant is restrained is longer than the plaintiff can require, inasmuch as it is not put an end to by the plaintiff's death or retirement from business. Suppositions have been made for the plaintiff, upon which it might possibly be for his benefit that the restraint should not be put an end to by his own death or ceasing to carry on the business: but the restraint is general, and will, if the agreement be upheld, operate whether those suppositions be verified or not. The objections hitherto have been made principally to the extent of space to which the contract extended; but its duration is manifestly as much a test of its reasonableness. In Davis v. Mason [5 T. R. 118] and Homer v. Ashford [3 Bing. 323] the duration was limited to fourteen years: in Mitchel v. Reynolds [1 P. W. 181] to five. It does not appear whether there was a limit in Hayward v. Young [2 Chit. 407]. If the agreement here be construed as limited to the time during which the defendant should remain in the plaintiff's service, the declaration is bad, for want of an allegation that the defendant was still in the service. So if it be construed as limited to the life of the plaintiff, or his carrying on trade by himself or his executors or assigns, the corresponding allegations are wanting.

Cur. Adv. vult.

LORD DENMAN, C. J., in *Trinity* term last (May 25th), delivered the judgment of the Court of King's Bench. After stating the nature of the motion, his Lordship said:

Some minor objections were taken to the declaration, which it is unnecessary to notice, as we are of opinion that the agreement itself is illegal.

The law upon this subject has been settled by a series of decisions, from Mitchel v. Reynolds [1 P. W. 181] to Horner v. Graves [7 Bing. 735]; viz. that an agreement for a partial and reasonable restraint of trade upon an adequate consideration is binding, but that an agreement for general restraint is illegal. What shall be considered as a reasonable restraint was much discussed in the case of Horner v. Graves [7 Bing. 735]; where the Chief Justice of the Common Pleas observed [P. 743], "We do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy." It may indeed be said that all such agreements interfere in some degree with the public interest; and great difficulty may attend the application of that test, from the variety of opinions that may exist on the question of interference with the public interest which the law ought to permit. But, on the other hand, it appears quite safe to hold that the law will not enforce any agreement for curtailing the rights both of the public and the contracting party, without its being necessary for the protection of him in whose favour it is made. In that case, the question arose upon the distance to which the restraint extended: here it arises upon the time. The agreement as to time is indefinite; it is not limited to such time as the plaintiff should carry on business in Taunton, nor to any given number of years, nor even to the life of the plaintiff: but it attaches to the defendant so long as he lives, although the plaintiff may have left Taunton, or parted with his business, or be dead. None of the cases in the books turn upon this question; it is indeed alluded to in Chesman v. Nainby [2 Str. 739. S. C. 2 Ld. Raym. 1456. S. C. in Error, in Dom. Proc. 1 Br. P. C. 234, (2d ed.)]; and the

counsel for the plaintiff below, arguendo, seems to admit that the bond on which that action was brought could not be put in force for a breach after the death of the obligee: but the breach was assigned on another part of the condition, and held good. In the present case, the agreement, not being under seal, and not being divisible, if bad in part, is bad altogether. In the absence of any authority establishing the validity of an agreement thus indefinite in point of time, and trying the reasonableness of it by the test above alluded to, we think that the restraint is larger than the necessary protection of the party in favour of whom it is given requires, and that it is therefore oppressive and unreasonable. The consideration for this agreement appears to have been trifling; but, even if it had been much more valuable, the same result would have followed. The judgment must be arrested.

Rule absolute.

Error having been brought in the Court of Exchequer Chamber, the case was argued on Saturday, November 26, 1836, before TINDAL, C. J., LORD ABINGER, C. B., GASELEE and VAUGHAN, Js., BOLLAND and ALDERSON, Bs.

Sir W. W. Follett, for the plaintiff in error (the plaintiff below). The plaintiff was not bound to take the defendant into his service: his doing so, therefore, constitutes a good consideration: the defendant has learned the secrets of the business, and has become acquainted with the customers. The objection as to the restraint being larger than is beneficial to the plaintiff was for the parties themselves to consider: but, in fact, it is not larger. First, as to the magnitude of the consideration, there is here a full consideration in fact: but it is necessary only that there should be a consideration capable of legally supporting an agreement: the magnitude of its value, provided there be a legal value, the Court cannot consider. This is all that the dicta to be found (for instance) in Mitchel v. Reynolds [1 P. W. 181], Horner v. Graves [7 Bing. 735], Davis v. Mason [5 T. R. 118], Gale v. Reed [8 East, 80], and Young v. Timmins [1 C. & J. 331. S. C. 1 Tyrwh. 226], can mean. [ALDERSON, B. If the considerations were so small as to be colourable, the agreement would be bad.] That is the full extent to which the dicta can be held properly to go. The

language which has been supposed to touch upon the amount of consideration had reference to the cases of bonds, where no consideration at all appeared, as in the case of the dyer who gave a bond without consideration. [Yearb. Pasch. 2 H. 5. fol. 5 B. pl. 26. Agreed to Per Curiam, in the Anonymous Case, Moore, 242. pl. 379. S. C. 2 Leon. 210; and see in Mitchel v. Reynolds, 1 P. W. 193.] In Horner v. Graves [7 Bing. 735] the amount of consideration was not the ground of decision. Secondly, the extent of the restraint is reasonable. In Horner v. Graves [7 Bing. 735] the restriction was thought to extend to a distance which could not be of any benefit to the plaintiff. [Lord Abinger, C. B. I should have thought that both questions were for the jury.] It is difficult to see how the questions can be raised on the record. In Bunn v. Guy [4 East, 190] the restriction of an attorney's practice extended to London and 150 miles round, and yet was held valid. Here the objection is to the time. The policy of the English law admits of restraints unlimited as to time: for, under the ancient corporate system, the carrying on trades within certain limits by any but a privileged class was often prohibited without any such limitation. The restraint here does not extend beyond the defendant's life. These restraints commonly originate in contracts of service, in partnerships, and in sales of good-will. The restriction may be unlimited, as to time, in any of these cases. If the plaintiff had sold the good-will to a stranger, could it have been unreasonable that he himself should have been restrained for life, without reference to the vendee's life, since the vendee might afterwards wish to sell it? Or why should not the plaintiff have the power of bequeathing it? Good-will has been treated as assets in the hands of an executor [See 2 Williams on Executors, 1178. note (p), pt. iv. book 1. ch. i. (2d ed.).] So, if one partner quit a partnership on terms, it is reasonable that he should agree, for his own life, not to be a competitor with the remaining partners, or any new partners or assignees. There is no authority for the limitation contended for, except the argument of counsel in Chesman v. Nainby [2 Str. 743, 744], and the apparent concession of the opposite counsel, the point not being raised in the cause. If it be necessary to confine the restraint to the plaintiff's life,

then a restraint for fourteen years only, without reference to the life, would be bad: but it was held good in Davis v. Mason [5 T. R. 118] and Homer v. Ashford [3 Bing. 323]. In Mitchel v. Reynolds [1 P. W. 181], no such limitation is laid down in the judgment; and there the contract was for five years generally, without reference to the life of any party. In Bunn v. Guy [4 East, 190] and Hayward v. Young [2 Chitt. 407] there was no limitation as to time. In Bryson v. Whitehead [1 Sim. & Stu. 74] Sir John Leach, Vice-Chancellor, enforced an agreement by a trader, upon selling a secret in his trade, to restrain himself for twenty years absolutely from the use of such secret, and said that he might "restrain himself generally." The limitation as to time might have been insisted on in Capes v. Hutton [2 Russ. 357], but was not. The reporter's note on Williams v. Williams [2 Swanst. 254] collects the cases as to contracts in restraint of trade, but does not mention the question of duration. If the want of limitation to the life of the plaintiff render the defendant liable to the plaintiff's executors, that must be on the ground that the restraint becomes part of the plaintiff's personal estate: if so, the contract is not longer than is beneficial to the plaintiff. Further, the contract is for the defendant to pay £500 if he practise. The plaintiff might, if he pleased, have demanded the sum absolutely for taking the defendant into his service at all: why then may he not make the payment depend upon the defendant's abstaining from practice? On a contract, shaped as this is, perhaps a court of equity would not restrain a party from practising, but would treat the agreement as simply a condition attached to the payment of the money.

Erle, for the defendant in error (the defendant below). First, contracts in restraint of trade are void *prima facie:* but, where the consideration is adequate, it is an excepted case, and they are then allowed; Mitchel v. Reynolds [1 P. W. 181]. Here there is not such a consideration. The service is paid for by the salary, which must be presumed to be no more than adequate to the service, and which cannot form a consideration for the restraint. The agreement is made after the relation of master and servant is entered into: the consideration is therefore executed; and there is no request. But, supposing a legal

consideration to exist, there is no adequate one; this has been always required to take the case out of the rule invalidating such contracts; and the Courts will notice the adequacy or inadequacy. The expressions of the Judges can be no otherwise construed. [ALDERSON, B., referred to the language of Lord KENYON, in Davis v. Mason [5 T. R. 120.] There the introduction is put as a "fair" consideration. In Mitchel v. Reynolds [1 P. W. 186] the words of the Court are, "upon a good and adequate consideration, so as to make it a proper and useful contract." [Lord ABINGER, C. B. Do you say a bond would be bad, if it were conditioned for any abstinence from trade and no consideration appeared?] The Court, in Mitchel v. Reynolds [1 P. W. 192], say, in answer to such a question, "Wherever such contract *stat indifferenter,* and for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad." In the two *Anonymous* cases [Moore, 115. pl. 259, Moore, 242. pl. 379, S. C. 2 Leon, 210] in Moore, bonds were held void: yet, in the technical sense, a bond is presumed to be upon consideration. In Jelliet v. Broad [Noy, 98] a promise, for a good consideration, not to trade in a particular place, was upheld; but Leggate v. Batchelour [Noy, 98] was there cited and approved of, in which a bond on a condition not to trade in Canterbury or Rochester for four years, no consideration appearing, was held bad. [ALDERSON, B. In Jelliet v. Broad [Noy, 98] the consideration was the sale of goods for £200: it might be argued that the goods were to be presumed worth the money.] Prugnell v. Gosse [Aleyn. 67] seems to shew that the adequacy of the consideration must be discussed. In Young v. Timmins [1 C. & J. 331. S. C. 1 Tyrwh. 226] the judgment turned entirely on the question of adequacy of consideration: there was a clear technical consideration, yet the contract was held bad. [ALDERSON, B. One party had the power to determine the contract, so that he gave up nothing: here there is an annual salary, which implies at least a contract for a year.] It does not appear that the plaintiff could not discharge the defendant; nor that the defendant was still in the plaintiff's service when he signed the agreement. In Gale v. Reed [8 East, 80] Lord Ellenborough enquires, whether the consideration be "adequate," whether "the restraint on one side" be "co-extensive only with the benefits

meant to be enjoyed on the other," whether "the compensation and restraint" be "commensurate with each other." So in Chesman v. Nainby [2 Str. 739. S. C. 2 Ld. Raym. 1456. S. C. in Error, in Dom. Proc. 1 Br. P. C. 234 (2d ed.)] the question is discussed on the commensurability of the consideration with the restraint. The same criterion was recognised in Horner v. Graves [7 Bing. 735]. Assuming, then, that principle, it cannot be said that the being taken into service at an annual salary, at a time past, is a consideration adequate to a promise by a party to abstain during his whole life from exercising the business in the prescribed limits. Secondly, the restraint is more than is necessary for the plaintiff's protection. It is said that the plaintiff may wish to sell or bequeath; but nothing of that kind appears: and, on that supposition, the contract should still have been limited to such time as the plaintiff, or his executors, administrators, or assigns, should carry on the business.

Sir W. W. Follett, in reply. There are many expressions which at first sight appear to warrant the argument that the Court will measure the adequacy of the consideration to the restraint; but no decision has turned upon the degree. In Prugnell v. Gosse [Aleyn, 67] the words are, "no consideration," and "a consideration." Parker, C. J., clearly speaks only of technical adequacy in Mitchel v. Reynolds [1 P. W. 185, 186]; yet he uses the word "adequate," which is the expression of the Judges, in Young v. Timmins [1 C. & J. 331. S. C. 1 Tyrwh. 226], insisted on here for the defendant. In Wickens v. Evans [3 Y. & J. 318] Hullock, B., uses the words, "sufficient consideration," but afterwards "no consideration," which shews that the technical sufficiency was meant. The expression of the Court in Horner v. Graves [7 Bing. 735] is "good and sufficient." It is said that the plaintiff might discharge the defendant: but in Davis v. Mason [5 T. R. 118] such a discharge was admitted on the record. As to the technical objections to the consideration, the original agreement, at the commencement of the service, clearly is that the plaintiff shall take the defendant into service, and that the defendant shall promise: the agreement is afterwards reduced into writ-

ing. [Lord Abinger, C. B. Suppose the plaintiff to die without assigning the business: who is to sue?] The executors, if any action would lie.

Cur. adv. vult.

TINDAL, C. J., on this day delivered the judgment of Court.

The ground upon which the Court of King's Bench held, after a verdict obtained by the plaintiff in this case, that the judgment of that Court ought to be arrested, was, that the agreement set out upon the record, and upon which the action was brought, was void in law, being an agreement in unreasonable restraint of trade. For, although the inadequacy of the consideration, upon which the agreement was entered into, was urged in argument as one reason for holding the agreement to be void,—and, in the delivering the opinion of the Court, some reference was made to that objection,—yet it is manifest that it formed no part of the ground upon which the Court refused to give their judgment in favour of the plaintiff.

The consideration for the agreement in question appears to have been, the receiving of the defendant into the service of the plaintiff as an assistant in his trade or business of a chemist and druggist, at a certain annual salary. And the agreement, on the part of the defendant, founded upon such consideration, is that, if he should at any time thereafter, directly or indirectly, in his own name or that of any other person, exercise the trade or business of a chemist and druggist within the town of Taunton, in the County of Somerset, or within three miles thereof, then that the defendant should, on demand, pay to the plaintiff, his executors, administrators or assigns, the full sum of £500 as and for liquidated damages.

The ground upon which the Court below has held this restraint of the defendant to be unreasonable is that it operates more largely than the benefit or protection of the plaintiff can possibly require; that it is indefinite in point of time, being neither limited to the plaintiff's continuing to carry on his business at Taunton, nor even to the term of his life. We agree in the general principle adopted by the Court, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered

as unreasonable in law, and the contract which would enforce it must be therefore void. But the difficulty we feel is in the application of that principle to the case before us. Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighborhood, the mode in which the trade or profession is usually carried on; with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But with respect to *the duration* of the restriction the case is different. The good-will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good-will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be, by making the restriction of the servant's setting up or entering into the trade or business within the given limit co-extensive with the servant's life.

And, accordingly, in many of the cases which have been cited, the restriction has been held good, although it continued for the life of the party restrained. And, on the other hand,

no case has been referred to, where the contrary doctrine has been laid down. In Bunn v. Guy [4 East, 190] a covenant by an attorney, who had sold his business to two others, that he would not, after a certain day, practice within certain limits, as an attorney, was held good in law, though the restriction was indefinite as to time. In Chesman v. Nainby [In Dom. Proc. 1 Br. P. C. 234. (2d ed.), S. C., in K. B. 2 Str. 739. 2 Ld. Raym. 1456] (in error) the condition of the bond was that Elizabeth Vickers should not, after she left the service of the obligee, set up business in any shop within half a mile of the dwelling-house of the obligee, or of any other house that she, her executors or administrators, should think proper to remove to, in order to carry on the trade; and in that case the contract was held to be valid, though the restriction was obviously indefinite in point of time, and although one of the grounds on which the validity of the contract was sought to be impeached was, that the restriction was for the life of the obligor. Again, in Wickens v. Evans [3 Y. & J. 318] the agreement in restraint of trade was made to continue during the lives of the contracting parties; and no objection was taken on that ground.

We cannot, therefore, hold the agreement in this case to be void, merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction.

But it was urged, in the course of the argument, that there is an inadequacy of consideration, in this case, with respect to the defendant; and that, upon that ground, the judgment must be arrested. Undoubtedly in most, if not all, the decided cases, the judges in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression, that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If by that expression it is intended, only, that there must be a good and valuable consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favoured in law, must either be a fraud upon the

rights of the party restrained, or a mere voluntary contract, a *nudum pactum,* and therefore void. But, if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court, in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party restrained has made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is *a* consideration for the bargain; and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary. We therefore think, notwithstanding the objections which have been urged on the part of the defendant, that the plaintiff has shewn upon the record a legal ground of action; and, having obtained a verdict in his favour, that he is entitled to judgment.

Judgment for the plaintiff.

FRENCH v. PARKER

(Supreme Court of Rhode Island, 1888. 16 R. I. 219.)

Bill for injunction. On demurrer.

Bill by Charles H. French against Edward D. L. Parker to enjoin him from practicing medicine in violation of an agreement. Defendant demurred.

William H. Clapp, for complainant. *James M. Ripley* and *Nathan W. Littlefield,* for respondent.

DURFEE, C. J. The case stated in the bill is to the effect that in February, A. D. 1887, the defendant, who was then a physician and surgeon living and practicing his profession in

the city of Pawtucket, published an advertisement offering to relinquish a very lucrative practice to the "right man, purchasing his real estate at its actual value;" that the complainant, likewise a physician and surgeon, was then living and practicing his profession in Waterbury, Conn.; that he was led by the advertisement to enter into negotiations with the defendant, which resulted in his purchasing the said practice and estate, and his removal to Pawtucket with his family, at great expense, and there entering upon the practice of his profession as the successor of the defendant; that he paid the defendant $15,000, over $5,000 of which was for the practice, the assessed value of the estate being less than $10,000, and not of so much value to the complainant except for his use as a practicing physician; that the defendant gave the complainant, in addition to the deed conveying the estate, a written covenant by which, in consideration of one dollar and other valuable considerations, the defendant assigned his practice to the complainant, and agreed to introduce and recommend the complainant to his patients, and also agreed not to engage, at any time thereafter, "in the practice of medicine or surgery in said city of Pawtucket." The bill alleges that the defendant has opened an office in Providence, advertised his card in the Pawtucket papers, visited his old patients, and is now practicing medicine and surgery in Pawtucket daily, to the great damage of the complainant, and that the defendant declares that he intends to continue to visit and prescribe professionally for all persons in Pawtucket who may call for him. The bill asks for an injunction to restrain the defendant from practicing in Pawtucket. The defendant demurs.

The defendant contends, in support of the demurrer, that the covenant, being a covenant in restraint of the exercise of a profession, is void because it is without limitation of time. The ground of this contention is that such a contract is valid only when it is reasonable, and it is not reasonable if the restraint which it imposes is larger than is necessary for the protection of the party in whose favor it is implored. This view is in accord with the language used by the judges in several English cases, but no case is cited in which it has been held finally that a contract in restraint of trade or business is void simply because the duration of the restraint is not limited. We know

of no such case. In Hitchcock v. Coker, 1 Nev. & P. 796, 6 Adol. & E. 438, the defendant had agreed not at any time to engage in the business of chemist and druggist, or either of them, in the town of Taunton; and the Court of King's Bench, on the authority of the language used by TINDAL, C. J., in Horner v. Graves, 7 Bing. 735, 743, decided that the agreement was void because it was unlimited as to time; but, on appeal to the judges in Exchequer Chamber, the decision was reversed, TINDAL, C. J., delivering the opinion. In the course of his opinion, he said: "We agree in the general principle that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." But distinguishing between extent and duration of restraint, he held, speaking for the Court, that the contract was valid, because a trader has an interest in his trade beyond his own exercise of it, namely, the good-will, which may be sold, bequeathed, or become assets, and which it is therefore not unreasonable for him to have protected by a continuance of the restraint beyond his own life. The defendant contends that the ground of this decision is that there is, in the case of a trade, a good-will which may be bequeathed or may pass as assets, and which will therefore be the more valuable for a continuance of the restraint after the trader's death; whereas, there is no good-will attaching to the profession of a physician or lawyer which can be bequeathed or pass as assets, and therefore any continuance of the restraint after the death of the lawyer or a physician is unreasonable because it will avail nothing. We think this is too narrow a view of the decision. One of the cases prominently cited in support of this decision was Bunn v. Guy, 4 East, 190, in which the covenant of an attorney not to practice within certain limits was held to be good, although the restraint was unlimited as to time. Of course, the Court would not have cited the case as authority for the decision if they did not regard it as falling within the principle of the decision. Moreover, a third reason was given for the decision, namely, that the good-will of the trade might be sold during the life of the trader, and would sell for more if protected from competition during the life of

the party restrained than it would if it were protected only during the life of the trader. This reason is as valid in the case of a profession as of a trade; for whether, technically speaking, there be any good-will attending a profession or not, the professional practice itself would probably sell for more with the restraining contract, if the restraint were unlimited in duration, than it would if the restraint were for the life of the promisee or covenantee only. If the complainant here wished to retire from his practice, and sell it, he could probably sell it for more if he would secure the purchaser from competition with the defendant forever than he could if he could only secure him from such competition during his own life. So, if he wished to take in a partner, he could, for the same reason, make better terms with him. It seems to us that the real principle of decision in Hitchcock v. Coker was this: that, if the contract were otherwise valid, it would not be held to be invalid simply because the restraint might continue beyond the life of the party for whose benefit it was accorded, if, for any reason, it might be beneficial to him to have it so continue. In Archer v. Marsh, 6 Adol. & E. 959, which was decided after, though heard before, the decision of the Court of Exchequer Chamber in Hitchcock v. Coker, Lord DENMAN, commenting on the reversal of the judgment of the Court of King's Bench, said that the judgment was reversed "on the principle that the restraint of trade in that case could not be really injurious to the public, and that the parties must act on their view of what restraint may be adequate to the protection of the one, and what advantage a fair compensation for the sacrifice made by the other." This, if we understand it correctly, is equivalent to saying that, if the restraint be otherwise not unreasonable, the courts will leave the parties to make their own terms in regard to its duration; and this is consonant with the uniform course of decision both before and since Hitchcock v. Coker.

Thus, the party restrained in Davis v. Mason, 5 Term. R. 118, was a surgeon, in Hayward v. Young, 2 Chit. 407, a surgeon and man-midwife, in Mallan v. May, 11 Mees. & W. 652, a surgeon and apothecary, in Bunn v. Guy, 4 East, 190, an attorney, in Butler v. Burleson, 16 Vt. 176, a physician and surgeon, and in *McClurg's Appeal,* 58 Pa. St. 51, a physician. In all these cases the contracts were sustained, though unlimited as

to time, simply because the area of restriction was not unreasonable. See, also, Gilman v. Dwight, 13 Gray, 356, Atkyns v. Kinnier, 4 Exch. 776, Hoyt v. Holly, 39 Conn. 326. In Butler v. Burleson, *supra,* the court say: "Dr. Burleson can be as useful to the public in any other town as at Berkshire, and the lives and health of persons in other villages are as important as they are there."

In Dwight v. Hamilton, 113 Mass. 175, it was decided that a contract by a physician for the sale of his "practice and good-will" in a particular town is valid, and carries with it an implied covenant on his part not to resume practice in the town; and that, if he attempts to do so, the Court will restrain him by injunction. In Whittaker v. Howe, 3 Beav. 383, an agreement by a solicitor not to practice as solicitor in Great Britain for twenty years without the consent of the plaintiff, to whom he had sold his business on those terms, was held to be valid, and an injunction was granted to prevent a breach. There the restraint was not unlimited, but, plainly, it might have lasted for years after the plaintiff's death. The contract is necessarily subject to a natural limitation, since it must terminate with the life of the party restrained; and, abstractly, there is no presumption that he will outlive the other party. It probably seldom happens that it makes any real difference whether the restraint is limited to the life of the party who profits by it, or is left without limitation, since the physician, lawyer, or trader who sells out his business in one place, to engage in it elsewhere, is not likely, after a few years, if he has any ability, to want to break up and return to his old home and then start anew. The tree that is transplanted and retransplanted after coming into fruit is not often the better for it. And it may be questioned whether the consideration is not of itself reason enough for allowing the parties to suit themselves in the matter.

In Hastings v. Whitley, 2 Exch. 611, the defendant had given his bond not to carry on the business of surgeon or apothecary at a particular place. In suit thereon by the executors of the obligee, the bond was held to be good. The report states that one of the points for the defendant was that the bond was illegal and void if it should be construed to extend to the defendant's practicing his profession after the obligee's

death. The Court held that the obligation was co-extensive with the life of the obligor: and PARKE, B., in giving judgment, said: "It was held in Hitchcock v. Coker that there was nothing illegal in the restriction being indefinite as to duration, the same being in other respects reasonable." The counsel for the defendant suggested, in the course of the hearing, the distinction which is here attempted, and the same judge replied: "What is the difference? The good-will of an apothecary is often disposed of." And the Court took no further notice of it, though the restraint extended to the business of the defendant as a surgeon as well as to his business as an apothecary, if it can be supposed that Baron Parke meant to say that the calling of an apothecary was a mere trade.

The case, among the cases cited for the defendant, which comes nearest to an authority for him is Mandeville v. Harman, 7 Atl. Rep. 37. In that case the defendant had covenanted not to engage in the practice of medicine or surgery in the city of Newark at any time afterwards. The suit was by the covenantee, in equity, for an injunction. The court refused the injunction on the ground that whether a restraint so unlimited as to time was reasonable or not had never been decided in that state. The Court did not decide that such a restraint was invalid, though its intimations were adverse to it. It referred to Keeler v. Taylor, 53 Pa. St. 467, as holding that such contracts, if not limited to a reasonable time, as well as confined to a reasonable space, were void at law. We have not been able to find any such doctrine in Keeler v. Taylor. The injunction was refused there because the terms of the contract were hard and complex; the injunction being, in the opinion of the Court, of grace, not of right. In *McClurg's Appeal,* 58 Pa. St. 51, which was in all points almost identical with the case at bar, the same Court which had previously decided Keeler v. Taylor granted an injunction, with very strong remarks in favor of the jurisdiction. See per SHARSWOOD, J., 55. Mandeville v. Harman was a hard case for the defendant.

Our conclusion is that it is not a sufficient reason for refusing the injunction that the contract is unlimited as to time. In this state the common-law and chancery jurisdiction are vested in the same tribunal, and it is the practice of the Court, sitting

in equity, to decide questions of law, as well as of equity, for itself, and to grant or refuse relief according as it decides them.

The defendant contends that it is not a breach of the contract for him to visit his old patients in Pawtucket when summoned by them from Providence. We think it is clearly a breach, his contract being not to engage at any time in the practice of medicine or surgery in the city of Pawtucket. It is true that the complainant may not get the patients if the defendant does not visit them, but it was the chance of getting them that would result from the defendant's not practicing in Pawtucket which the complainant purchased, and this chance we think he is entitled to have secured to him.

Demurrer overruled.[9]

9—In Mandeville v. Harman, 42 N. J. Eq. 185, at p. 193, Van Fleet, V. C., said:

"Professional skill, experience, and reputation are things which cannot be bought or sold. They constitute part of the individuality of the particular person, and die with him. There can be no doubt, I think, that if the complainant was the most distinguished physician of the city of Newark, and had by far the most lucrative practice in that city, and he should be so unfortunate as to die next month or next year, it would be impossible for his personal representative to sell his good-will or practice, as a thing of property distinct from the office which he had occupied prior to his death, for any price; and I think it is equally obvious that, if it were sold in connection with his office, the only possible value which could be ascribed to it would be the slight possibility that some of the persons who had been his patients might, when they needed the services of a physician, go or send there for the next occupant of the office. The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither an intrinsic nor a market value. And, if the complainant should make sale of his practice in his life-time, it is manifest all the purchaser could possibly get would be immunity from competition with him, and perhaps his implied approval that the purchaser was fit to be his successor; but it would be impossible for him to transfer his professional skill and ability to his successor, or to induce anybody to believe that he had.

"These considerations make it apparent, I think, that the reason which induced the court of exchequer chamber to hold a like restraint valid in Hitchcock v. Coker does not exist in this case. There a right or interest existed, which, according to the law of Great Britain, would, on the death of its possessor, pass to his personal representative. No such right or interest exists here. At least, its existence is as yet unrecognized in this state by law."

NORDENFELT v. MAXIM NORDENFELT GUNS & AMMUNITION CO.

(House of Lords, 1894. [1894] App. Cas. 535.)

LORD HERSCHELL, L. C.:—[10]My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade.

The covenant in question was contained in an agreement of the 12th of September, 1888, and was in these terms: "[11]The said Thorsten Nordenfelt shall not, during the term of 25 years from the date of the incorporation of the company if the company shall so long continue to carry on business, 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, gunpowder, explosives, or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided, that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2,000 a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into.

10—The concurring opinions of Lords Watson, Ashbourne, Macnaghten and Morris, are omitted.

11—114 Ch. Div. 351, 363.

The appellant had, prior to March, 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th of March, 1886, an agreement was made between the appellant and the Nordenfelt Guns and Ammunition Company by which the company was to purchase the good-will of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly, in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July, 1888, negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the transfer of their business and assets to a new company, to be called the Maxim-Nordenfelt Guns and Ammunition Company.

By an agreement for amalgamation of the two companies, dated the 3rd of July, 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thaine, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September, 1888.

The respondents were incorporated on the 17th of July, 1888, and on the 8th of August the agreement of the 3rd of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be,

inter alia, not only the adoption of the agreement of the 3rd of July, but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns and Ammunition Company, the good-will of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the good-will of the appellant's business, and was designed for the protection of the good-will so sold, and he contended that this was an error, inasmuch as there was no sale by him of the good-will on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the good-will was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in September, 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company the object was, as I have shewn, stated to the world to be the acquisition of the good-will of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the good-will of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognised and given effect to by Lord Macclesfield in his celebrated judgment in Mitchel v. Reynolds [1 P. Wms. 181]. That was a case of particular restraint, and the covenant was held good, the Chief Justice saying, "that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, namely, where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by." And at a later part of the judgment, after dividing voluntary restraints by agreement into those which are, first, general, or secondly, particular as to places or persons, he formulates with regard to the former the following proposition: "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not." In the case of Master, &c., of Gunmakers v. Fell [Willes, at p. 388], Willes, C. J., said the general rule was "that all restraints of trade (which the law so much favours,) if nothing more appear, are bad. . . . But to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained."

As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad.

In the case of Horner v. Graves [7 Bing. 735], TINDAL, C. J., said: "The law upon this subject (i. e. restraint of trade) has been laid down with so much authority and precision by PARKER, C. J., in giving the judgment of the Court of B. R. in the case of Mitchel v. Reynolds [1 P. Wms. 181], which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the Court in that case is, 'that voluntary restraints, by agreements between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as to be a proper and useful contract,' that is, 'so as it is a reasonable restraint only,' are good."

After stating that the case then before the Court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one.

It is true that in a later part of his judgment the following passage occurs: "In the case above referred to, PARKER, C. J., says, 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good'; which are rather instances and examples, than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case." But I cannot, in view of the passage which I have quoted from the earlier part of his judgment, understand this as an indication of opinion on the part of TINDAL, C. J., that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by PARKER, C. J., nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner. I am confirmed in this view of TINDAL, C. J.'s opinion by his judgment in the subsequent case of Hinde v. Gray [1 Man. & G. 195]. In that case the defendant had entered

into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach; judgment was given for the defendant, TINDAL, C. J., saying that it was "assigned on a covenant which, according to the case of Ward v. Byrne [5 M. & W. 548], was void in law." This is, to my mind, only intelligible if Ward v. Byrne [5 M. & W. 548], which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void; unless it were so, I do not see how it could be regarded as determining that the covenant in question in Hinde v. Gray [1 Man. & G. 195] was void; or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are material distinctions between the circumstances of the two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the Court should not be regarded as governed by Ward v. Byrne [5 M. & W. 548]; but TINDAL, C. J., did not proceed to inquire whether, under the particular circumstances appearing on the record in Hinde v. Gray [1 Man. & G. 195], the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to Ward v. Byrne [5 M. & W. 548], except to say, that although the learned judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to

recognise that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made, unsuccessfully, to maintain that a covenant otherwise general might be regarded as a particular restraint, if limited in point of time: a contention for which some colour was afforded by the language used in earlier cases.

The views which I have expressed appear to me to have been entertained by that very learned lawyer Mr. John William Smith, as shewn by his notes to Mitchel v. Reynolds [1 P. Wms. 181]. He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law, the restraint must be, first, partial, secondly, upon an adequate, or, as the rule now seems to be, not on a mere colourable consideration, and there is a third requisite, namely, that it should be reasonable." This exposition of the law has, further, the very weighty sanction of WILLES and KEATING, JJ., who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases.

In the year after the decision of Hinde v. Gray [1 Man. & G. 195] the case of Whittaker v. Howe [3 Beav. 383, 394] came before Lord Langdale. Howe had covenanted not to practice as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced against practising in London, where he had previously carried on business. On an application for an interlocutory injunction, it was contended that the covenant was void. The Master of the Rolls refused to accede to this contention and granted the injunction. It was, of course, clear that a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favour at the hands of the Court. But the question was whether so extensive a covenant as that entered into could be supported. The case of Mitchel v. Reynolds [1 P. Wms. 181] was cited in argument, but neither Ward v. Byrne [5 M. & W. 548] nor Hinde v. Gray [1 Man. & G. 195] appear to have been brought to the notice of the Court. Lord Langdale expressed himself thus (Whittaker v. Howe [3 Beav. 383, 394]): "Agreeing with the Court of Common Pleas, that in such cases 'no certain precise boundary can be laid down

within which the restraint would be reasonable, and beyond which excessive,' having regard to the nature of the profession to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord Kenyon said in Davis v. Mason [5 T. R. 118], 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.' "

The learned judge distinctly indicated that he had not arrived at an irrevocable conclusion, for he added: "In the progress of the case it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is, to say the least, so far doubtful, that he ought not to be permitted to take the law into his own hands." It is not necessary to consider whether the decision can be supported, though it was regarded by WILLES and KEATING, JJ., as questionable, and it is certainly difficult to see why, if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in Hinde v. Gray [1 Man. & G. 195], should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities I have already referred to.

There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only allude to two of these, in which the existence of the rule I have been considering has been questioned. In the case of the Leather Cloth Company v. Lorsant [Law Rep. 9 Eq. 345], JAMES, V. C., said: "I do not read the cases as having laid down that unrebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract."

And again, in Rousillon v. Rousillon [14 Ch. D. 351], FRY, J., thus expressed himself: "I have therefore, upon the authori-

ties, to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule; and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable."

I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid.

The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee.

When Lord Macclesfield emphasized the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms:

"Thirdly, 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. The Roman Law would not enforce such contracts by an action. (See Puffendorf, lib. 5, c. 2, § 3, 21 H. 7, 20)." There are other passages in the judgment where this view is enforced.

There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of Lord Macclesfield's judgment will shew that if the conditions which prevail at the present day had existed in his time he would not have laid down a hard-and-fast distinction between general and particular restraints, 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 recognised as established, or whether the rule is itself 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 it exceeds what 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 has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the good-will of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the good-will would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the good-will were in such cases rendered unsaleable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in Horner v. Graves [7 Bing. 735, 743], in considering whether the agreement was reasonable. TINDAL, C. J., said: "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down that if this can be shewn the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shewn that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole

of the United Kingdom it is obvious that it would be 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.

So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed.[12]

12—See to the same effect Rousillon v. Rousillon, 14 Ch. Div. 351; Badische, etc., v. Schott, L. R. [1892] 3 Ch. 447; Diamond Match Co. v. Roeber, 106 N. Y. 473, *post*, p. 55.

In accordance with the principal case, upon the sale of a world-wide business a restriction which is unlimited as to time and territory should, it would seem, be valid: National Enameling & Stamping Co. v. Haberman, 120 Fed. 415 (contract unlimited in time and restriction operative throughout the United States—held legal). But Davies v. Davies, L. R. 36 Ch. Div. 359 (Ct. of Appeal, 1887), seems *contra*.

BISHOP v. PALMER

(Supreme Judicial Court of Mass., 1888. 146 Mass. 469.)

Appeal from Superior Court, Suffolk county.

Action of contract by Robert Bishop against Elisha L. Palmer *et al.* The plaintiff's declaration was as follows: "And the plaintiff says that heretofore, to-wit, on March 16, 1886, the defendants made with the plaintiff the written contract of which a copy is hereto annexed; that by the terms of said contract, and for the considerations therein alleged, the defendants, among other things, promised to pay to the plaintiff the sum of $5,000 in ten equal monthly installments, on the first day of each month, thereafter, until all were paid; that the plaintiff has done and performed all things necessary, by the terms of said contract, to entitle him to receive the sum of $5,000, but that the defendants have not performed their said promise, and have failed and neglected to pay to the plaintiff the respective sums of $500 due on the first days of the months of July, August, September, October, and November, as aforesaid; wherefore the plaintiff says that the defendants owe him the sum of $2,500." The second count was for $2,500 upon an account annexed, the cause of action being the same as in the first count. To the declaration the defendants filed a demurrer. The contract was, in substance, as follows: "This agreement, made this sixteenth day of March, A. D. 1886, by and between Robert Bishop of Boston, party of the first part, and Elisha L. Palmer, Frank L. Palmer, Edward A. Palmer, and George S. Palmer, copartners, . . . parties of the second part, and the Massasoit Manufacturing Company, a corporation, . . . party of the third part, witnesseth, that, whereas, said party of the first part is engaged in the business of manufacturing and selling bed-quilts and comfortables, together with all his plant, machinery, and stocks, manufactured and unmanufactured, now on hand, and of wholly giving up and going out of said business for the next five years, and is also desirous of selling that part of his cotton-waste business which is done or transacted in whole or in part in the city of Fall River, . . . and with any and all of the mills doing business in said city; now, therefore, in consideration of the premises, and of the sum of $5,000, to be paid by the parties of the second and third parts, in the manner

and times hereafter specified, the party of the first part hereby sells, assigns, transfers, and delivers unto the parties of the second part his entire business, plant, and enterprise as a manufacturer of, and dealer in bed-quilts and comfortables, together with the good-will of said business, and all and singular, the machinery, etc., used by him in said business, and constituting said manufacturer's plant, as follows, to-wit: [Then follows an itemized list of the machinery, etc., to be transferred and provisions for the delivery of the same.] And, for the consideration named, the party of the first part hereby sells, assigns, transfers, and conveys to the party of the third part all that portion of his waste business which is transacted or done in the city of Fall River . . . with any and all corporations doing business in said city; and he hereby assigns and transfers to said party of the third part all his existing contracts, whether verbal or written, with any of such corporations, or with firms or persons, and all rights thereunder, including rights of renewal, and also the good-will of his said business and trade with the corporations in said city of Fall River. This clause does not have any reference to buying and selling from individuals, it being the intention of said party of the first part absolutely and completely to sell and transfer to said party of the third part his entire cotton-waste business, trade, and dealings, and the exclusive right to deal and do a cotton-waste business with, and purchase cotton waste of, any and all of said corporations, for the period of five years from the date hereof. And said party of the first part hereby, for himself, his executors, and assigns, covenants and agrees with said parties of the second and third parts, and each of them, and their executors, administrators, successors, and assigns, respectively, that, for and during the period of five years from the date hereof, he will not, either directly or indirectly, in his own name, or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing, or dealing in, bed-quilts or comfortables, or of any business of which that may form any part. And he further covenants and agrees, as aforesaid, that, for and during said period, he will not enter into the cotton-waste business in said city of Fall River with any corporation, firm, or person located and doing business in said city; and especially that he will not, directly or indirectly, in his own name, or in

the name of any other person, buy, or influence or procure other persons to buy, any cotton waste from said mills, in said city of Fall River, or belonging to or controlled by any corporation located in said city, and that he will not, either directly or indirectly, make any bid therefor, or influence any other person so to do, in connection with the waste business in said city, or the purchase of waste from such parties." The party then further agreed not to buy, or offer to buy, any waste produced by certain specified corporations in Fall River; and the contract then provided that the payment of the consideration should be in installments payable as set forth in plaintiff's declaration. The Superior Court sustained defendants' demurrer, and the plaintiff appealed to the Supreme Judicial Court.

C. ALLEN, J. The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and the faithful performance of the covenants and agreements contained in the written instrument signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties.

It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void, as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so, it being a general agreement, without any limitation of space, that, for and during the period of five years, he will not, either directly or indirectly, continue in, carry on, or engage in, the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part. Thus much is virtually conceded by the plaintiff, and so are the authorities. Taylor v. Blanchard, 13 Allen 370; Dean v. Emerson, 102 Mass. 480; Machine Co. v. Morse, 103 Mass. 73; Alger v. Thacher, 19 Pick. 51; Navigation Co. v. Winsor, 20 Wall. 64; Davies v.

Davies, 36 Ch. Div. 359; 2 Kent, Comm. 467, note; Metc. Cont. 232.

Two principal grounds on which such contracts are held to be void are that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly. Alger v. Thacher, *ubi supra.*

The question then arises whether an action can be supported upon the promise of the defendants founded upon such a consideration as that which has been described. As a general rule, where a promise is made for one entire consideration a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made, or means of apportionment furnished, by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails. Robinson v. Green, 3 Metc. 161; Rand v. Mather, 11 Cush. 1; Woodruff v. Wentworth, 133 Mass. 309, 314; Bliss v. Negus, 8 Mass. 51; Clark v. Ricker, 14 N. H. 44; Woodruff v. Hinman, 11 Vt. 592; Pickering v. Railway Co., L. R. 3 C. P. 250; Harrington v. Dock Co., 3 Q. B. Div. 549; 2 Chit. Cont. (11th Amer. Ed.) 972; Leake, Cont. 779, 780; Pol. Cont. 321; Metc. Cont. 247.

It is urged that this rule does not apply to a stipulation of this character which violates no penal statute, which contains nothing *malum in se,* and which is simply a promise enforceable at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statutes. They are forbidden by the common law, and are held to be illegal. 2 Kent, Comm. 466; Metc. Cont. 221; 2 Chit. Cont. 974; White v. Buss, 3 Cush. 449, 450; Hynds v. Hays, 25 Ind. 31, 36.

It is contended that the defendants, by being unable to enforce the stipulation in question, only lose what they knew, or were bound to know, was legally null; that they have all that they supposed they were getting, namely, a promise which might be kept, though incapable of legal enforcement; and that if they were content to accept such promise, and if there is another good and sufficient consideration, they may be held upon their

promise. But this agreement cannot properly extend to a case where a part of an entire and inseparable consideration is positively vicious, however it might be where it was simply invalid, as in Parish v. Stone, 14 Pick. 198. The law visits a contract founded on such a consideration with a positive condemnation, which it makes effectual by refusing to support it, in whole or in part, where the consideration cannot be severed.

The fact that the plaintiff had not failed to perform his part of the contract, does not enable him to maintain his action. An illegal consideration may be actual, and substantial, and valuable, but it is not, in law, sufficient.

The plaintiff further suggests that, if the defendants were to sue him on this contract, they could clearly, so far as the question of legality is concerned, maintain an action upon all its parts, except, possibly, the single covenant in question. Mallan v. May, 11 Mees. & W. 653; Green v. Price, 13 Mees. & W. 695, 16 Mees. & W. 346. This may be so. If they pay to the plaintiff the whole sum called for by the terms of the contract, it may well be that they can call on him to perform all of his agreement, except such as are unlawful. In such case, they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this that they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. They are at liberty to repudiate the contract on this ground, and, having done so, the present action founded on the contract cannot be maintained; and it is not now to be determined what other liability the defendants may be under to the plaintiff, by reason of what they may have received under the contract.

Judgment affirmed.[13]

13—*A fortiori*, a restriction lacking in limitation as to time or territory, would usually be held illegal, as in Alger v. Thacher, 19 Pick. (Mass.) 51; Berlin Machine Works v. Perry, 71 Wis. 495; Thomas v. Adm'r of Miles, 3 Oh. St. 274; Wiley v. Baumgardner, 97 Ind. 66 (five year limitation, but no limit as to territory—contract illegal).

It has been held also that a restriction limited to the United States was illegal because not sufficiently limited as to territory: Lange v. Werk, 2 Oh. St. 519; Lufkin Rule Co. v. Fringeli, 57 Oh. St. 596.

The restriction has even been held illegal when operative throughout a state of the United States: Taylor v. Blanchard, 13 Allen (Mass.) 370.

GAMEWELL FIRE-ALARM CO. v. CRANE

(Supreme Judicial Court of Mass., 1893. 160 Mass. 50; 35 N. E. R. 98.)

Appeal from Superior Court, Suffolk county.

Bill by the Gamewell Fire-Alarm Telegraph Company against Moses G. Crane and Frederick W. Cole to enjoin defendant Crane from engaging in the manufacture and sale of fire alarm and police telegraph apparatus, in violation of his contract with plaintiff, and to enjoin defendant Cole from participating with Crane in the violation of said contract. Final decree was entered in plaintiff's favor as against defendant Crane, but the bill was dismissed as against Cole. Plaintiff and defendant Crane both appeal.

Modified.

FIELD, C. J. The plaintiff company and the defendant Crane have each appealed from the decree of the Superior Court. The principal question is whether the following stipulation in the contract between the plaintiff and Crane is void. The stipulation is: "Said Crane further agrees not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly, for the period of ten years next ensuing after the date of this agreement." Crane had been a manufacturer of fire alarm and police telegraph apparatus from the year 1856 to 1886, when the contract was entered into which is the subject of this suit. From the year 1879 to January, 1891, he was a director of the plaintiff company. In 1881 he, or the firm of which he was a member, entered into a contract with the plaintiff company to do all of its manufacturing. He testified that the company "was to have the use of patents of mine for the term of ten years, and to give all its manufacturing to Moses C. Crane or Crane & Co., and they agreed not to compete with the Gamewell Company during that time." This is the contract which was annulled by the contract in suit. By the contract in suit Crane sold and conveyed to the company all his machinery, tools, draw cases, and other property used in or connected with his business of manufacturing for said company, including "stock supplies partly manu-

factured, and raw material of every kind in any way pertaining" to said business of manufacturing in his factory at Newton Highlands, in Massachusetts, and he agreed to transfer to said company exclusive rights under and control of all letters patent for fire alarm and police apparatus only, owned or controlled wholly or in part by him, together with exclusive rights under and control of all improvements in said fire alarm and police apparatus only, made by him up to the date of the contract, and he gave to said company the "first option to purchase or obtain exclusive control for fire alarm and police purposes only, under any and all letters patent, improvements applicable to such apparatus which may be made by said Crane during the term of ten years next ensuing after the date of this agreement," etc. The consideration to be paid was $30,000 in cash and notes, and such unwrought stock, machinery, etc., as was on hand at the date of the transfer, and was not included in the schedule attached to the contract, was also to be paid for at the "cost price, to be fixed by appraisal." Crane also agreed to let his factory to the company at a reasonable rent if the company desired to hire it. The company actually paid Crane about $47,000 as the consideration of the contract and the property conveyed.

The plaintiff contends that the agreement "not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly, for the period of ten years," etc., is not void as being in restraint of trade—First, because it is an agreement pertaining to "property and business protected by patents;" secondly, because the restraint is coextensive only with the business sold, and is necessary to enable the company to enjoy fully what it has bought and paid for; and, thirdly, because it relates to a single commodity, not of prime necessity, and not a staple of commerce. See Roller Co. v. Cushman, 143 Mass. 353; Machine Co. v. Morse, 103 Mass. 73; Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92.

There seems to be no reason why the defendant Crane should not assign the patents and inventions which he agreed to assign, if there are any, and no serious objection has been raised by the defendant on this part of the case. The defendant contends that he has a right to assist in forming a corporation, and to act

as one of its officers, the business of which is to manufacture and sell fire alarm and police telegraph machines which are not made under any patents owned by the plaintiff, or under any patents which he has agreed to assign to the plaintiff, or which the plaintiff has elected to purchase, under the option given in the contract, even although by so doing he enters into competition with the plaintiff in its business. He, in effect, concedes that, so far as the business is protected by patents which he has assigned or agreed to assign, the restraint is valid. It appears that there are "a dozen or fifteen concerns in the United States engaged in a somewhat similar business." The defendant testified that he looked up the number of patents pertaining to this branch of the art in 1881, and that there were then about 500. The defendant contends that he ought to be able to use his own patents for subsequent improvements applicable to such apparatus if the plaintiff does not elect to purchase them; that he was previously a manufacturer of fire alarm and police telegraph apparatus, and not a seller thereof; that the good-will which attached to his business was that of a manufacturer who did not sell his manufactures in the market; and that it is against public policy that he should be restrained from exercising his peculiar skill anywhere in the United States or in the world for the period of 10 years. The apparatus, as the defendant contends, which he has a right to manufacture and sell is not secret machinery, and is not protected by any patents which the plaintiff owns or has a right to control, but is apparatus either not protected by patents at all, or by patents of his own, or of some other persons who may choose to employ the defendant.

The only ground, then, on which this restriction can be maintained is that it is reasonably necessary for the beneficial enjoyment by the plaintiff of the property it bought of the defendant, or, if this is not so, that the law in modern times does not regard such an agreement as against public policy. So far as we are aware, in every modern case in this commonwealth, except one where a contract in restraint of trade has been held valid, the restriction has been limited as to space. In Taylor v. Blanchard, 13 Allen 370, the parties entered into a partnership for carrying on "the trade or business of manufacturing shoe cutters," and it was provided that "at whatever time the said copartnership shall be determined and ended" the defendant "shall not,

nor will at any time or times hereafter, either alone or jointly with or as agent for any person or persons whomsoever, set up, exercise, or carry on the said trade or business of manufacturing and selling shoe cutters at any place within the aforesaid commonwealth of Massachusetts, and shall not, nor will set up, make, or encourage any opposition to the said trade or business hereafter to be carried on" by the plaintiff. The manufacture of shoe cutters was an art, which could be carried on only by persons instructed in it, and the business was confined to the plaintiff and three other persons; but the court held the agreement void.

In Bishop v. Palmer, 146 Mass. 469, the plaintiff, being engaged in the manufacturing and selling of bed-quilts and comfortables, conveyed to the defendant his "entire business plant and enterprise as a manufacturer of and dealer in bed-quilts and comfortables," together with the good will of the business, and all the machinery, implements, and utensils used by him in said business, and agreed "that for and during the period of five years from the date hereof he will not, either directly or indirectly, in his own name or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing or dealing in bed-quilts or comfortables, or of any business of which that may form any part." It was held that this was clearly illegal and void as being in restraint of trade, because not limited as to space. See, also, Alger v. Thacher, 19 Pick. 51; Pierce v. Fuller, 8 Mass. 223, 226; Perkins v. Lyman, 9 Mass. 522; Stearns v. Barrett, 1 Pick. 43; Palmer v. Stebbins, 3 Pick. 188; Gilman v. Dwight, 13 Gray 356; Angier v. Webber, 14 Allen 211; Dean v. Emerson, 102 Mass. 480; Dwight v. Hamilton, 113 Mass. 175; Boutelle v. Smith, 116 Mass. 111; Ropes v. Upton, 125 Mass. 258; Handforth v. Jackson, 150 Mass. 149.

The case of Machine Co. v. Morse, *ubi supra*, is the case referred to as an exception. The question arose upon demurrer. The agreement of the defendant was not only to transfer his patents, machinery, etc., and all improvements and inventions, but "that he will use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations as may tend to insure the success of the same and of the company," and that he "will do no act that

may injure the company or its business, and that he will at no time aid, assist, or encourage in any manner any competition against the same." He also agreed "to serve as the superintendent of the company for three years," etc. The plaintiff company was formed by the defendant and others, and the defendant's business was transferred to it. He was a stockholder, and was made superintendent. The plaintiff agreed to employ the defendant for three years, and he was actually employed as superintendent up to the time he entered upon a competing business. The case seems to have been decided on the ground that the defendant had agreed to give to the plaintiff his exclusive services with reference to his mechanical skill and ingenuity in all improvements, alterations, and combinations which would tend to insure the success of the plaintiff in manufacturing twist drills and collets. The court say that "the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him." The opinion proceeds to consider the English cases where the restriction was held not to extend beyond the good will of the business which was the subject of the sale, or was not greater than the interests of the vendee required, and was not unreasonable in view of all the circumstances. This doctrine, in England, has been carried very far. See Davies v. Davies, 36 Ch. Div. 359. In this country the courts generally have not gone so far, but the old law has been a good deal modified in some jurisdictions in view of modern methods of doing business. See Navigation Co. v. Winsor, 20 Wall. 64; Fowle v. Park, 131 U. S. 88; Ellerman v. Stockyards Co., (N. J. Ch.) 23 Atl. Rep. 287; Association v. Starkey, 84 Mich. 76; Matthews v. Associated Press, (N. Y. App.) 32 N. E. Rep. 981; Oliver v. Gilmore, 52 Fed. Rep. 562; Match Co. v. Roeber, 106 N. Y. 473; Whitney v. Slayton, 40 Me. 224.

In the present case the plaintiff did not buy the good will of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus. The plaintiff gets everything it bought if it gets the tangible property and the letters patent and the improvements which the defendant Crane agreed to convey. The stipulation that Crane will not for 10 years manufacture or sell fire alarm or police telegraph machines and apparatus, although under patents,

in which case it has refused to buy, or under no patent at all, will tend to give the plaintiff a monopoly of the business. To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living.

The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion. The principal object of the stipulation was, we think, to prevent the manufacture or sale by the defendant of any instruments which would serve the same purpose as those made and sold by the plaintiff, and thus to enable the plaintiff more completely to control the market. Large cities and towns cannot well do without some kind of fire alarm and police telegraph apparatus, and it is an article of necessity for such municipalities. We are of the opinion that under our decisions the stipulation must be pronounced void as against public policy. If there is to be a change in the law, as heretofore many times declared by this court, we think it is for the legislature to make it. See Factor Co. v. Adler, (Cal.) 27 Pac. Rep. 36; Taylor v. Sourman, 110 Pa. St. 3; Richardson v. Buhl, 77 Mich. 632; Herreshoff v. Boutineau, (R. I.) 19 Atl. Rep. 712; Strait v. Harrow Co., (Sup.) 18 N. Y. Supp. 224; Anderson v. Jett, (Ky.) 12 S. W. Rep. 670; Urmston v. Whitelegg, 63 Law T. R. (N. S.) 455; Perls v. Saalfeld, [1892] 2 Ch. 149.

For these reasons a majority of the court are of opinion that the decree against Crane should be substantially affirmed as to the assignment of patents and inventions and as to costs, and should be reversed as to the rest. The decree in favor of Cole should be affirmed.

So ordered.

DIAMOND MATCH CO. v. ROEBER

(Court of Appeals of New York, 1887. 106 N. Y. 473.)

ANDREWS, J. Two questions are presented—First, whether the covenant of the defendant contained in the bill of sale exe-

cuted by him to the Swift & Courtney & Beecher Company on the twenty-seventh day of August, 1880, that he shall and will not at any time or times within 99 years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employee of the said Swift & Courtney & Beecher Company) within any of the several states of the United States of America, or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada, and in the territory of Montana, is void as being a covenant in restraint of trade; and, second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks, and good will of the business, for the aggregate sum (excluding a mortgage of $5,000 on the property assumed by the company) of $46,724.05, of which $13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, $28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred, August 27, 1880, by giving to the defendant the option to receive the $28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase price, $18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the $28,000, the sum of $8,000 in cash and notes, and $20,000 in the stock of the plaintiff; the plaintiff company having prior to said payment purchased the property of the Swift & Courtney & Beecher Company, and become the assignee of the defendant's covenant. It is admitted by the pleadings that in August, 1880 (when the covenant in question

was made), the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the states of Connecticut, Delaware, and Illinois, and of selling the matches which it manufactured "in the several states and territories of the United States, and in the District of Columbia;" and the complaint alleges and the defendant in his answer admits that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in 10 states. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the twenty-seventh of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of $1,500 a year. He then entered into the employment of the plaintiff, and remained with it during the year 1881, at a salary of $2,500 a year, and from January 1, 1882, at a salary of $3,600 a year, when, a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than $2,500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of $5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff.

The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of $15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law, first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, and which has been repeated many times by judges in England and

America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date, in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality was considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts (volume 2, p. 748, note). The earliest reported case, decided in the time of Henry V, was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts, and gave judgment for the plaintiffs; and before the case of Mitchel v. Reynolds it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstance, and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases prior to Mitchel v. Reynolds sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of Mitchel v. Reynolds was a case of partial restraint, and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this state are of that character, and in all of them the particular contract before the court was sustained. Nobles v. Bates, 7 Cow. 307; Chappel v. Brockway, 21 Wend. 157; Dunlop v. Gregory, 10 N. Y. 241. In Alger v. Thacher, 19 Pick. 51, the case was one of general restraint, and the Court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In Mitchel v. Reynolds the Court, in assigning the reason for the distinction between a contract for the general restraint of trade and one limited to a particular

place, says: "for the former of these must be void, being of no benefit to either party, and only oppressive;" and later on, "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 in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz., the michief which may arise (1) to the party by the loss by the obligor of his livelihood and the substance of his family, and (2) to the public by depriving it of a useful member, and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when Mitchel v. Reynolds was decided. Steam and electricity have for the purposes of trade and commerce almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striving to better their condition, have greatly enlarged the field of human enterprise, and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England. Rousillon v. Rousillon, 14 Ch. Div. 351. The law has for centuries permitted contracts in partial restraint of trade, when reasonable; and in Horner v. Graves, 7 Bing. 735, Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is coextensive only with the interest to be protected, and with the benefit meant to

be conferred, here seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one, and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint coextensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only, sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case, and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammeled by unnecessary restrictions. "If," said Sir George Jessell in Printing Co. v. Sampson, L. R. 19 Eq. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."

It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the busi-

ness is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. 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 his becoming a competitor with the covenantee. 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 legally 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. Combinations between producers to limit production, and to enhance prices, are or may be unlawful, but they stand on a different footing.

We cite some of the cases showing the tendency of recent judicial opinion on the general subject: Whittaker v. Howe, 3 Beav. 383; Jones v. Lees, 1 Hurl. & N. 189; Rousillon v. Rousillon, *supra;* Leather Co. v. Lorsont, L. R. 9 Eq. 345; Collins v. Locke, 4 App. Cas. 674; Steam Co. v. Winsor, 20 Wall. 64; Morse, etc. Co. v. Morse, 103 Mass. 73. In Whittaker v. Howe, a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held valid. In Rousillon v. Rousillon a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. In Jones v. Lees, a covenant by the defendant, a licensee under a patent, that he would not during the license make or sell any slubbing machines without the invention of the plaintiff applied to them, was held valid. BRAMWELL, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In Steam Co. v. Winsor the Court enforced a covenant by the defendant made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the state of California for the period of 10 years.

In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint

of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed. The covenant in the present case is partial, and not general. It is practically unlimited as to time, but this under the authorities is not an objection, if the contract is otherwise good. Ward v. Byrne, 5 Mees. & W. 548; Mumford v. Gething, 7 C. B. (N. S.) 317. It is limited as to space since it excepts the state of Nevada and the territory of Montana from its operation, and therefore is a partial, and not a general, restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the state of New York constitutes a general restraint within the authorities. In Chappel v. Brockway, *supra*, BRONSON, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the state, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet-boats on the canal between Rochester and Buffalo. The attention of the Court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the state of New York, but excepted other states from its operation. The remark relied upon was *obiter*, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country as a whole is that of which we are citizens, and our duty and allegiance are due both to the state and nation. Nor is it true as a general rule that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which from their nature are localized, but this is not true of 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 Mon-

tana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of Steam Co. v. Winsor, *supra*, supports the view that a restraint is not necessarily general which embraces an entire state. In this case the defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction was not excluded by the fact that the defendant, in connection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is of course competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance. Insurance Co. v. Insurance Co., 87 N. Y. 405. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in Long v. Bowring, 33 Beav. 585, which was an action in equity for the specific performance of a covenant, with a claim for liquidated damages: "All that is settled by this claim is that if they bring an action for damages, the amount to be recovered is 1,000 pounds, neither more nor

less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of $15,000, the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. Insurance Co. v. Insurance Co., *supra;* Long v. Bowring, *supra;* Howard v. Woodward, 10 Jur. (N. S.) 1123; Coles v. Sims, 5 De Gex, M. & G. 1; Avery v. Langford, Kay, 663; Whittaker v. Howe, *supra;* Hubbard v. Miller, 27 Mich. 15.

There are some subordinate questions which will be briefly noticed:

First. The plaintiff, as successor of the Swift & Courtney & Beecher Company, and as assignee of the covenant, can maintain the action. The obligation runs to the Swift & Courtney & Beecher Company, "its successors and assigns." The covenant was in the nature of a property right, and was assignable; at least, it was assignable in connection with a sale of the property and business of the assignees. Hedge v. Lowe, 47 Iowa, 137, and cases cited.

Second. The defendant is not in a position which entitles him to raise the question that the contract with the Swift & Courtney & Beecher Company was *ultra vires* of that corporation. He has retained the benefit of the contract, and must abide by its terms. Arms Co. v. Barlow, 68 N. Y. 34.

Third. The fact that the plaintiff is a foreign corporation is no objection to its maintaining the action. It would be repugnant to the policy of our legislation, and a violation of the rules of comity, to grant or withhold relief in our courts upon such a discrimination. Merrick v. Van Santvoord, 34 N. Y. 208; Bank v. Lacombe, 84 N. Y. 367; Code Civil Proc. § 1779.

Fourth. The consent of the Swift & Courtney & Beecher Company to the purchase by the defendant of the business of Brueggemann did not relieve the defendant from his covenant. That transaction was in no way inconsistent therewith. Brueggemann was selling matches manufactured by the company, under an agreement to deal in them exclusively.

There are some questions on exceptions to the admission and exclusion of evidence. None of them, we think, present any question requiring a reversal of the judgment.

We think there is no error disclosed by the record, and the judgment should therefore be affirmed.

All concur, except PECKHAM, J., dissenting.

LESLIE v. LORILLARD

(Court of Appeal of New York, 1888. 110 N. Y. 519.)

Appeal from Supreme Court, general term, Second department.

Demurrer to complaint by defendants Lorillard and the Lorillard Steamship Company.

The plaintiff is a stockholder of the defendant, the Old Dominion Steamship Company of Delaware. In the year 1873 the Old Dominion Steamship Company of New York was a corporation organized under the laws of New York, and was engaged in the business of running a line of steamships between the port of New York and certain ports in the state of Virginia. The defendant, the Lorillard Steamship Company, was also a New York corporation, organized for the business of navigating the ocean by steamships. The defendant Lorillard was a director and the president of the Lorillard company, and had entire control of it; the other directors, except one, who was a brother-in-law, being his clerks and employees. The complaint charges that in and prior to the summer of 1873 said Lorillard, "for the purpose of extorting large sums of money from the Old Dominion Steamship Company of New York, stated to the officers of said corporation that the said Lorillard Steamship Company intended to put on and run a line of steamships between the ports above mentioned, in opposition to the steamships of said Old Dominion Steamship Company; and, to deceive the officers of said company, and cause them to believe that a formidable opposition would be established against said company, said Lorillard caused said Lorillard Steamship Company to lease docks at Norfolk and other places, and to hire agents and servants at different points, and, in or about the month of October, 1873, said Lorillard caused said Lorillard Steamship Company to put on and run a line of steamships between said ports in opposition to said Old Dominion Steamship Company of New York;"

that said Lorillard continued to run his steamships at great loss, and at his own expense, until his efforts were successful in deceiving the officers of the Old Dominion Company into the belief that a powerful opposition line had been established; and in January, 1874, an agreement running between the Old Dominion Company and Lorillard and his company was signed by the president of each company, and by Lorillard for himself, by the terms of which, in consideration of a monthly payment to him, Lorillard and his company agreed to discontinue running their vessels, or any others, between the ports mentioned; and that they would not charter or sell the vessels to any other company or persons to be used on that route, and would not become in any way interested in the running of steamships between those places; that in February, 1875, the defendant, the Old Dominion Steamship Company of Delaware, was formed under the laws of that state, and succeeded to the business of the New York company, and "became vested with the property of said last-named company, which was duly conveyed and assigned to it, and subjected to the liabilities and contracts of said company;" that this new company continued making payments to Lorillard under the contract mentioned until February, 1878, when disputes arose between the various parties, and a new contract was entered into in October, 1878; that by this latter contract the previous contract was canceled, and, in consideration of the payment of a gross sum of money, and of certain monthly payments, to be continued through five years from February, 1879, Lorillard and his company again agreed not to run or to be in any way interested in the running of steamships between the ports named; that the Delaware Company made all the payments called for under the second agreement up to August, 1881, when further payment of the monthly subsidies was enjoined in an action brought by this plaintiff. Plaintiff alleges that prior to the commencement of this action, and in February, 1884, he requested the Delaware Steamship Company to pay no more moneys, and to commence an action for the cancellation of the contract, and for the recovery back of the moneys paid under the contracts. This demand was in a letter, and the reply to it contains a resolution of the board of directors refusing to take the action requested. Plaintiff also alleges the commencement of an action in February, 1884, by Lorillard

against the Delaware Company to recover the monthly payments payable under the contract from and after August, 1881, and that the Delaware Company did not intend to defend it.

The relief demanded is an injunction against the Delaware Company's making any payments under the contract, against Lorillard from prosecuting his action, the cancellation of the contract, and the re-payment by Lorillard of all moneys received.

The demurrer having been overruled at special term, and its decision having been affirmed at general term, defendants Lorillard and the Lorillard Steamship Company appealed to this court.

GRAY, J. The defendants Lorillard and the Lorillard Steamship Company have demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. We are thus required to examine this pleading, and to see whether, allowing to its averments all the force and truth such a ground of demurrer concedes, it may be sustained as the foundation of an action for equitable relief.

Our decision of the question will necessarily turn upon the validity of the contracts which are set forth. An extended discussion of the principles controlling the making and enforcement of corporate contracts is unnecessary. By frequent adjudications certain principles are well settled, and have become familiar.

The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking, not within the scope of their charter, which is their rule of corporate action. In the granting of charters the legislature is presumed to have had in view the public interest, and public policy is (as the interest of stockholders ought to be) concerned in the restriction of corporations within chartered limits, and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public or to the stockholders. As artificial creations they have no powers or faculties, except those with which they were endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be, is the act prohibited as prejudicial to some public interest, or is it an act, not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea of

ultra vires should not prevail when it would not advance justice, but, on the contrary, would accomplish legal wrong.

In suits between the corporation and strangers dealing with it the question is whether the act is one the corporation is not authorized to perform under any circumstances; or one that it may perform for some purposes, or under certain conditions. In the first case it is *ultra vires,* and there can be no recovery, because the party dealing with the corporation is bound to know from the law of its existence that it has no power to perform it. In the second case the issue will turn upon whether the party dealing with it is aware of the intention to perform the act for some unauthorized purpose, or whether the attendant circumstances justify its making and its performance. In actions by stockholders, which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed; or unless it be made to appear that the acts were fraudulent or collusive, and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for equity interference, for the powers of those intrusted with corporate management are largely discretionary.

Testing by these rules the case made by plaintiff in his complaint, in approaching the consideration of that pleading, we find that the only respect in which the contracts in question could be viewed as prejudicial to public interests, and therefore become the subject of judicial condemnation as against public policy, would be that they were in restraint of competition, and tended to create a monopoly. The tendency of modern thought and of the decisions, however, has been no longer to uphold in its strictness the doctrine which formerly prevailed in respect of agreements in restraint of trade. The severity with which such agreements were at first treated became more and more relaxed by exceptions and qualifications. This change was gradual, and may be considered, perhaps, as due mainly to the growth and spread of the industrial activities of the world, and to enlarged commercial facilities, which render such agreements less dangerous as tending to create monopolies. The earlier doctrine, of course, obtained in respect of agreements between individuals. The limitation which became imposed was that the agreement should operate as to a locality and not as to the

whole land. In later times the danger in such agreements seems only really to exist when corporations are parties to them; for their means and strength would better enable them to buy off rivalry, and to create monopolies.

The object of government, as interpreted by the judges, was not to interfere with the free right of man to dispose of his property or of his labor; it was to guard society, of which he was a member, from the injurious consequences of his agreement, whether they would arise from his own improvidence in bargaining away his means of gaining a livelihood, or in the deprivation to society of the advantages of competition in skilled labor. At the present day there is not that danger, or at least it does not seem to exist to an appreciable extent, except, possibly, as suggested, in the case of corporations. In their supervision and in their restriction within the limits of their chartered powers the government and the public are directly interested. Corporations are great engines for the promotion of the public convenience, and for the development of public wealth, and so long as they are conducted for the purposes for which organized they are a public benefit; but if allowed to engage without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and monopolize the avenues to that industry in which they are engaged, they become a public menace, against which public policy and statutes design protection.

Where, therefore, the provisions of agreements in restraint of competition tend beyond measures for self-protection, and threaten the public good in a distinctly appreciable manner, they should not be sustained. The apprehension of danger to the public interests, however, should rest on evident grounds, and courts should refrain from the exercise of their equitable powers in interfering with and restraining the conduct of the affairs of individuals or of corporations, unless their conduct, in some tangible form, threatens the welfare of the public. The doctrine relating to contracts in restraint of trade has been elaborately discussed in a careful opinion of ANDREWS, J., in the recent case of Match Co. v. Roeber, 106 N. Y. 473. Under the authority of that case it may be said that no contracts are void, as being in general restraint of trade, where they operate simply to prevent a party from engaging or competing in the

same business. It is there said (106 N. Y. 483): "To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privileges."

Under the doctrine of that case it is difficult to see how these contracts which are complained of here are open to the objection suggested by counsel. Regarded only in the light of what they tended to effect, these agreements removed a business rival, whose competition may have been deemed dangerous to the success or maintenance of the business of the Old Dominion Company. They could not, of course, exclude all competition in the business, but could in that particular case.

How, then, is the result different from the simpler case of the sale by an individual of his business and his right to conduct it in a particular part of the land. The doctrine held by this Court in Match Co. v. Roeber, *supra,* should control in the case at bar, and these contracts, therefore, cannot be considered objectionable on the ground that they restrained competition. Whether competition in this particular business would be a public benefaction, or its restraint a source of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil.

The conclusion at which we have arrived as to these contracts would seem to dispose of this case, and make further consideration useless, for the plaintiff makes them the basis of his action. The relief he has sought is the prevention of a misappropriation of corporate funds by the officers of the company, and the annulment of these contracts as obtained by deception.

We do not question the undoubted right of stockholders to complain of any diversion of the capital and assets to purposes not authorized by the charter, and to arrest by suit an unauthorized course of dealing which results in such diversion. The powers of a court of equity may be put in motion at the instance of a single stockholder, if he can show that the corporation are employing their statutory powers for the accomplish-

ment of purposes not within the scope of their institution. Ang. & A. Corp. § 393. But this is not such a case. The contracts were within the power of the corporation to make, and if they were free from the taint of fraud, and were not procured to be made by some collusion or conspiracy, then they are binding upon the company, and constitute an obligation which the officers must discharge. If this is a controversy between a stockholder and directors or other shareholders, who may be acting distinctively towards the property in which he has an interest, it is one with which these defendants are not concerned, and into which they should not be brought. They dealt with the directors, in respect of matters which were within the discretionary powers of a board of management. If it were charged that some fraud was practiced by Lorillard, to which the officers of the New York Company were parties, and that they had colluded with him, the equitable jurisdiction of the Court might be invoked by the plaintiff; for fraud vitiates all contracts, and it is a general rule that in cases of fraud, or where the charge is of conspiracy or of a fraudulent combination, equity has concurrent jurisdiction with the law, and will give redress.

But in every case the exercise of jurisdiction in equity rests in the sound discretion of the Court, and depends upon the special circumstances disclosed. McHenry v. Hazard, 45 N. Y. 580; Dodge v. Woolsey, 18 How. 331. In Hawes v. Oakland, 104 U. S. 450, Miller, J., asserted the doctrine established in the case of Dodge v. Woolsey to be that, to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, there must exist as a foundation for the suit, "some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself, or of

the rights of the other shareholders." We concur in the adoption of these principles for application to such actions.

But it is not made to appear here that there was any collusion between the officers of the New York Company and these defendants; and as to the second contract, which was made between these defendants and the Delaware Company, of which plaintiff was a stockholder, there is no allegation whatever of any deception or collusion. We think that, as these contracts were not *ultra vires,* or assailable on grounds of public policy, that they were such as came within the discretionary powers of the board of management to make in the interests of the corporation. Within the limits of the chartered authority the officers of a corporation have the fullest power to regulate the concerns of the company according to their best judgment. It is true that the powers conferred upon its agents by the charter of a corporation cannot be transcended by any considerations of expediency which they suppose may result to the stockholders from an act not within the scope of their authority [McCullough v. Moss, 5 Denio, 567]; but these contracts were such as the corporation could legitimately make, and consequently came within the scope of the ordinary powers of corporate management.

The conclusions at which we have arrived render further discussion of the questions in this record unnecessary.

The interlocutory judgment overruling the demurrer should be reversed, the demurrer sustained; and the complaint dismissed, with costs.

All concur, except RUGER, C. J., not voting.

WOOD v. WHITEHEAD BROS. CO.

(Court of Appeals of New York, 1901. 165 N. Y. 545.)

This action was brought to recover a sum claimed to be due to the plaintiff under a contract made orally with the defendant in May, 1895, by the terms of which the latter had agreed to pay to the former $30 each month while he lived and while it remained a corporation, in consideration of his agreement to give up the business of dealing in molding sand obtained from

sandbanks in the county of Albany, and not to engage further in it personally, or as agent for any other than the defendant. Both parties were, and had been for some years before, engaged in the business of dealing in molding sand. The $30 were paid monthly to the plaintiff until the end of the succeeding year, when further payments were refused, and subsequently the present action was brought to recover the amount remaining unpaid at the time of the bringing thereof. Prior to the making of the contract, and in the month of April, 1893, the plaintiff had executed and delivered to the defendant a writing of which the following is a copy:

"Albany, N. Y., April 15, 1893.

"Received this day of Whitehead Bros. Company the sum of two hundred and fifty dollars, the receipt of which is hereby acknowledged, the same being payment in full for all debts, dues, demands, services, and all or any obligations whatsoever; and I hereby agree to render to said company my services in selling molding sand for them, and in any other way or manner they may require; and I further agree not to allow any other person to use my name in the purchase of, or the sale of, molding sand, from this date on. I hereby agree to accept from this date from the said Whitehead Bros. Co., in full compensation for the services as described above, the sum of fifteen dollars per month, the same to terminate whenever said company give me thirty days' notice that they no longer require my services. [Signed] Harvey Wood. Witness: P. J. Rorabeck."

Thereafter the defendant paid to the plaintiff $15 a month, until about two months before May, 1895, the time when the contract now sued upon was made. The trial judge, before whom the trial was had without jury, made findings of fact, which included the facts stated; and he found, further, that when the defendant ceased paying the $15 a month under the agreement of 1893, it had not required of the plaintiff any services whatever, nor did the plaintiff tender any services, or demand any payment under that agreement, and that both parties had treated the same as at an end, although no notice as provided in the writing was ever given. As conclusions of law, he found that the agreement of 1893 was not supported by

mutual promises, but, if valid and enforceable because acted upon, it was abandoned by both parties; that there was a sufficient consideration for the contract of May, 1895; that that agreement was not void as being in restraint of trade; and that the plaintiff was entitled to recover. The plaintiff's judgment was affirmed at the appellate division, in the Third department, and the defendant appealed to this court.

GRAY, J. (after stating the facts). The appellant has raised two questions with respect to the validity of the contract sued upon. In the first place, it is contended that it was wholly without any consideration, for the reason that when it was made there was in force a prior contract, made in 1893, which required the plaintiff to do every act and thing required of him by the contract of 1895, invoking a familiar principle in the law of contracts. Vanderbilt v. Schreyer, 91 N. Y. 392, 401. I think that there are two answers to this. The writing of 1893 was of a twofold nature. It was in part an acknowledgment by the plaintiff of the receipt of the sum of $250 as payment in full for all debts, services, demands, etc., and it was in part an agreement by the plaintiff to render to the defendant his "services in selling molding sand for them," and "not to allow any other person to use his name in the purchase or the sale of molding sand." The payment of $250 would not appear to be the consideration for the agreement by the plaintiff to render future services, but rather to be simply the receipt or acknowledgment of payment of something which was then due the plaintiff. The further statement as to compensation for those services confirms this interpretation, and it is, in fact, borne out by the plaintiff's evidence that the $250 was paid him at the time on an old contract. But, if we could assume that it was the consideration for the plaintiff's agreement to render the future services, still I think it is clear that that agreement was essentially other than the contract which the parties made in 1895. The plaintiff, by his agreement of 1893, was to serve the defendant in selling molding sand for it and in any other way it might require. He agreed to become its agent, and his agreement did not compel him to cease dealing in the sand for his own account. But, by the subsequent contract of 1895, such an obligation to cease the business of deal-

ing in Albany molding sand was imposed upon and assumed by him. Then, further, I do not think that the finding of fact that the agreement of 1893 was treated by the parties as at an end is without support in the evidence. The trial judge could reasonably infer from the facts testified to that the defendant had stopped paying to the plaintiff the $15 a month for some two months before the agreement of 1895, and that the plaintiff thereupon had resumed his dealings in sand until the contract of 1895 was made; that the parties regarded their arrangement as terminated, and had abandoned it.

I think, therefore, that the contract of 1895, which is found to have been made by the parties and carried into execution, was valid and enforceable, unless, as it is, in the second place, contended by the appellant, it was against public policy, as being in restraint of trade, and therefore void. The argument in that respect seems to be that the contract was the plaintiff's covenant not to do business in molding sand anywhere, and was not connected with a transfer of anything in the way of a business or a plant. As to the plaintiff's agreement, the appellant is incorrect as to the general nature of its restraint upon the plaintiff. The finding is, and the evidence supports it, that the plaintiff's agreement related only to the purchase and sale of Albany molding sand; that is, molding sand from the county of Albany. However, I should not regard it as of any controlling importance if it were as broad as the appellant claims. The feature which is said to distinguish this case from our prior decisions upon the subject is that the plaintiff's agreement was unaccompanied by the sale of any business plant or stock. At the time of contracting with the defendant he had neither. He was engaged in the business of buying and selling Albany molding sand, and was, presumably, a business rival of the defendant. By this contract he agreed to discontinue his business, and to turn over to the defendant all orders for sand which he then had or might thereafter receive. The effect of the arrangement was to transfer to the defendant the good will or custom of the business which he had built up, and to cease to be its competitor to the extent described. That a man may not contract as he will with respect to himself or to his property rights demands the intervening of some authoritative reason, founded in considerations of public policy. The denial of the

right can only be reasonable when to permit its exercise is seen to be fraught with consequences injurious to the interests of society. The state has a right to limit individual rights where their exercise touches the public interests, and, if unrestrained, would be prejudicial to order or to progress. The doctrine which avoids a contract for being one in restraint of trade is founded upon a public policy. It had its origin at a time when the field of human enterprise was limited, and when each man's industrial activity was, more or less, necessary to the material well-being and welfare of his community and of the state. A discussion of the doctrine and the history of the law appear in the cases of Match Co. v. Roeber, 106 N. Y. 473, and of Leslie v. Lorillard, 110 N. Y. 519, 1 L. R. A. 456. The conditions which made so rigid a doctrine reasonable no longer exist. In the present practically unlimited field of human enterprise there is no good reason for restricting the freedom to contract, or for fearing injury to the public from contracts which prevent a person from carrying on a particular business. Interference would only be justifiable when it was demonstrable that, in some way, the public interests were endangered. But contracts between parties, which have for their object the removal of a rival and competitor in a business, are not to be regarded as contracts in restraint of trade. They do not close the field of competition, except to the particular party to be affected. To say, at the present day, that such a contract as was made in this case was affected by a public interest and was a matter of public concern would be, in my opinion, unreasonable. Such a contract not only does not obstruct trade, but it may be for the advantage of the public as well as of the individual. Story, Cont. § 551. Heretofore, in most of the cases which have come before the courts, the covenant to refrain from a calling within a territory described accompanied a sale of the business itself, with all its appliances or appurtenances. For obvious reasons, that would be so; but, if the calling be one which is followed without a business plant, is any principle of public policy the more violated by a covenant to discontinue it? Clearly not, and this court has not held to that effect. Indeed, its utterances have intimated to the contrary. Leslie v. Lorillard, *supra,* is much in point, where the contract was that a steamship company would, in consideration of monthly payments, discontinue its

business of running vessels between certain ports. The contract was not considered to be objectionable. Quite recently it was said by Judge Landon, speaking for this court, in the case of Cummings v. Stone Co., 164 N. Y. 401, that "it may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel any one to continue a business which he can sell or finds it to his interest to abandon, much less to continue it for any time or in any particular manner or place." The Match Case, the Leslie Case, and the case of Tode v. Gross, 127 N. Y. 480, 13 L. R. A. 652, were cited and relied upon. In Brett v. Ebel, 29 App. Div. 256, Mr. Justice Barrett considered a similar question, and it was there held that the contract in question, which involved only the sale of the good will of the particular business, was not within the application of the doctrine. The plaintiff exercised his right to agree to go out of the business, for an advantage deemed to be gained by him in so agreeing, and he also agreed to turn over to the defendant his good will and custom. I think the contract did not come within the condemnation of the law.

The case of Francisco v. Smith, 143 N. Y. 488, is not at all opposed to this view. It was stated in the opinion, what is an evident fact, that an agreement not to engage in a particular business is a valuable right, in connection with the business it was designed to protect, and that if the business had not been disposed of there would have been nothing for the agreement to operate upon. In that case the covenant accompanied the transfer of the business, and the vendee was held capable of further assigning the covenant, in connection with his sale of the business, to another.

I think the judgment should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, CULLEN, and WERNES, JJ., concur. HAIGHT, J., absent. LANDON, J., not sitting.

Judgment affirmed.[14]

14—See Mapes v. Metcalf, 10 No. Dak. 601 (contract to refrain from carrying on printing business, the consideration being a share in the covenantee's printing business—construed as sale of good-will of a printing business pure and simple and a restriction by the covenantor —held legal).

OAKDALE MANUF'G CO. v. GARST

(Supreme Court of Rhode Island, 1894. 18 R. I. 484.)

Bill in equity by the Oakdale Manufacturing Company and others against Sebastian Garst for an injunction to restrain the defendant from carrying on business in violation of the following agreement:

"And it is further mutually covenanted and agreed by and between the parties hereto, each for himself, however, and not for the others, that they will not engage, directly or indirectly, in any business of the same kind, or for the same purpose or purposes, as that to be carried on by the corporation to be formed; nor will they directly or indirectly be concerned in or be interested in any firm, firms, corporation, or corporations engaged in the same business or business similar to the business of the corporation to be formed for the period of five years from and after the date of this agreement."

The complainant, the Oakdale Manufacturing Company, is the corporation organized by the other parties to the suit, under the laws of the state of Kentucky, in pursuance of the agreement referred to in the opinion of the court.

Arnold Green, Richard B. Comstock, and Rathbone Gardner, for complainants. Simon S. Lapham, for respondent.

STINESS, J. The complainants seek an injunction against the respondent to restrain him from violating his covenant that he would not engage or be concerned in, directly or indirectly, the manufacture or sale of butterine or oleomargarine, for the space of five years from the date of the covenant. Prior to April 30, 1891, the parties carried on that business separately, when they agreed to unite and form a corporation for the purpose of carrying on their business together. To this end, all the parties turned in the stock, machinery, accounts, and good will of their respective concerns, at a valuation greatly in excess of the value of the property itself, taking an amount of stock in the corporation represented by such valuation. The corporation has carried on the business since that time. In August, 1892, the defendant sold his stock in the company, to present holders, for $60,000, although, as he says, the property it represented was worth only about $28,000. After this he entered the

same business again, and claims the right to do so upon the following grounds, viz.:

(1) That he was induced to enter into the contract through false and fraudulent misrepresentations of the complainants.

(2) That the contract is void as a combination to raise the price of a necessary and useful commodity in trade, and to stifle competition.

(3) That one purpose of the contract was to form a corporation in violation of the laws of this state.

(4) That, the contract being in restraint of trade, its enforcement is unreasonable.

As to the first defense, it is sufficient to say that we do not find it to be supported by the evidence. The respondent knew perfectly well what he was doing in making the arrangement, and agreed to it freely. The facts that one of the companies was using a secret process to preserve the freshness of the product, so that it could be exported to tropical climates, and that it was engaged to some extent in such export are shown by the proof.

In support of the second ground of defense, the respondent cites cases of contracts to create a monopoly and to force prices. Such was People v. North River Sugar Refining Co., 54 Hun. 354, a proceeding to vacate the charter of the company because it had become a partner in the "Sugar Trust." The unlawfulness of such a combination was largely dwelt upon, but in the court of appeals (121 N. Y. 582) the decision was sustained only upon the ground that the company had practically relinquished its corporate functions, and so had forfeited its franchise. Arnot v. Coal Co., 68 N. Y. 558; Craft v. McConoughy, 79 Ill. 346; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; and Emery v. Candle Co., 47 Ohio St. 320, were cases where contracts, based upon a monopoly, were held to be invalid. Undoubtedly, there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such

a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule. This is well put in Skrainka v. Scharringhausen, 8 Mo. App. 522, where 24 owners of stone quarries, on account of a ruinous competition, which made it impossible to work their quarries at a profit, made an agreement to sell through a common agent for the space of six months, and the agreement was sustained. The court says: "But not every agreement in restraint of trade is illegal. Where the contract injures the parties making it, by diminishing their means for supporting their families, tends to deprive the public of the services of useful men, discourages the industry, diminishes the production, prevents competition, enhances prices, and, being made by large companies or corporations, excludes rivalry, and engrosses the markets,—tends to 'make a corner,' to use the slang of the stock and provision gamblers,—it is against the policy of the law. But restraints upon trade imposed by agreement, under limitations as to locality, time, and persons, are not necessarily restraints of trade in the general sense which is objectionable." So in Tode v. Gross, 127 N. Y. 480, the defendants had sold their business of making cheese by a secret process, under a general restriction not to engage in the business for five years, with reference to which it is said: "The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction on either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agree-

ment is not opposed to public policy, even if the restriction was unlimited as to both time and territory. The restriction under consideration, however, was not unlimited as to time." These two cases state a very sensible rule, both as to the public and the parties, and they are exactly like the case before us. Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite; one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies. This is neither monopoly, nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition.[15]

15—*Accord:* Anchor Electric Co. v. Hawkes, 171 Mass. 101; Meredith v. New Jersey Zinc & Iron Co., 55 N. J. Eq. 211. In the latter case Pitney, V. C., said:

"It remains to consider the question of illegal combination, which would subject the new corporation to an attack by the attorney general. Upon such consideration as the four days allowed me for that purpose has permitted me to give the subject, I think that there is nothing in that ground.

"The circumstances show that it is not the object or purpose of the contract to create a monopoly. The affidavit of the president of the New Jersey Zinc & Iron Company shows that the zinc ores which will be controlled by it after these several purchases constitute but a small fraction of the world's supply, and that its product of zinc will also be but a small fraction of that produced throughout the country. Besides, buying up by one corporation of the property of another, and consolidating the whole into one business, to the extent and in the manner provided for in this agreement, is not, in my judgment, contrary to public policy, nor does it tend to create a monopoly. The question was carefully examined by Vice Chancellor Green in Ellermann v. Stockyards Co., 49 N. J. Eq. 217, and that opinion was reviewed and reaffirmed in the subsequent case of Willoughby v. Stockyards Co., 50 N. J. Eq. 656, heard by both Vice Chancellor Green and Vice Chancellor Van Fleet, and they concurred in the same result.

"It must be remembered, in this connection, that these companies are not exercising any public franchise of carrying passengers or goods, but only the franchise of being a corporation. Their business is one that may be conducted by private individuals. They are simply the owners of a certain species of property which in its natural state is of no use to mankind, and which after it has been manufactured and made fit for use can hardly be classed as a neces-

With reference to the third ground of defense, it does not appear that the agreement in any way violates the laws or policy of this state, and if it did, the defendant, being a party to it, could not set it up. Chafee v. Manufacturing Co., 14 R. I. 168. The mere fact that the complainant corporation is created under the laws of the state of Kentucky is not sufficient to warrant a dismissal of its case, for foreign corporations have frequently been recognized as suitors in this court. Bank v. Kendall, 7 R. I. 77; Machine Co. v. York, 11 R. I. 388; Smelting Co. v. Smith, 13 R. I. 27; Manufacturing Co. v. King, 14 R. I. 511. They are also recognized as doing business here by comity. Pierce v. Crompton, 13 R. I. 312. While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business, and violates no law of this state, we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders, given to creditors under our statute, are wanting; but that is a matter for those who deal with the corporation to consider. We can hardly deny the right of a foreign corporation to do business in this state, upon considerations of public policy, when our own statutes

sity. The law forbidding forestalling the market does not, in my judgment, apply to the purchase of such property. Jac. Law Dict.; Bouv. Law Dict. tit. 'Forestalling.' By the law of the land these owners have the right to exercise their own judgment as to when, if ever, and how, they will spend their money in preparing their property for market and rendering it fit for use by mankind. Now, I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact, the essential quality of that series of acts or course of conduct which we call 'competition' is that it shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty."

(Pub. Laws, c. 1200) expressly provide for corporations formed in this state for carrying on business out of the state.

The fourth ground of defense involves the reasonableness of the restrictive covenant. The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and it is not to be arbitrarily limited by boundaries of time and space. There has been much discussion upon this subject, which need not be repeated. The law has advanced, *pari passu* with social progress, to a point of practical unanimity. The rule, now generally received, has been recognized in this state, that contracts in restraint of trade are not necessarily void by reason of universality of time (French v. Parker, 16 R. I. 219, nor of space (Herreshoff v. Boutineau, 17 R. I. 3; but they depend upon the reasonableness of the restrictions under the conditions of each case. The diversity of these conditions produces an apparent diversity of decision, and yet it will be found upon examination that most of the cases really turn upon the reasonableness of the restriction. For example, in Wiley v. Baumgarden, 97 Ind. 66, cited by the respondent, sale was made of a dry-goods store, with the vendor's agreement not to engage in the dry-goods business for five years; and in Herreshoff v. Boutineau the agreement was not to teach within this state. In these cases the subjects of the contracts were of a purely local character, and outside restraint was unreasonable. On the other hand, in Thermometer Co. v. Pool, 51 Hun. 157, where the business was extensive, restraint within the entire territory of the United States, and in Tode v. Gross, 127 N. Y. 480, unlimited restraint as to territory, were sustained. The contract is to be determined by its subject-matter and the conditions under which it was made; by considerations of extensiveness or localism, of protection to interests sold and paid for, or mere deprivation of public rights for private gain, of proper advantage on one side, or useless oppression on the other. In this case the contracting parties were all capable business men. They knew what they were about. The clause objected to was mutually beneficial and equally restrictive. The respondent was to gain as much advantage from it as any of the others, so long as he remained in the company, and in case of sale it would enhance the value of his stock. And this

it did; for, when he sold his stock, he received for it more than double what he testified the property was worth. Having received this large price for his stock, he now seeks to destroy its value upon the ground that the original agreement was unreasonable. The circumstances show that it was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products. Time was needed to ascertain what could be done, and where, and so the term of five years was agreed upon within which the company should be free to seek its field of operation. To allow the respondent now to overthrow that agreement would be grossly inequitable. We think the complainants are entitled to the relief prayed for.

WICKENS v. EVANS

(Court of Exchequer, 1829. 3 Younge & Jervis, 318.)

Assumpsit. The first count of the declaration stated, that, before and at the time of making the articles of agreement, and the promise and undertaking of the said defendant thereinafter next mentioned, the said plaintiff was a box-maker, and the trade, business, and calling of a box-maker had used, exercised, and carried on, and still did use, exercise, and carry on, on to-wit, at Oxford, in the County of Oxford; and whereas, before and until the making of the said articles of agreement, the said plaintiff, from time to time, traveled, by himself and his servants, into various parts of the country, and of the several districts in the said articles of agreement mentioned and referred to, for there vending trunks and boxes, by him made in his said trade, business, and calling; and the said defendant and one William Fletcher also severally and respectively exercised and carried on the said trade, business, and calling of box-makers, and, severally and respectively, traveled into various parts of the country and of the several districts aforesaid, for there severally and respectively vending

and selling trunks and boxes, to-wit, at Oxford, aforesaid, in the county aforesaid; and thereupon, theretofore, to-wit, on, &c., at, &c., by certain articles of agreement, bearing date a certain day and year, to-wit, &c., then and there made and entered into, between the said William Fletcher, of the first part; the said defendant, of the second part; and the said plaintiff, of the third part; reciting, that, whereas the said William Fletcher, Daniel Evans, and Joseph Wickens had, for several years last past, traveled into various parts of the country, vending trunks and boxes for sale, but, on account of the inconvenience and loss which they severally acknowledged to sustain, by reason of their exercising their trade and calling in places which they wished to keep separate and distinct from each other, they, the said William Fletcher, Daniel Evans, and Joseph Wickens, had, in consideration thereof, agreed to divide the same, and enter into the terms and conditions thereinafter mentioned relative to such division, (that is to say), the said William Fletcher, Daniel Evans, and Joseph Wickens did thereby, severally and respectively, agree with each other to divide, and not interfere with certain districts of the several cities, boroughs, towns and villages, set forth on Bowles's Post-map of England and Wales, thereto annexed and referred to, and signed with the respective proper handwriting of the said William Fletcher, Daniel Evans, and Joseph Wickens, it being the true intent and meaning of the said parties thereto, and of those present, that the said William Fletcher should and might, at all times thereafter, during the life of the said William Fletcher, by himself and his agents (duly authorized only), travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said Daniel Evans and Joseph Wickens, or either of them, during their joint natural lives, in the several cities, boroughs, towns and villages, marked with ink, and set out with black cotton, so set forth and described on the said map, as aforesaid; and also, that the said Daniel Evans should and might, at all times thereafter, during the life of him and the said Daniel Evans, by himself and his agents (duly authorized only), travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said William Fletcher and Joseph Wickens, or either of them, during their joint natural lives, in the several

cities, boroughs, towns, and villages, marked with ink, and set out with black cotton, so set forth and described on the said map, as aforesaid; and also, that the said Joseph Wickens should and might, at all times thereafter, during the life of him the said Joseph Wickens, by himself and his agents (duly authorized only) travel into, to sell trunks and boxes in his way of business, without any interruption whatsoever by the said William Fletcher and Daniel Evans, or either of them, during their joint natural lives, in the several cities, boroughs, towns, and villages, marked with ink, and set out with black cotton, so set forth and described on the said map, as aforesaid. And it was thereby further agreed by and between the said parties thereto, that they, and each of them, should also be at liberty to travel, for such purposes of trade as aforesaid, during their joint natural lives, as aforesaid, to all such other places as might thereafter be built, although not set forth on the said map, so as such trading should not interfere with either of the said districts of the said parties thereto, so respectively marked out on the said map as aforesaid; and also, it was thereby further agreed by and between the said parties thereto, that they should not, directly or indirectly, allow or suffer any goods in their said trade to be manufactured at their respective shops or warehouses, or be sent from their or his respective shops, houses, or warehouses, or from any other place, for the purpose of being sold or disposed of, on the ground to be traveled by the said parties thereto, so marked out on the said map as aforesaid, or in any manner whatsoever participate in any profits arising from any sale of the said goods in such respective districts as aforesaid, and so thereby agreed to be divided as aforesaid; and also, should not aid and assist any person or persons whomsoever, to oppose all, any, or either of the said parties thereto, in the said trade, in England and Wales; and it was thereby further mutually agreed by and between the said parties thereto, that they and each of them should not nor would, during their joint natural lives, as aforesaid, buy or purchase any tea chest or chests, black or green, at a higher price than 6d. or 8d. each, in Oxford; and it was thereby lastly agreed by and between all the said parties thereto, that they should not, by themselves, or either of them by himself, nor should their, or either of their servants or agents in

that behalf, travel into the districts of each other, so set forth on the said map, or into any other place which might be thereafter built, forming the route of either of the said parties thereto, in the way of their or his said trade and business, to the injury and prejudice of each other. And for the true performance of that agreement, each of the said parties thereto bound himself unto the other of them, in the sum of £40 as to the sale of trunks and boxes, and £10 as to the purchase of any tea chest or chests, black or green, at a higher price than above stated, for each and every offense or infringement of all or any of the clauses above contained, to be recovered by way of liquidated damages, against the party or parties who should be guilty of any breach of that agreement, or of any part thereof. And, moreover, it was further agreed, that if, at any time thereafter, during the joint natural lives of the said parties thereto, any person or persons should set up and oppose any or either of the said parties, in the said trade of box and trunk making in England and Wales, then, that the said parties thereto should and would meet together, and enter into such mutual agreement, to the intent therein above agreed to, as should be beneficial to the mutual interests of the said parties thereto, it being their, and each of their, true intention, not to do any act, prejudicial to the interests of each other, but to aid and assist each other in the said trade and business, to the utmost of their power.

Breach—That the said defendant, not regarding the said articles of agreement, nor his said promise and undertaking, did, afterwards, to wit, on, &c., and at and on divers, to wit, nine other times and occasions, between that day and the day of exhibiting the bill of the said plaintiff against the said defendant, travel, by himself and his servants and agents in that behalf, into the district of the said plaintiff, so set forth on the said map, in the way of his, the said defendant's, said trade and business, to the injury and prejudice of the said plaintiff, and did thereby commit divers, to wit, ten offenses and infringements of the said articles of agreement against him the said plaintiff, whereby, and according to the form and effect of the said articles of agreement, the said defendant forfeited and became liable to pay to the said plaintiff the sum of £40 of lawful money of Great Britain, for each and every of said

offenses and infringements of the said articles of agreement by him the said defendant, amounting together to a certain large sum of money, to-wit, the sum of £400, &c.

The second count, after setting forth the agreement as in the first count, proceeded to aver, as breaches, that the defendant, on divers, to-wit, nine times and occasions, did travel, by himself, and his servants and agents in that behalf, into the district of the plaintiff, in the way of the defendant's trade and business, and did, at and on each of those times and occasions, sell and dispose of divers large quantities of trunks and boxes, in the way of his said trade and business, amounting, in the whole, to a large sum of money, to-wit, the sum of £3,000, and thereby hindered and prevented the said plaintiff from selling and disposing of divers and very many trunks and boxes, which he otherwise might and would have there sold and disposed of, &c. General demurrer to the first and second counts, and joinder therein.

Taunton, W. E., in support of the demurrer.—The agreement stated in the first and second counts of this declaration, operates in general restraint of trade, and is, therefore, void, or it is an agreement for a partial restraint, without a sufficient consideration. From the recitals, it appears to have been the object of the parties, to avoid the inconveniences they experienced, as competitors, from underselling each other, which, however, although a loss and a prejudice to them, was a benefit to all the subjects of the realm. The intent of each party is, to monopolize the business of a box-maker, and to secure to himself an exclusive sale in the particular district marked out on the map; and, for this purpose, each engages not to manufacture or sell goods, or to aid other persons in manufacturing or selling goods, to be sent into the districts of the other parties, and not to travel into those districts. They are not to purchase tea chests in Oxford at a higher price than is agreed upon; and, if they meet with any opposition, they are to concert measures for their own benefit. All these stipulations are inconsistent with the policy of the law; and the combination is illegal. Now, it is quite clear, that any agreement for the total restraint of trade, that is to say, an agreement whereby an individual is restrained from trading throughout the whole

realm, during his life, is bad; but it is conceded, that a partial restraint may be good, provided there is sufficient legal consideration. This distinction has been long admitted and acted upon. Prugnell v. Goss, All. 67, Broad v. Jollyfe, Cro. Jac. 596, Anonymous, Moore, 114, 2 Wms. Saunders, 156, n. 1. In Claygate v. Batchelor, Ow. 143, S. C. Cro. Eliz. 872, it was held, that the condition of a bond, restraining an apprentice from using the trade of a haberdasher within the county of Kent and the cities of Canterbury and Rochester, for the space of four years, was against law. Three reasons are assigned for this judgment: "It is against the liberty of a freeman, and against the statute of *Magna Charta,* cap. 20, and is against the commonwealth. And Anderson said, that he might as well bind himself that he would not go to church." This decision is noticed by PARKER, L. C. J., in his judgment in Mitchel v. Reynolds, 1 P. Wms. 181, wherein all the law upon this subject is fully explained. In Comyns's Digest, Tit. "Trade" (D.), all the cases are collected, and the author lays it down, on his own authority, that "an obligation or promise, which restrains the total use of a man's trade for four years, will be void." In Davenant and Hurdis, cited in the Case of Monopolies, 11 Rep. 86, an ordinance by the company of Merchant Tailors of London, directing that every brother of the society should put out one-half of his clothes to some brother of the said society, who exercised the art of a cloth-worker, was declared to be against the common law and the freedom of the subject, and was, therefore, adjudged void. In that case, nothing operated to the total restraint of trade, inasmuch as the ordinance related only to the brothers of the society. [HULLOCK, B.—But there was no consideration for the partial restraint.] There was a latent consideration arising from the obedience due from every member to the laws of the company, and an indirect benefit springing out of this by-law. The result of the decisions relative to the adequacy of the consideration is, that there must be an extrinsic, foreign and collateral consideration, *dehors* the instrument, and not merely such as arises, as in this case, only upon the face of the instrument itself. That was the case in Horner v. Ashford, 3 Bing. 322 (E. C. L. R. vol. 11). But, supposing that is not necessary, the only consideration here expressed amounts to an illegal combination between the three

parties, to obtain a monopoly in their trade, throughout England. Such a combination, if good in the case of three persons, must be equally so with regard to any number. Thus, the brewers or distillers in London might enter into a similar agreement to divide the Metropolis into districts, the effect of which might be to supply the public with a commodity prepared with inferior ingredients, at a higher price.

Cross, G. R., *contra.*—The law is correctly stated, when it is said, that no consideration can support an agreement operating as a general restraint of trade. Here, however, the restraint contemplated is not general, but confined to particular limits; and there is also an adequate and good consideration. The judgment in Mitchel v. Reynolds, 10 Mod. 130, and all the antecedent cases there referred to, clearly establish, that a contract, not to exercise a trade within a particular place or parish, is good, if made upon a fair and just consideration. That judgment also shows, that it is no good objection to a voluntary restraint, that it is against *Magna Charta,* or the liberty of the subject, for "*Magna Charta* provides against force and power, and not the voluntary acts of men; and if I sell my liberty to trade, it is no longer mine, but his to whom I sell it." (10 Mod. 134.) In Colmer v. Clark, 7 Mod, 230, a bond, restraining the obligor from carrying on his trade within the city and liberty of Westminster and the bills of mortality, for a limited time, was held good in law, the restraint from the exercise of trade being confined to a particular district, and founded on a valid consideration. The case of Chesman v. Nainby, 2 Stra. 739, S. C. Lord Raym. 1456, S. C. Bro. Parl. Ca. 349, was an action on a bond conditioned not to set up the trade of a linen-draper, or to assist or instruct any other person in the managing and carrying on of that trade, within the space of half a mile from the plaintiff's dwelling-house, or of any other house, to which she, her executors or administrators, might think fit to remove. This bond was held to be valid, and the plaintiff obtained judgment, which was affirmed on error. In like manner, in Davis v. Mason, 5 Term. Rep. 118, a bond, not to practice as a surgeon, for fourteen years, within ten miles of the town of Thetford, where the plaintiff lived, was held good, although it was objected that the limits, as to time

and place, were unreasonable. Lord Kenyon, C. J., in that case, observed: "I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line. Neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practice as a surgeon in this town." This last observation applies forcibly to the agreement now in question, inasmuch as every other box-maker is at liberty to carry on business in any of the districts to which the agreement is referable. Nor is the consideration insufficient or invalid. "A consideration of loss or inconvenience, sustained by one party at the request of another, is as good a consideration in law for a promise by such other, as a consideration of profit or convenience to himself."—Per Lord Ellenborough, C. J., in Bunn v. Guy, 4 East, 190–4. Here, then, there appears, upon the face of the agreement, to be a benefit obtained by the defendant, and a loss incurred by the plaintiff, at the same time that the public will not be deprived of the advantages arising from the competition of other box-makers, and, it is to be presumed, will obtain boxes and trunks cheaper from these three parties, by reason of the deduction of two-thirds from the expenses of traveling. The stipulation of the parties to aid and assist each other, is nothing more than is commonly undertaken by all partners, and, therefore, cannot vitiate the contract.

Taunton, in reply.—It is the policy of the law to support the freedom of trade; and, therefore, all contracts imposing particular restraints, are, prima facie, presumed to be void. In former times they were looked upon by the Courts with great jealousy, as appears from the strong expressions of Judge Hall (2 H. 5, f. 5): *"A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre common ley, et per Dieu si le plaintiff fuit icy, il irra al prison tanq: ill ust fait fine au roy."* In all the cases cited there was an extrinsic consideration, independent of the agreement, and a loss and benefit before the agreement was entered into, as in the ordinary instances of a tradesman giving up the good-will of his business to his shopman or apprentice.

GARROW, B.—This question, as it appears to me, is confined within a narrow compass; and, as we have all formed the same

opinion, I shall state my view of it very shortly. The principles upon which the decisions upon subjects of this nature are founded, have been accurately stated; and, indeed, have so frequently and so long been acted upon, that they are now indisputable. A general, universal, restraint of trade, inasmuch as it affects the public property, and the interests of the community, is bad; and those to whose interests it more immediately relates, cannot make it good by any consideration passing between themselves. But, it is submitted, that there may be, upon a good consideration, a partial restraint of trade; and that an agreement for that purpose is sustainable, and has been sustained. The legality of a partial restraint of trade has been established in a variety of cases; and the general transactions of mankind furnish daily instances of its existence. Without resorting to the aid of black cotton lines, in order to divide all England into districts, there is no man engaged in trade who does not, in effect, impose some restraint upon himself in point of practice, by confining himself within a particular district, and circumscribing his trade within certain bounds. It has been supposed that the public are interested in precluding the parties from entering into the agreement now in question; but, I think it very doubtful, whether the benefit of the public would be best consulted by these three persons continuing to travel over the whole country, or by each confining himself to the district marked out in the map. Let us see what is the case now presented. It appears, according to the recital in the agreement, that these three persons, in carrying on their business of box-makers, had traveled into various parts of the country to vend their boxes and trunks, and had sustained great loss and inconvenience by reason of exercising their trade in the same places. This is the mischief and evil recited in the agreement; and what is the remedy they propose? Not a monopoly, except as between themselves; because every other man may come into their districts and vend his goods: all they propose is, that they shall not carry on a rivalry, nor continue any longer to trade throughout the country. This, then, is only a partial restraint of trade. But, it is said that, admitting that to be so, there is no consideration extrinsic of the agreement itself; and that argument is illustrated by the cases of a master giving up his business to his apprentice or to

his journeyman. It strikes me, however, that, in the present case, there is as good a consideration as in either of those alluded to. Each party here, before the agreement is entered into, has a trade in all the districts; and he agrees to retire, and to relinquish that trade in two of those districts, in order to secure the others in undisturbed possession. An objection is then made to that part of the agreement, by which it is stipulated, that, in case other persons shall begin to trade as box-makers in any of the districts, the parties shall meet to devise means to promote their own views. What those means may be, it is unnecessary to surmise; but we cannot presume that they will be illegal; and, therefore, this stipulation does not affect the validity of the agreement.

HULLOCK, B.—I think this demurrer ought to be disallowed. The question is properly stated, when it is said to be, whether there be a sufficient consideration. It is conceded that there may be an agreement for a partial restraint of trade, provided there be a good consideration. This doctrine is to be found in Comyns's Digest, and is laid down in all the cases cited in the argument; and the question is said by Lord Kenyon, in Davis v. Mann, 5 East, 120, to have been at rest ever since the case of Mitchel v. Reynolds. I do not understand the principle upon which it is argued, that there is here no consideration, because it is not extrinsic or foreign to the instrument. The law makes no distinction of that kind, but looks whether there is, upon the face of the instrument, a good and valid consideration, that is to say, either a benefit to one party, or a loss to the other. Upon that rule I should say, that, upon the face of this instrument, there is a sufficient consideration. But, it is said, that the effect of this agreement is to create a monopoly; and that, by upholding its validity, we shall lead to other combinations for monopolizing trades. If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated; and the consequence would, perhaps, be, that the public would obtain the articles they deal in at a cheaper rate. Upon the whole, then, I cannot distinguish this case from any of those cited in which an agreement for a partial restraint of trade has been supported.

VAUGHAN, B.—I am entirely of the same opinion. The only question is, whether there appears upon the face of this agreement a sufficient consideration for the partial restraint of trade it contemplates. In consequence of the loss and inconvenience which it is recited the parties has before sustained, they entered into this agreement, by which the loss and benefit to each is reciprocal. In my opinion, this was an honest and upright contract, which has been the question in all the cases; and a contract by which the public are not injured, as they may be supplied upon easier terms.

Judgment for the plaintiff.[16]

NATIONAL BENEFIT CO. v. UNION HOSPITAL CO.

(Supreme Court of Minnesota, 1891. 45 Minn. 272.)

MITCHELL, J. This appeal is from an order overruling a demurrer to the complaint, and the sole question is whether it appears that the contract declared on is void on grounds of public policy as being in restraint of trade. The plaintiff, an Illinois corporation, and the defendant, a Wisconsin corporation, were each organized for and engaged in the same business, to-wit, "issuing and selling, to such persons as might desire to purchase the same, certificates entitling the holders thereof, when sick or injured, to maintenance and to medical and surgical care, attention, and treatment in any hospital provided by said corporation, and to such support during the time said holders might be confined in such hospitals; and to provide hospitals, infirmaries, and such other places as might be necessary for the reception of the holders of the certificates issued by it without cost other than the cost of such certificates." The plaintiff was carrying on this business in a large number of the states of the Union, and had established a large and lucrative

16—Jones v. North, L. R. 19 Eq. 426 (association of quarrymen by which all sold their products to one who was to sell to the city, and the others agreed not to sell to the city. Held legal); Fox Solid Pressed Steel Co. v. Schoen, 77 Fed. 29 (where each party gave up some business for the benefit of the other and the covenant of one party was held legal).

business of the character described in the states of Minnesota and Wisconsin and in the northern peninsula of Michigan, and had acquired many valuable contracts with hospitals throughout that territory entitling the holders of its certificates to treatment in said hospitals. Thereupon the parties entered into the contract sued on, the principal features of which were: (1) That the plaintiff company agreed to refrain for the term of three years from selling certificates in the states of Minnesota, Wisconsin, and the northern peninsula of Michigan, except to railroad employes. (2) The plaintiff also agreed, by every proper means in its power, to secure to the defendant participation in all contracts and arrangements which it already had within that territory with hospitals, and whenever by such contracts it had the exclusive right to hospital service, so far as any company doing the same business was concerned, it would not consent to the substitution of parties other than defendant. (3) In consideration of these agreements on part of the plaintiff, the defendant agreed to pay to it certain sums of money, and also to refrain, during said term of three years, from selling certificates to the employes of any railway corporation doing business within the territory mentioned. The business carried on by these two companies was open to be engaged in within this territory by any other person or corporation organized for that purpose.

Shortly stated, the legal effect of this contract was a sale by plaintiff, for a valuable consideration, to defendant, of its business and good-will within the territory mentioned (except the right to sell certificates to railroad employes), with a stipulation that it would refrain from engaging in such business within that territory for three years, and a like stipulation on part of defendant not to engage in the department of the business reserved by plaintiff. It will be observed that the restriction is not general, but limited both as to space and time, and is only coextensive in space with the business transferred. Also, that the contract does not require either company to wholly refrain from engaging in the business for which it was organized, each remaining free to engage in it without restriction anywhere except within the designated territory; and, even in that, each may still pursue a certain department of such business. Moreover, both companies are purely private corporations, organized

for purposes of private gain, and hence not charged with any public duty. Neither one nor both of these companies have any exclusive right to engage in this business, it being one open to all; hence this contract does not, and cannot, create any monopoly. The most that can be claimed against it is that it reduces by one the number of competitors. Nor can it tend to exclude any one from hospital treatment, its only effect being to reduce by one the number of companies from whom persons desiring to secure in this form the right to hospital treatment could purchase these "benefit certificates."

We feel safe in asserting that no modern decision can be found holding any such contract, under a similar state of facts, void because in restraint of trade. Formerly in England the courts frowned with great severity upon every contract of this kind. The reasons for this partly grew out of the English law of apprenticeship, by which, in its original severity, no person could exercise any regular trade or handicraft except after having served a long apprenticeship. Hence, if a person was prevented from pursuing his particular trade, he was practically deprived of all means of earning a livelihood, and the state was deprived of his services. No such reason now obtains in this country, where every citizen is at liberty to change his occupation at will. Moreover, as cheaper and more rapid facilities for travel and transportation gradually changed the manner of doing business, so as to enable parties to conduct it over a vastly greater territory than formerly, the courts were necessarily compelled to readjust the test or standard of the reasonableness of restrictions as to place. And again, modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common-law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions—both English and American. A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not

lightly to interfere with freedom of contract. It is unnecessary at this time to go over ground so often traveled by others, and enter into any extended consideration of the decisions on this branch of the law. The principal cases on the subject, from the Year Books down, will be found collated in 2 Parsons on Contracts, 748, and also in the notes to Mitchel v. Reynolds, 1 Smith, Lead. Cas. (9th Ed.) 694. See, also, Alger v. Thacher, 19 Pick. 51; Match Co. v. Roeber, 106 N. Y. 473; Beal v. Chase, 31 Mich. 490; and Navigation Co. v. Winsor, 20 Wall. 64.

The general consensus of all the authorities, at least the later ones, is that there is no hard and fast rule as to what contracts are void as being in restraint of trade, but each case must be judged according to its own facts and circumstances; that a party may legally purchase the business and trade of another for the very purpose of removing or preventing competition, coupled with an undertaking on the part of the seller not to carry on the same business in the same place or within the same territory; and the question of the reasonableness of the restraint of trade depends upon whether it is such only as to afford a fair protection of the party in whose favor it is made; and the limits of restraint as to space depend upon the kind of trade or business which is the subject of the contract. Tested by these rules we find nothing legally objectionable in the contract under consideration. In addition to cases cited above, see, also, Moore & H. Hardware Co. v. Towers Hardware Co., 6 South. Rep. 41. There are two classes of cases, some of which appellant has cited, which are often confounded with, but are clearly distinguishable from, cases like the present and stand upon an entirely different footing. The one is combinations between producers or dealers to limit the production or supply of an article so as to acquire a monopoly of it and then unreasonably enhance prices. The other is where a corporation of a *quasi* public character charged with a public duty, as a railway company, gas company, or the like, enters into a contract restrictive of its business which would disable it from performing its duty to the public. Neither of these elements enters into this case.

Order affirmed.

VANDERBURGH, J., did not sit.

UNITED STATES CHEMICAL CO. v. PROVIDENT CHEMICAL CO.

(United States Circuit Court, Eastern Distr. of Missouri. 64 Fed. 946.)

This was an action by the United States Chemical Company against the Provident Chemical Company for rent, on a lease. Trial by the Court, without a jury.

ACTION FOR RENT. Defense that the lease is void, because antagonistic to public policy. On the 25th of September, 1888, the plaintiff company leased to Henry H. Welch, for the term of 10 years, from the 1st of September of that year, at a monthly rental of $1,000 per month, in advance, the building and equipment then used by it for the manufacture of bone tartar in Camden, N. J. The mutual covenants are expressed in seven paragraphs. The first stipulates for the right of entry for default in the payment of rent, and is of the usual character. The second prohibits the assignment of the leasehold or an underletting without the written consent of the lessor. The third provides that, if the premises be destroyed by fire, the lessor shall have 20 days within which to elect to rebuild, and, if the lessor shall choose to rebuild, the rental should then continue for a period of three months, and not longer, until after the complete restoration of the rebuilding, when it would again revive. If the lessor elected not to rebuild, such determination concluded the term. The fourth is a covenant that in the event the buildings should be destroyed by fire, and the lessor elect not to rebuild, then the lessor will not engage in the manufacture of bone tartar so long as the lessee shall continue to pay the rental of $1,000. The fifth assures to the lessee the right to remove any engine, boilers, tools, machinery, or fixtures placed upon the premises. The sixth relates to the prudent use of the premises, so as not to increase the risk by fire, and restricts the employment of the premises to the manufacture of bone tartar. The seventh and concluding covenant is as follows: "Said lessor, for itself, its successors and assigns, hereby covenants to and with said lessee, his heirs, executors, administrators, and assigns, that if said lessor will not, during the period that this lease may be in force, and that the rent herein reserved shall be paid as it falls due, ever manufacture or sell any bone tar-

tar." On the day the lease was executed, it was, with the consent of the lessor, assigned to the defendant, a corporation organized pursuant to the laws of Missouri, and which, for many years antecedent, had been engaged in the manufacture of bone tartar at the city of St. Louis, and whose trade in that product extended through the United States, wheresoever there was a demand for that article. Although the lease was made to Mr. Welch, it was understood by both parties that he was merely the representative of the defendant company, whose officers had negotiated and consummated the terms of the trade. The plaintiff was organized as a corporation under the laws of New Jersey, and had for a number of years been engaged in manufacturing various kinds of chemical compounds, principally sulphuric acid, alum, rock tartar, fertilizers, and latterly bone tartar, at Camden, N. J. It used a separate building for each of the different kinds of its products, and each was operated by mechanical power derived from a common motor. The building which the defendant leased had no power, and unless supplied with engine, as seems to have been contemplated by paragraph 5 of the lease, or power rented from the defendant, would be useless for the manufacturing purpose for which it had been rented. The defendant points to this incident as a clear indication of a design, of which both parties must be cognizant, not to employ the building in the business to which it was especially adapted, but to close it up, so that the defendant would be in complete control of the trade in bone tartar. And there is some evidence that, in conversations attending the negotiations which culminated in the lease, the defendant expressed an intention not to operate the factory; and also that, at least for the immediate future, if the negotiations were concluded, the defendant would have complete control of the trade in the bone tartar commodity; and that this latter feature was utilized by the plaintiff to obtain the rental finally agreed upon.

"Bone tartar" is a coined term for the chemical compound "acid phosphate of calcium," and is obtained by treating calcined bone or fossil and kindred rock with sulphuric acid. Whether made of bone or fossil rock is not discernible in the finished product, either by taste, analysis, or effect in use. Bone and rock tartar are indiscriminately used as one of the prime components of baking powder. It was the trade of the manu-

facturers of baking powder that the defendant had been cultivating for years, and of which, so far as bone tartar, its exclusive product, was used, it had almost the exclusive patronage up to the time when the plaintiff began to produce bone tartar. The plaintiff's first manufacture of said phosphate of calcium was from rock, but, for two or three years before the date of the lease, it had added to its works, at Camden, the building leased to the defendant, especially adapted to the making of bone tartar, and early began to press this product upon the market, in competition with that of the defendant, and threatening to become a dangerous rival. The defendant, in order to protect its trade, conceived the idea of perpetuating its regency in this particular field by gaining control of the plaintiff's works whereat the rival product was made. Its efforts resulted in the lease which is the basis of this suit. The quality of the plaintiff's bone tartar was equal to that of the defendant's. While the manufacture of acid phosphate of calcium was open to the talent and capital of any one, yet, to successfully make it, great skill and experience were required, and this skill had only been attained by the plaintiff and defendant, with a few unimportant exceptions, up to the time of the lease. A Mr. McNab was the expert in charge of the plaintiff's works, and, after the execution of the lease, the defendant requested the plaintiff to endeavor to keep him in its employment in the other departments of its business, so that he might not engage in starting a business that would compete with the defendant's; and this the plaintiff, in a spirit of accommodation, consented, so far as it could with propriety, to do. The defendant, after the lease was made, purchased of the plaintiff all of its finished products, both of rock and bone tartar, and the raw material for making them. The raw material was sent to the defendant's works at St. Louis, and the manufactured sold from Camden to customers, including those who had been purchasers of the plaintiff, and to whom the plaintiff used its best endeavors to introduce defendant, under the name of the United States Tartar Company, the defendant thinking it prudent to disguise the fact that it had acquired the plaintiff's factory and bone tartar business. The value of the leased premises is shown to be between $17,000 and $24,000 and the annual rental to be from 10 to 15 per cent. of this value, while the rental stipulated

in the lease is $12,000 per annum. Inasmuch as the lease contains no grant of the good will of the plaintiff, the defendant contends this large monthly sum is but the price which the plaintiff demanded for withdrawing its rivalry to the defendant; while, upon the other hand, the plaintiff contends that it is but a fair compensation for the profit it had been realizing and might reasonably anticipate from that particular branch of its business, and the use of the leased property; and I am convinced of the accuracy of the plaintiff's contention by the evidence. Up to May, 1893, the rental was promptly paid by the defendant. McNab, without the connivance of the plaintiff, had left its employment, and had started a factory for making bone tartar. Other rival institutions sprang up, and the prices of bone tartar were tending downward; and under these influences the defendant repudiated the lease, as contrary to the policy of the law. The plaintiff sues for the rent in arrear.

PRIEST, District Judge (after stating the facts). The question of moment in this case is whether the seventh covenant of the lessor, not to manufacture or sell any bone tartar during the period the lease may be in force, is in restraint of trade, and for that reason void. The transaction in which this restriction appears is the leasing of premises and equipment especially devoted to the manufacture of bone tartar. The rental value of the real estate and buildings was between $2,000 and $2,500. The profits derived by the plaintiff from making and sale of bone tartar were from $10,000 to $12,000 per annum at the time the lease was made. It is manifest that the inducement moving the plaintiff to lease the premises was to obtain a fixed and certain sum, rather than a contingent and uncertain one; and the motive of the defendant was to get rid of a dangerous and aggressive competitor in the trade of the article of which it was in practical control, and to the manufacture of which it was exclusively devoted. The plaintiff sought a trade for this article throughout the United States—an achievement which the defendant had already accomplished, being earlier in the field. In view of these conditions, is the covenant condemned by public policy?

The restraint extends literally everywhere, but a fair construction would limit it to the United States. If valid to that

extent, we have no concern with the broader boundary. It is commonly and casually said that contracts in general restraint of trade are void. This rule, whatever may have been its earlier character, is now neither arbitrary nor inflexible. The sense of the modern decisions is that, if the restraint is only commensurate with the fair protection of the business sold, the contract is reasonable, valid, and enforceable. It is only where the restriction can be of no avail to the vendee, and unnecessarily hampers the vendor, that it becomes oppressive and void. Fowle v. Park, 131 U. S. 88; Ellerman v. Stock-Yards Co. (N. J. Ch.), 23 Atl. 287; Long v. Towl, 42 Mo. 545; Match Co. v. Roeber, 106 N. Y. 473; Lawson, Cont. § 327.

Among the potent reasons first assigned against such contracts was that the person restrained by thus surrendering his chosen occupation—one for which he had been especially prepared—might become a public charge, and the public be injured in being deprived of his personal skill in the avocation to which he had been brought up. Such reasons cannot be applied to artificial persons without absurdity. The substantial ground in all cases, especially where corporations are concerned, is that such contracts tend to create monopolies. In discussing this phase of the subject, we must not lose sight of some other principles, the disregard of which would be more harmful to public interest than monopolies. The right to contract is a cardinal element of constitutional liberty, and, as such, should be jealously guarded. In one of the cases *supra* it is said:

"It is clear that public policy and the interest of society favor the utmost freedom of contract within the law, and require that business transactions should not be trammeled by unnecessary restrictions. 'If,' said Sir George Jessell, in Printing Co. v. Sampson, L. R. 19 Eq. 462, 'there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice.' " Match Co. v. Roeber (N. Y. App.), 13 N. E. 422.

Private corporations are subject to the control of the states from which they derive their charters. From an abuse or misuse or excess of their powers, they can be called to an account by the state. It is better such control and regulation should be

had by that ample authority than, indirectly, by a foreign forum, upon collateral questions of public expediency. The facts of this case disclose no tendency to monopoly. Monopoly implies an exclusive right, from which all others are debarred, and to which they are subservient. Greene's Case, 52 Fed. 104. In Match Co. v. Roeber, *supra* (a case very similar in facts to this), the Court observed:

"To the extent that the control prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege."

That the contract in this case was ineffectual to create a monopoly, or even to confer a dominating control over the trade in bone tartar, is confessed to some extent by the answer, wherein it assumes, as a just reason for repudiating the contract, competition subsequently started. Acid phosphate of calcium is made by several processes. The plaintiff employed two—one from rock, and the other from bone. It leased the plant for making bone tartar only, reserving the other. The process was not discernible in the finished product. There is nothing in the contract from which we can reasonably infer a tendency to create a monopoly such as the law condemns. Even if an article be of prime necessity, the public is not concerned with who makes, but only with the reasonableness of, the price. But it is said that the defendant had, by its part in the transaction, such a purpose in view. This may be. The intent is only condemned as it is manifested in an unlawful act. If a person does a lawful act with a vicious intent, he is without the pale of legal punishment. Whatever may have been the defendant's motive, and even if reprehensible, there is no rule by which we may reprimand the plaintiff for the defendant's evil or wrongful intentions or acts. Whether the defendant's purpose is condemned by law or not does not affect the validity of the contract, unless plaintiff contributed something more to the accomplishment of the unlawful design than the mere leasing of its property. Labbe v. Corbett, 69 Tex. 503; Tied. Sales, § 294. But we are of the opinion that defendant has been

hastily and unnecessarily self-accusing. The plaintiff was making inroads upon the defendant's business, and greatly cutting the prices of its sole manufactured product, while with the plaintiff this product was but a single feature of its manufacturing plant. The defendant had a perfect right to buy off the competition of a dangerous, powerful, and aggressive rival. The law of self-defense and protection applies to one's business, as well as to his person. But, if another springs up in the stead of the one silenced, the courts cannot, under the guise of public expedience, relieve him from the improvidence of his first contract.

Our attention has been called to many cases which condemn, in perhaps not too severe terms, combinations and trusts. It is a nervous and alarmed imagination which sees in every transaction involving large exchange of properties a monster threatening public interests. Combinations in the nature of modern trusts, so soundly condemned, are those which aim at a union of energy, capital, and interest to stifle competition, and enhance the price of articles of prime necessity and staples of commerce. In such cases there is absent the element of exchange of one valuable right or thing for another. In the contract here we find none of the elements of a combination or trust. It is a simple lease and sale for a fair and reasonable compensation, with stipulations only commensurate with a reasonable, necessary protection. The effect of the transaction, while not so literally expressed, was to convey with the premises the good will of the plaintiff in its bone tartar product and trade. It is both unnecessary and unprofitable to discuss the many cases cited in the briefs. Upon a topic of public expedience, adjudications are, seemingly, necessarily inharmonious.

Judgment for the plaintiff for the rent sued for, and 6 per cent. interest upon each installment from the date it became due.

DUNBAR v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY

(Supreme Court of Illinois, 1909. 238 Ill. 456.)

VICKERS, J. Francis W. Dunbar and others, minority stockholders [17] of the Kellogg Switchboard & Supply Company (hereinafter called the "Kellogg Company") filed a bill in equity in the Circuit Court of Cook county against the American Telephone & Telegraph Company (hereinafter called the "American Company"), the Western Electric Company (hereinafter called the "Electric Company"), the Kellogg Switchboard & Supply Company, Milo G. Kellogg, Wallace De Wolf, and others, for the purpose of having a sale of the majority of the stock of the Kellogg Switchboard & Supply Company made by Milo G. Kellogg and others to the American Company set aside and held for naught, and for an injunction and other relief. Milo G. Kellogg answered the bill, in which he substantially admitted all its averments, and filed a cross-bill, in which he repeated, with some variations and additions, the substantial averments of the original bill, and prayed that the pretended sale of the capital stock held by him in the Kellogg Company should be adjudged illegal and void and be canceled and set aside. Some of defendants below answered both the bill and the cross-bill, while others demurred to both. The demurrers were sustained, and the bills both dismissed for want of equity. This decree was affirmed by the Appellate Court, but upon further appeal to this court the decree sustaining the demurrer and dismissing the original bill was reversed, while the decree dismissing the cross-bill on demurrer was affirmed. This court remanded the cause to the Circuit Court, with directions to proceed in conformity with the views of this court expressed in its opinion. Our former opinion is reported as Dunbar v. American Telephone & Telegraph Co., 224 Ill. 9, 115 Am. St. Rep. 132. Upon the reinstatement of the cause in the Circuit Court most of the defendants who had not already filed answers answered the bill.

17—For the proposition that a minority stockholder may maintain a bill based upon the illegal acts of the corporation in becoming a party to an illegal combination: Harding v. American Glucose Co., 182 Ill. 551, 625–633; also Bigelow v. Calumet & Hecla Mining Co., 155 Fed. 869, *post*, p. 1195, and cases there cited.

Those not answering were either mere formal parties, or parties whose interests were represented and protected by the answers filed. After the issues were made up the cause was heard in the Circuit Court, the Hon. Thomas G. Windes presiding, upon oral evidence taken in open court, except certain portions of the testimony which was submitted in depositions. The findings of the Circuit Court were that the allegations of the bill were substantially true, and by its decree the purchase of the stock of the Kellogg Company by the American Company was declared void and of no effect, and the relief granted was such as the court deemed equitable, proceeding upon the assumption that the title to the stock of the Kellogg Company had never passed out of the persons who made the alleged sales to the American Company. The scope of the decree of the Circuit Court, both in its findings and its equity-adjusting features, will be more specifically stated hereinafter. Upon a writ of error being sued out of the Appellate Court, that court, while agreeing in the main with the Circuit Court in its findings, disagreed with the relief granted, and accordingly reversed the decree and remanded the cause to the Circuit Court, with directions to enter a decree in accordance with the specific directions expressed in the opinion of the Appellate Court. The complainants in the original bill have appealed to this court, and here insist upon a reversal of the Appellate Court and an affirmance of the Circuit Court. Milo G. Kellogg has assigned cross-errors, as have also the American Company and Enos M. Barton. The cross-errors assigned by Kellogg do not materially differ from the errors assigned by appellants, while the cross-errors assigned by the American Company and Barton bring in question the decree of the Circuit Court.

Upon the former hearing of this cause in this court the substance of the bill filed by appellants was set out in the statement preceding the opinion. Since the American Company and others question by cross-errors the sufficiency of the evidence to support appellants' bill, it will be necessary to restate the essential features of the bill upon which the cause was finally heard.

Appellants allege in their amended and supplementary bills that the Kellogg Company was an Illinois corporation, organized for the purpose of manufacturing, selling, hiring, leasing, or otherwise procuring, owning, and disposing of, electric tele-

phone and telegraph instruments of all kinds; that the capital stock consisted of 5,000 shares, of $100 each; that Wallace L. De Wolf was the president, E. H. Brush the vice president, and Leroy D. Kellogg the secretary and treasurer of the company; that upon its organization Milo G. Kellogg became the principal stockholder, owning about two-thirds of the capital stock. It is further alleged that the American Company was a corporation organized under the laws of New York, and was doing business in this state and most of the other states of the Union; that said last-named company had become the owner of the business and stock of the American Bell Telephone Company of Boston, and that F. P. Fish was its president; that the American Company was the owner of a large amount of stock of numerous licensee or subsidiary telephone companies, and operated a large system of telephone and telegraph lines in the United States; that said American Company owned a majority of the capital stock of the Electric Company; that said corporation and the Electric Company formed what is known as the "Bell Telephone Monopoly," which for many years had exclusive control of the business in the United States as to the use of both telephone and telegraph apparatus, due to the numerous patents owned and controlled by said American Company; that the president of the American Company is also a director of the Electric Company; that the Electric Company is an Illinois corporation, engaged in the manufacturing, buying, and selling of electric apparatus used in the construction, operation, and maintenance of telephone and telegraph systems; that E. M. Barton is president of said Electric Company, and that he is dominated by Fish and the American Company through the latter's control of the board of directors of said Electric Company. It is further alleged in the bill that telephones, switchboards, and instruments and other apparatus of the independent telephone companies throughout the United States have been manufactured by a number of companies, the most important of which are the Kellogg Company and the Stromberg-Carlson Company, both of which are located in Chicago, and each of which exceeds in capacity the business of any other telephone manufacturing company in the United States except the Electric Company; that the business of the Kellogg Company exceeded that of the said Stromberg-Carlson Company in supplying

switchboards and other apparatus for the larger independent exchanges throughout the country; that, in consequence of the conditions and circumstances thus stated, it is charged in the bill that in order to stifle competition and create a monopoly in itself and its licensee companies, and to enable them to exact unreasonable and excessive rates and charges, the American Company conceived the illegal purpose of acquiring at least two-thirds of the stock of the Kellogg Company, and through said ownership to elect and maintain a board of directors which should not act in the real interest of the Kellogg Company, but in the interest of and subservient to the interest of the American Company, and thereby free that company and its licensees from the competition of the Kellogg Company and independent exchanges. The bill charges, on information and belief, the method that said American Company contemplated adopting to accomplish its unlawful purpose. The bill then sets out the circumstances under which the American Company acquired, by purchase from De Wolf, an agent of Milo G. Kellogg, 3,307 shares of the Kellogg Company stock, and the acquirement, with like unlawful purpose, of 1,004 other shares of stock from other stockholders in the said Kellogg Company. The bill charges that these purchases were made by Barton, president of the Electric Company; that the money to pay for said stock was furnished by the American Company, and that the stockholders of the Kellogg Company of whom these shares were purchased by Barton were ignorant of the fact that they were selling to the American Company. It is charged that, by the contract entered into between De Wolf and Barton in regard to the sale of the Kellogg shares, Barton agreed to pay $45 per share in cash upon the delivery of the certificates, and also to pay, in addition, per share, the proceeds of any and all bills and accounts receivable due and owing to said Kellogg Company on December 1, 1901, amounting to $323,248.09, as the same are paid and collected; that it was also agreed that the business of the Kellogg Company should be carried on in the usual manner for the space of one year; that these transactions were all consummated while Milo G. Kellogg was in California on account of ill health, and without his knowledge or personal participation therein, and that as soon as he learned of said sale he heartily disapproved thereof and sought in every way to repur-

chase his stock, in order that the Kellogg Company might be managed in the interest of its stockholders and not be used as an instrument to create and perpetuate in the American Company a monopoly of the telephone business; that Barton and Fish, while willing to sell a portion of said stock, insisted upon retaining two-thirds thereof. The bill further charges a series of acts done by Barton through the officers and agents that had been placed in control of the Kellogg Company through the control it had acquired of a majority of the Kellogg Company stock, all of which acts are charged to be in furtherance of the illegal purpose of the American Company to disorganize and dissolve the Kellogg Company. The prayer of the bill was that a temporary injunction might issue, which, upon final hearing, should be made perpetual, restraining the American Company, Barton, Fish, and the Electric Company from selling or otherwise disposing of the shares of stock which they held in the Kellogg Company, aggregating 4,311 shares; that a meeting of the stockholders be convened, under the direction of the court, for the election of a new board of directors, and that the holders of the stock in question be enjoined from voting in said meeting any of said shares of stock, and that the said American Company, Barton, Fish, the Electric Company, and all of their officers and agents, be enjoined from attempting to dissolve or otherwise interfere with the interest and business of the Kellogg Company, and that the sale of the shares of stock in the Kellogg Company to the American Company be set aside and held for naught.

By a second supplemental bill filed by Francis W. Dunbar, Kempster B. Miller, and George L. Burlingame it is charged that in January, 1907, the meeting of stockholders of the Kellogg Company was held in Chicago; that all the stock of said company was represented at the said meeting either by owners or proxies, and that Milo G. Kellogg attended said meeting and nominated for election a board of directors consisting of Dunbar, Miller, Burlingame, Milo G. Kellogg, Leroy D. Kellogg, Edwards, and James G. Kellogg, and that one Charles S. Holt nominated the following board of directors: Buckingham, Brush, Hanford, Dommerque, De Wolf, Edwards, and Coffeen; that votes were cast for the directors as above named, by Milo G. Kellogg 3,405 shares, and by other persons, making a total

of 3,736 shares out of 4,970 shares present, and that said board of directors were duly declared elected by Dunbar; that De Wolf, as president, presided at the said meeting; that Charles S. Holt, counsel for the American Company, was present, and claimed to be the proxy and owner of 3,305 shares of the 3,405 shares so owned and voted by Milo G. Kellogg in person; that said De Wolf, acting in the interest of the American Company and the Electric Company, refused to recognize the vote of Milo G. Kellogg in respect to 3,305 shares of stock, and claimed and pretended that the directors so chosen were not elected, but that in their place and stead the second set of nominees were elected, and that said second set of directors, other than Edwards, under the direction of the American Company, the Electric Company, and Fish and Barton, have assumed and pretended to be, and have acted as, the directors of said Kellogg Company. It is averred that Milo G. Kellogg was the owner of and entitled to vote the 3,305 shares of stock, and that the vote of such stock by Holt was void and of no effect. Said supplemental bill prays that Dunbar, Miller, Burlingame, Milo G. Kellogg, Leroy D. Kellogg, James G. Kellogg, and Edwards may be declared elected and to constitute the duly elected board of directors of the Kellogg Company, and prays for an injunction against all persons interfering with the exercise of their duties as such board. Subsequently, by amendment and supplemental bill, it was charged that on the 19th day of December, 1906, the Kellogg Company declared a dividend of 50 per cent upon all its capital stock, and that said company on that date paid to such American Company a dividend amounting to $215,550 upon 4,311 shares of stock of said Kellogg Company. The American Company denied, by supplemental answer, that it had received a 50 per cent. dividend, or a dividend of any per cent. or any amount, on any shares of stock of the Kellogg Company. A plea was interposed setting up the dismissal of the cross-bill and the affirmance thereof by this court as an adjudication that Milo G. Kellogg was not the owner nor entitled to said shares of stock, and for that reason was not entitled to vote said shares at the stockholders' meeting on January 15, 1907.

The foregoing statement is sufficient to show the general character of the bill. The findings and decree of the Circuit Court may be summarized as follows: After reciting in detail

the averments of the bill and finding the facts substantially as therein charged to be true, and specifically finding that the pretended purchase of 4,311 shares of stock by the American Company, in its necessary operation at the time it was made tended and tends to materially suppress competition and creates in said American Company and its licensee companies a monopoly in the rendering of telephone service to the public throughout the United States and in the different cities and other places thereof, and that it was the intention and purpose of said American Company, in making each of the pretended purchases of said shares of stock, to so restrict and suppress competition in said telephone service and create in itself a monopoly in said service, and that said attempted purchases of stock by the American Company were contrary to the public policy of the state of Illinois and void, the decree finds that no title to said stock passed thereby from any of said sellers to said American Company or to said Barton, but that, despite said attempted sales, each of said sellers still remains the owner of the shares of stock so attempted to be purchased from him. The decree finds that the American Company paid De Wolf, as attorney in fact of Milo G. Kellogg, for the stock obtained from him, $351,229.44, and that the said American Company paid to the several owners thereof $114,036.48 for the other shares of stock, being a total of $465,265.92 which the said American Company paid for 4,311 shares of stock. The decree finds that on December 19, 1906, the Kellogg Company declared a dividend of 50 per cent. upon all its capital stock being then under the control of the American Company, and on that date paid to said American Company, and said American Company received, the dividend of 50 per cent. upon the 4,311 shares of stock which the said American Company claimed to own. The dividend paid to the American Company on this date was $215,550. The decree recites the proceedings of the stockholders' meeting in January, 1907, and finds that the set of directors nominated and voted for by Milo G. Kellogg were duly elected directors of the Kellogg Company, and that said Kellogg was entitled to be recognized as a stockholder of the Kellogg Company, with the right to vote the shares of stock attempted to be sold by De Wolf to the American Company, and that the other set of directors, other than Edwards, were not elected directors of the said company. Following

these findings, the decree of the Circuit Court ordered, adjudged, and decreed that Milo G. Kellogg and the other stockholders of the Kellogg Company who had made a pretended sale to the American Company are still severally the owners of such shares of stock, aggregating 4,311 shares, and a permanent injunction is granted restraining the Kellogg Company, and its agents and officers, from refusing to recognize such parties as stockholders and from rejecting the votes of any of them except in so far as the injunction might be modified, and also from recognizing and treating said American Company, or any of its assigns, as the owner or owners of any of the said 4,311 shares of stock; that the temporary injunction heretofore issued against the American Company and others be made perpetual. The board of directors declared to have been elected by De Wolf at the January meeting are enjoined perpetually from exercising any of the powers or privileges of directors of said Kellogg Company, and from in any way interfering with the conduct or management of the business affairs or the possession or control of the property, books, or papers of said Kellogg Company, unless hereafter duly elected such directors in said company. De Wolf and Dommerque were perpetually enjoined from acting as president and secretary, respectively, of the Kellogg Company. By the seventh paragraph of the decree it was ordered, adjudged, and decreed that the American Company, within 10 days from the 15th day of February, 1908, deposit with the clerk of the Circuit Court, duly indorsed in blank or to the order of the clerk of said court, all of the certificates of stock representing or purporting to represent 4,311 shares of stock so attempted to be purchased by said American Company, and, if necessary to enable him to make distribution of said shares according to the decree, said clerk is authorized to surrender such certificates, and that the Kellogg Company should issue in lieu thereof other like certificates of stock, aggregating 4,311 shares. By the eighth paragraph of the decree it is ordered, adjudged, and decreed that within 20 days after said certificates shall have been deposited with said clerk, and any of said sellers to the American Company of said stock shall have been served with notice of the deposit of said certificates with said clerk, said seller may deposit with such clerk a certified check upon a Chicago bank, payable to the American Company, for the difference

between the purchase price paid by the American Company for the said stock, plus the interest at the rate of 5 per cent. per annum thereon from the time or times when payment or payments were made to the date of said deposit of said check, and the sum of 50 per cent. of the par value of said stock, plus interest thereon at 5 per cent. per annum from December 19, 1906, to the date of the deposit of said check, and upon delivery of such certified check to the clerk said clerk shall forthwith deliver to the seller so depositing such check a certificate, duly indorsed, for the number of shares so attempted to be sold by said seller to the American Company, and shall deliver said check to the American Company. The decree names the several sellers of stock and the number of shares that each is entitled to receive under this clause of the decree. By paragraph 9 of the decree it is ordered, adjudged, and decreed that in the event the said American Company shall not, in compliance with this decree, deposit the said certificates for 4,311 shares of stock within 10 days from the 15th day of February, 1908, the said certificates of stock for said 4,311 shares shall, each of them, be, and the same are, canceled and held for naught, and the Kellogg Company is directed to immediately issue and deliver to the clerk of the court new certificates for said 4,311 shares of stock, such certificates to be for the several numbers of shares of stock which will permit the distribution to the several parties as in the decree contemplated, and the several sellers of such stock are permitted to receive the shares to which they are severally entitled, by depositing a check for the amount and in the manner provided in paragraph 8 of the decree, and upon his doing so the clerk shall deliver to such seller such new certificate of stock for the number of shares specified opposite his name in paragraph 8, and said Kellogg Company shall have and recover from the American Company the sum of $215,550, with interest thereon at the rate of 5 per cent. per annum from December 19, 1906, crediting, however, in reduction of said judgment, all sums received by said American Company in respect of dividends or interest thereon which any seller shall have applied, by way of offset, in a settlement for his stock under the provisions of the decree, and in default thereof execution to issue therefor. Any money collected by the Kellogg Company on said judgment is to be held by it subject to the further order of the court, and

any checks delivered to the clerk by any seller under the provisions of this paragraph shall be turned over and paid to the American Company. Paragraph 10 of the decree makes provision for a public sale by the master in chancery of all or such part of the certificates of stock as should not be accepted and paid for by the sellers thereof in accordance with the preceding provisions of the decree. Out of the proceeds of the sale the master was directed to deduct his commission, and pay from the proceeds of said sale to the American Company the difference between the purchase price paid by the said American Company to said seller to it, for the shares of stock so sold by the master, plus interest at 5 per cent. on said payments from the date when they were made to the day of sale, and the sum of 50 per cent. of the par value of the said stock so sold, plus interest thereon at 5 per cent. from December 19, 1906, to the date of said sale by the master, and if there is a balance remaining in the hands of the master of said proceeds he is directed to pay it to the sellers of the stock. A provision is made in the decree modifying the injunction so as to permit the board of directors elected by the votes of the American Company in January, 1907, to continue in the management of the affairs of the Kellogg Company until all of the sellers of said stock shall have complied with the provisions of the decree in regard to making a deposit with the clerk to reimburse the American Company in accordance with the provisions of paragraphs 8 and 9 of the decree, or until a sale of said stock. There are some general provisions in the decree intended to regulate the conduct of the affairs of the Kellogg Company pending the execution of the decree which are not necessary to be set out, since they are subsidiary in their nature and intended to regulate matters of detail consistently with the general relief granted by the decree.

Upon a review of the foregoing decree by the Appellate Court for the First District the decree of the Circuit Court was reversed and the cause remanded to the Circuit Court, with directions to enter a decree in accordance with the views expressed in the opinion of said Appellate Court. The Appellate Court held that the evidence sustained the material averments of the bill, but refused to hold that the purchase of the stock by the American Company was void as between the parties to the sale. It held

that the sale was void as to the minority stockholders, and only voidable as to Kellogg and other sellers. The decree of the Circuit Court was held to be erroneous in that it recognizes in the minority stockholders the right to have the title to the 4,311 shares of stock determined and adjudged upon their bill, holding that such relief could not be granted under the pleadings in this record. Another point of difference between the Circuit and Appellate Courts is in regard to the election of a board of directors at the January meeting, 1907. The Appellate Court held that owing to an irregularity in the manner of voting the shares of Milo G. Kellogg the persons for whom he attempted to vote were not elected, independently of the question as to who had the right to vote said shares, and that therefore De Wolf, Hanford and Buckingham, who had previously been elected directors prior to this meeting, held over until their successors were duly elected; that, eliminating the 4,311 shares of stock from the January meeting, there was no quorum and no election, hence the result is reached that the old board is still holding over in office under the by-laws, which provide that the directors shall hold their office until their successors are duly elected. The Appellate Court held that by the alleged sale by De Wolf of the Kellogg stock a title passed which is good until set aside, and that such sale could only be set aside on a bill for that purpose upon equitable terms requiring a return of the purchase money; that the decree dismissing Kellogg's cross-bill was an adjudication that he had no right to the stock. The relief which the opinion of the Appellate Court directs to be given is limited to a perpetual injunction against the American Company from voting the stock and from receiving any dividends thereon, and a like injunction against the Kellogg Company from permitting such stock to be voted by the American Company or any one representing it, and from paying such American Company any dividends upon such stock.

While briefs have been filed in this court on behalf of four parties, it is apparent that there are only two real adversary interests—the American Company and those identified with it, on the one hand, and those who are seeking to maintain the integrity and independence of the Kellogg Company, on the other. All the parties can readily be located on the one side or the other of this line of division. The American Company, its

president, Fish, and other officers and agents; the Electric Company, its president, Barton, and its other officers and agents; De Wolf, and other officers and agents of the Kellogg Company, who owe their official relation to it to the American Company from its control of the majority of the stock of the Kellogg Company—are all identified in interest with the American Company; on the other hand, Milo G. Kellogg and others who made the alleged sales of stock to the American Company, the minority stockholders who filed the original bill, and the board of directors for which Kellogg cast his votes at the January meeting, in 1907, represent the other side of the controversy. We will consider the several questions arising on this record with this general classification in view.

The first question which requires consideration arises on the cross-errors assigned by the American Company, which call in question the findings of the Circuit Court that the tendency of the stock purchased by the American Company was to suppress competition and that such purchase was made for such unlawful purpose. This question involves the right of appellants to any relief whatever. If appellees' contention is sustained upon this point, it would necessarily follow that the judgment of the Appellate Court and the decree of the Circuit Court should both be reversed and the cause remanded to the Circuit Court, with directions to that court to dismiss appellants' bills.

A preliminary question is presented as to the degree of proof required to establish the charges in the bill. On behalf of the American Company and Barton, it is contended that the bill charges them with a criminal offense, in that the bill, in effect, charges a violation of sections 1 to 4 of the anti-trust law of 1891 and sections 1 to 6 of the anti-trust act of 1893, both of which acts are found in chapter 38, sections 269a to 269t, Hurd's Rev. St. 1905. Without deciding what the rule as to quantity of evidence would be if a violation of the anti-trust laws were charged in the bill, it is sufficient to say that the law of 1893 has been held unconstitutional by the Supreme Court of the United States in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, and that as to the act of 1891 it is leveled against creating, entering into, or becoming a party to any pool, trust, agreement, or combination to fix or limit the amount or quantity of any article of merchandise or fix the price or lessen

the production and sale of any such article, which offenses are not charged in the bill either by direct averment or necessary implication. The charge in the bill is that the purpose and tendency of the purchase of the stock in question by the American Company were to stifle competition, and the purchase was therefore illegal and void because contrary to the public policy of this state. Whether any of the provisions of the anti-trust act were violated by any of the parties to the transactions involved in this suit is not necessary for us to now discuss or determine. It is a sufficient answer to this contention that such violation is not charged in the pleadings, nor is it necessary to prove such offense to maintain the action or defense set up in these pleadings. It is not necessary that the proof should exclude every reasonable doubt of the truth of the averments of the bill to justify a decree in favor of appellants. Does the evidence sustain the averments of the bill upon the truth of which the unlawful character of the stock purchases depend? The evidence in this record, which is largely directed to a solution of this question, is very voluminous. It would not be practicable within any reasonable limits of an opinion to discuss it in detail. In the bill of appellants, as the same was presented upon the former hearing in this court and as the same stood, with some slight amendments and additions, when the cause was heard, the facts relied upon to establish the unlawful purpose and tendency of the stock purchases were set out in detail, as will appear from the summary of those averments already set out in this opinion.

The proof shows that the American Company and the Kellogg Company were competitors in business, and that their fields of operation extended not only throughout the United States, but to foreign countries as well. That the American Company regarded the so-called independent exchanges throughout the country as offering the most serious obstacle in the way of its complete monopoly of the telephone business in the United States cannot, under the evidence in this record, be denied. The Kellogg Company manufactured multiple switchboards and other telephone apparatus and supplies, and sold its products to the independent exchanges throughout the country. The interest, therefore, of the Kellogg Company was identified with the independent exchanges, since they were the only customers for its products. It is shown that Milo G. Kellogg was an expert in telephony

and a successful inventor of many new and valuable appliances in the telephone business. Patents for these appliances were owned and controlled by the Kellogg Company, and contributed much to the success both of the Kellogg Company and the independent exchanges which bought and used them. The evidence shows that the independent exchanges, to the number of 7,000, maintained friendly relations with each other through a central organization, which holds annual conventions for the purpose of discussing questions of mutual interest and with a view of advancing the interests of the independent exchanges in their rivalry and competition with the American Company and its subsidiary exchanges. It is also shown that the American Company controlled its licensee companies through the ownership of a majority of stock of the local Bell Telephone Companies, and that the local Bell Telephone Companies obtained their equipment entirely through the Electric Company, which the American Company also controlled through the ownership of a majority of the capital stock of the Electric Company. Thus the profits of the American Company depended upon the number and success of its subsidiary companies. The Electric Company manufactured only for the subsidiary American companies. The independent companies were compelled to procure their apparatus and equipment from independent manufacturers, the principal one of which was the Kellogg Company. Continuance in business of the independent exchanges throughout the country depended upon the continued existence of the independent manufacturers of whom they could procure equipment. If the independent manufacturers should go out of business or pass under the control of the American Company, the independent exchanges would be reduced to the alternative of going out of business or becoming subsidiary to the American Company. In addition to selling equipment to independent companies, the Kellogg Company and other independent manufacturers would promote and finance the independent exchanges by furnishing money for construction purposes and taking pay in securities. This feature of the independent manufacturers was a source of no little concern to the American Company.

The evidence shows that in November, 1901, Milo G. Kellogg, being much alarmed about his health, hastily placed the affairs of the Kellogg Company in the hands of his brother-in-law,

Wallace De Wolf, and on or about the 23d day of that month went to California, where he remained until the latter part of the following summer. The Kellogg Company, and Milo G. Kellogg personally, had become liable, as indorsers, for a large amount of paper made by the Everett-Moore syndicate, and, in anticipation that it would be necessary to raise money to meet these liabilities and other accruing bills of the Kellogg Company, Milo G. Kellogg gave De Wolf a general power of attorney to sell or hypothecate all the shares of stock in the Kellogg Company which were the individual property of Milo G. Kellogg. The evidence shows that, soon after the departure of Kellogg for California, De Wolf entered into negotiations with Barton for the sale of a controlling interest in the Kellogg Company. After one or two interviews between Barton and De Wolf, Barton went to New York and had a conference with Fish, the president of the American Company. The result of this interview was that Barton returned to Chicago with full authority from Fish to purchase a controlling interest in the Kellogg Company. The contract of sale was entered into between Barton and De Wolf on January 4, 1902. The money to pay for this stock was forwarded by Fish to Barton and by him delivered to De Wolf. The stock was assigned to Barton, although he was not the real purchaser, and, so far as the record shows, had no personal interest in the transaction. It was understood and agreed between Barton and De Wolf that the transaction should be kept secret. De Wolf did not inform Milo G. Kellogg of the sale until the 4th day of July, 1902. De Wolf testifies that Kellogg was a very sick man, and that he told Barton that he had gone to California, and that he doubted whether he would "ever recover." De Wolf was continued in charge of the Kellogg Company, but after the sale of this stock he consulted with Barton with reference to its affairs. On July 4, 1902, De Wolf met Milo G. Kellogg in Denver, Colo., and then for the first time told Kellogg about the sale of the stock to Barton. The evidence shows that Kellogg heartily disapproved of the course that had been taken. He entered into negotiations for the purpose of buying this stock back, but Fish and Barton refused to sell him the stock, although he offered a profit of $25 per share. In the contract that was entered into between Barton and De Wolf it was stipulated that the Kellogg Company should be

run for one year as it had been theretofore. It was also provided in the contract that Barton should purchase any other shares of stock that might be offered, upon the same terms he had contracted for the Kellogg stock, and under this clause the purchase of the other shares followed.

The purpose and intent of De Wolf in making this sale is not of controlling importance. Whatever his purpose may have been does not assist us in determining the buyer's purpose. It may be that De Wolf's purpose was to relieve the financial situation of the Kellogg Company, which seems to have been greatly exaggerated in his estimation. At all events he makes this excuse for himself, and we are disposed to take a charitable view and accord him the benefit of his own explanation. It is certain that neither Fish nor Barton was actuated by sympathy for any real or imaginary financial distresses that surrounded the Kellogg Company. The reasonable inference from the evidence in this record is that, if Barton and Fish had been sure that the Kellogg Company was on the brink of financial ruin, they would not have invested in this stock, but would have trusted to the desired end working itself out through the downfall and failure of the Kellogg Company. We cannot conceive of the American Company rushing in to aid a rival in business by investing nearly a half million dollars in the stock of a company of doubtful solvency. What, then, must have been the purpose of this purchase? In answer to this question three possible motives may be suggested: (1) The purpose may have been to acquire additional manufacturing facilities; or (2) to invest idle funds of the American Company in stocks which would make a fair return upon the money; or it may have been (3) to advance the interests of the American Company by lessening the competition of the independent exchanges which were being supplied with apparatus and financial aid by the Kellogg Company. Let us inquire, in the light of the testimony, which of these motives actuated the American Company in making this purchase.

Mr. Fish, in his testimony given in a case against the American Company in New York, which was a proceeding to set aside a contract by which the American Company obtained control of the Stromberg-Carlson Company, another independent manufacturing concern, testified as follows: "The question that

was troubling me was not as to the value of the Stromberg-Carlson Company's plant to any one who wanted a telephone manufacturing company. We did not want a telephone manufacturing company, because we had one of our own. We have had trouble in supplying all the wants of our companies through our present sources of manufacture, but it was a trouble we could meet by the developments of our own factory." He testifies that the Electric Company turned out last year a product of $69,000,000, and these additional companies, being so small in comparison with the Electric Company, would not weigh in the balance. The first motive suggested must be eliminated as entirely without the range of reasonable probability.

Was this stock purchase made as a legitimate investment of surplus funds by the American Company? To this question a negative answer must be given for the following reasons: (1) The American Company is not an investing company, except in the stocks of its subsidiary companies. Mr. Fish says in his testimony: "I couldn't tell you what percentage of this capital is invested in the stocks of these subcompanies. It is a very large per cent. Besides this, something over $35,000,000, if I recollect aright, is invested in the long-distance lines. Of course, the company has real estate, and also, of course, a large investment in the telephones that are leased to these subcompanies. Those are the substantial items. I don't recall any of large magnitude outside of that. To no substantial extent that I remember has it been an investor in other stocks than stocks of companies connected with the telephone service. It has to a negligible extent—to no large extent, that I recall—all its investments of stock have been in these telephone companies, largely for the purpose of developing those companies. In the very old days there was undoubtedly a period when the company bought stock for the purpose of bringing them into the sphere, but it is many years since there has been any change in the relations, and since my time it has been substantially all for the purpose of developing the business of the companies whose stock was already held, and this stock-buying has substantially been along that line." (2) The evidence does not show that the American Company had any surplus money to invest. At the time this stock was purchased the American Company was contemplating the issuance of $30,000,000 of its bonds, and within a few

months after this stock was purchased these bonds were issued and sold, together with issues of its stock for the purpose of raising funds to extend its business. (3) If the American Company bought this stock as an investment, why refuse to sell it to Kellogg when, within a few months after the purchase, he offered it a profit of $25 per share? This offer was refused when this litigation was threatened, and, if the purchase had been made for the purpose of an investment, it is reasonable to conclude that the American Company would have preferred a large profit rather than to imperil the whole investment in uncertain and vexatious litigation.

Eliminating from consideration the possible motives already suggested and considered, we are brought to the conclusion that the only conceivable purpose the American Company had in making this purchase was to decrease to the minimum the competition of the independent exchanges, the existence and success of which were due in a large degree to the Kellogg Company. Is there any evidence to justify this inference aside from that by which all other rational motives are eliminated?

Mr. Fish says in his testimony: "The Kellogg Company and the other manufacturers for the so-called independent companies were in the habit, and are today, of financing them; that is, carrying the large indebtedness and taking pay in securities. . . . I have no doubt that in the course of the discussion [with his executive committee] I made reference to that fact, for I had frequently considered it with the executive committee before, and probably did say that with the Kellogg Company run strictly as a business concern it would no longer jeopardize its own interests and hurt us by unduly financing the independent telephone companies. . . . If I said anything at all—and I don't remember that I did say it, although I have often said the same thing to the members of the executive committee—it was that if this arrangement were made the Kellogg Company would no longer give extended credits to customers like the Everett-Moore syndicate, that were enabled to develop at the expense of the manufacturing companies from whom they bought their supplies, and, to the small extent that the Kellogg Company was in the field as a promoting company, that was an element to be taken into account. . . . The only way in which our companies were injured by the financing by the manu-

facturing companies of independent telephone companies was not the competition that those independent companies, when financed, created in our field, but the kind of competition, which was one based upon absolutely false ideas of cost and rates that were and have been found to be impossible, . . . and when I speak of the injury to my companies, what I mean is, the plain proposition that there was an illegitimate business developed at the expense of the manufacturing companies." Again he says: "I have no doubt that we should have used our interest in the Kellogg Company exactly as we used our interest in the Western Electric Company, or any other interest—to benefit our organization as a whole." Again, he testifies that it "was an advantageous investment for us to make of a small amount of money in view of our general interests." By "advantageous" he explained: "I mean advantageous pecuniarily to the American Telephone & Telegraph Company and its stockholders. The ultimate motive is everywhere and always the advantage of the American Telephone & Telegraph Company and its stockholders." He testifies that in some instances his company has incidentally fostered and advanced independent telephone companies, "and in some of them we have done it knowing what we were about," but he distinctly takes this transaction out of that class by saying: "I don't think in this we fostered or undertook to foster or advance independent interests." Again he says: "We had no purpose to save the Kellogg Company from a collapse out of consideration for the independent interests." Again Mr. Fish says, in his testimony: "These transactions of which you are inquiring were taken with the end in view of working out the telephone situation as well as we could. If it were practicable to work it out so as to eliminate the competition in the same territory, that would be clearly for every one's interest, and it would have undoubtedly worked out in that way. It was our thought that by making this purchase we could get rid of this ruinous competition in the end, and be of substantial benefit not only to our company, but to the competitors to our company and the public."

In view of these admissions of the president of the American Company, the conclusion is irresistible that the purchase of the stock of the Kellogg Company was made with the purpose and intent on the part of the American Company to ultimately de-

stroy, as far as possible, the competition of the independent exchanges which were being financed and furnished equipment by the Kellogg Company. That it was contemplated that ultimately there should be an increase in the rates charged the public for telephone service as fast as the independent exchanges could be put out of business and the American subsidiary companies installed in their stead is virtually admitted by Mr. Fish in his testimony, both in respect to the Kellogg purchases as well as in his evidence in regard to the Stromberg-Carlson deal in New York. Mr. Fish's contention is that the independent companies were furnishing service to the public from 30 per cent. to 35 per cent. cheaper than it should be. He testifies that in his opinion the so-called independent companies did not figure a sufficient sum for renewal of worn-out equipment, and by thus disregarding this important factor in the telephone business the independent exchanges were engaged in "ruinous" competition. Mr. Fish also testifies that "the American Company is a dividend-paying company. Its object is to make dividends as large as possible." While he does not say so, it is not impossible that the desire "to make dividends as large as possible" may also be a factor which has much to do with the price which Mr. Fish thinks any well-regulated telephone company ought to charge the public for telephone service.

The evidence is entirely satisfactory in this record that this stock was purchased with the intent and purpose charged in the bill, and at the time it was contemplated that the Kellogg Company would cease business if the original plan and purpose had been carried out. Mr. Fish admits that he and Barton discussed the probable loss that would result from winding up the affairs of the Kellogg Company, and that it was estimated that the loss would not exceed $100,000. That the original purpose was to wind up the affairs of the Kellogg Company is manifest from a clause in the contract entered into between De Wolf and Barton, by which it was agreed that there should be a distribution of the proceeds of bills and accounts receivable to the selling stockholders. This clearly contemplated the liquidation of the Kellogg Company. This clause of the contract was commented on by this court on the former hearing, on page 23 of 224 Ill. (115 Am. St. Rep. 132), as follows: "The averment of the bill to the effect that it is the purpose of the American

Company to suppress competition and create in itself a monopoly is further aided by the averment that Barton, through whom the purchase was made, agreed to pay, as part of the purchase price, so much per share in cash and the balance by applying thereto the pro rata proceeds of any or all bills and accounts reasonably due and owing to the Kellogg Company on December 1, 1901, the same to be settled and paid to said seller as the same are paid and collected by said company, plainly indicating that a dissolution of the Kellogg Company was contemplated, because in no other event could the American Company appropriate the assets of the Kellogg Company to pay a stockholder of that company for the stock purchased by the former company from him; also, that by the contract of purchase the Kellogg Company should be carried on in the usual manner for the space of one year in order that bills and accounts receivable could be collected in the usual course of business, thus showing a purpose to dissolve the Kellogg Company after the expiration of one year."

If further evidence were necessary to fix upon the American Company the unlawful purpose of eliminating competition in the purchase of this stock, the fact might be pointed out that, about the time this purchase of stock in the Kellogg Company occurred, Mr. Epps called on Mr. Stromberg and said that he "represented one of the largest stockholders in the Kellogg Company," and wanted to buy a controlling interest in the Stromberg-Carlson Company. Mr. Stromberg refused to entertain a proposition to sell. Epps was sent to Stromberg by De Wolf, who admits that he had talked with Barton about it, and Barton does not deny his participation in this transaction. The evidence shows that afterwards the Stromberg-Carlson Company's plant was removed to Rochester, N. Y., where it continued to manufacture equipment for the independent telephone companies, and that afterwards the American Company again attempted to buy the Stromberg-Carlson Company's plant by purchasing a control of another company which owned a majority of the stock of the Stromberg-Carlson Company. This transaction resulted in a suit by the Attorney General of New York, which caused the abandonment of the proposed purchase. If a controlling interest in these two large independent manufacturing companies could have been obtained by the American

Company, it would have seriously crippled independent exchanges throughout the country.

Again, the evidence shows that the American Company, almost immediately after the purchase of the Kellogg stock, made an attempt to get control of $275,000 of notes of the Everett-Moore syndicate. Everett and Moore were promoters. They had behind them a syndicate which had built a large number of street railways and telephone plants in Ohio, Illinois, and elsewhere. About the time of the purchase of the Kellogg stock, the Everett-Moore syndicate became temporarily embarrassed financially, and it was at this time and under these circumstances that the American Company sought to acquire the notes of the Everett-Moore syndicate. Mr. Fish in his testimony frankly admits the attempt to obtain control of this large amount of indebtedness against a concern which was giving aid and assistance in promoting and maintaining independent telephone exchanges at a time when the Everett-Moore syndicate was temporarily embarrassed, and the reason given by Mr. Fish for desiring to obtain control of these notes is thus explained by Mr. Fish himself: "You are undoubtedly referring to the thing I referred to a short time ago, that some time in the spring there was a suggestion made that we should buy the claims against the Everett-Moore syndicate; and my further impression is that they were claims of Mr. Kellogg's, and not of the Kellogg Company, and that we should buy those for a substantial discount from their face value, which would give us the claims for adversary purposes, if we chose to use them in that way. By adversary purpose I mean for the purpose of taking such steps against Everett and Moore and the Federal Telephone Company as were to our interest; that we should get such advantage as there should be by coming into the possession of these creditors' claims." This circumstance is mentioned as throwing a sidelight on the general methods of warfare against the independent telephone interests that Mr. Fish and his company sanctioned and employed. There can scarcely be any doubt that the purchase of the stock of the Kellogg Company proceeded from the same general purpose which Mr. Fish confesses he had in seeking to obtain the Everett-Moore syndicate notes.

Without attempting to analyze the evidence in detail or further discussing it in general, our conclusion is that the finding

of the Circuit Court that the purpose of the American Company in making this purchase, as well as the inevitable tendency of the same, was to lessen competition in the business of furnishing the public with telephone service, is abundantly sustained by the proofs. This question of fact being settled, the law applicable thereto was determined by this court upon the former hearing already referred to. It would not be necessary for us to do more than call attention to our previous decision in order to establish the general legal conclusion to be drawn from these facts, were it not that a serious difference of opinion seems to exist as to what this court really did decide on the former hearing. Appellees contend that, conceding the facts to be as found by the Circuit Court, still the stock purchase was only voidable, and that such contention is consistent with the previous decision of this court in this cause. This view was adopted by the Appellate Court, hence the widely different results reached by that court and the Circuit Court in the adjustment of the equities of the parties. We do not think there is any uncertainty or ambiguity in the language employed by Mr. Justice Wilkin in rendering the opinion of this court on the former hearing. 224 Ill. 9, 115 Am. St. Rep. 132. A careful reading of that opinion will show that the right of the minority stockholders to maintain their bill is placed on two grounds: First, that there was a total want of power in the American Company to purchase a controlling interest in a competing Illinois corporation. This question is discussed on pages 26 to 29 of the opinion of 224 Ill. (115 Am. St. Rep. 132), and it is there held, as clearly as language can express it, that no title to the stock passed by the alleged sale under the facts averred in the bill, and that the "whole transaction is null and void," and that the minority stockholders had a standing in equity to restrain the pretended holders of such stock from any participation in the affairs of the company. A second ground upon which this court held that the bill might be maintained by the minority stockholders was that treating the sale simply as an excessive and wrongful exercise of a power which the American Company had, for the purpose of making the Kellogg Company subservient to the American Company, thereby freeing that company and its licensees from the competition of the Kellogg Company and independent exchanges, was such a fraud against the stockholders

of the Kellogg Company that the plainest principles of equity gave them a right to relief. This view is presented on pages 29 to 32 of 224 Ill., 115 Am. St. Rep. 132. The discussion of the second ground upon which the bill was maintainable in no way detracts from the force of the decision in regard to the first.

Both the American Company and the Kellogg Company were engaged in this state in the same general line of business. They were indirectly, if not directly, competitors in the business of supplying the public with telephone service. This business is impressed with the public use. The American Company could exercise no powers in this state which could not be exercised lawfully by a domestic corporation in the same line of business. The attempt by the American Company to purchase a controlling interest in the Kellogg Company was unlawful. The word "unlawful," as applied to the purpose and acts of corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is often employed to designate powers which corporations are not authorized to exercise or contracts which they are not authorized to make—or, in other words, such acts, powers, and contracts as are *ultra vires*. Neither a foreign nor a domestic corporation can lawfully become a stockholder in another corporation unless such power is expressly given or necessarily implied, and especially is this true where the object is to obtain the control of such other corporation. There is no provision of our general incorporation law authorizing one corporation to purchase and hold shares of stock in other corporations, and there is no implied power to so purchase stock in other corporations except where it is necessary to carry into effect the objects for which such corporation was formed. The purchase of a controlling interest in the Kellogg Company by the American Company cannot be sustained on the ground of implied power. As a general proposition, all contracts and agreements, of every kind and character, made and entered into by those engaged in an employment or business impressed with a public character, which tend to prevent competition between those engaged in like employment, are opposed to the public policy of this state and are therefore unlawful. All agreements and contracts tending to create monopolies and prevent proper competition are by the common law illegal and void. People v. Chicago Gas Trust Co., 130 Ill. 268, 8 L. R. A. 497, 17 Am. St.

Rep. 319. The public policy of the state on any question is to be sought for in the Constitution and legislation as interpreted and expounded by the courts. Section 22 of article 4 of the Constitution of 1870 provides that the General Assembly shall pass no local or special law for "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." This is a clear declaration that the public policy of this state is opposed to all exclusive and monopolistic franchises and powers, of whatsoever kind or character. It is also contrary to the public policy of this state to charter a corporation for the purpose of buying and selling real estate. The Connecticut Land Company was a corporation organized under the laws of the state of Connecticut, and by its charter it was authorized to deal in real estate. That corporation invested $500,000 in Illinois lands. In the case of Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632, this court held that the Connecticut Land Company had no power to purchase land in this state contrary to the public policy thereof, and that no title passed to said company, and it had no power to pass title to its grantees. This case is an illustration of the application of the doctrine, announced by this court on the former hearing of this case, that a contract made in violation of the public policy of this state is utterly void. It logically follows that the attempt of the American Company to acquire the control of the Kellogg Company is void, and that the contracts entered into in pursuance of this purpose are mere nullities, and that the title to the stock in question never passed from the sellers to the American Company. This was, in effect, what this court decided on the former hearing.

The next question that requires consideration is whether the Appellate Court erred in its direction to the Circuit Court in respect to the relief to be granted appellants. As already shown, the Appellate Court limits the relief to be granted to an injunction against the American Company exercising the rights of a stockholder and from receiving any dividends upon the stock in question. A decree confined to such relief would leave this stock in the hands of the American Company, which is inconsistent with the previous decision of this court, wherein it is held that the American Company had no corporate power to buy the stock, and that the attempt to purchase it was *ultra vires*. The

interests of the minority stockholders could not be as well protected by allowing the American Company to retain this stock as they will by requiring this stock to be returned to its rightful owners. It is not conceived how it would be practicable to continue the business of the Kellogg Company with a controlling interest in its stock tied up by injunction in the hands of an unfriendly competitor. No method of conducting the affairs of the Kellogg Company is suggested by the opinion of the Appellate Court, and it may be that that court took the view that was urged upon this court in the oral argument, that the decree which the Appellate Court directed to be entered would, operating from the self-interest of the American Company, force it to sell its holdings of Kellogg Company stock. This might or might not be the result, but if the American Company is allowed to sell this stock, it will, of course, determine who the purchaser or purchasers will be. A decree entered under the direction of the Appellate Court would leave the American Company with liberty either to retain the stock or to sell it to any person to whom it saw fit to sell, and the purchasers from the American Company would enjoy all the rights, privileges, and benefits of stockholders. If the American Company should sell this stock to some one who was friendly to the American Company, it is not at all improbable that the decree which the Appellate Court directs to be entered would be entirely barren of any substantial relief to the minority stockholders. It seems to us that the only way any substantial and permanent relief can be given to these minority stockholders is to require the American Company to surrender its stock to its rightful owners upon equitable terms. This relief the Circuit Court granted, and in our opinion properly so, since nothing short of this will afford the minority stockholders complete relief.

It is contended by appellees that the decree of the Circuit Court cannot be sustained because it grants affirmative relief to Milo G. Kellogg without a cross-bill being filed by him. When this case was before us on the former hearing it was held that the court below properly sustained a demurrer to Kellogg's cross-bill. One of the reasons then given why the decree was affirmed is found on page 32, where this Court said: "We think the decree of the Circuit Court sustaining the demurrer to and dismissing the cross-bill is right and should be affirmed.

No necessity whatever for that bill is shown. At most, Milo G. Kellogg was a mere nominal party to the original bill. No relief was prayed against him, and, if a decree granting the prayer of that bill had been rendered, he would have obtained all he was in equity entitled to." The relief which Milo G. Kellogg obtains under the decree of the Circuit Court is a necessary incident to the complete relief to which the minority stockholders are entitled. As we have already attempted to point out, if a controlling interest in the Kellogg Company is left in the hands of the American Company, or some friendly ally to whom it might choose to sell, it is apparent that the interest of the minority stockholders would be exposed to all the dangers which led them to file their bill in the first instance. It therefore becomes necessary, in order to fully protect the complaining stockholders, to divest the American Company of all advantages it has secured through its unlawful attempt to obtain control of the Kellogg Company. When the court grants the minority stockholders adequate relief, it is clear that the relief resulting to Kellogg and other stockholders who sold to the American Company is merely incidental to the main relief sought by the bill.[18] A cross-bill is wholly unnecessary. Kellogg answered the original bill, in which he admitted all of the material averments thereof, so that there was no issue as to him to be tried, and no relief was prayed against him in the original bill. In Boone v. Clark, 129 Ill. 466, 5 L. R. A. 276, this court held that a cross-bill filed by junior mortgagees, filed in a proceeding to foreclose the senior mortgage, was properly dismissed for want of equity. On page 493 of 129 Ill. (5. L. R. A. 276), this court said: "It is further insisted that at least these appellants were entitled to a decree, under their cross-bill, foreclosing their trust deed as against W. H. Colehour, and the court, therefore, erred in dismissing the cross-bill. The filing of a cross-bill is not

18—Observe that in Harriman v. Northern Securities Co., 197 U. S. 244, 295, Harriman after the decree of dissolution of the Northern Securities Company at the suit of the United States, affirmed in Northern Securities Co. v. United States, 193 U. S. 197, sought to recover the shares of stock in the Northern Pacific Railroad Company which he had transferred to the Northern Securities Company in return for stock of the Northern Securities Company. This he was not permitted to do because he was *in pari delicto.*

necessary for the preservation of the rights of a junior mortgagee to the same premises, as has been seen; and, if the appellants desire, they may, under their answer, move the court, and it will be the duty of the chancellor—and which may yet be done in this cause—to preserve their rights, as against Colehour, in any surplus remaining from the sale of the property after the payment of the amount due appellees."

Again, appellees contend that the dismissal of the Kellogg cross-bill for want of equity was an adjudication of all his rights. This contention is answered by the quotation which we have already made from Boone v. Clark, *supra*. The dismissal of a cross-bill for want of equity, under circumstances rendering the cross-bill unnecessary in order to obtain the relief sought by it, is not an adjudication that the complainant in the cross-bill has no rights in the subject-matter of the litigation. It would be a judicial outrage on the rights of Kellogg to dismiss his cross-bill on the ground that he could obtain all the rights he was entitled to under the original bill, and then deny him, upon the hearing of the original bill, such relief as he in equity is clearly entitled to, on the ground that his rights had already been adjudicated. Courts of equity were never designed to work out such unconscionable absurdities.

Again, the appellees insist that the decree of the Circuit Court cannot be sustained for the reason that Kellogg and the other selling stockholders are in *pari delicto* with the American Company. To this we cannot assent. In the first place, the unlawful features in this transaction are largely imported into it by reason of the unlawful purpose of the American Company. It was the American Company that expected to profit by suppressing competition and the creation of a monopoly in this state. There is no evidence that this unlawful purpose was entertained by Kellogg or the other sellers of this stock. If it be said that De Wolf is *particeps criminis* in this transaction, it may be replied that Kellogg could not and did not attempt to authorize him to enter into a contract against the laws or public policy of the state. Kellogg gave De Wolf a power of attorney to sell his stock if necessary to raise funds to protect his interest and that of the Kellogg Company. This was a perfectly legal and proper thing to do. If De Wolf wrongfully, and in violation of the confidence reposed in him by Kellogg, entered into a secret

intrigue with the representatives of the American Company for the purpose of violating the laws of public policy of the state of Illinois, it cannot be said, with any show of reason, that Kellogg, who was then in California and in total ignorance of what his agent was doing in Chicago, is equal in guilt with the American Company. If wrong at all is to be imputed to Kellogg, it is only in a highly technical sense and limited degree. He is certainly less blameworthy than the American Company. One of the exceptions to the rule that courts will not interpose to grant relief to either party to an illegal agreement where both parties stand in *pari delicto* is that in some instances the party least blameworthy may, in furtherance of justice and a sound public policy, obtain full affirmative relief. This principle is thus stated by Mr. Pomeroy in his work on Equity Jurisprudence (section 942) as follows: "Lastly when the contract is illegal, so that both parties are to some extent involved in the illegality —in some degree affected with the unlawful taint, but are not in *pari delicto;* that is, both have not, with the same knowledge, willingness, and wrongful intent engaged in the transaction, or the undertakings of each are not equally blameworthy—a court of equity may, in furtherance of justice and of a sound public policy, aid the one who is comparatively the more innocent, and may grant him full affirmative relief by canceling an executory contract, by setting aside an executed contract, conveyance, or transfer, by recovering back money paid or property delivered, as the circumstances of the case shall require, and sometimes even by sustaining a suit brought to enforce the contract itself, or, if this be impossible, by permitting him to recover the amount justly due by means of an appropriate action not directly based upon the contract. Such an inequality of condition exists, so that relief may be given to the more innocent party, in two distinct classes of cases: (1) It exists where the contract is intrinsically illegal, and is of such a nature that the undertakings or stipulations of each, if considered by themselves alone, would show the parties equally in fault, but there are collateral and incidental circumstances attending the transaction and affecting the relations of the two parties which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weaknesses, and the like, as a

means of inducing the party to enter into the agreement, or of procuring him to execute and perform it after it had been voluntarily entered into. (2) The condition also exists where, in the absence of any incidental and collateral circumstances, the contract is illegal but is intrinsically unequal; is of such a nature that one party is necessarily innocent as compared with the other; the stipulations, undertakings, and position of one are essentially less illegal and blameworthy than those of the others."

But there is something else here. It must be borne in mind all the while that in this proceeding a court of equity is seeking to protect the public against an infringement of the public policy of the state, and, having determined that the transactions in question in their purpose and inevitable tendency are to stifle competition and create a monopoly of a business impressed with a public character, the court will not be deterred from administering full relief by forms of procedure or technical rules which might control its action under other circumstances. Regard for the public welfare is the highest law of the land. Broom's Legal Maxims, p. 1. Pomeroy, in his work on Equity Jurisprudence (section 941), thus states the principle now under discussion: "Even where the contracting parties are in *pari delicto,* the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement." The cases cited by the author in the footnotes fully sustain the text. Story's Equity Jurisprudence (13th Ed.) vol. 1, § 298, recognizes the same principle. This author says: "But in cases where the agreement, or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not, in equity, material. The reason is that the public interest requires that relief shall be given, and it is given to the public

through the party.'' [19] The rule that courts will not interpose to grant relief when an illegal agreement has been made and both parties stand in *pari delicto* [20] cannot be invoked by appellees as a defense in this case.

19—Johnson v. Cooper, 2 Yerg. (10 Tenn.) 524 (land lost at gaming and conveyed to winner, recovered by the loser in equity); Whittingham v. Burgoyne, 3 Anst. Rep. 900 (purchaser of commission in the army recovered the amount paid); Rucker v. Wynne, 2 Head (Tenn.), 617 (loser in gaming transaction recovered property transferred to winner); Jackman v. Mitchell, 13 Ves. Jr. 581, 587 (bond to secure to one creditor the deficiency of a composition not communicated to the other creditors decreed to be delivered up with costs though the one who gave the bond was *particeps criminis* to the illegal transaction. The court said: ''In these cases, which proceed upon grounds of public policy, the relief is given on account, not of the individual, but of the public''); Lord St. John v. Lady St. John, 11 Ves. Jr. 525, 535 (equity might require the delivery up of a deed even to a *particeps criminis* where it was made pursuant to an illegal separation agreement by husband and wife. The court said: ''The authorities go to this: that where the transaction is against policy, it is no objection, that the plaintiff himself was a party to that transaction, which is illegal''); Pullman Palace Car Co. v. Transportation Co., 171 U. S. 138 (the Pullman Company made a lease of all its assets to another company, which was illegal and void as against public policy because it involved an abandonment by the Pullman Company of its duty to the public. The Pullman Company in suing for rent on the lease discovered this fact, for the recovery was denied in 139 U. S. 24. The Pullman Company then took the affirmative and sued to set aside the lease and recover the property conveyed. This it was permitted to do); Meech v. Lee, 82 Mich. 274 (mother who had mortgaged to save her son from criminal prosecution was permitted to set aside the mortgage in equity and recover the land); Gorringe v. Reed, 23 Utah 120 (deed given by wife to prevent prosecution of husband set aside at the suit of the wife); Daniels v. Benedict, 50 Fed. 347 (wife agreeing that suit for divorce might be begun against her on the sole ground of desertion allowed to set aside a decree obtained against her on the ground of adultery); Cox v. Donnelly, 34 Ark. 762 (the court said, p. 766: ''Although in general, courts of equity will not interpose to grant relief to persons who are parties to agreements or other transactions against public policy, there are cases where the public interest requires that they should, for the promotion of public policy, interpose, and the relief in such cases is given the party'').

20—Goodrich v. Tenney, 144 Ill. 422 (a contract between a person and an attorney representing creditors, that such person would procure affidavits of the debtor and two others showing that a sale made by the debtor was fraudulent and also depositions to the same effect, for which such person is to be paid 25% of the debt collected is illegal

We have discussed the questions, both of law and fact, upon which the right of the appellants to relief depends. There are some other questions of minor importance treated in the briefs of counsel for appellees—such as that appellants are not prosecuting the suit in good faith for their own benefit, and that there is a collusion between Kellogg and appellants—which we have considered, but we do not deem these matters of sufficient importance to require discussion. From what has been said, it follows that the decree of the Circuit Court is based upon a correct solution of the questions involved. That part of the decree which adjusts the equities of the parties is attacked by appellees on the ground that it proceeds from an erroneous decision of the questions involved. If the sale of stocks in question

and void and the person cannot recover from the attorney. The law leaves the wrongdoer where it finds him. It made no difference that the attorney had received the money. He was not obliged to account for it and no implied assumpsit arose in plaintiff's favor); Perry v. U. S. School Furniture Co., 232 Ill. 101 (equity would not enforce a judgment obtained upon a contract which was in violation of the anti-trust law); Conway v. Garden City Paving Co., 190 Ill. 89 (contract between bidders for a public contract tending to stifle competition between them is illegal and the plaintiff is not entitled to recover the consideration promised, although he had rendered the service required); Crichfield v. Bermudez, 174 Ill. 466 (contract to promote passage of special assessment ordinance illegal and plaintiff could not recover on it); Craft v. McConoughy, 79 Ill. 346 (contract in restraint of trade which took the form of a partnership for the purpose of dealing in grain. No accounting for profits allowed by one partner against the other). See also Schubart v. Chicago Gas Light & Coke Co., 41 Ill. App. 181, 186; Griffin & Connelly v. Piper, 55 Ill. App. 213; American Strawboard Co. v. Peoria Strawboard Co., 65 Ill. App. 502; Evans v. American Strawboard Co., 114 Ill. App. 450; McMullen v. Hoffman, 174 U. S. 639 (contract to suppress bidding and competition); St. Louis R. R. v. Terre Haute R. R., 145 U. S. 393 (lease by one railroad to another which is *ultra vires* of one or both, not set aside in equity at the suit of the lessor. The *in pari delicto* doctrine applied, see especially p. 407); Harriman v. Northern Securities Co., 197 U. S. 244, 295, 298. (In the government suit against the Northern Securities the United States enjoined the voting of the railroad stock held by the Northern Securities Company. The decree, however, did not cancel the Northern Securities stock held by the stockholders of the Northern Securities Company which had been issued in return for the stock of the two railroads transferred to the Northern Securities Company. The court doubted its power to do this in view of the fact that the stockholders

were void and no title passed, as the Circuit Court found and as we have sought to show, we perceive no objection to the extent of the relief granted or the methods adopted by the Circuit Court to adjust the equities between the parties. No other or better method of settling this controversy occurs to us, and none is suggested or pointed out by appellees. The 15th of February, 1908, the date fixed by the decree of the Circuit Court from which the time when the various acts in the execution of the decree were reckoned, having passed, it is ordered that all acts which in the terms of said decree were to be performed within a given number of days from the 15th day of February, 1908, shall be performed in like manner as in said decree directed within a like number of days from the 15th day of April, 1909, and that said decree of the Circuit Court shall be executed in all respects as therein directed, except the

were not made parties. In the Harriman suit those who had given up railroad stock for the stock of the Northern Securities Company came into court to get their stock back. It was held that they were not entitled to do so. (1) Harriman was *particeps criminis* and the usual rule that he would be left where he was applied. (2) The exception that on grounds of public policy and to vindicate the public right the wrongdoer might recover what he had transferred, was inapplicable because the public right had been completely vindicated by the Attorney-General in the government suit. Hence Harriman was left without any excuse for attempting to get back the stock transferred); Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24 (the Central Company was not permitted to sue for rent on a lease it had made of all its assets); Woodstock Iron Co. v. Extension Co., 129 U. S. 643 (agreement to build a railroad on a longer line in order that it should pass by plaintiff's factory. Railroad carried out its part of the bargain but could not recover the consideration). See also Hitchcock v. Davis, 87 Mich. 629, 632; Belding v. Pitkin, 2 Caines (N. Y.) 147; Atcheson v. Mallon, 43 N. Y. 147; Leonard v. Poole, 114 N. Y. 371; Wheeler v. Russell, 17 Mass. 258, 281; Snell v. Dwight, 120 Mass. 9; Kahn, Jr. v. Walton, 46 Oh. St. 195; Thomas v. Brownville Railway, 2 Fed. 877 (here a contract between a railroad and a construction company was held void because the directors of the railroad were interested in the construction company. This contract was so far against public policy that no equitable relief by way of foreclosure was permitted on the bonds held by it. Furthermore, the stockholders were not estopped by long acquiescence in such a contract).

15th day of April, 1909, shall be substituted for the 15th day of February, 1908.

Believing that the decree of the Circuit Court does justice between the parties, enforces the law and upholds a sound public policy, and that there is no reversible error therein, the decree should be affirmed. The judgment of the Appellate Court for the First District is therefore reversed, and the decree of the Circuit Court affirmed.

Appellate Court reversed, Circuit Court affirmed.[21]

CHAPIN v. BROWN BROS.

(Supreme Court of Iowa, 1891. 83 Ia. 156.)

ROTHROCK, J. It appears from the petition that in the month of March, 1890, the plaintiffs entered into a written agreement with the defendants and other parties. The following is a copy of said agreement:

"We, the undersigned grocerymen of Storm Lake, finding the business of purchasing butter of farmers and handling the

21—People v. Nussbaum, 66 N. Y. Supp. 129 (1900); Chester, J., said:

"It is also asserted that under the laws of this state, as well as those of Maine and of New Jersey, it was lawful for the American Ice Company to exchange its capital stock for the capital stock of the Consolidated and Knickerbocker Ice Companies. It is true that, under section 40 of the stock corporation law (Laws 1892, c. 688), this is so; and it has been held that that section authorizes one corporation to purchase stock in another, although the result might be to destroy competition. Rafferty v. Gas Co., 37 App. Div. 618. But it may happen that an act otherwise legal, if done with an illegal purpose or intent, becomes, by virtue of such purpose or intent, illegal, and therefore to be condemned. While the law permits one corporation to buy and hold stock of another corporation, the attorney-general sufficiently alleges that this was done in this case for an unlawful purpose. He alleges, in effect, that the purpose of the alleged agreement or arrangement between these companies to so combine their interests was to create a monopoly in the ice business, and destroy competition in the production, supply, and sale of ice in the city of New York, in violation of law, and that in pursuance of such agreement and arrangement the

same very burdensome, and of material loss to us, and believing the same could be handled as advantageously by persons who would make butter buying and handling an exclusive business, and whereas, the firm of D. & E. Chapin, through their agent, assure us of their ability to handle butter to the best advantage, and that they will engage in the business extensively in our town, we make a solemn engagement and pledge ourselves to each other and to the said firm of D. & E. Chapin that we will buy no more butter or take no more in trade, except for our family use, and all butter so bought shall be delivered by the seller to the buyer's place of residence. This, however, shall not prevent any merchant from buying butter to retail from any regular butter buyer who buys all the butter he handles in this town for cash. It is further provided that the said firm of D. & E. Chapin, in whose favor we abandon the business, shall open rooms conveniently located for buying butter; that they shall keep a man in attendance during all business days and hours in the year from as early in the morning and until as late in the evening as the season of the year and state of the weather might seem to require. They shall accept all the butter offered, and shall pay for the same as high price in cash, or by giving check against a suitable deposit in some bank in this town, as merchants or butter buyers in the town of Newell, this county, are at the time paying in cash for a similar grade of butter, except in extreme cases, where they may be paying materially more than the markets will warrant. It is also provided that the said D. & E. Chapin shall not direct their checks or persons taking the same to any particular store for payment. That they shall not buy in connection with any dry goods or grocery store. Whenever a majority of the merchants signing this article of agreement are convinced that the engagements herein entered into are not being complied with, or whenever they are dis-

American Ice Company acquired the stock of the other two companies. I think, therefore, that he brings the case within the provisions of the law which condemns every contract, agreement, arrangement, or combination having for its purpose the creation or maintenance within this state of a monopoly of the production or sale of an article of common use, or the restraining or preventing competition in the price or supply of any such article, and that his written application is sufficient to justify the order for examination which has been granted."

satisfied with this arrangement or the manner in which it is being carried out, any merchant whose name is hereto appended may appoint a meeting by notifying each grocery firm in town of the time and place for the purpose of considering who may be guilty of a breach of faith in carrying out these engagements, or whether it is advisable to continue the same; and if, at such meeting, a majority of the subscribers hereto shall certify in writing that they think it advisable for the interest of the town to withdraw from this engagement, this contract shall become null and void. This engagement shall take effect and be in force from and after such time as when it shall have been subscribed to by each grocery house in this town, and when the firm of D. & E. Chapin shall designate, provided they are then prepared to handle the butter, and shall continue two (2) years unless sooner dissolved, as herein provided. We also agree not to pay a higher price for eggs than shall be fixed by the said firm of D. & E. Chapin, provided said firm shall fix as high price as eggs are at the time worth to ship. W. C. Kinne & Co., Fred Scholler, Brown Bros., J. O. Douglas, W. A. Jones, Geo. E. Ford & Bro., W. Lownsberry, Libby & Rae, D. & E. Chapin."

It is averred in the petition that the plaintiffs, in pursuance of said written contract, came and located at Storm Lake, and engaged in the business of buying butter at that place, and were at the commencement of the suit still so engaged, and have made arrangements to continue the business for the said period of two years, and that they have thus far fully complied with said written agreement, but that the defendants, in violation thereof, have opened a butter store in said town, and have engaged in the business of buying butter generally, and have thereby interfered with plaintiffs' business, and alienated their trade to the extent of 5,000 pounds of butter, upon which plaintiffs would have realized a profit of 3 cents a pound, making in all $150 damages suffered by plaintiffs. Judgment is demanded for said sum, and an injunction is prayed restraining the defendants from continuing in said business.

Among the several grounds of objection to the granting of an injunction we regard two of them as material. They are as follows: "*First,* that the agreement in writing is void for want of consideration, as there is no money value inuring to

the benefit of the defendants herein; and, *second,* that said contract by its terms is for the purpose of creating a monopoly in purchasing and selling butter at Storm Lake, and is therefore in restraint of trade, to the detriment of the producers and consumers of butter at that place and in that vicinity." The history of the law upon the question of contracts in restraint of trade is an interesting subject of investigation. The books abound in cases upon the subject. Anciently all contracts were void which in any degree tended to the restraint of trade, even in a particular locality, and for a limited time. This ancient rule has been so far modified that, although agreements in general restraint of trade are invalid, because they deprive the public of the services of the citizen in the occupation or calling in which he is most useful to the community, and expose the people to the evils of monopoly, and prevent competition in trade, yet an agreement in partial restraint of trade will be upheld where the restriction does not go beyond some particular locality, is founded upon a sufficient consideration, and is limited as to time, place, and person. It is accordingly everywhere now held that when one engaged in any business or occupation sells out his stock in trade and good-will he may make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a time named, and he may be enjoined and restrained from violating his contract. This is about as far as contracts in restraint of trade have been upheld by the courts in this country or in England. The general principles above announced will be found in all text-books upon contracts, and find support in many adjudged cases. We have not thought it necessary to set out or cite the cases. They will be found collected in 3 Amer. & Eng. Enc. Law, p. 882, and 10 Amer. & Eng. Enc. Law, p. 943; 2 Pars. Cont. p. 747.

Applying these rules to the contract under consideration, we are to inquire first whether there is a sufficient consideration for the promise of the defendants and the other parties who executed the instrument not to engage in dealing in butter at Storm Lake. It is very plain that there was no money paid to them as a consideration. The plaintiffs did not purchase any stock of butter which the defendants had on hand. They paid nothing for an established plant or place of doing business, nor

for the good-will of any business. So far as appears, they went into the town of Storm Lake, and proposed to go into the butter business if the other persons then engaged in that business would agree to quit that line of trade for two years. In all the search we have made for authority upon this branch of the controversy we have found no warrant in any precedent for holding that this is a sufficient consideration. There are cases which hold, and the law is well settled, that where a party proposes to expend money in erecting a manufactory or other plant which may be a public benefit, subscriptions in aid of the enterprise are valid obligations. But such contracts are widely different in principle from the agreement under consideration. Suppose the plaintiffs had made a proposition to the dry goods merchants of Storm Lake that if they would all quit the business for two years, without any consideration being paid to them for so doing, the plaintiffs would establish a dry goods store at that place, and the proposition had been accepted; it would be a marvelous decision if any court would hold that there was any consideration for such a contract.

II. But it appears to us that the decision of the District Court is manifestly right upon the question that the agreement is against public policy. It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely, where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality. Such contracts cannot be enforced.

Affirmed.

KELLOGG v. LARKIN

(Supreme Court of Wisconsin, 1851. 3 Pinney 123.)

Error to the County Court for Milwaukee County.

Action of covenant for the recovery of rent.

Two pleas filed by the defendants.

To these the plaintiff demurred.

Joinder in demurrer and judgment for plaintiff thereon; and the defendants brought this writ of error.

HOWE, J. The plaintiff below, Larkin, declared in covenant for the rents reserved in a lease executed by him to Kellogg & Webb, of one portion of a certain warehouse, situated in the Fifth Ward of the City of Milwaukee. The lease contained a covenant on the part of the plaintiff by which he obliged himself, during the term for which the premises were demised, to wit: from the 7th of January to the 1st day of August following, "not to purchase, store, or handle any wheat in the Milwaukee market, except under the direction" of the defendants.

This covenant, as is said, being in partial restraint of trade, is *prima facie* bad, and should be aided by an averment of some special circumstances, showing a good reason, independent of a mere pecuniary consideration, to support it. And the want of any such covenant, it is further said, is a substantial defect in the declaration which entitles the defendants to judgment upon the demurrer, notwithstanding the insufficiency of their plea.

The only reason ever assigned in support of such restrictions is, that they are necessary or useful to the party with whom the contract is made, as a protection to him in the prosecution of his business. And it is not necessary that such reason should be expressly averred, if it sufficiently appears from the contract itself. Here the lease is set forth at length in the declaration, and that sufficiently discloses the interest which the defendants had in requiring protection against the competition of the plaintiff. And so the interest or reason is usually made to appear. See, for instances, Mitchel v. Reynolds, 1 P. Wms. 181; Mallan v. May, 11 Mees & W. 652; Chappell v. Brockway, 21 Wend. 157.

I have found no case in which these circumstances or reasons have been expressly averred, although it is suggested that they *might* be set out by averment when they did not appear upon the face of the contract. Ross v. Sadgbeer, 21 Wend. 166.

The declaration is therefore sufficient in substance, to support the judgment of the County Court. Let us consider if the plea demurred to discloses a good answer to that declaration.

This plea, in its character, is quite original. I think it would be difficult to say what precedent gave form to it. But in its structure it is ingenious; I think it would be quite as difficult to say what canon of good pleading was violated by it. But I have to consider, not its form, but its body in substance.

Its material averments, I think, may be stated as follows:

1. That the lease declared upon "was made, entered into and executed for the further countenancing and proceeding in the undertakings, schemes and plans of the produce association," of which the parties to the lease were severally members.

2. That the produce association was composed of the proprietors of certain warehouses, to the number of eleven, and the owners of certain mills in the City of Milwaukee.

3. That the produce association, on the 29th day of December, 1849, entered into an agreement by which the mill owners were parties of the first part, and the warehousemen were parties of the second part, the prominent features of which agreement were as follows:

First. The mill owners agree to pay the warehousemen "four cents per bushel commission, or storage, on each and every bushel of wheat coming to the Milwaukee market to be disposed of, by sale in the street, or by storage (so far as they are able to control the same," from that date to the 1st day of August, then next.

Second. The warehousemen, in consideration thereof, agree "to give to the parties of the first part, full, absolute and uninterrupted control of the Milwaukee wheat market, from the date hereof, up to the first day of August, A. D. 1850, so far as they shall be able to do so by virtue of their capacity as warehousemen or vessel and dock owners; that they will not themselves, or through the agency of others, directly or indirectly, under any name or pretense whatsoever, purchase, contract or bargain for any wheat in the Milwaukee market, from the date hereof, up to the 1st day of August, A. D. 1850, nor make any contracts for the storage of wheat during the time aforesaid, except as agents under the direction and control of the parties of the first part."

Third. That nothing herein contained is to give the said parties of the first part, any right to close the warehouses

against the storage of wheat, or to fix a higher rate of storage than 4 cents per bushel.

Fourth. That "the parties of the second part shall at all times hold themselves in readiness to purchase, store and deliver, or ship wheat for account of the parties of the first part, at the rate of 4 cents per bushel, as aforesaid," and,

Fifth. That the mill owners shall pay to the warehousemen 4 cents per bushel upon all wheat received into the mills for shipment or grinding, "grist work excepted."

4. It is averred that the objects and purposes of the association were to carry out and perform these agreed plans and schemes.

5. It is averred that the association, its general plans, schemes, attempts and undertakings, tended to the manifest injury and restraint of trade, the depression of the wheat market, to reduce the price of the commodity of wheat and to stifle fair and lawful rivalry and competition of dealers therein.

Upon this last averment a point was raised upon the argument, which, as it seems preliminary to the main question, I will here dispose of.

It was said that because it is expressly averred that the "association, its agreed plans, schemes," etc., "tended to the manifest injury and restraint of trade," etc., and because the truth of this averment is admitted by the demurrer, and because whatever contracts do have such tendency, are held to be void as contravening public policy, therefore the judgment of the County Court should have been for the defendants.

The answer to this objection is manifest. Undoubtedly a demurrer admits the verity of every fact well pleaded; but I have to say, that if the "agreed plans and schemes" which are alleged to have such pernicious tendency are any other than those that are developed in the articles of the 29th of December, 1849, then they are not well pleaded, and for these two reasons:

1. Because (as I think) they should be set forth in terms; not by describing their symptoms or effects, but stating their essence and nature, leaving the court to judge of their tendencies and probable effects; and

2. Because, in such case, this averment would be clearly repugnant to that other averment, to wit: that the "objects and

purposes of which association were to carry out and perform all the acts, plans and schemes contemplated and agreed upon in the said article of agreement."

But doubtless the pleader referred to the articles themselves, which he sets forth *in extenso,* as developing the plans and schemes alleged to be so injurious to the public interests. The agreement is therefore laid before the court for construction—to have its character and tendencies determined by judicial interpretation—not proved to the satisfaction of a jury.

Whether such an agreement existed—whether the lease sued upon grew out of it, or was connected therewith so as to be tainted by it, if taint was in it, were questions which, if raised, must be settled by a jury. But what the agreement essentially was, and whether it violated any law of the land or any rule of public policy, were purely questions of law, to be determined by the Court. Therefore no averment could give to the agreement a character which it had not, and no admission could take from it the character which it had.

Millan v. May, 11 Mees & W. 652, was an action upon a covenant not to carry on the business of a surgeon dentist in London, or in any of the places or towns in England or Scotland, where the plaintiffs might have been practicing within four years, for which term the agreement ran. Plea to the second breach assigned that the plaintiffs, before the expiration of the term, had practiced in many towns in England, and that divers of them were distant from each other one hundred and fifty miles; wherefore the said stipulation was an unreasonable restriction of trade. Upon demurrer, the plea was held bad for attempting to put in issue a matter of law.

The County Court, then, we think, properly assumed the responsibility of passing upon the nature and effect of the agreement, and I come now to consider the gravest question presented upon this record, to wit: whether that court erred in its estimate of the character of that agreement.

The plaintiffs in error aver that this agreement "tended to the manifest injury and restraint of trade, the depression of the wheat market, to reduce the price of the commodity of wheat, and to stifle fair and lawful rivalry and competition of dealers therein," and this view was enforced by an argument of great length, and exhibiting much ingenuity and research.

Before proceeding to discuss the question whether this agreement does in fact contravene public policy, I desire to refer to the very happy and every way timely remarks of Mr. Story. He says: "Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition, in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void, as being against public policy." Story on Conf. Laws, § 546.

And I desire to add that as a general rule, the immediate representatives of the people, in legislature assembled, would seem to be the fairest exponents of what public policy requires, as being most familiar with the habits and fashions of the day, and with the actual condition of commerce and trade, their consequent wants and weaknesses. And a legislative enactment would seem to be the least objectionable form of exposition, for these two reasons:

1. Because it would operate prospectively as a guide to future negotiations, and would not, like a judgment of a court, annul a contract already concluded in good faith, and upon a valuable consideration; and

2. Because a rule so established has a wider circulation among the people, and enters more generally into the information of the public.

I by no means intend to deny the right or the propriety of judicially determining, that a contract which *is* actually at war with any established interest of society is void, however individuals may suffer thereby, because the interest of individuals must be subservient to the public welfare. But I insist that before a court should determine a contract which has been made in good faith stipulating for nothing that is *malum in se,* nothing that is made *malum prohibitum,* to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. And I submit that he is the safest magistrate who is more watchful over the rights of the

individual, than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject, than the rights of the state.

And having ventured upon these few preliminary reflections I disclaim all aid from any one of them in the determination of this cause, but I affirm, that, upon the spirit of the letter of the law, as it has been adjudicated for one hundred and forty years, the agreement disclosed in the plea of the plaintiff in error is not against public policy.

Contracts against public policy are divided, by Mr. Story, into seven classes, as follows: 1. Contracts in restraint of trade; 2. Contracts in restraint of marriage; 3. Marriage brokerage contracts; 4. Wagers and gaming; 5. Contracts to offend against the laws and public duty; 6. Usury, and 7. Trading with an enemy.

This agreement clearly does not fall under either of the six heads last above mentioned. If objectionable at all, then it must be as a contract in restraint of trade. In that light alone it was considered by the counsel for the plaintiffs in error upon the agreement.

But contracts in restraint of trade are divided by PARKER, J., in Mitchel v. Reynolds, 1 P. Wms. 181, into involuntary and voluntary, the former comprising restraints arising from either: 1. Grants or charters from the crown; 2. Customs, or 3. By-laws, and the latter comprising those restraints which arise from the agreement of parties.

When I have said, then, that the agreement we are considering, most certainly does not present a case of involuntary restraint, I think I have dispensed with the necessity of examining that large class of cases, cited by counsel upon the argument, and which arose upon royal grants and charters, customs or by-laws. These decisions rest upon reasons applicable to those cases, and different from the reasons which have entered into the adjudications upon cases of voluntary restraint.

These latter cases are again distinguished as, *first*, General; or, *second*, Particular; as to places or persons, or time.

A general restraint which is defined to be "an agreement not to carry on a certain business anywhere" (Story on Conf. Laws, § 550) is against public policy, and is void. So it was held after several arguments in Mitchel v. Reynolds, *supra*, and

the doctrine has been affirmed and reaffirmed in numerous cases since, and I am not aware of the propriety of the rule being questioned in any single case. PARKER, J., in Mitchel v. Reynolds, states the reasons upon which the rule is founded, as follows:

"*First.* The mischief which may arise from them. 1. To the party by the loss of his livelihood, and the subsistence of his family. 2. 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. 3. 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."

I do not notice here the fourth and fifth reasons assigned, because the fourth is declared by the learned judge to be in favor of the contract, and so opposed to the rule, and the fifth applies to contracts with a consideration, which he evidently supposes to be without the rule, and which he says the law is not so unreasonable as to declare void, "for fear of an uncertain injury to the party."

Now, in applying the rule to any given case, it is important that we attend to the reasons upon which it is founded. "Whoso knoweth not the reason of the law, knoweth not the law."

And in regard to the reasons above stated, I have to say that I very much question whether, here in Wisconsin at the present time, and in view of our present social and political position, more than one of them is entitled to any considerable importance, in our consideration. The opportunities for employment are so abundant, and the demand for labor on all sides is so pressing and urgent and the supply so limited, that I much question, were we to consider the subject 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 excluded 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 for competition with capital, perhaps, that it has yet enjoyed, I question if we have much to fear from attempts to secure exclusive advantages in trade, or to reduce it to few hands.

While so much more 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 while apprentices are sought for oftener than they seek apprenticeships, we need hardly fear, I think, that they will be subject to *great* vexation by their masters on account of any anticipated prejudice to their custom. Besides, if such indirect practices should be resorted to here to obtain similar bonds, as Lord Macclesfield says was the case in his time, perhaps the courts would find those indirect practices themselves as good a pretext for setting aside the bonds as any real or fancied injury to the public policy arising therefrom would afford.

As to the third reason, I apprehend it would be thought a dangerous precedent were a court to annul any other voluntary bond for which a voluntary consideration has been received, upon the ground that it was of no use to the obligee. Ordinarily, we say, let parties who are competent to contract determine for themselves what contracts will profit them. 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 for interference.

It is enough, however, that one good reason still remains to

uphold the rule. The loss to society of a valuable member is as great a public injury now as it ever was, and as great here as anywhere. I hope, indeed, that the market value of a human being is higher now than it was in England at the beginning of the eighteenth century, when the case of Mitchel v. Reynolds was decided. The capacity of an individual to produce (using that word in its largest sense) constitutes his value to the public. That branch of industry in which a man has been educated, and to which he is accustomed, and for the abandonment of which he demands compensation, is supposed to be the one in which he can render the greatest profit. The value of what he produces belongs to himself. The actual product belongs immediately to him who employs him, but mediately to the state, and goes to swell the aggregate of public wealth. Therefore, 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 any 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 advantage that will arise to the public from so holding.

But none of these reasons apply to what are called partial or limited restraints, or to agreements not to exercise a particular calling in a particular place. Indeed these seem to be not so much restraints upon trade as upon tradesmen. For when a silversmith obligates himself not to pursue that particular business in Milwaukee, the trade need not necessarily be restrained thereby, for he can pursue if he pleases in Racine, or elsewhere in the state; and to all legal intendment with equal advantage to himself and to the public. Accordingly, such agreements have uniformly been upheld by the courts, when founded upon a sufficient consideration.

This modification of the rule is said to have obtained as early as 1621. Brand v. Joliffe, Cro. Jac. 596.

In Mitchel v. Reynolds, 1 P. Wms. 181, the law is declared so to be, and so to have been.

The cases which have been decided in accordance with this doctrine are numerous. I will only instance Bunn v. Guy, 4

East, 190; where an attorney bound himself not to practice within London and one hundred and fifty miles from thence. In Leighton v. Wales, 3 Mees & W. 545, the restraint was against running any coach on a particular road. Pierce v. Fuller, 8 Mass. 223; Palmer v. Stebbins, 3 Pick. 188; Pierce v. Woodward, 6 id. 201; Nolles v. Bates, 7 Cow. 307; Chappel v. Brockway, 21 Wend. 158; Perkins v. Lyman, 9 Mass. 532; which latter case arose upon an agreement not to be interested in any voyage to the northeast coast of America, or any traffic with the natives of that coast for seven years, and the agreement was adjudged good.

Now it is manifest, that by every known rule of construction, the agreement exhibited to us in the defendant's plea is one falling within the principle of the cases above cited. The restraint it imposed upon trade, if any, was partial and limited; limited in every particular referred to in the books. It was limited as to persons, as to object, as to place, and as to time (though this last is not essential). As to persons, it was limited to the proprietors of eleven warehouses; as to object, it was limited to the traffic in wheat; as to place, it was limited to the Milwaukee market; and as to time, to a period of about seven months.

It was indeed objected upon the argument that there was nothing upon the record to show the extent of the Milwaukee market. But surely this objection cannot be well taken. Admitting for the purpose of the argument, the law to be that only so much restraint upon the obligor will be upheld by the courts as shall appear to the court to be necessary to the protection of the obligee, still the agreement is before us, and if we are to construe it as a contract, and with reference only to the apparent intention of the parties, I think we would find no difficulty in holding that the contracting parties intended by that term to confine themselves to the market in Milwaukee, a city which we judicially know to exist, and the market or place of sale in which, I think we may legally infer, is not more extensive than the boundaries of the city.

If on the contrary we are to construe it as a part of the plea in the case, having reference to that degree of certainty requisite in good pleading, I have simply to remark, that whatever is uncertain in this behalf, is the fault of the plaintiffs in

error, from whom the pleading comes; and because they have not averred the Milwaukee market to have an unreasonable extent, we are to presume that it has not. 1 Ch. Pl. 345. In either point of view the restraint was limited, and the limits were reasonable.

But the parties are said to have combined and agreed not to engage in trade, and that this was clearly against public policy; and in the plea, the plaintiffs and defendants, together with divers other persons, are averred to have formed themselves and entered into an association. Let this matter be understood, and we need not be frightened by the terms employed to characterize it. The agreement discloses no combination and no association in the sense in which the words are evidently used. It is of two parts. It creates mutual obligations, and provides mutual equivalents, as every contract, *inter partes,* does. But there is no identity of interest or of duty between the parties of the second part, no more than always exists between landlord and tenant. The warehousemen received their daily compensation, and the millers received their daily profits.

And there was no combination between the parties of the second part, the warehousemen. Perhaps they must be considered to have jointly promised the party of the first part, but it is not disclosed that they have promised each other, which I understand they must have done, before they can be said to have combined.

Besides, if the design be lawful, as the abandonment of trade in a particular place is, what matter how many combine in it? But at all events, it is said, that as creating a particular restraint, the contract is *prima facie* bad; and the facts and circumstances which will justify it, if any such exist, should be made to appear.

And upon this point, the authority of Lord Macclesfield is again invoked, who says in Mitchell v. Reynolds that "a particular restraint is not good, without just reason and consideration." And again, "In all restraints of trade, where nothing more appears, the law presumes them bad." Special circumstances may exclude the presumption, and the court is to judge of those circumstances, and determine accordingly, and if, upon them, it appears to be a just and honest contract, it ought to be maintained.

What were those special circumstances in that very case? Why, that the plaintiff was the assignee of a lease of a messuage and bakehouse in Liquor Pond street, in the parish of St. Andrews, Holborne, for the term of five years. This was held a sufficient reason to support a covenant not to exercise the trade of a baker within that parish during the said term.

What are the special circumstances in this case? The obligees are the proprietors of several mills in the City of Milwaukee, for the manufacture of wheat into flour. Will any one presume to say here is not as good a reason for upholding a promise not to traffic in wheat in Milwaukee, to the prejudice of these proprietors, for the term of seven months?

But how should these special circumstances be made to appear? By averment in the pleadings and by proof upon the trial? Certainly not. It was not so in the case just cited. They appeared upon the face of the instrument sued upon, by way of preamble to the conditions, were set out on prayer of oyer, and the question arose upon demurrer to the declaration.

Here these circumstances appear in the agreement which is set out in the plea, and the question arises upon demurrer to the plea.

It is insisted further that the contract of the 29th December, 1849, discloses an attempt to create a monopoly of the wheat market. And in support of this position we are again referred to the leading case.

"It may be useful," says PARKER, J., "and lawful to restrain him from trading in some places, unless he intends a monopoly, which is a crime."

But the word monopoly is used to signify something which is very different from aught that could have been intended by this contract. The learned judge himself interprets it in another part of the same opinion. He says, "that to obtain the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law." He adds that when restrained to particular places or persons, if lawfully and fairly obtained, the same is not a monopoly.

Now could the parties possibly have intended by this simple contract, to vest in the mill owners the sole exercise of the traffic in wheat, throughout the State of Wisconsin? If so, there was the most extraordinary disproportion of means to the

end ever betrayed in the negotiations of business men. But they intended nothing of the kind. Not even a monopoly of the market in Milwaukee. On the contrary, these mill owners who desired to purchase wheat for manufacturing, evidently sought to protect themselves against the competition (doubtless often sharp and injurious) of the warehousemen.

The obligors possessed large facilities as warehousemen, vessel and dock owners, for storing and freighting the produce which came to that market. Their interests led them to deal in that produce in the bulk, because so it would pay the most storage and the most freight. On the other hand, to give employment to their mills, the obligees sought the same produce for manufacture. Here their interests clashed. The contract before us is the result of a compromise of those conflicting interests. And if the argument needed any such beggarly support, I think it might well be asked if the public interests were not promoted, rather than prejudiced by an arrangement which saved to the wealth of our state, the earnings from the manufacture of so large a quantity of wheat as we may reasonably suppose to have been floured in the Milwaukee mills, and which, but for this arrangement, would have been floured in the mills of some eastern state.

I waive this consideration. I say there was no monopoly intended, none effected. We cannot fail to perceive, that in spite of this contract, all the rest of Wisconsin was an open and unrestricted market for the sale of wheat. And even in Milwaukee, the market was open to the fiercest competition of all the world, except these obligors.

True, the language of the contract is, that the parties of the second part, "agree to give the parties of the first part, full, absolute and uninterrupted control of the Milwaukee wheat market;" and had it stopped here it might well have been urged that there was an *agreement* for a monopoly of the trade in that market. And if that had been the only market for Wisconsin (which it is not), it might well be said the agreement was as pernicious as an agreement to strike the sun from the system. Either, if performed, would be ruinous to the farmers of Wisconsin; but I submit that the impossibility of performing, would constitute as good a reason for holding either of them void, as the injurious consequences certain to result from per-

formance. But this stipulation is qualified by adding the words, "so far as they shall be able to do so," and had they stopped here, to any objection that a monopoly was agreed upon, it might well be answered, that the giving of such control or such monopoly (if they are synonymous terms), of the Milwaukee wheat market as those parties could give, was no monopoly at all. But the agreement is still further limited by the words, "by virtue of their capacity of warehousemen, vessel and dock owners."

It is then simply an agreement to give to the mill owners, such control of that market as they can give by virtue of those specified employments. In other and equivalent terms, it is a transfer of such control as the obligors possessed in right of their employment as warehousemen, etc. Such are the general terms selected by the draftsmen to express the complete abandonment of that trade in that market to the obligees.

Personally, the obligors were to do nothing to confirm the mill owners in that trade to the exclusion of anybody but themselves. Accordingly they go on to render the nature and meaning of the stipulation more definite, by specifying several things which the parties of the second part shall *not* do, but not one which they *shall* do.

It is unnecessary to examine the cases cited by counsel in support of the proposition I have here been combatting. They all arose upon royal grants or by-laws, and consequently were cases of involuntary restraints. They do establish the doctrine that the grant of a monopoly is void; but they do not support the averment of the plaintiff in error, that this contract disclosed a monopoly. Upon this point, better authority may be found in the language used by BRONSON, J., in Chappell v. Brockway, 21 Wend. 157. To a similar averment, he replied: "The defendant can gain nothing by giving the transaction a bad name, unless the facts of the case will bear him out. He calls this a monopoly. That is certainly a new kind of monopoly which only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise."

But the crowning objection urged against the validity of this agreement is, that it tends "to depress the wheat market; to

reduce the price of the commodity of wheat, and to stifle the fair and lawful rivalry and competition therein." It is quite observable that the word "stifle" is used more adroitly than aptly. But if its use is insisted upon, I admit that it does tend to *stifle* the competition of these obligors, and I assert that the right to stifle competition by contract, so far as it is injurious to the parties contracting, has not before been denied or questioned for two hundred years, unless two cases reported in 4 Denio 349, and 5 Denio 434, are to be considered as denying the right. Nor can I perceive how this agreement can reduce the price of wheat, below its actual market value.

Wheat, being an article of almost universal consumption, has a market everywhere, and a value in every market. And that value in any particular place is determined, less by the number of purchasers in that place, than by its distance from, and means of communication with the great central markets of the country and of the world. It is fluctuating to be sure, but usually it is very accurately ascertained, and well understood by the people. And I cannot suppose that the agreement of those warehousemen not to purchase that great staple upon their own account would affect its value, more than the agreement of so many brokers not to take foreign gold in a particular place would diminish the current value of such coin. Even if this contract had removed all competition from that market, and the mill owners had taken advantage of that exemption to lower their bids, one of two results must have followed. Either that product would have been wholly driven from the market, or new competitions would have entered the field to purchase. Either result would have defeated the very object which the parties had in view. It was said, indeed, upon the argument, that foreign capital was excluded from the market by this contract, because the essential facilities of trade were denied thereto. But the agreement will not warrant any such interpretation. On the contrary, the power to close the warehouses against the storage of wheat, or to demand exorbitant prices therefor is denied to the obligees by the express terms of the instrument.

Numerous cases were cited upon the argument in support of this last averment. Few of them, however, bear any analogy to the case before us. Most of those cases arose upon secret

agreements not to bid at auction sales, or upon the employment of secret bidders. All such secret arrangements are very properly discountenanced by the courts, and forbidden by the law. They are frauds upon the party who is uninformed of them and who acts in good faith.

When a man publicly offers his property to the highest bidder at an auction sale, thereby obligating himself to take the highest sum offered for it, however disproportioned that sum may be to its actual worth, it seems very reasonable that he should be protected against secret agreements between the bidders, by which one may be enabled to make the purchase upon his own terms. No such consequence could follow the making of the contract we are considering, for the simple reason that the obligees were not enabled thereby to purchase a bushel of wheat unless they offered a price for it which the vendor chose to take.

But the distinction between the case at bar, and the case referred to, is too apparent to require illustration. And I would not have felt called upon to notice those cases at all, but that they have been supposed to sustain two other decisions pronounced by the Supreme Court of New York, and which are claimed by the plaintiffs in error to be entirely decisive of the main question presented upon this record. I refer to the cases of Hooker v. Vanderwater, 4 Denio 349, and Stanton v. Allen, 5 id. 434. These cases arose upon contracts between different transportation companies upon the Erie canal, by which the parties agreed to stock their capital, and turn their earnings into a common fund, to be then apportioned between the different proprietors, under certain regulations contained in the articles of agreement.

The purpose assigned for the arrangement was the establishing of fair and uniform rates of freight, so equalizing the business among themselves as to avoid all unnecessary expense in doing the same. In the case first mentioned, the agreement was held to be void as conflicting with a statute of that state. In the second case the same court held the agreement void at common law. In the former case, JEWETT, J., remarks: "It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious, if not fatal to it." And in the latter case, McKISSOCK, J., observes that: "While the introductory terms of

the agreement proposed nothing apparently objectionable, the ultimate object is very manifest, and is of a different character. It is nothing less than the attainment of an exemption of the standard of freights, and the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition." And again: "As the canals are the property of the state, constructed at great expense, as facilities to trade and commerce, and to foster and encourage agriculture, and are at the same time a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interests of the whole state. If then, in addition to the evils already pointed out, as incident to this confederacy, a diminution of the revenue of the state would follow, of which there can be no doubt, as our canals have rivals by no means impotent, in the great inland carrying trade of the north and west, the question whether the association can be upheld, becomes one of momentous import."

Such reasons are assigned in support of the judgments pronounced in those cases. I would be reluctant to subscribe to them. I think it would be unsafe to adopt as a rule of law, every maxim which is current in the counting room. It was said some three hundred years ago, that trade and traffic were the life of every commonwealth, especially of an island. City of London's Case, 8 Co. 125.

If it be true, also, that competition is the life of trade, it may follow such premises, that he who relaxes competition commits an act injurious to trade; and not only so, but he commits an overt act of treason against the commonwealth. But I apprehend it is not true that competition is the life of trade. On the contrary, 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 speculation, and is hardly entitled to take rank as an axiom in the jurisprudence of this country. I believe universal observation will attest that for the last quarter of a century, competition in trade has caused more individual distress, if not more public injury, than the want of competition.

Indeed, by reducing prices below or raising them above values (as the nature of the trade prompted), competition has done more to monopolize trade, or to secure exclusive advan-

tages in it, than has been done by contract. Rivalry in trade will destroy itself, and rival tradesmen seeking to remove each other rarely resort to contract unless they find it the cheapest mode of putting an end to the strife. And it seems to me not a little remarkable that in the case of Stanton v. Allen, 5 Denio 434, it should have been urged against the agreement, that its object was to exempt the standard of freights, etc., from the wholesome influence of rivalry and competition. For it is very certain that because of that very purpose, because they did tend to protect the party against the influence of rivalry and competition, courts of law have upheld like agreements in partial restraint of trade, ever since the case of Mitchell v. Reynolds, *supra,* was decided. And upon the argument of this cause it was earnestly contended that some such object should have been expressly averred by the plaintiff in his declaration, in order to support the restraint imposed upon the lessor by one of the covenants in the lease declared upon.

But upon the abstract question whether the agreements disclosed in those cases did contravene public policy, the decisions therein pronounced are entirely conclusive upon us. And if the policy of that great state imposes upon her citizens the obligation of unrestrained and unrelenting competition in the business of transportation upon her canals, in order to swell the revenues from that already munificent source, I have nothing to urge against it.

I am not sure I should have discovered the rule applied in the determination of those cases, had it not been disclosed to me by the high authority of that court. Entertaining the views I do of the extreme caution to be observed in setting aside *bona fide* contracts in behalf of public policy, I am not sure I should have found, as a legal presumption, that when the parties to those contracts had combined their efforts and capital in order to diminish their expenses and increase their profits, they would have so abused the advantages thereby secured as to drive the carrying trade into the hands of those potent rivals, and thus sacrifice all profit.

But entirely controlling as those judgments are upon the question decided, they are far from being decisive of the case before us; for those agreements are broadly distinguished from the one I am considering, in the following characteristics: The

theater upon which the restraint was imposed by those contracts was the property of the state, was built by the state, from which the state received the revenues. Here the theater is the City of Milwaukee, from which the state receives no revenue except what is derived from ordinary taxation. There the theater was the only one within the state affording like facilities to the same trade. Here the City of Milwaukee is only one (though doubtless the most considerable) of very many markets within the state for the sale of wheat. There the combination comprised, in one case, a large portion, and, in the other, all the facilities employed upon the canal. Here the record does not inform us what portion of the facilities for the wheat trade existing in Milwaukee are placed under the control of the mill owners. There, an unlimited power was reserved to raise the price of transportation. Here the right to increase the price of storage above 4 cents per bushel is expressly denied.

Because, therefore, the restraint imposed by this agreement is limited and reasonable, and because it is supported by a good consideration, in the judgment of this court, the same does not contravene public policy, is not void; and the judgment of the County Court must be affirmed.

TRENTON POTTERIES CO. v. OLIPHANT

(Court of Errors and Appeals of New Jersey, 1899. 58 N. J. Eq. 507.)

Appeal from Court of Chancery.

MAGIE, C. J. The appeal in this cause is from a decree of the Court of Chancery, made upon the advice of Vice Chancellor Grey, dismissing appellant's bill of complaint, and denying the relief sought thereby.

The pleadings in the cause, the issues presented, and the facts established by the proofs, are set out with such completeness in the opinion of the learned vice chancellor, and the statement preceding it, reported in 56 N. J. Eq. 680, 39 Atl. 923, that it is unnecessary to repeat them here.

The bill was filed by appellant against the seven defendants and respondents to restrain the breach of contracts alleged to

to have been made by them with it. It was dismissed as to all the respondents upon the ground that the contracts in question were in illegal restraint of trade, and against the public policy of the state. As to three of respondents, the dismissal was also put on other grounds. As to James V. Oliphant, one of respondents, one additional ground was that he had not become bound to appellant by any such contract. As to him, and also as to Richard C. and Henry D. Oliphant, also respondents, the additional ground for dismissal was that the proofs disclosed no breach of the contracts on their parts.

The appeal is from the whole decree, but counsel for appellant conceded in the argument that, although Richard C. and Henry D. Oliphant were proved to have been bound to appellant by the contracts which the bill sought to enforce, yet that no sufficient evidence of any breach of those contracts by them appeared. It results that so much of the decree as dismisses the bill as to them must be affirmed.

But appellant contends that the dismissal of the bill as to James V. Oliphant cannot be supported upon the additional grounds assigned therefor. This contention requires a review of the proofs touching the relation of James V. Oliphant to the contracts in question, which were contracts to abstain from the manufacture of pottery ware. The first contract claimed was contained in a letter addressed to one Tapscott, dated January 23, 1891, and signed, "Oliphant & Co.," which is set out in the prefatory statement of the vice chancellor. The other contract relied on was contained in a sealed instrument dated July 6, 1892, purporting to be made between the seven respondents and Tapscott, also to be found in that statement. This writing was executed by all the respondents except James V. Oliphant.

The proofs show that, at the date of the letter in question, James V. Oliphant was not a member of the firm of Oliphant & Co. He became a member about January 1, 1892. The letter gave Tapscott an option to purchase at a stated price the pottery business carried on by Oliphant & Co., including the real estate, plant, and good will, which option was to be exercised within a limited period. That period had expired when James V. Oliphant became a member of the firm. On February 1, 1892, all the members of the firm, including James V. Oliphant, signed a writing, addressed to Tapscott, extending the option

originally given for a period of 90 days. The option was accepted by him on May 20, 1892. On May 21, 1892, an agreement of sale was signed by all the members of the firm except James V. Oliphant. But on May 23, 1892, he executed under seal a memorandum of agreement to the terms and conditions mentioned in the agreement of the other owners of the property which was the subject of the sale. The sale was consummated on June 6, 1892. Tapscott was acting in the transaction for those who formed the corporation which is the appellant, and for that corporation after its formation on May 27, 1892. Appellant acquired all Tapscott's rights in the contracts with respondents.

The vice chancellor reached the conclusion that the bill should be dismissed as to James V. Oliphant, because, not having executed the sealed instrument of July 6, 1892, he had not become bound by its covenants, and because the contract of the letter of January 23, 1891, adopted and ratified by him by his joining in the extension of the option by the writing of February 1, 1892, was a joint, and not a several, contract, and merely bound the firm of Oliphant & Co. not to engage in a competitive business.

The omission of James V. Oliphant to execute the instrument of July 6, 1892, unquestionably deprives appellant of any right to enforce its provision against him in this cause.

If necessary to construe the contract contained in the letter of January 23, 1891, I think it would be difficult, if not impossible, to hold it to be a mere partnership undertaking. No doubt, an obligation entered into by more than one person is presumed to be joint, and a several responsibility will not arise, except by words of severance. Alpaugh v. Wood, 53 N. J. Law 638. But the purpose of this letter was to give an option to purchase a business carried on by individuals who were partners. It recites that "we, the undersigned," do business under a firm name, and own and control the Delaware Pottery, which was the subject of the offer to sell. It contains an agreement that in case of sale "we will not, directly or indirectly," engage in a competitive business. In my judgment, it would not be an unnatural or strained construction to attribute to these words a several force, and to find that the firm signature thereto bound the members of the firm, not merely jointly, but

also severally. Upon any other construction, it is obvious that the protection of the business and good will proposed to be sold would only be partially secured.

But we are not required to construe the terms of the letter by themselves. By the extension of the option by the writing executed by all the firm members, including James V. Oliphant, on February 1, 1892, a several quality in the contract contained in that letter either was recognized as originally in it, or was imparted to it. By that instrument each partner agreed to an option of purchase for a fixed period, and that such agreement should be part of the original option given by that letter. When they all executed that instrument, and declared that it was to be attached to, and become part of, the original option, the then owners made a new contract in the terms of the former contract, which bound those signing as if they had signed the original option with the extended term. The contracts thus amalgamated stipulated that in the event of sale "we will not, directly or indirectly," engage in a competitive business. These words, over individual signatures respecting a business previously averred to be a partnership business, indicate several as well as joint undertakings. It is as if they undertook that they would not directly by their joint act as a firm, or indirectly by any several act of any member, engage in a competitive business. This construction is greatly aided by the exception from the undertaking, whereby the proposing vendors are permitted to engage in the business of manufacturing pottery ware as agents or employees of the proposing purchaser. These words indicate a relation which might be formed between vendors and purchaser in case of sale effected. While the firm could become the purchaser's agent, it could not in any other sense become his employee. Individual members of the firm might become either agents or employees. The exception therefore indicates that the contract it limited was one affecting individual members of the firm.

As James V. Oliphant, upon this construction, became bound by the contract, and as the proofs show that he had broken it, the decree dismissing the bill as to him cannot be supported on this ground.

It is next to be considered whether the decree can rest upon

the ground that the contracts sought to be enforced are in illegal restraint of trade.

The contract contained in the letter of January 23, 1891, and the covenant of June 6, 1892, are the obligations which the bill was filed to enforce. They are identical in terms, and purport to bind respondents to absolutely refrain from engaging in the business of manufacturing pottery ware "within any state in the United States of America, or within the District of Columbia, except in the State of Nevada and the Territory of Arizona, for the period of fifty years." They are contracts in restraint of trade.

This Court, speaking by Chief Justice Beasley, more than 30 years ago, declared that contracts in general restraint of trade are illegal. Brewer v. Marshall, 19 N. J. Eq. 537. The learned chief justice found that to have been the undisputed rule of the English and of our own courts since the decision, in 1711, of Mitchel v. Reynolds, 1 P. Wms. 181. In that celebrated case Lord Macclesfield placed the illegality of such contracts upon the sole ground of their being inimical to the public interest or public policy. To the same origin the rule denying validity to such contracts was attributed by the chief justice in our leading case above cited. Our Court of Chancery has announced and applied the rule, and upon the same ground. Mandeville v. Harman, 42 N. J. Eq. 185; Sternberg v. O'Brien, 48 N. J. Eq. 370; Althen v. Vreeland, 36 Atl. 479.

In determining what is the public policy in this regard, we have, however, to take into account certain contracts which restrain trade. It is of public interest that every one may freely acquire and sell and transfer property and property rights. A tradesman, for example, who has engaged in a manufacturing business, and has purchased land, installed a plant, and acquired a trade connection and good will thereby, may sell his property and business, with its good will. It is of public interest that he shall be able to make such a sale at a fair price, and that his purchaser shall be able to obtain by his purchase that which he desired to buy. Obviously, the only practical mode of accomplishing that purpose is by the vendor's contracting for some restraint upon his acts, preventing him from engaging in the same business in competition with that which he has sold. His contract to abstain from engaging in

such competitive business is a contract in restraint of trade, but one which, from the time of Mitchel v. Reynolds to this time, has been recognized as not inimical to, but permitted by, public policy. Therefore, while the public interest may be that trade in general shall not be restrained, yet it also permits and favors a restraint of trade in certain cases.

Contracts of this sort, which have been sustained and enforced by courts, have been generally declared to be such as restrain trade—not generally, but only partially, and no more extensively than is reasonably required to protect the purchaser in the use and enjoyment of the business purchased, and are not otherwise injurious to the public interest. This is the doctrine declared and applied in the Court of Chancery, and recognized in this court by our affirmance of its decrees. Richardson v. Peacock, 26 N. J. Eq. 40; Id., 28 N. J. Eq. 151; Id., 33 N. J. Eq. 597; Mandeville v. Harman, 42 N. J. Eq. 185; Finger v. Hahn, 42 N. J. Eq. 606; Id., 44 N. J. Eq. 604; Sternberg v. O'Brien, 48 N. J. Eq. 670.

It is observable that of late, and elsewhere, it has been questioned whether the rule as thus stated is not too broad to be applicable to present conditions. In 1711 trade was subject to limitations which have largely diminished or ceased to exist. When orders and responses had to be transmitted by mail or messenger, and the mail and travelers were carried by coaches drawn by horses, and goods were transported by pack or wagon, the area of the trade of a manufacturer or tradesman was necessarily limited by those conditions. Now that orders and responses may be transmitted for long distances by telephone, and over the world by telegraph, and goods and travelers may have quick transit over land and sea, the area of such trade may be immensely greater. Thereupon it is contended with great force that the true test of the validity of such contracts in restraint of trade is to be found alone in their being reasonably essential to the protection of the purchaser, and that, considering the vast extent of the area of some trades, there are cases in which a general restraint cannot be held to be unreasonable. Match Co. v. Roeber, 106 N. Y. 473; Nordenfelt v. Ammunition Co. [1894] App. Cas. 535; Rousillon v. Rousillon, 14 Ch. Div. 351; Cloth Co. v. Lorsont, L. R. 9 Eq. 345;

Machine Co. v. Morse, 103 Mass. 73; Gibbs v. Gas Co., 130 U. S. 396; Underwood v. Barker [1899] 1 Ch. 300.

The question thus suggested does not arise in this case, unless the contracts before us are found to be contracts in general restraint of trade. This leads us to inquire whether they are general, or only partial, in their restraint, and, if the latter, whether they extend beyond what is reasonable for a fair protection of the business and good will which appellant purchased from respondents.

The contention on the part of respondents is that the contracts in question restrain them from engaging in the business of manufacturing pottery ware in an area comprising the whole United States, and that the exception of one state and one territory was illusory and colorable, because they claim the proofs show that such manufacture cannot be carried on in those localities with profit. It is insisted that a restraint extending over the whole nation is a general, and not a partial, restraint.

It was well said by Judge Andrews in his opinion in Match Co. v. Roeber, *ubi supra*, that "the boundaries of the states are not those of trade or commerce." It may also be said that in these days the business of many a concern extends, not only beyond the boundaries of the state in which it has a local habitation, but even beyond the limits of the nation. Yet the public policy of that state may be involved in favor of or against the restraint of such trade, however widely extended. It is possible to conceive of a business so widely extended that a restraint of it within the limit of one country might be in fact but a partial restraint.

In the case last cited an exception of one state and territory similar to that contained in the contracts in question was pronounced not colorable, but the case does not indicate that the exception was shown by the proofs to be of territory in which the restrained manufacture could not be carried on with practical results. In this case the proofs establish that to be the fact as to the area included in exception. It is contended for appellant, however, that the fact so established is immaterial, because the rule against general restraint of trade is an arbitrary one, and an exception from the restraint, however unsubstantial or illusory, will make the restraint partial. It is not easy to perceive how a rule of this character, founded on

considerations of public policy, and applied in the public interest, can be rightly deemed arbitrary in the sense intended in this contention. Nor is it obvious that the courts would permit the evasion of the rule by illusive contrivances.

But the question presented need not be decided, unless the contracts, properly construed, extend the restraint of respondents over the whole area of the United States, except the excepted parts. If by the true construction the contracts are divisible, and bind respondents to a restraint in one or another of separately described areas, and, as applied to one or more of such areas, the restraint is not unreasonable, the suggested question need not be solved.

The area or areas within which the restraint upon respondents is engaged for in these contracts is described as being not, as stated in the opinion below, within any state "of" the United States of America, but "within any state *in* the United States of America."

In seeking the meaning of this description, we are to be guided by the ordinary rules of construction. We may presume that the contracting parties intended to make a valid contract in this case, under the doctrine enunciated in Brewer v. Marshall, that they designed to contract for a restraint which would be partial, and not general, and reasonable, in their judgment, for the protection of the purchaser in the enjoyment of the subject of the purchase. The contracts are to be construed so as to give them validity, if such construction does no violence to their language; and the subject-matter of the contracts is to be considered, and their terms are to be construed, in reference thereto. Here the transaction was the sale and purchase of an established business with its good will, and the contracts in question were plainly intended to furnish protection to the purchaser in the enjoyment of the things purchased. Respondents received a large sum of money for what they sold appellant, which they yet retain, and it is clear that the consideration thus received and retained must have been enhanced in amount by the obligation of the contracts now in question, and that so much could not have been obtained by respondents if no obligation to restrict competition had been made.

Examining thus the description of the area within which the restraint agreed to by respondents is to operate, I have reached

the conclusion that, without doing any violence to the language, or straining its import, it may be and ought to be held to be a divisible description, embracing, not one whole area, but several areas disjunctively described. The exception of the territory of Arizona is urged as inconsistent with this construction. But the express inclusion of the District of Columbia equally militates against the contrary construction, for, if the description covers the whole area of the United States of America, the District of Columbia was already included. Looking at the subject of the contracts, their presumed intent, and the purpose of any agreement to restrain respondents from engaging in a competitive business, the description can be read as applicable disjunctively to different areas—as within the State of Maine, within the State of New Hampshire, or within the State of New Jersey, etc., or within the District of Columbia, excepting, etc., and such should be its construction.

Thus read, the contracts in question are applicable to all the described areas, and are enforceable in those of them within which the restraint contracted for is reasonably required for the protection of appellant in the use and enjoyment of the business and good will acquired from respondents.

An instructive case on this point has lately been decided in England. The question arose upon a covenant by an employee with his employer that within twelve months after leaving his employment he would not engage in a similar business "in the United Kingdom or in France, or in the Kingdom of Belgium or Holland, or in the Dominion of Canada." The employee voluntarily left the service of his employer, and entered into the employment of a merchant in the same trade in England. Upon a bill by the first employer, KEKEWICH, J., allowed an injunction against the breach of the covenant. Upon appeal the cause was heard in the Chancery Division, before LINDLEY, M. R., and RIGBY and VAUGHAN WILLIAMS, L. JJ. The master of the rolls and RIGBY, L. J., held that the covenant was a separable one, and was not unreasonable, as to the restraint imposed on the covenantor within the United Kingdom, and they sustained the injunction. Vaughan Williams dissented, but upon the ground that the restraint within the whole of the United Kingdom was unreasonable. Underwood v. Barker, *ubi supra.*

It is next to be considered whether the contracts in question, thus construed, were reasonably required for the protection of appellant, and to what extent, if any, they should be enforced, under the proofs in the cause.

It appears by the proofs that the business which appellant purchased of respondents had been carried on by them within an area, roughly speaking, covering the states east of the Mississippi river, and north of a line drawn through Richmond and Louisville, including the District of Columbia.

Appellant contends that such contracts were reasonably required to protect it, not only in the areas in which the business it purchased of respondents had been carried on, but also in other states to which it might extend that business. But this contention I deem to be inadmissible. The validity in this respect of such contracts is to be tested by the effect upon the business and good will sold and purchased. What is reasonably required to protect that may be upheld. But the vendor can no more contract to restrict his use of his trade or calling beyond such protection than he could do if he had made no sale at all. Such a contract would be opposed to public policy.

But while it results from this view that the contracts in question, so far as they restrain respondents from engaging in the same business in localities in which the business purchased by appellant of them had never been carried on, may be opposed to public policy, it does not follow that they are wholly unenforceable. Contracts including distinct and separable obligations, some of which are legal, and some prohibited, are enforceable as to such obligations as are legal. Union Locomotive & Exp. Co. v. Erie Ry. Co., 35 N. J. Law, 240; Stewart v. Railroad Co., 38 N. J. Law, 505. These contracts, as to areas described therein in which the acquired business had been carried on, may be enforced upon proper proofs.

Upon the proofs, how far may these contracts be enforced? The prayer of the bill is for an injunction in the terms of the contracts. But this would be too broad a restraint on respondents, because it would include localities in which the purchased business had never been carried on, and where no protection of it was required. Upon the proofs, I conclude that no restriction can be imposed upon respondents as to any area beyond the State of New Jersey. In this state all the respondents, except

Richard C. and Henry D. Olyphant, are actively engaged in the very business they contracted not to engage in. There is some proof of sales and solicitation of trade in other prohibited areas, but it lacks the requisite certainty to justify a broader injunction.

It remains to consider other objections to the reasonableness of these contracts. It is contended that they are unreasonable because they restrain respondents from the manufacture of any pottery ware, while the business sold is claimed to have been that of manufacturing sanitary pottery ware. But the plant respondents sold was adapted to the manufacture of other kinds of ware, and they had in fact manufactured other ware. The business purchased was not the mere manufacture of sanitary pottery ware, and the contracts were not too broad, in furnishing appellant protection in respect to the manufacture of all pottery ware.

It is further objected that the contracts in question extend the restraint upon respondents over too great a period of time. The ages of respondents, it is said, show that at the expiration of the limit of 50 years probably some of them will have died, and all of those surviving will have passed the age of business activity. The contracts are not unlimited in time, but the insistment is that they are unreasonable because of the long limit of restraint. But whether they are reasonable is not to be determined by their disadvantageous effect upon respondents, but by considering whether the restraint to which, for what they received as a sufficient consideration, they bound themselves, was reasonably required to protect the purchaser in the enjoyment of his purchase. As they were dealing with a corporation which had acquired a corporate life of 50 years for the purpose of carrying on this business, the limit of time fixed by the contracts is not unreasonable. The fact that the limit exceeds the corporate life of appellant by a few days does not, in my judgment, require a different conclusion.

It remains to consider whether the contracts in question are otherwise against the public policy of our state. The learned vice chancellor held them to be opposed to the public interest, because he conceived that they tended to create a monopoly in the business of manufacturing sanitary pottery ware. This effect he deemed established by the proofs that appellant, simul-

taneously with its purchase from respondents, also purchased four other plants used in the manufacture of such ware in Trenton, and the property, business, and good will of their owners, and took from each of those vendors contracts restraining them from engaging in the business of manufacturing pottery ware, substantially identical with the contracts taken by it from respondents. The contracts procured from respondents he deemed to be part of a scheme to control the production, distribution, and sale of sanitary pottery ware, and to exclude competition therein. Such ware he declared, on the authority of the promoters of appellant, to be a necessity of life.

The scheme held to be reprehensible was found in the situation disclosed in the proofs. Respondents, as owners of the business sold to appellant, had, several years before the sale, united with the owners of seven other potteries in Trenton, which made, among other things, sanitary pottery ware, in an association called the American Sanitary Potters' Association. That association had in some way controlled the prices at which such ware produced by its eight members (counting the owners of each pottery as one member) should be put upon the market. The action of the association in that regard was determined by a majority of its eight members. By its purchases appellant acquired the interest of five of the members, and seems to have been permitted to cast a vote for each in controlling the action of the association. After appellant's purchases, prices were so controlled for some time, and until the association fell to pieces.

Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production, or by restriction on distribution, or by express agreement to maintain specified prices, are, without doubt, opposed to public policy. The contract of the Sanitary Potters' Association in this regard was inimical to public interest when respondents were members of it, and none the less so when appellants acquired the property of five of its members. However solemnly the members of that association may have obligated themselves to obey the behests of the majority in respect of the control of prices of their ware, no court would have enforced their agreements, or awarded damages for any breach of them.

But the contracts by which appellant acquired the property

and business of respondents and of four other members of the association contained no term stipulating for the continuance of the association, or for the enforcement of any objectionable agreements it had entered into. At the most, so far as appears, the contemporaneous purchases by appellant gave it an opportunity to use the majority vote in the association for such control of prices as its agreements provided for. Although the control of the voting majority of the association may have been one of appellant's motives for making its simultaneous purchases, it is inconceivable that any one of the five vendors could have repudiated his contract to sell to appellant on the ground that such sale, if consummated, would enable appellant to obtain such control. The public interest would be amply protected by invalidating the agreement of the association for the control of prices, and the disconnected agreement of sale would be enforced as other contracts.

It is further urged that the simultaneous contracts procured by appellant create or tend to create a monopoly, because they stipulate for the removal of many competitors in the business of manufacturing sanitary pottery ware. The owners of five of the eight potteries in Trenton manufacturing that kind of ware (and there were but few, if more than one, elsewhere) thereby agreed not to engage in that business for a long period of time, and over a great extent of country. The engagement of respondents in that respect has been found not to be an improper restraint of trade, nor inimical to public policy on that ground, but a contract partially enforceable upon respondents, if not otherwise objectionable. The engagements of the other vendors who sold their properties and business to appellant are similar in terms to that entered into by respondents, and furnish a reasonable protection to appellant of the business and good will purchased by it of each of them. Each sale and each incidental contract against competition are, for reasons before given, unobjectionable. Are they rendered objectionable by the fact that, being simultaneously made, they excluded from engaging in the business of manufacturing sanitary pottery ware so large a proportion of those previously engaged in that manufacture?

It is to be observed that the contracts of respondents and the other vendors to appellant restricted them from engaging in the

business of manufacturing, not sanitary pottery ware alone, but all pottery ware. The proofs show that a large number of persons are engaged in manufacturing pottery ware in various parts of the country, and that the contracts in question would exclude from competition a very small proportion of them. But as the proofs also show that the main purpose of appellant was to engage in the manufacture of sanitary pottery ware, I have stated the proposition in a more restricted form.

Whether sanitary pottery ware has become a necessity of life is open to question. It is certain that many persons manage to exist without using it. But if its use is of importance to health and comfort, and a considerable and increasing number of persons desire to acquire and use it, the public may have such an interest in its manufacture and sale that public policy will justify judicial interference and refusal to enforce illegal combinations to enhance its price. The elimination of competition may produce that result. The contracts in question were not intended to withdraw, and do not appear to have withdrawn, from work, a single workman in that industry. They restrain a comparatively small number of capitalists, who had previously employed their capital in such manufacture, from continuing so to do. The entire capital of the country, except theirs, is free to be employed in the manufacture. There seems no ground for the claim that we should refuse to enforce respondents' contracts by injunction, when the proofs furnish no reason for the belief that the public will suffer if they are held to their bargains.

The contemporaneous contracts were all made as incidental to the sale and purchase of competing concerns engaged in the manufacture of sanitary pottery ware. They were, as we have seen, reasonably appropriate to the protection of the purchaser in each case. While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the courts are bound to enforce. A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to

buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions, if such could be imposed, upon the acquisition of such property, and its use when so acquired, courts could impose no limitation. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish, or even to exclude, competition.

But appellant is a corporation, and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregation of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold, and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or for a time, at least, destroy, competition. Contracts for such purchases cannot be refused enforcement.

Since contracts by individuals, and by corporations having legislative authority, for the purchase of competing plants and business, may be made, and are enforceable, although, as a result thereof, competition is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased cannot be declared by the courts to be repugnant to public policy. The interference with competition resulting from such purchases under legislative permission being found not to invalidate contracts for such pur-

chases, the like interference by contracts reasonably required for the protection of the purchaser cannot be held to invalidate them.

The result is that the decree appealed from must be affirmed as to Richard C. and Henry D. Olyphant, but as to the other respondents it must be reversed, and a decree be made enjoining them, according to the prayer of the bill, within the state of New Jersey.[22]

For reversal (in part)—The Chief Justice, Van Syckel, Dixon, Garrison, Gummers, Ludlow, Bogert, Nixon, Adams, Vredenburgh—10.

For affirmance—Lippincott, Hendrickson—2.

TUSCALOOSA ICE MFG. CO. v. WILLIAMS

(Supreme Court of Alabama, 1899. 127 Ala. 110.)

McCLELLAN, C. J.[23] B. H. Williams is plaintiff, and the Tuscaloosa Ice Manufacturing Company is defendant, in this action. The complaint is as follows: "The plaintiff claims of the defendant the sum of three hundred and twenty-five dollars, with interest from the 1st day of September, 1898, as damages for the breach of a contract or agreement entered into between the plaintiff and defendant on, to wit, the 1st day of January, 1898, in substance as follows: This agreement, made and entered into between the Tuscaloosa Ice Mfg. Co., of which Henry B. Gray is president, of the first part, and B. H. Williams, sole owner of an ice machine located near the Alabama Great Southern Railroad depot, at Tuscaloosa, Ala., of the second part, witnesseth that the party of the first part, for and in consideration of the covenants of the party of the second part hereinafter mentioned, agrees to pay the party of the second part the sum of eight hundred and seventy-five dollars ($875.00), in five equal payments, of one hundred and seventy-five dollars each

22—See also Davis v. Booth & Co., 131 Fed. 31, 37; Camors-McConnell Co. v. McConnell, 140 Fed. 412; Chappel v. Brockway, 21 Wend. (N. Y.) 157.

23—Only the opinion of the court is given.

($175.00), the first payment to be made this day, and the other four payments on the 1st day of June, 1898, 1899, 1900, 1901, respectively. In consideration of the promise of the foregoing payments, the party of the second part hereby agrees not to run his ice machine as described above, nor suffer it to be run, for the term of five years, at Tuscaloosa, Ala., unless the party of the second part shall make a sale of the same to be run at Tuscaloosa, Ala., in which event he releases the party of the first part from making all subsequent payments to him, and also agrees to refund on any payment made by [to] him during the year such sale is made such a part of said payment as the remainder of that year bears to the entire year. It is further agreed that, if the said party of the second part shall sell his ice plant between January 1st and June 1st of any year, he shall be entitled to his proportional payment for that year. It is further agreed that in case some unknown party should erect or operate an ice machine in the city of Tuscaloosa, Ala., or in the vicinity of said city of Tuscaloosa, that the party of the second part, known in contract as B. H. Williams, shall release all subsequent payments to the party of the first part at the time of the erection of an ice plant to compete with said first party, provided that the sum of $500 shall have been paid to the party of the second part. It is further agreed that, if said plant or opposition should disturb the party of the first part before the amount of five hundred dollars is paid to the party of the second part, that the party of the first part shall only pay to the party of the second part the difference between the total payments made and the $500.00, and, should said ice plant be erected after $500.00 had been paid to the party of the second part, no other payments will be required. And plaintiff says that although he has complied with all its provisions on his part, and has not sold his said ice machine to be operated at or in the vicinity of Tuscaloosa, the defendant has failed to comply with its provisions on its part in the particulars following, viz.: Some time during the summer of 1898, to wit, in July or August, the Tuscaloosa Gas, Electric Light & Power Co., a corporation having its office and principal place of business at Tuscaloosa, Ala., amended its corporate charter, changing its name to the 'Tuscaloosa Light & Ice Company,' and having conferred upon it the power to manufacture and sell ice at Tuscaloosa, Ala., and

erected an ice plant and began the manufacture of ice at Tuscaloosa; and although the defendant had, at the time of the establishment of said Tuscaloosa Light & Ice Co.'s ice plant at Tuscaloosa, only paid to plaintiff the first payment of $175.00 mentioned in said contract as paid on the day of its execution, it has wholly failed and refused to pay plaintiff the difference between said payment of $175 and $500.00, as it agreed in said contract to do in the event of the erection of an opposition ice plant; hence this suit."

To this complaint the defendant interposed the following plea: "At the time said contract was entered into the plaintiff owned and operated the only ice factory in Tuscaloosa or its vicinity, and the only factory which was then selling ice to the people of Tuscaloosa and immediately surrounding territory, other than defendant's factory. Said population, consisting of, to wit, seven thousand people, was drawing its whole supply from, and was dependent upon said two ice factories for the same, and the demand for ice in said community was sufficient to consume and render marketable the output of both of said factories. Prior to said contract the price of this article of necessity and comfort was lessened to said community of consumers by competition between these two said ice factories. The object and effect of said contract was to wholly discontinue the manufacture of ice by plaintiff, to close down plaintiff's factory, to end all competition with defendant's ice trade, to leave defendant's plant the sole source of ice supply for said community, and to give to defendant the complete control and monopoly of said ice market, enabling it to increase the price thereof regardless of the cost of its manufacture; wherefore said contract was one cornering said ice market, stifling competition, creating monopoly, closing down heretofore active manufacture, and hence the same is void as in restraint of trade and against public policy." The trial court sustained a demurrer to the plea, defendant declined to plead over, and judgment was entered for plaintiff. The present appeal from that judgment presents the question of whether the contract sued on, considered in connection with the facts averred in the plea, involves a vicious restraint of trade, and is therefore violative of the public policy of the state and void.

The argument in support of the contract is largely based upon the considerations that the restraint it imposes is limited both

as to time and to territory,—to five years at the most, and to the town of Tuscaloosa and its vicinity,—and many cases have been determined upon these considerations alone. But they were so determined, or at least at the present day they could be so determined, only because the contracts involved in them were unobjectionable upon other grounds. As the principles obtaining here are understood in their application to existing conditions of traffic and commerce, we apprehend that circumstances in respect of a particular business might exist under which a covenant against engaging in it covering all time and the whole country would be upheld by the courts. All such covenants are for the protection of the business of the covenantee, and the logical rule would seem to be that their scope may be as broad as to time and territory as the business intended to be protected. It is upon this principle that contracts not to engage at any time in particular businesses in the United Kingdom, or in the United States, or even in Great Britain and Holland, or in the United States and Canada, have been held valid; the business in each instance being co-extensive with the territory embraced in the covenant, and of probable indefinite continuance. And, on the other hand, the same principle is potent to the conclusion that such covenant, having reference to a particular county or even town only, and confined to a year or other definite time, may be void, in whole or in part, for being broader as to time or place than the business designed to be protected by it; as where the business extends only to a part of the county or town, or must cease short of the time of the covenant. But however extended or circumscribed the business may be, however broad or narrow may be the covenant in respect of time and place, and however exactly the covenant may respond in time and place to the exigencies of the business, the contract may yet fall under the ban of public policy, and call for condemnation by the courts upon other and distinct considerations, growing out, it would seem, of the nature of the transaction upon which it is based, or looking to the protection of the public from the strangulation of legitimate and necessary competition.

One of these considerations—that resting on the nature of the transaction in which the covenant not to engage in a particular business is made—is this: Leaving to one side and out of view those cases in which property is sold, and as part of the con-

sideration the vendee agrees not to employ it in a business being carried on by the vendor, or within the territory covered by the vendor's business, and that other class of cases in which an employee covenants with his employer not to engage in the business about which he is employed on his own account or for another after the termination of his employment, and that yet other class of cases involving secret or patented processes, or patented devices and instrumentalities, it seems that the only cases, apart, as we have indicated, from those just mentioned, in which there can be any legitimate occasion for a covenant on the part of one not to engage in the business proposed to be carried on by another, are those in which the covenantor has sold to the covenantee his stock in trade, as in the case of a merchant, or his part of it, as where one mercantile partner sells out to the other or to a stranger, or being a professional man with an established practice, as a physician, dentist, and the like, or mechanic with a shop and accustomed patronage, as a blacksmith and the like, or, if he be a manufacturer, sells out his practice or business or plant, with or without an express stipulation as to its good will, and in the same transaction, and as part of the thing sold, and as in part the consideration for the price paid, agrees not to engage in that business, profession, or trade, as the case may be, within the territory covered or supplied by the business, practice, or factory purchased, during the time the vendee shall be interested therein. In line with this view, it is said by Mr. Beach: "The modern doctrine is well-nigh universal that, when one engaged in any business or occupation sells out his stock in trade and good will or his professional practice, he may contract with the purchaser and bind himself not to engage in the same vocation in the same locality for a time named, and he may be enjoined from violating this contract. This is about as far as contracts in restraint of trade have been upheld by the American courts or those of England. While the law, to a certain extent, tolerates contracts in restraint of trade or business when made between vendor and purchaser, and will uphold them, it does not treat them with any special indulgence. They are intended to secure the purchaser of the good will of a trade or business a guaranty against the competition of the former proprietor. When this object is accomplished, it will not be presumed that more was intended." 2 Beach,

Cont. § 1575. And to the same effect is the declaration of the Supreme Court of Illinois in More v. Bennett, 140 Ill. 69, 80, 15 L. R. A. 364: "Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased;" and this language is quoted approvingly by the Supreme Court of Pennsylvania. Nester v. Brewing Co., 161 Pa. St. 473, 481, 24 L. R. A. 250. The Supreme Court of Iowa adopts the same view (Chapin v. Brown [Iowa] 48 N. W. 1074, 12 L. R. A. 428); and so have other courts, where this phase of the general question has been discussed (Oliver v. Gilmore [C. C.] 52 Fed. 562). There are several reasons for upholding the covenant on the part of the vendor in all such cases to desist from the business in competition with the purchaser which do not obtain in other cases. In the first place, the restraint is partial in the sense that it covers only the time and locality during and in which the vendee carries on the business purchased, and beyond these limitations the seller is at liberty to carry on the same business. Then, too, the vendor receives an equivalent for his partial abstention from that business in the increased price paid him for it on account of his covenant; and his entering into and observance of the covenant not only does not tend to his pauperization to the detriment of the public, but, to the contrary, by securing to him the full value of his business and its good will,—a value which he has an absolute right to secure in this way,—the covenant operates to his affirmative pecuniary benefit and against his impoverishment, involving, the theory is, imminency of his becoming a public charge or a criminal, in that, while being paid for desisting from the particular business in the locality covered by it, he may still enter upon other pursuits of gain in the same locality or upon this one in other localities. And, finally, while such covenants preclude the competition of the covenantor, it is neither their purpose nor effect to stifle competition generally in the locality, nor to prevent it at all in a way or to an extent injurious to the public; for the business in the hands of the purchaser is carried on just as it was in the hands of the vendor; the former merely

takes the place of the latter; the commodities of the trade are as open to the public as they were before; the same competition exists as existed before; there is the same employment furnished to others after as before; the profits of the business go, as they did before, to swell the sum of public wealth; the public has the same opportunities of purchasing, if it be a trading business; they are served in the same way, if it be a profession; and production is not lessened, if it be a manufacturing plant. As said by PUTNAM, C. J., in Oliver v. Gilmore (C. C.) 52 Fed. 568: ". . . When the covenantor surrenders his trade or profession, an equivalent is given to the public, because, ordinarily, as a part of the transaction, the covenantee assumes and carries on the trade or profession, nothing is abandoned, and only a transfer is accomplished. The same occupation continues. The same number of mouths are fed." And these considerations obtain where one already engaged in a business in good faith, for the purpose of enlarging and increasing his business, purchases the stock in trade or practice or plant of a rival, and incident thereto takes the covenant of the seller not to engage in the same business within the territory covered by the consolidated enterprise, and in all such cases the covenant in restraint of trade is a reasonable one and valid. But there is no room for the application of these reasons to cases in which the covenantee does not purchase the business, practice, trade, or plant of the covenantor, and the transaction involves nothing but a bald covenant in restraint of trade, for which there is no other consideration than the payment of money for the obligation itself. In such case the business of the covenantor is not transferred merely; it is destroyed. His plant is not continued by the covenantee in useful production, but is left to rust and canker in disuse. The public loses a wealth-producing instrumentality. Labor is thrown out of employment. "The same number of mouths" are not fed. The consideration the covenantor receives is not the just reward for his skill and energy and enterprise in building up a business, but is a mere bribery and seduction of his industry, and a pensioning of idleness. The motives actuating such a transaction are always, in a sense, sinister and baleful. Its purpose and effect are not to protect the covenantee in the legitimate use of something he has acquired from the covenantor, but to secure to him the illegitimate use,

or the use in an illegitimate way, of that which he already has, in respect of which there is no reason or occasion for the covenantor to assume any obligation of protection. Such an undertaking in restraint of trade, however limited as to time and place, would seem, upon all general principles, though we know of no case expressly and directly so deciding, to be necessarily unreasonable and vicious on the consideration alone that it is not entered into nor has it the effect of protecting some business, practice, trade, or interest which the covenantor has sold to the covenantee. The undertaking involved in this case is precisely of that class, and must fail upon the principle we have been discussing.

But this contract is clearly bad upon the other consideration adverted to above: It tends to injure the public by stifling competition and creating a monopoly. Its manifest purpose, even upon its face, and certainly when taken in connection with the facts averred in the plea, was to secure to the covenantee a monopoly in the production and sale of ice in the town of Tuscaloosa and vicinity, and such is its operation and effect. Indeed, on the allegations of the plea, it was even worse than this; for one of its results was to reduce the available supply of ice below the needs of the locality affected by it. It thus operated not only to put it in the power of the covenantee to arbitrarily fix prices, but directly and necessarily to create a partial ice famine, upon which the defendant company could batten and fatten at its own sweet will. But, aside from this, the monopoly itself—the putting in the power of the covenantee to control the production, and to fix its own prices whatever the production—is quite sufficient for the utter condemnation of the contract as being against public policy. The purpose to create a monopoly is obvious. It is well-nigh expressed in the writing itself. That a monopoly was created is clear beyond all dispute. That ends the case against the validity of the covenant. Nothing more need be said. All that has been said for the appellee against that conclusion is vain and useless. Given the purpose and effect of this contract, its condemnation would follow even had the plaintiff, as a part of the transaction, sold his ice plant to the defendant; and the limitation of the covenant as to time and place, though reasonable in itself, is of no redeeming importance or efficacy whatever. So of the suggestion that no monopoly

was created because the contract itself evidences a contemplation that "unknown parties" might come to Tuscaloosa, establish an ice factory, and enter upon the production and sale of ice in competition with the covenantee. There was no other such plant there at the time the contract was entered into (it would not have been entered into at all had there been), and it is of no sort of consequence that another might be established, or even that another was in fact established, soon after its execution,—as soon, probably, as one could be established after defendant's monopoly began to grind. Nor is there the least merit in the suggestion that ice could be brought to Tuscaloosa from other places, and hence that defendant had no monopoly. Even with ordinary commodities, a covenant tending to create a monopoly in a given city or to unduly control prices is not relieved by the consideration that its baneful effects may be counteracted in greater or less degree by importations; and the position is exceedingly nude and bald when taken in respect of a commodity like ice or water, the chief cost of which, apart from the plant for its manufacture or collection, is in the transportation to the consumer, and it may be safely said that an ice factory in a town beyond the ordinary reach of delivery wagons from another town has a monopoly of the ice business in that town. And so of the argument that public policy has to do in this connection only with the necessaries of life, and that ice is not a commodity of that class. Both the propositions thus asserted—the one of law, the other of fact—are unsound. To say the least, it is against public policy to monopolize in this way any commodity of common utility, or of common consumption or use among the people, or even of considerable utility or consumption, whether it be one of the necessaries of life or not; and, in the second place, we feel entirely assured of conservatism in declaring that in this latitude, and especially in towns as populous as Tuscaloosa, ice is one of the common necessaries of life. All of the foregoing propositions, sustaining the conclusion that the contract sued on is violative of public policy as stifling competition and promoting monopoly to the manifest injury of the public, are fully supported by the following authorities: 2 Beach, Cont. §§ 1579–1592; Clark, Cont. p. 458 *et seq.;* Craft v. McConoughy, 79 Ill. 346; Arnot v. Coal Co., 68 N. Y. 558; More v. Bennett, 140 Ill. 69, 15 L. R. A. 361; Lumber Co. v. Hayes, 76 Cal. 387; Hooker v. Vandewater, 4 Denio 349; Stan-

ton v. Allen, 5 Denio 434; Salt Co. v. Guthrie, 35 Ohio St. 666; Association v. Kock, 14 La. Ann. 168; Oil Co. v. Adoue, 83 Tex. 650, 15 L. R. A. 598; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Chaplin v. Brown (Iowa) 48 N. W. 1074, 12 L. R. A. 428; Oliver v. Gilmore (C. C.), 52 Fed. 562; Nester v. Brewing Co., 161 Pa. St. 473, 24 L. R. A. 247; Anderson v. Jett, 89 Ky. 376, 6 L. R. A. 390.

It follows that, in our opinion, the court below erred in sustaining the demurrer to defendant's plea. The judgment of the law and equity court will be reversed, and a judgment will be here entered overruling said demurrer. The cause will be remanded.

Reversed, rendered in part, and remanded.

CLEMONS v. MEADOWS

(Court of Appeals of Kentucky, 1906. 123 Ky. 178; 98 S. W. 13.)

PAYNTER, J. This action was instituted upon a writing which reads as follows: "This agreement entered into this 12th day of July, 1904, by and between W. W. Meadows, of the New Meadows Hotel, and Clemons & Wade Bros., of the Usona Hotel, both of Fulton, Ky., witnesseth: That for a period of three years from date hereof W. W. Meadows, who agrees to close and keep closed his hotel, known as the 'New Meadows Hotel,' reserving to himself the right to rent the same for offices of all kind and description, and also to all roomers for one week or more, when opportunity may occur. That for and in consideration of the aforesaid elimination of the New Meadows Hotel as a factor in the hotel situation for the time named, of Fulton, Ky., Clemons & Wade Bros. agree to pay in advance to W. W. Meadows one hundred dollars cash, and one hundred dollars additional on the 12th day of each succeeding month for three years from this date. It is agreed by both parties that, should any rush of patronage greater than the Usona Hotel can accommodate occur, W. W. Meadows agrees to entertain, for lodging only, any and all guests sent to him by Clemons & Wade Bros., and to receive therefor as compensation 50 per cent of any

revenue derived therefrom. It is further agreed that the price for said lodging shall never be less than $1 per person. However, it is agreed and understood that absence from home or any other good reason shall be sufficient and good reason for W. W. Meadows declining to take such guest. All rooms occupied by guests at the New Meadows Hotel to be cared for by W. W. Meadows."

The appellants claim that the contract is not enforceable, and that they cannot be required to pay the sums of money therein stipulated to be paid, because the contract is against public policy and without consideration. It is averred in the answer that at the time of the execution of the contract Fulton was a town of 5,000 inhabitants; that it was situated at the crossing of the Illinois Central Railroad, running from Chicago to New Orleans and from Louisville to Memphis and New Orleans; that it was the headquarters of the Kentucky & Tennessee Division of the road, and a large number of local and transient persons stopped at the hotels for meals and lodging; that the New Meadows and Usona Hotels were first-class hotels, and were the only hotels of that class in the town; that they were rivals and competitors; that there was no consideration for the execution of the contract, except that which is stipulated therein; that it was entered into between the parties for the purpose of removing competition that existed in the hotel business in Fulton, and for the purpose of giving the Usona Hotel a monopoly of the hotel business of its class; and that the contract is against public policy. The court sustained a demurrer to the answer, and, the appellants failing to plead further, judgment was rendered against them.

So far as we are aware, the exact question presented by this record has never been decided by this court. This court has upheld contracts which were in partial restraint of trade. Pyke v. Thomas, 4 Bibb 486, 7 Am. Dec. 741; Grundy v. Edwards, 7 J. J. Marsh, 368, 23 Am. Dec. 409; Sutton v. Head, 86 Ky. 156, 9 Am. St. Rep. 274; Warehouse Co. v. Hobson, 16 Ky. Law Rep. 869. It was said in Sutton v. Head, 86 Ky. 156, 9 Am. St. Rep. 274: "Indeed, a particular trade may be permitted by being limited for a short period to a few persons, and the public benefited by preventing too many from engaging in the same calling at the same place. If, therefore, the limitation be a rea-

sonable one, it will be upheld.'' Beach on Contracts, § 1575, announces the rule as follows: ''The modern doctrine is well-nigh universal that when one engaged in any occupation sells out his stock in trade and good will, or his professional practice, he may contract with the purchaser and bind himself not to engage in the same vocation in the same locality for a time named, and he may be enjoined from violating this contract. This is about as far as contracts in restraint of trade have been upheld by the American courts, or those of England. While the law, to a certain extent, tolerates contracts in restraint of trade or business, when made between vendor and purchaser and will uphold them, it does not treat them with any special indulgence.''

The cases in which this and other courts have recognized this rule as correct, are where parties sell their business or trade, together with good will. For instance, cases where a merchant sells to his partner, or to a stranger, or where one being a professional man, with an established business as a physician or dentist, sells it, and as part of the consideration the vendor agrees not to engage in the business for a time, in that locality, and in such cases the courts have sustained such a contract, although they be in partial restraint of trade. Such contracts are intended to secure to the purchaser the good will of the trade or business, and as a guaranty the vendor agrees not to engage in like business or trade at that place for a specified time. In these cases the restraint to be valid must be more extensive than is reasonably necessary for the protection of the vendee, in the enjoyment of the business which he has purchased. In this class of cases the court recognizes that the vendor has received an equivalent for his agreement to partially abstain from business at the place where his business was formerly conducted. In such cases the agreement does not contemplate that the business or trade purchased shall be discontinued and thus perhaps thrown out of employment those whose services were necessary to carry on the business, but on the contrary, it is contemplated that the business will be carried on and that the public will continue to receive benefits which may accrue from the conduct of the business. It results that the agreement does not have the effect of depriving the public of any benefits which it has enjoyed from the conduct of the business, or pursuit of the trade which has been transferred to another. Such con-

tracts do not have the effect of destroying the competition which existed by reason of which the public enjoyed benefits. From the terms of the contract and the averments of the answer it is perfectly manifest that the purpose of entering into the contract was to eliminate the New Meadows Hotel from the hotel business in Fulton, and prevent competition between it and the Usona Hotel conducted by the appellants, and to give to the latter a monopoly of the hotel business of the class to which these hotels belong. They were the only first-class hotels in town, and the effect of the contract was to enable the Usona Hotel to serve all the patrons whose tastes and financial condition induce them to stop at first-class hotels.

The question for our solution is: Is the contract against public policy and without consideration? Hotels are established and maintained for the purpose of serving the public. The opening of a hotel is an invitation to the public to become its guests. Hotels are not conducted for the social enjoyment of the owners, but for the convenience of the public, that is, those whose business or pleasure may render it necessary that they shall ask and receive food and shelter at a place of public entertainment for compensation. A hotel is a quasi public institution. Those who desire to conduct a hotel must first obtain a license from the commonwealth allowing them to do so. Laws have been enacted for the purpose of protecting the proprietors of hotels because of the public character of the business. It is the duty of hotel proprietors to receive guests of good character, well demeaned and who are free from any contagious or infectious disease, and who have the financial ability to pay the charges. When a hotel agrees not to perform a duty imposed upon them by law, and agrees not to serve the public with a view of giving a competitor in business a monopoly of the hotel business, its act is in contravention of a sound public policy. The contract relied upon in this case is plainly in restraint of trade, the only consideration being the payment of money for such an agreement. No property is sold or good will transferred. The business is destroyed, not continued for the benefit of the public. The laborers that were necessary to run the hotel are thrown out of employment, and the public is deprived of the benefits which would accrue should the competition continue. The contract was not for the purpose of protecting the appel-

lants in the legitimate use of something, which they acquired by it, for, nothing was conveyed to them. The purpose and effect of the contract was to enable the appellants to enjoy an illegitimate use of something which they already had. Our conclusion is that the contract is against public policy and the demurrer to the answer should have been overruled. Chapin v. Brown (Iowa), 12 L. R. A. 428, 32 Am. St. Rep. 297; Clark v. Needham (Mich.), 51 L. R. A. 785, 84 Am. St. Rep. 559; Tuscaloosa Ice Mfg. Co. v. Williams (Ala.), 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125; Anderson v. Jett, 89 Ky. 375, 6 L. R. A. 390. In Anderson v. Jett, 89 Ky. 375, 6 L. R. A. 390, this Court well said: "Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it all along the line. The accumulation of wealth out of the brow sweat of honest toilers, by means of combinations, is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations because unfair to fair dealing, thrift, and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in, utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may, in fact, have that tendency, it is void as being against public policy."

The judgment is reversed for proceedings consistent with this opinion.

Petition for rehearing by appellee overruled.

WESTERN WOODEN-WARE ASSN. (A CORPORATION) v. STARKEY

(Supreme Court of Michigan, 1890. 84 Mich. 76.)

LONG, J. The bill in this cause is filed for the purpose of having the defendants Starkey, Ferris, and Olmsted enjoined

from engaging in the business of manufacturing pails, tubs, and other articles of wooden-ware during the period of five years, from the 29th day of June, A. D. 1888; to enjoin the other defendants from carrying on that business with them; to enjoin all the defendants from using certain premises in the village of St. Louis, Gratiot county, for the purpose of manufacturing tubs, pails, etc. The bill asks for an accounting touching complainant's damages, for a decree requiring the same to be paid, and there is also a prayer for general relief.

The bill shows that the complainant is a corporation organized under the laws of the state of Illinois for the purpose of carrying on the business of manufacturing, buying, and selling wooden-ware, and the materials which enter into wooden-ware; that it was engaged in the business prior to June 29, 1888; that on that date the defendants Starkey, Ferris, and Olmsted were doing business at St. Louis as partners under the name of the St. Louis Wooden-Ware Company; that they were engaged in business similar to that of complainant, and owned and occupied certain premises, with a manufacturing establishment, and were possessed of a large quantity of manufactured articles, materials, tools, and other chattels used in their business; that on that date the complainant and the members of said copartnership entered into a contract which is attached to the bill, the material parts of which will be referred to. By this contract, the firm, in consideration of $6,000, agree to sell to the complainant their stock on hand, materials, tools, implements, and chattels. The contract contains this clause:

"And the said first parties also agree not to become engaged in the manufacture of tubs and pails during the next five years in the states of Michigan, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Indiana, and Ohio, or allow their property at St. Louis, Mich., to be used for that purpose, nor to sell said property to any one for that business, except by consent of said second parties; and in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party $2,000 for damages, for violating this contract."

The contract also contains certain other provisions not necessary here to be noticed. After making the contract the complainant paid the copartnership the $6,000, and received the chattels. The defendants Starkey, Ferris, and Olmsted violated

the contract in that they are now engaged in the manufacturing and selling wooden-ware in the premises in question, and, as the bill alleges, have confederated with the other defendants Palmerton, Fowler, and Newman to carry on the business with them, and, for the purpose of concealing their transactions, procured the defendants Palmerton, Fowler, and Newman to organize a corporation under the name of the F. G. Palmerton Wooden-Ware Company, Limited, with intent to engage in said business.

The bill further charges that the defendant Starkey pretended to convey the lands in question to his son-in-law Palmerton; that Palmerton has conveyed them to the Palmerton Wooden-Ware Company, and that the business of manufacturing wooden-ware has been carried on in said premises by the Palmerton Wooden-Ware Company; that the defendants Starkey and Ferris have active supervision, control, and management of said corporation, and have been making sales of their pails and tubs in all the states of Michigan, Wisconsin, Illinois, Iowa, Missouri, Indiana, and Ohio. The bill charges that the corporation so organized by the defendants is a mere pretense and cover procured to be organized by the defendants Starkey and Ferris; that Starkey and Ferris furnish the capital therefor; that the stock of the corporation is held for their benefit and advantage; that the breach of the contract on the part of the defendant has greatly injured and damnified the complainant.

To this bill the defendants filed a general demurrer, which the circuit judge sustained; and on the 14th day of March, 1890, entered a decree dismissing the bill. From this decree complainant appeals.

Complainant's counsel raised but three questions in this court:

(1) That the clause of the contract wherein the defendants Starkey, Ferris, and Olmsted agree not to become or engage in the manufacture of tubs, etc., during the next five years, in any of the eight states named, or permit the premises in question to be used for that purpose, without the consent of the complainant, is valid;

(2) that the clause of the contract which provides "in case any of the parties of the first part violate this agreement, they do hereby agree to pay to said second party $2,000 for damages

for violating this contract,'' does not preclude the complainant seeking relief by injunction;

(3) that Act No. 225 of the Public Acts of 1889, declaring certain contracts, agreements, undertakings, and combinations unlawful, and to provide punishment for those who shall enter into the same, or do any act in the furtherance thereof, has no application in this case.

Counsel for complainant contends, under his first proposition, that this covenant is limited in respect to time; that it is also limited in regard to territory,—that is, to Michigan and the seven other states named; that it is a covenant embodied in the contract, of which contract the defendants Starkey, Ferris, and Olmsted sell certain property, the price being fixed at one sum, both for the value of the property and for the covenant; that how much of this price is applicable to the property sold, and how much to the covenant not to engage in business, neither the contract nor the circumstances enable us to say; but that it would be presumed that, by reason of the covenant, a larger price was paid by the complainant than would be necessary merely to cover the value of the property sold. Counsel insists that this question has been settled decisively by this court, and, in support of that proposition, counsel cites Hubbard v. Miller, 27 Mich. 15; Beal v. Chase, 31 Mich. 490. Counsel also contends that the rule laid down in Beal v. Chase, *supra,* is approved in Doty v. Martin, 32 Mich. 462; Caswell v. Gibbs, 33 Mich. 331; Grow v. Seligman, 47 Mich. 610; Watrous v. Allen, 57 Mich. 366.

From the view we take of this case, we need discuss but one question. The contract must be declared void on the ground of public policy. The cases cited by counsel for complainant do not sustain the doctrine he contends for here. This case does not fall within that class of cases where contracts have been upheld though the parties, by the contract, were to abstain from carrying on the same business for a particular length of time, and within a designated territory. In Hubbard v. Miller, *supra,* the complainant was engaged in carrying on the business of a general retail hardware store, in the city of Grand Haven, including the tubing and all necessary apparatus and tools for sinking drive-wells, and was also carrying on the business of putting down drive-wells. Two of the defendants, Miller and

Decker, partners under the firm name of George W. Miller & Co., kept a like hardware store in the same city, and like the complainant kept on hand the tubing and other materials used in putting down such wells, and were also engaged in putting them down for those who chose to employ them. Complainants purchased the stock, tools, etc., of the defendants Miller and Decker, and paid their price on condition that they would cease to do that kind of business, and would not keep well-drives, tools, and fixtures. The defendants violated this contract. The firm of George W. Miller & Co., was dissolved, and afterwards reorganized, with the defendant Akeley as a member of the firm. The new firm shortly after went into business, and kept the same kind of tools and materials as complainant, and carried on the well-driving business. Defendant Decker went into business for himself, and also carried the same line of stock, and commenced putting down drive-wells. It is true that this court, on the hearing here, granted a perpetual injunction. But CHIEF JUSTICE CHRISTIANCY, who wrote the opinion in the case, said:

"Whether such contracts 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 restrictions, its effect upon the public; in short, all the surrounding circumstances, and the weight or effect to be given to these circumstances, is not to be affected by any presumption for or against the validity of these restrictions. If reasonable and just, the restriction will be sustained; if not, it will be held void."

The court construed this contract as limited to the city of Grand Haven and vicinity. It will be noticed that the circumstances surrounding that case and the situation of the parties show that the complainant purchased a business which was similar to the one which he was then carrying on, and which he continued to carry on thereafter in the same place. The public may have been as well served by this means as though the two or three firms continued the business.

In Beal v. Chase, 31 Mich. 490, to which the learned counsel refers as sustaining his position, it appears that Chase was the publisher of a receipt-book, and carried on the business of printing. Chase sold to Beal his printing establishment, the receipt-

book and copyrights, the good-will of the business, and the right to use the name of Dr. Chase in connection with the book and business, and agreed not to engage in the business of printing and publishing in the state of Michigan, so long as Beal remained in the printing and publishing business at Ann Arbor. The whole business was turned over to Beal, and he was to fulfill all contracts entered into by Dr. Chase, and was to furnish the paper, the "Courier and Visitant," to all subscribers, etc. It appears that the business was to be carried on as Chase had carried it on, and the property purchased was devoted to the business in which it had theretofore been used. It was not, like the present case, closed up and taken out of the channels of business, and the court upheld and enforced the contract which the parties themselves had made.

The complainant here is a corporation organized and existing under the laws of the state of Illinois, and having its place of business in Chicago. It is alleged in the bill that they are engaged in the business of manufacturing, buying, and selling pails, tubs, and other articles of wooden-ware, and manufacturing, buying, and selling staves, heading, hoops, and other articles of wooden-ware; also for the owning and operating machinery, tools, and implements connected with and used in the manufacture of pails, tubs, and other articles of wooden-ware; that it sells products in the eight great states named. It is not alleged by the bill that, in the making of the contract the complainant intended to take the business and good-will of Starkey, Ferris, and Olmsted, and carry on the business of manufacturing these articles in this state; but, from the terms of the contract, it is manifest that they not only intended to take these parties out of the manufacturing business, but to ship the machinery which was used for that purpose out of the state, and close the doors of the shops. Complainant did not purchase the realty. It purchased all the machinery there in use, and the contract shows that it was to be taken down and placed on board the cars. The interests of the parties alone are not the sole considerations involved 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 to all judicial inquiries.

Here a large manufacturing business had been established,

and presumably it gave employment to quite a number of people. By the contract these people are thrown out of employment, and deprived of a livelihood, and no other of the citizens of Michigan are called in to take their places. The business is no longer to be carried on here, but is removed out of the state. The parties are not only bound by the contract, if valid, not to manufacture here for a period of five years, but in seven other of the states of the great northwest teeming with its millions of people. If the complainant could enforce this contract against Starkey, Ferris, and Olmsted, and shut the doors of that shop, and prohibit their again opening them for five years in any one of those states, they could as well make valid and binding contracts to shut the shop of every manufacturing institution in the state, and in the other seven states, and compel the parties now owning and operating them to remain out of business for a term of years, and hold the doors of these shops shut during such period; for the contract which complainant seeks to enforce provides that these parties shall not allow their property to be again used for that purpose within the time limited, nor sell it to any one for that business, except by consent of the complainant, and this under a penalty of $2,000.

A somewhat similar question arose in Wright v. Ryder, reported in 36 Cal. 342. There a contract had been entered into for the purchase by the Oregon Steam Navigation Company of the California Steam Navigation Company of a steamboat called the "New World," for the sum of $75,000, and also an agreement by the Oregon Steam Navigation Company that the steamboat should not be run upon any of the routes of travel on the rivers, bays, or waters of the state of California, for the period of 10 years thereafter. The validity of this contract was before the court, it being claimed that it was void on the ground of public policy, and it was held void, the court there saying:

"If the California Steam Navigation Company, which now occupies our bays, rivers, and inlets with its fleet of steamboats, should suddenly convey them all to a purchaser on condition that they were not to be employed in navigating any of the waters of this state for a period of 10 years, no one could doubt that this would operate as a great present calamity to the public, and the condition would be void as a restraint upon trade. On the other hand, if a sloop or schooner of 50 tons burden should

be sold on a similar condition, the injury to the public would be scarcely appreciable. In like manner, if all the carpenters and masons in a large city should bind themselves not to prosecute their business in this state for a period of 10 years, it might produce great public inconvenience; whereas, if only one carpenter or mason should enter into a similar contract, the loss of his service might not be felt by the public. And yet, in the latter case, we should be bound by a long line of adjudications in England and America to hold the contract void in restraint of trade."

In the present case, the defendants Starkey, Ferris, and Olmsted were not only to remain out of such business for the full time specified, but the premises which had been used to carry on the manufacturing by them, though not sold and conveyed under the contract, could not be again used for such time by them or any other party for the same business. I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned by the courts, and held void as unreasonable restraints of trade, and therefore void on the ground of public policy.

The decree of the court below must be affirmed, with costs.

The other justices concurred.[24]

WEST VIRGINIA TRANSPORTATION CO. v. OHIO RIVER PIPE CO.

(Supreme Court of Appeals, West Virginia, 1883. 22 W. Va. 600.)

Bill to enjoin certain defendants from laying and constructing any line of pipe or tubing for the transportation of oil upon and from a tract of land known as the "Gale tract," or from interfering in any manner with the sole and exclusive right thereon acquired by the complainant by the deeds hereafter mentioned in the opinion of the Court.

24—In Clark v. Needham, 125 Mich. 84, a contract to cease manufacturing certain articles for one year, the promisee having the privilege of renewing the contract for four years more, was held illegal.

Defendants demurred and filed their joint and several answers.

On the final hearing it was decreed that the said injunction awarded the plaintiff be dissolved and the bill of the plaintiff be dismissed.

From this decree the West Virginia Transportation Company appealed.

GREEN, J. The real question involved in this case is: Should the courts at the instance of the West Virginia Transportation Company enforce the grants and contracts made with it by E. L. Gale and wife dated respectively January 31, 1870, and October 23, 1873? These two contracts are identical in language, except that the first applied to lands in Ritchie county and the second to lands in Wood county adjoining. The first of these contracts is in the following language:

"We, the undersigned, for and in consideration of the sum of one dollar, receipt of which is hereby acknowledged, do hereby grant unto the West Virginia Transportation Company, a company incorporated under special act of the Legislature of West Virginia, passed February 26, 1867, and their assigns, the *exclusive* right of way and privilege to construct and maintain one or more lines of tubing for the transportation of oil, water or other liquids along, through and under lands owned by the undersigned in Ritchie county in the State of West Virginia; also the right to construct and maintain a telegraph along said tubing, and the privilege to remove said tubing and telegraph at pleasure.

"Witness our hands and seals this 31st day of January, 1870.

"E. L. GALE. [Seal.]

"MARY GALE. [Seal.]"

It was duly acknowledged and admitted to record in Ritchie county on March 15, 1870.

When these grants and contracts were made, Mary Gale, the wife of E. L. Gale, owned a tract of land lying partly in Wood and partly in Ritchie county, West Virginia, containing about two thousand acres, which had been conveyed to Mary Gale, the wife of E. L. Gale, as long ago as March 7, 1854.

Subsequently to the recordation of said grants and contracts of January 31, 1870, and October 23, 1873, that is, on January

26, 1875, said Gale and wife in consideration of eight thousand one hundred and forty-six dollars and fifty-six cents, conveyed to James M. Stephenson, Thomas Leach, W. Vrooman, C. H. Shattuck and H. H. Moss a moiety of one thousand acres of this land with general warranty of title, which deed was duly recorded on July 6, 1875. These grantees afterwards for convenience in managing said property assumed the name of the Wood County Petroleum Company. They claim, that, if these grants and contracts of date January 31, 1870, and October 23, 1873, were binding grants and contracts, which the courts would enforce between the original parties to them, nevertheless they would not be enforced against them, as they were purchased for valuable consideration without notice of their existence; and they insist, that the recordation of these grants and contracts cannot be regarded as giving them any constructive notice of their existence, because they profess to grant "*exclusive* rights of way and privilege to contract and maintain one or more lines of tubing for the transportation of oil along, through and under lands owned by the grantors in Ritchie and Wood counties *in the State of West Virginia;*" that this description of the lands, through which said rights of way were granted, is so utterly *vague and indefinite,* that it would not operate when recorded as any constructive notice to a subsequent purchaser without notice, as they claim to be. To sustain this position they rely on Munday v. Vawter, 3 Gratt. 518, and Carrington v. Goddin, 13 Gratt. 609.

On the other hand, the description of the land contained in these grants and contracts, the West Virginia Transportation Company insist, is legally equivalent to "all the lands owned by Gale and wife in Ritchie and Wood counties," and this being the legal signification of the description of the land in these grants and contracts, that the recordation of them was constructive notice to every one of the existence of these grants and contracts. To sustain this they rely on Warren v. Syme, 7 W. Va. 474. They also insist, that, even if this were not so, the evidence shows, that they were after the making of said grants and contracts in the actual possession of all this "Gale tract," so far as the exclusive possession and control of many lines of tubing through it was concerned, and that subsequent purchasers of any portion of this "Gale tract" were bound to inquire into

the nature of their possession; and had they done so, they must have discovered, that they claimed the exclusive right of way for tubing to transport oil either through this tract or such as was produced upon it; and therefore they are chargeable with implied notice of the claim of the West Virginia Transportation Company. To sustain this position they rely upon Daniels v. Davison, 16 Ves. 249; Wilson v. Wall, 6 Wall. 83; French v. Loyal Co., 5 Leigh 627; Campbell v. Fetterman's Heirs, 20 W. Va. 398.

From the views I take of this case I deem it unnecessary to consider or determine, whether the persons known as the Wood County Petroleum Company are or are not to be regarded as having either constructive or implied notice of these contracts and grants by Gale and wife with and to the West Virginia Transportation Company. As all questions involved in this cause can be determined without considering this question and by confining our attention to the question, whether the courts ought to enforce in favor of the West Virginia Transportation Company these grants and contracts as against the original obligors and grantors, we will consider this latter question only.

These grants and contracts are on their face ambiguous; and it has been held, that, when this is the case, the courts will look at the surrounding circumstances existing, when such ambiguous contracts were made, at the situation of the parties and the subject-matter of the contract, and sometimes even call in aid the acts done by the parties under such contracts, as affording a clue to the intention of the parties; but the court never resorts in such cases to the verbal declarations of the parties either before or after or at the time of the execution of the contracts to aid it in construing its language. See Crislip's Guardians v. Cain, 19 W. Va., p. 483, and the authorities there cited.

The contracts were in the case before us made respectively on July 31, 1870, and October 23, 1873. The parties to them had made on September 23, 1868, another contract in precisely the same language, except that by it was granted "the right of way to construct and maintain one or more lines of tubing for the transportation of oil along, through and under lands owned by them in Ritchie county," while these new contracts under consideration granted instead of such "right of way" and "exclu-

sive right of way." When these contracts were made the grantors owned a large tract of land of about two thousand acres in Ritchie and Wood counties, West Virginia, which was and for a long time had been very productive in valuable petroleum oil. The land had been divided into small lots and leased to numerous parties for terms generally of twenty years, who sunk wells on their respective lots, paying as a royalty or rent for working such wells one-fourth of the oil produced from them. The production of oil from these wells was some twenty thousand barrels a year, and there were upon it some fifty tenants. The oil produced each year was worth from sixty to one hundred thousand dollars.

On February 26, 1867 (Acts of 1867, p. 110), the Legislature of West Virginia had incorporated the West Virginia Transportation Company with the right to "lay out and conduct a line or lines of tubing for the purpose of transporting oil through the same in, through or along the oil district in the County of Wirt." This charter had been amended February 20, 1868 (see Acts of 1868, pp. 63 and 64), so that the company organized under this act of February 20, 1867, was authorized "to construct and maintain a line or lines of tubing for the purpose of transporting petroleum or other oils through pipes in the counties of Wirt, Wood, Ritchie and Pleasants. And the said company shall have power to enter and condemn lands and to acquire right of way in the counties aforesaid for the purposes of said company in the manner prescribed by the fifty-sixth chapter of Code of West Virginia." And on February 9, 1869 (see Acts of 1869, p. 8), the charter of this company was again amended and it was declared said company should "have power to construct or maintain pipes or tubing, together with all necessary and proper machinery, telegraphs, buildings and other appurtenances, for the purpose of transporting petroleum or other oils or liquids through such pipes or tubing; and said company shall also have the right to construct, own and run tank-cars, boats and other receptacles for the transportation of petroleum or other oils or liquids and to receive and hold such petroleum or other oils in storage and to buy and sell the same on commission or otherwise." Said act further provided the means and manner whereby lands might be condemned and

rights of way acquired in said counties for constructing such pipe-lines and works.

When oil was first struck on this Gale tract, he induced this company to lay a line connecting this tract with petroleum. He then with his wife executed the contract and grant, whereby he gave said company a right of way through said land; but this right of way was not an *exclusive* right of way. Afterwards oil was struck on other portions of said Gale tract of land; and he proposed to this company, that, if they would lay a pipe-line to these new points of production, he and his wife would grant them an exclusive right of way through this "Gale tract," so far as it lay in Ritchie county. This was agreed to, and the contract and grant dated January 31, 1870, was executed, and subsequently the contract and grant of like kind, so far as the "Gale tract" lay in Wood county, was executed on October 25, 1873. Under these contracts this company laid down pipe-lines to a large number, probably to fifty wells on this "Gale tract."

On June 26, 1875, E. L. Gale and wife conveyed a moiety of one thousand acres of this "Gale tract" for eight thousand one hundred and forty-six dollars and fifty cents to persons since constituting the Wood County Petroleum Company; and they, believing that the West Virginia Transportation Company, was exacting from them and their tenants illegal charges for transportation; and by mixing different oils and by other violations of their charter injuring them, concluded to lay down pipes to the various wells on their part of this "Gale tract," and connect them with the pipes of the Ohio River Pipe-Line Company, another corporation organized for transporting oils. This was about being done, when it was prevented by injunction awarded in this suit.

These facts show that the grants and contracts of January 31, 1870, and October 25, 1873, made by E. L. Gale and wife to and with the West Virginia Transportation Company, while ambiguous on their face when interpreted by the aid of the circumstances of the case, and the situation and conduct of the parties in carrying them out were designed not only to confer on the West Virginia Transportation Company the right of way for their pipes through this "Gale tract" of two thousand acres in Ritchie and Wood counties, but also to confer on them the

exclusive right of way, that is to say, to bind the grantors in their deeds and contracts not themselves to use pipe-lines to transport oil from said "Gale tract" and not to grant to any other person or persons authority to lay pipe-lines through said "Gale tract" to transport petroleum oil produced either on it or any other lands. That this is the true interpretation of these grants and contracts is, I think, apparent from Western Union Telegraph Co. v. Chicago & Paducah Railroad Co., 86 Ill. 246 (29 American R. 28), and from Western Union Telegraph Co. v. American Union Telegraph Co., 65 Ga. 160 (38 American R. 781).

It remains for us to decide whether these are such contracts, as the court ought on the application of the West Virginia Transportation Company to enforce against the obligors or those claiming under them, assuming that those so claiming are doing so with notice, at the time they purchased, of these grants and contracts with the West Virginia Transportation Company and of the character of their claim under these contracts.

The reason why, it is insisted by the counsel of the appellees, these contracts ought not to be enforced is, that they are contrary to public policy. The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything, when the thing to be done or omitted is in any degree clearly injurious to the public. (Chappel v. Brockway, 21 Wend. R. 159.) It is upon this principle that it is settled, that contracts in restraint of trade are in themselves, if nothing shows them to be *reasonable,* bad in the eye of the law; and though such contract be for a pecuniary consideration, or, what is the same thing, though it be under seal and stipulate only that a certain trade or profession shall not be carried on in a *particular* place, if there be no recitals in the deed or contract or no averment and proof showing circumstances, which render such contract *reasonable,* the contract or instrument is void, though it be but in *partial* restraint of trade. (Horner v. Graves, 7 Bing. 744; Pierce v. Fuller, 8 Mass. 223.) Contracts in restraint of trade are for the most part contrary to sound policy and are consequently to be held void. This is the general rule. There may be cases where the contract, though in apparent restraint of trade to some partial extent is

neither injurious to the public at large nor even to the obligors, and when this is made to appear affirmatively, the courts hold such contracts valid, though apparently to some extent in restraint of trade. If the contract go to the total restraint of the trade in the state where it is made, it is necessarily void, whatever be the condition on which it was based. Such a contract must be injurious to the citizens of the state in which it is to operate. For however small the state in which he was, the man making such contract would at least compel himself to transfer his residence and allegiance to another state in order to pursue his avocation. (Chappel v. Brockway, 21 Wend. 159; Taylor v. Blanchard, 13 Allen, 374; Dunlap v. Gregory, 10 N. Y. 241; Horner v. Ashford, 3 Bing. 328; Mitchel v. Reynolds, 1 P. Wms. 181; Alger v. Thacher, 19 Pick. 51; Smith's Leading Cases, Vol. 1, Part 2, p. 508.) On the other hand, if the contract be but in *partial* restraint, it may not be invalid; for there may be good reason, so far as the public interest is concerned, for allowing parties to contract for an apparent limited restraint, as that a man will not exercise his trade or profession in a *particular* case. And if such good reasons are shown, such contract will be upheld as not contrary to public policy. (Chappel v. Brockway, 21 Wend. 159; Ross v. Sadgbeer, 21 Wend. 166; Lange v. Werh, 2 Ohio State R. 420.) I presume that it is not absolutely necessary, however, that such good reasons should be set out on the face of the contract. I suppose this might be averred in the pleadings and proven. (Ross v. Sadgbeer, 21 Wend. 168; Mitchel v. Reynolds, 1 P. Wms. 181, and Horner v. Ashford, 3 Bing. 322.)

Though a contract in restraint of trade be in all other respects *reasonable,* and be not otherwise in any manner prejudicial to either the public or the obligor, yet the simple fact, that it restrains trade over an *unreasonable* extent of territory, though it be not a *general* restraint of trade, will render such contract invalid as contrary to public policy. Thus in Lawrence v. Kidder, 10 Barb. 641, the court held, that a contract, whereby the party covenanted that he would not sell mattresses in New York west of Albany, was held because of the large extent of the territory, in which this restraint operated, as contrary to public policy and void. But while the burden is on the party claiming the benefit of every contract in restraint of trade to

show, that under the particular circumstances of the case the partial restraint of trade is of no prejudice to the public, yet by what circumstances this burden would be met would seem to be difficult to state, and has apparently depended a good deal on the particular judge, who has had to pass judgment on the circumstances. Thus, in Whitney v. Slayton, 40 Me. 231, the court held, that "an agreement not to engage in the business of iron-casting within sixty miles of Calais for the term of ten years" was valid; but they based their judgment in part on the fact, that much of the country within sixty miles of Calais was but sparsely settled, and there were but few places of business within this territory, and also in part on the fact, that Calais was on the extreme border of Maine.

In The Oregon Steam Navigation Company v. Winsor, 20 Wall. 64, the court laid down the rule in such cases in a manner substantially corresponding with the views which I have expressed in the syllabus, saying "Questions about contracts in restraint of trade must be judged according to the circumstances in which they arise, and in subservience to the general rule, that there must be no injury to the public by its being deprived of the restricted party's industry, and that the party himself must not be precluded from pursuing his occupation and thus prevented from supporting himself and family." But in applying these principles the court held, that when A., engaged in navigating waters in California alone, sold in 1864 a steamer to B., who was engaged in the business of navigating the Columbia river in Oregon and Washington territories, and B. agreed that for the period of ten years he would not employ this steamer in the waters of California, the contract was not void, this stipulation being reasonable and not prejudicial to the public interest, as the vendor of the steamer, who thus contracted not to navigate with it the waters of California, proposed, when he purchased it, to navigate with it the waters of Puget Sound.

In Wright v. Ryder, 36 Cal. 342, a California company engaged in navigating the waters of California sold one of its steamboats to an Oregon company engaged in navigating Oregon waters, and the purchasers agreed not to navigate the waters of California for ten years with this steamboat; and the court

held this contract to be void, being contrary to public policy and an unreasonable restraint of trade.

In all such cases the difficulty lies in determining what are reasonable and what unreasonable restrictions in respect to the area, within which the trade is to be confined. As is said by Justice Bradley in the Oregon Steam Navigation Company v. Winsor, 20 Wall. 69, "It is obvious on first glance, that what is a reasonable restraint must depend upon the circumstances of the particular case; although from the uncertain character of the subject much latitude must be allowed to the judgment and discretion of the parties. It is clear, that a stipulation, that another shall not pursue his trade or employment at such a distance from the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding, which imposes the restraint only to such an extent of territory, as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, that the country be not deprived of the benefit of his exertions."

I will here say, that this last condition is the one which the courts must ever keep in view, that is, that the restriction is not prejudicial to the interest of the public. If it is, the contract is contrary to public policy and will not be enforced. The cases show, that whether the public interest is prejudiced by a contract, which restricts a business or profession with *impartial* limits, will often depend very largely on the character of the profession or calling. Thus in Bunn v. Guy, 4 East, 190, a contract made by an attorney, solicitor and conveyancer, that he would not practice his profession in London or within one hundred and fifty miles thereof, was held valid as not an unreasonable restriction; but in Sainter v. Ferguson, 7 Man. G. & Scott, 716 (62 Eng. Com. L. R.), the question was discussed whether Macclesfield or within seven miles thereof was a reasonable restriction, within which a surgeon and apothecary was to be restrained from practicing his profession, the court holding that it was. The reason why the courts regard as a reasonable restriction to the practice of the legal profession a territory so much larger than would be allowed as a reasonable

restriction to the practice of a surgeon's profession is obviously because a lawyer can practice his profession effectually at a long distance from his residence, say fifty or one hundred miles, by correspondence and occasional visits, while a surgeon can practice his profession at but a short distance from his residence, as nothing can be done by him except by personal visits. The public therefore may not be injured by a lawyer being required to live fifty miles distant, while they would be entirely deprived of a surgeon's services, if he was required to live at that distance from them.

According to the modern and better authorities, if the restriction of the particular trade or business be partial and reasonable, when all the circumstances are considered, including the restriction and object of the parties and the nature of the business, which is restricted, as well as the extent of the restriction in reference to time and space, then such contract imposing such reasonable restrictions will be upheld without regard to the adequacy or inadequacy of the consideration. (Hitchcock v. Coker, 6 A. & E. 438; Leighton v. Wales, 3 M. & W. 545; Archer v. Marsh, 6 A. & E. 959. In Pilkington v. Scott, 15 M. & W. 657, the law is thus stated by ALDERSON, B.: "That if it be an unreasonable restraint of trade, it is void altogether; but if not, it is lawful; the only question being whether there is a consideration to support it and the adequacy of the consideration the court will not enquire into, but will leave the parties to make the bargains for themselves. Before the case of Hitchcock v. Coker, 6 A. & E. 439, a notion prevailed, that the consideration must be adequate to the restraint; that was in truth the law making the bargain instead of leaving the parties to make it and seeing only that it is a reasonable and proper bargain." And this is the law in this country. See Hubbard v. Miller, 27 Mich. 15. Guerand v. Dandelet, 32 Md. R. 562. It may be regarded as established as a general rule, that when a covenant in restraint of trade is reasonable and is valid at common law, it will be specifically enforced in equity by enjoining the obligor from violating such covenant. See Harrison v. Gardner, 2 Madd. R. 444; Whitekar v. Howe, 3 Beav. 383; Guerand v. Dandelet, 32 Md. 562; Beard v. Dennis, 6 Ind. 200; Butler v. Barleson, 16 Vt. 176.

The cases established, that the restrictions, which may be put

upon any trade or business, are only such as in the judgment of the courts will not be prejudicial to the public; and that the extent of the restriction allowed must therefore depend largely on the character of the trade or business. In most cases the trade or business has been strictly local in its character, and a contract prohibiting one from engaging in such strictly local business, which is held to be valid, has been only such as prohibited the obligor from engaging in such business in a particular place, as a named town or city. To permit the obligee to stipulate that the obligor should not engage in such strictly local business in an extent of country exceeding the bounds of a given town or city would be to permit him to enforce a contract clearly prejudicial to the public interest. According to the spirit pervading the decisions everywhere a barber would be allowed to make a contract, whereby the obligor should not be allowed to carry on a business in opposition to the obligee in a certain village, town or city. But if the contract prohibited the obligor from carrying on such a business in such town or village or for a space of ten miles around it, such a contract would be no doubt held to be void, so far as it restricted the obligor from engaging in the business outside of the limits of such town or village, though according to the decisions such contract would be enforced, so far as it restricted the business within the limits of the town or village. (Price v. Green, 16 M. & W. 346; Chesman et ux. v. Nainby, 2 Strange 739; Woods v. Benson, 2 Cromp. & J. 94; Mallan v. May, 11 M. & W. 653; Nicholls v. Stretton, 10 Q. B. 346; Oregon Steam Navigation Company v. Winsor, 20 Wall. 70; Lange v. Werk, 2 Ohio St. 520; Horner v. Graves, 7 Bing. 738; Guerard v. Dandelet, 32 Md. 561.) The reason for such holding is obvious; for as a barber could not have customers for a space of ten miles around his shop, such a restriction on another person could be of no possible benefit to the obligee in such a contract, while it might obviously injure the public by depriving another community of the services of a barber. But if the restriction was confined to a village, the contract would be upheld, as it might be actually of benefit to the inhabitants of the village, that the business of barbering should not be overdone, and as a village could support but one barber, the villagers would probably be better served, if only one attempted to do such business in the village.

But on the other hand, the courts might uphold as valid a contract in which the obligor bound himself not to engage in the business of a surgeon-dentist or milkman within ten miles of a village, for such a circuit is not greater than could be reasonably occupied by a person engaged in business of this description. (Cook v. Johnson, 47 Conn. 175; Proctor v. Sargent, 2 M. & G. 31.) If the business was that of iron-making, the extent of country, within which the court would permit an iron-founder to restrain another from engaging in the business, would be still larger. Thus in Whitney v. Slayton, 40 Me. 224, the court upheld a contract, which prohibited the obligor from engaging in a business of this character for a space of sixty miles around Calais. But this, it is believed, is a space greater than would under ordinary circumstances be allowed to be included in such a restriction in this sort of business. A lawyer has been allowed to stipulate with another, that the obligor should not practice in London or within one hundred and fifty miles thereof (Bunn v. Guy, 4 East. 190); and in Whittaker v. Howe, 5 Beav. 383, the court went still further, upholding a contract, which prohibited an attorney from practicing in Great Britain for twenty years. It is believed, that such contract ought to be held as prejudicial to public interest and void; but there is no question that the restriction in point of space upon the practice of the legal profession would be allowed to an extent much greater than in most professions or occupations, as the profession of law can be well carried on over an extent of country much larger than most professions or occupations. There is, however, one sort of business which requires for its proper prosecution a still larger extent of territory than even the profession of a lawyer, that is, navigating or steam-boating; and accordingly the courts have shown a disposition to uphold contracts prohibiting an obligor to engage in this character of business over a very large extent of territory. Thus the Supreme Court of the United States in Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64, upheld a contract, which prohibited the obligor from navigating with a particular boat the waters of the State of California. But the Supreme Court of California, in Wright v. Ryder, 36 Cal. 342, refused even in the case of steam-boating to uphold a contract, which went to this extent in restricting steam-boating. The cases almost universally lay down

the rule, that any contract, whereby any obligor stipulates, that he will nowhere engage in any specified business, will be held void as against public policy; but to even this rule there are exceptions, it being regarded by the courts that there are some species of employments which may be legitimately subjected to such general restraint. For instance, this rule is held not to extend to a business, which is secret and not known to the public. The public is regarded as not being prejudiced by a contract restraining generally such a business, because the public has no rights in the secret. (Bryson v. Whitehead, 1 Sim. & Stu. 74; Peabody v. Norfolk, 98 Mass. 452.) It has been held, too, that if a party purchase out a magazine, he may stipulate with the vendor, that he shall not publish another periodical of a like nature though this restriction be general. (Ainsworth v. Bentley, 14 Weekly Rep. 630; Ingram v. Stiff, 5 Jur. [N. S.] 947.) So too in Stiff v. Cassell, 2 Jur. (N. S.) 348, it was held, that a party might agree to write a tale for a periodical, and that he would not write another for any other periodical for a year.

In Leather Cloth Co. v. Lorsont, Law Rep. 9 Eq. 345, and Morse Twist Drill & Machine Co. v. Morse, 103 Mass. 73, these principles are laid down, that while contracts are void, if their object is to deprive the state of the benefit of the labor, skill or talent of a citizen, yet public policy requires, that when a man has by skill or other means obtained something, which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and in order to enable him to do this, it is necessary that he should be able to preclude himself from entering into competition with the purchaser, provided the restriction is not unreasonable by going beyond the extent to which it would be a benefit to the purchaser. If a general restraint in such case is necessary for the benefit of the purchaser, it will be enforced, if inserted in the contract. In such cases the public interest on the whole is regarded as not prejudicial but rather promoted by even a general restraint, if necessary to enable the inventor to realize from his invention; for the public are interested, that inventors should be fairly compensated. On the other hand, the cases lay it down as a general rule, that any trade or business may be subjected by contract to a *partial* restraint, provided that the restraint, to which it is subjected,

is so limited as that it may benefit the public or at least not be prejudicial to the public interest; and the cases show that the extent to which this restraint may be legally imposed depends largely upon the character of the business restrained.

From the principles, which underlie all the cases, the inference must be necessarily drawn, that if there be any sort of business, which from its peculiar character can be restrained to no extent whatever without prejudice to the public interest, then the courts would be compelled to hold void any contract imposing any restraint, however *partial,* on this peculiar business, provided, of course, it be shown clearly that the peculiar business thus attempted to be restrained is of such a character that any restraint upon it, however *partial,* must be regarded by the court as prejudicial to the public interest.

Are there any sorts of business of this *peculiar* character? It seems to me that there are, and that they have been recognized as possessing this *peculiar* character, both by the statute-law and by the decisions of the court. Are not *railroading* and *telegraphing* forms of business, which are now universally recognized as possessing this *peculiar* character? Look at the Legislature of our own state in reference to these sorts of business and see if it does not distinctly recognize them as possessing this *peculiar* character. Our statute-law provides for the condemnation of lands by railroads and telegraph companies; and by pursuing the provisions of the statute-law these companies may acquire lands for their purposes without the consent of the owners of such lands. (Ch. 52 and Ch. 42 of the Code of West Virginia.) In conferring on such companies the power to exercise at their pleasure the state's power of eminent domain and the power thus to take land without the owner's consent for railroading and telegraphing, the Legislature has emphatically declared that the business of railroading and telegraphing is business in which the people of the state have such great and direct interest, that no individual land-owner shall prevent this business of railroading and telegraphing being carried on at every locality in the state, where any company may choose to engage in such business. After such a legislative declaration the courts could not say that in any particular locality, however limited, the public had not such a direct interest in railroading and telegraphing that its interest would

not be prejudiced by any person or corporation entering into a contract with another, whereby the obligor should bind himself to impede the making of such railroad or telegraph through any locality, however small, by refusing to grant a right of way through such locality or by refusing to permit a railroad or telegraph to pass through such locality. Such a contract would be necessarily prejudicial to the public interest, as the Legislature has recognized the public interest to have a telegraph or railroad through every parcel of land as so clear as to justify the condemnation of every such parcel of land without any kind of enquiry as to the public utility of the particular railroad or telegraph through that parcel of land.

The statute-law assumes as self-evidence, that the public interest is promoted in the building of a railroad or telegraph through each particular parcel of land; and the courts must therefore act on this assumption in every case, and as a consequence upon the principle, that the public interest is promoted by the business of railroading and telegraphing being done on each parcel of land, the courts must hold in accordance with the principles underlying all the decided cases, that no person or corporation can restrict this business being done on any parcel of land, however small, by a contract, which by giving to another an exclusive right of way or in any other manner requires the obligor to refuse to permit the doing of such business on said land by any and all companies, who are willing to pay a just compensation for the land which may be actually used in the doing of such business.

In the Western Union Telegraph Company v. American Union Telegraph Company, 65 Ga. 160 (38 Am. R. 781), it was expressly decided, that "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 as in restraint of trade and against public policy." The court, after first showing the public necessity for the telegraph, says: "Shall the means then, by which information is transmitted, be monopolized by a contract? When such exclusive rights exist, or such monopolies are established, the same should be done by legislative grant and not by an individual contract. Our judgment therefore is, that these contracts are especially made and entered into to cripple and prevent competition, and they thereby

enable the party to fix its tariff of rates at a maximum, governed alone by the necessities of its patrons. Such contracts are not favored by the law; they are against the public policy because they tend to create monopolies and are in general restraint of trade." The latter words above quoted, "they are in general restraint of trade," may not be entirely accurate language, as the contract prevents the erection of another telegraph line only on the land of the grantors, which may be ever so small a parcel of land. But it is true that to some extent "such contract is in restraint of this telegraphing business;" and for the reasons, which we have given, any restraint of that *particular* kind of business is contrary to public policy and a prejudice to public interest. The court subsequently say truly: "The state's right of eminent domain extends over every foot of its territory, and the same is held by its owners in subordination to that fixed and co-existing right, and may be taken for public uses upon just compensation" (p. 784). The inevitable inference from this is, that no one can give to a railroad or a telegraph company the exclusive right of way for a railroad or telegraph line through his land, however small a parcel it may be. Such contract is contrary to public policy. And if it were a valid contract, it would defeat the state's right of eminent domain.

The foregoing decision is, as I understand the case, followed in the case of Western Union Telegraph Co. v. Chicago and Paducah Railroad Co., 86 Ill. 246 (29 American R. 31). There the railroad company had contracted with the telegraph company, that it would furnish and distribute along its track cedar poles, and furnish all the labor necessary to erect the poles and place wires and insulators thereon, and furnish the labor to keep the telegraph-wire in repair, the wire, insulators, batteries and instruments and all other material being furnished by the telegraph company, the telegraph company to give the use of new patents. And the railroad company agreed to assure to the telegraph company, so far as it legally might, an *exclusive* right of way along the railroad line and lands for commercial and public purposes, and agreed to discourage competition by withholding facilities and assistance, performing to competing lines its legal duty and no more. There was proof, which appears to have satisfied the court, that two lines of wire on the same telegraph-poles, under the management of different com-

panies, could not be worked without serious annoyance and inconvenience and injury to each other. The court held, that this contract was valid and could be executed, so far as it prevented the railroad company from permitting another telegraph company from putting up wires on the same poles; but that it was contrary to public policy, if it was to be interpreted as preventing another telegraph company from erecting another line of poles along the railroad and placing on them another line of wires.

If I am right in the views which I have expressed, it would be contrary to public policy for the owner of a water grist-mill to contract with another person the owner of a mill-site in the neighborhood, that he would not erect on it a water grist-mill, because the business of grinding corn, like that of railroading, is regulated by the statute-law as one in which the public has a direct interest, and the necessary land may be condemned for the erection of such water grist-mill.

We will now proceed to apply these principles of law to the case before us. Examining the contracts betweeen Gale and wife and the West Virginia Transportation Company of date January 31, 1870 and October 25, 1873, the first thing which strikes us is, that while they are for the exclusive right of way and privilege to maintain lines of tubing for transportation of oil, etc., through this Gale tract, yet these contracts expressly reserve the privilege to remove such tubing at the pleasure of the West Virginia Transportation Company. Now, if we were to assume that a proper contract might be made for such *exclusive* right of way, we should be compelled to hold, that these were not proper contracts, because of this proviso authorizing the West Virginia Transportation Company to remove at their pleasure this tubing, and of course at their pleasure to decline to transport the oil raised on this "Gale tract" of land. It is true that this does not make these contracts void because of a want of consideration; for the trouble which the West Virginia Transportation Company was at in laying down this tubing would be a sufficient consideration to support these contracts, if they were contracts for such reasonable restraint of trade as that they ought to be supported. But this provision, that this tubing might be removed at the pleasure of the West Virginia Transportation Company itself, made these contracts unreason-

able restraints of trade, so far as the public and the fifty tenants on this "Gale tract" of land were concerned. The position of the public was, that no one by these contracts could with any convenience transport to market the oil made on this "Gale tract" of land except the West Virginia Transportation Company; and by these contracts they could cease to do so, whenever they pleased and thereafter, as no one else could lay down tubing, the public would necessarily in a large degree be deprived of the oil, which would otherwise have been produced on this land. Even if a proper contract for this exclusive use of a right of way for such tubing could have been made, this would have made these contracts unreasonable restraints on trade, contrary to public policy and void.

But there are much more serious objections to these contracts than these provisions. And had these obnoxious provisions not been in these contracts, they must still have been held void as contrary to public policy. The West Virginia Transportation Company could not ask, that the courts should enforce these contracts against Gale and wife, much less against their assignees, because these contracts are void as contrary to public policy. It is an attempt to restrain trade of a particular form, which from its character is recognized by the statute as such a business as can not be restrained even partially. A business, in which the general public has such a direct interest, that the statute has provided, that it may be carried on upon any tract of land in the state without the owner's consent. Hence it follows, that any contract made by the owner intended in any degree to restrain this business is contrary to public policy. This business of transporting oil in tubes is, like railroading and telegraphing, a business recognized by our statute-law as one in which the public has so great and direct an interest, that to promote it the statute authorizes the state's right of eminent domain to be exercised by any corporation to acquire a right of way for its tubing through any parcel of land in the state. And from what has been said it must follow, that no person can lawfully contract with any corporation for an *exclusive* right of way for tubing through his land, whereby oil is to be transported. For if he could, he would thereby defeat the state's right of eminent domain.

Our conclusion therefore is, that such a contract, so far as

it confers on the corporation a right of way through the grantors' land, is valid and binding on him and on every subsequent assignee or grantee of the land; but so far as it attempts to deprive the grantor or his assignee or any other corporation from exercising the right to lay other tubing through said land for the transportation of oil, such contract is wholly inoperative and void, being contrary to public policy and an unreasonable restraint on trade. I feel confident that I am justified in holding this attempted restraint on the original grantor and covenantor as inoperative and void for this reason, and, of course, if this be true, it cannot bind any subsequent grantee of the land, or impede any other corporation in acquiring in a legal manner a right of way for the transportation of oil through such land.

[In the balance of the opinion it is argued that "if such contract were obligatory on the original covenantor or grantor it could not possibly be binding upon a grantee of the land or any other corporation seeking a right of way through such land."]

Judges SNYDER and WOODS concurred.

Affirmed.

SECTION 2

CONTRACTS ACCOMPANYING THE SALE OF PROPERTY RESERVING THE SELLER'S BUSINESS

HODGE v. SLOAN

(Court of Appeals of New York, 1887. 107 N. Y. 244.)

Appeal from general term, Supreme Court, Third department.

The original action in this case was begun by Edward Null against Richard Sloan to restrain the defendant from selling sand off of a parcel of land sold by plaintiff to the defendant's grantor, John D. Sloan. Judgment was entered for defendant upon an order which affirmed a judgment for defendant dismissing the complaint, entered upon a decision of the court at special term. After appeal to this court, the plaintiff died, and his executor, Augustus M. Hodge, was substituted as appellant. On the 9th day of May, 1868, Edward Null was the

owner of certain land containing deposits of sand, the sale of which constituted his whole business. The land included about forty acres and upon being applied to by John D. Sloan for a portion of the land, about half an acre, he refused to sell, because by selling he would injure his business. Afterwards, upon Sloan's agreeing not to sell any sand off of the land, the plaintiff sold to him the portion of the land he wished. A contract of sale was made which contained such agreement, and, in fulfillment of the contract, a warranty deed was given from plaintiff to Sloan containing a covenant by the grantee "not to sell any sand off of said premises." The deed was received and duly recorded, and possession taken. Afterwards, Sloan conveyed to his son, the defendant, Richard Sloan, by deed containing no reference to the covenant in the deed from plaintiff; but defendant, at the time of taking the land, had full knowledge of the existence of the covenant. Against the protest of plaintiff, he opened a sand-pit, and proceeded to sell the sand therefrom. The court held that the covenant was void as against public policy, being in restraint of trade, and the complaint was dismissed.

DANFORTH, J. The conclusion of the trial court is against our ideas of natural justice; for it takes from one party an advantage which he refused to sell, and secures to the other, without price, a privilege which his grantor was unable to buy. Nor do we find that this denial of private right is required by any rule of public policy. Assuming, with the respondent, that the covenant is in restraint of trade, it is still valid if it imposes no restriction upon one party which is not beneficial to the other, and was induced by a consideration which made it reasonable for the parties to enter into it; or, in other words, if it was a proper and useful contract, or such as could not be disregarded without injury to a fair contractor. This is the doctrine of Chappel v. Brockway, 21 Wend. 157, and Ross v. Sadgbeer, Id. 166, derived by a learned court from the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, and an examination of subsequent decisions. It is also so amplified and discussed in a case just decided by this court (Match Co. v. Roeber, 106 N. Y. 473, opinion by ANDREWS, J.) as to make any elaboration of the general rule quite superfluous.

The subject of the contract at the bottom of this controversy was a piece of land which Sloan wanted to buy, and which the plaintiff was willing to sell, provided it should not be made an instrument for the destruction of his means of livelihood, or detrimental to his business. The principle which favors freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools or instruments or means by which he gains the support of his family, or if, as in the case before us, the instrument or means are susceptible of several uses, one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him, upon a sale of the instrument, to consent to that use, or prohibits him from binding his vendee against it.

We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way; and, in order to do this, it was necessary that he should preclude himself from so using it as that, by its means, he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration, and is not larger than is necessary for the protection of the covenantee in the enjoyment of his business.

But the question presented is, upon the conceded facts, really one of individual right, with which the question of public policy has little if anything to do.

Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in a particular manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should, in equity at

least, bind whoever takes title with notice of such covenant. By reason of it, the vendor received less for his land; and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land, and so running with the title. It is enough that a purchaser has notice of it; the question in equity being, as is said in Tulk v. Moxhay, 11 Beav. 571, 2 Phil. Co. 774, not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. This principle was applied in Tallmadge v. Bank, 26 N. Y. 105, where the equity in regard to the manner of improvement and occupation of certain land grew out of a parol contract made by the owner with the purchaser, and was held binding upon a subsequent purchaser with notice, although his legal title was absolute and unrestricted.

In Trustees v. Lynch, 70 N. Y. 440, the action was brought to restrain the carrying on of business on certain premises in the City of New York, of which the defendant was owner, upon the ground that the premises were subject to a covenant reserving the property exclusively for dwelling-houses. The court below held, among other things, that the covenant did not run with the land, and that the restriction against carrying on any business on the premises was liable to conflict with the public welfare, and judgment was given for the defendant. Upon appeal it was reversed; the covenant held to be binding upon a subsequent grantee with notice, as well upon the original covenantor. So the restraint may be against the use of the premises for one or another particular purpose, as that no building thereon "shall be used for the sale of ale, beer, spirits," etc., "or as an inn, public-house, or beer-house" (Carter v. Williams, L. R. 9, Eq. 678); and it is said a man may covenant not to erect a mill on his own lands (Mitchel v. Reynolds, *supra*).

Many other instances of restraint might be referred to; and where it is of such nature as concerns the mode of occupying or dealing with the property purchased in the way of business operations, or even the omission of all business, or certain kinds

of business, or the erection or non-erection of buildings upon the property, we see no reason to doubt the validity of an agreement, fair and valid in other respects, which secures that restraint. Indeed, it seems well settled by authority that a personal obligation so insisted upon by a grantor, and assumed by a grantee, which is a restriction as to the use of the land, may be enforced in equity against the grantee and subsequent purchasers with notice. Parker v. Nightingale, 6 Allen, 341, 344; Burbank v. Pillsbury, 48 N. H. 475. Nor is it essential that the assignees of the covenantor should be named or referred to. Morland v. Cook, L. R. 6, Eq. 252. In Tulk v. Moxhay, 1 Hall & Tw. 105, it was said that the jurisdiction of the court in such cases is not fettered by the question whether the covenant does or does not run with the land. In that case the purchaser of the land, which was conveyed to him in fee-simple, covenanted with the vendor that the land should be used and kept in ornamental repair as a pleasure-garden, and it was held that the vendor was entitled to an injunction against the assignee of the purchaser to restrain them from building upon the land. Upon the appeal, the chancellor (Cottenham) said: "I have no doubt whatever upon the subject. In short, I cannot have a doubt upon it, without impeaching what I have considered as the settled rule of this court ever since I have known it. Where the owner of a piece of land enters into contract with his neighbor, founded, of course, upon a valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by the contract particularly specifies, it appears to me the very foundation of the whole of its jurisdiction to maintain that this court has authority to enforce such a contract. It has never, that I know of, been disputed." The question before the court was stated to be whether a party taking property with a stipulation to use it in a particular manner, will be permitted by the court to use it in a way diametrically opposite to that which the party has stipulated for. . . . "Of course," he says, "of course, the party purchasing the property which is under such restriction gives less for it than he would have given if he had bought it unincumbered. Can there, then, be anything much more inequitable or contrary to good conscience, than that a party who takes property at a less price because it is subject to a restriction

should receive the full value from a third party, and that such third party should then hold it unfettered by the restriction under which it was granted? That would be most inequitable, most unjust, and most unconscientious; and, as far as I am informed, this court never would sanction any such course of proceeding." And, in language very applicable to the case before us, he adds: "Without adverting to any question about a covenant running with land or not, I consider that this piece of land is purchased subject to an equity created by a party competent to create it; that the present defendant took it with distinct knowledge of such equity existing; and that such equity ought to be enforced against him, as it would have been against the party who originally took the land from Mr. Tulk." This case is cited and followed, as to restrictive covenants, in many cases. Brown v. Railway Co., 2 Q. B. Div. 406; Railway Co. v. Gomm, 20 Ch. Div. 562, 576.

Each case will depend upon its own circumstances, and the jurisdiction of a Court of Equity may be exercised for their enforcement, or refused, according to its discretion (Trustees v. Thacher, 87 N. Y. 311); but, where the agreement is a just and honest one, its judgment should not be in favor of the wrong-doer. Such seems to us the character of the covenant in question. It is restrictive, not collateral to the land, but relates to its use; and, upon the facts found, the plaintiff is entitled to the equitable relief demanded.

Brewer v. Marshall, 19 N. J. Eq. 537, is cited by the respondent as requiring a different construction. The general rules in regard to such covenants are not stated differently in that case; but, in the opinion of the court, it was not one for the interference of the Court of Equity. Among many other cases, Tulk v. Moxhay, *supra,* is cited; and the learned court say: "It will be found, upon examination, that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights, and not upon the idea that the engagements enforced create easements, or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point." And, from a "review of the authorities," the court say "it is entirely satisfied that a Court of Equity will sometimes impose the burden of a covenant relating to lands on the alience of such lands, on a

principle altogether aside from the existence of an easement, or the capacity of such covenant to adhere to the title." The only question which the court regarded as possessed of difficulty was whether the covenant then in controversy was embraced within the proper limits of this branch of equitable jurisdiction. By a divided court, an injunction was denied. The circumstances were quite unlike those before us, and the decision furnishes no precedent for us to follow.

The judgment appealed from should be reversed, and new trial granted, with costs to abide the event.

All concur, except PECKHAM, J., not voting, and ANDREWS and EARL, JJ., dissenting, because, in their opinion, the covenant was a personal one, and did not bind the grantee of the land.

Judgment reversed.

SECTION 3

EXCLUSIVE CONTRACTS OF SALE AND PURCHASE

NEWELL v. MEYENDORFF

(Supreme Court of Montana Territory, 1890. 9 Mont. 254.)

DE WITT, J.[25] The record in the case presents the following history: The complaint is for the price of cigars sold and delivered by plaintiffs to defendant. Defendant answered, and admitted the sale and delivery, and set up in recoupment a contract, the terms of which were, generally, that in 1886 he was dealing in cigars; that plaintiffs approached him to sell their "Flor de B. Garcia Cigars," agreeing that defendant should have the sole and exclusive right of selling, handling and dealing in said cigars in Montana; that plaintiffs would not sell said cigars to any one else in the territory; that defendant would cease advertising and selling various other valuable brands of cigars in which he was dealing, and from the sale of which he was deriving much profit; that he would accept said sole agency, would purchase said brand of cigars from plaintiffs,

25—Only that part of the opinion is given which relates to the ruling of the court below sustaining a demurrer to the answer.

and would introduce and promote the sale thereof to the best of his ability. The answer further alleges, in detail, the performance by defendant of his part of the contract, and the expenditure of large sums of money in placing said cigars upon the market. Then follows the allegation of breach by plaintiffs, in that they sold the said brand of cigars to other dealers in the territory, by which breach the defendant suffered great damage in his business, which damage he recoups against the plaintiff's account for the cigars sold. The court below sustained a demurrer to this answer, on the ground that the contract pleaded was void, as against public policy, being in restraint of trade, and could not be pleaded in recoupment. . . .

We will first construe the contract as to whether it must be considered void as in restraint of trade. The rule that contracts that are in restraint of trade shall be void, as against public policy, is among our most ancient common-law inheritances. In Alger v. Thacher, 19 Pick. 51, MORTON, J., says: "As early as the second year of Henry V. (A. D. 1415), we find, by the year-books, that this was considered to be old and settled law. Through a succession of decisions, it has been handed down to us unquestioned, till the present time." The learned judge traces the history of the rule to its modern modification, that "contracts in restraint of trade, generally, have been held to be void; while those limited as to time or place or persons have been regarded as valid, and duly enforced." He gives the reasons for the rule in the following language: "(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 person to imposition and oppression. (2) They tend to deprive the public of the services of men in the employment and capacities in 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; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and

engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void." See, also, cases in that opinion cited.

The doctrine is again well stated in Lawrence v. Kidder, 10 Barb. 641, in which case the court, SELDEN, J., cites with approval BRONSON, J., in Chappel v. Brockway, 21 Wend. 157, as follows: "There may be cases where the contract is neither injurious to the public nor the obligor, and then the law makes an exception, and declares the agreement valid." In Navigation Co. v. Winsor, 20 Wall. 68, Mr. Justice BRADLEY says: "There are two principal grounds on 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 by 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 his family. It is evident that both 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. But if neither of these evils ensue, and if the contract is founded on a valid consideration, and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

We have cited these reasons for the rule in full, in order to apply them to the contract under construction. They embody the modern doctrine, as held by the authorities. A recitation alone, of the rule and its reasons, seems to us sufficient to take the contract under consideration out of the operation of its prohibitions. The contract is not general; it is limited as to place and person. The public is not deprived of the alleged restricted party's industry. On the contrary, the contract provides for the placing upon the Montana market the product of the plaintiffs' industry, by the selection and services of a local Montana agent, interested in the success of sales, and to be rewarded by such success. Nor is there any injury to the party himself, the plaintiffs, by their being precluded from pursuing their occupation. Rather, by the contract, they seem to have

sought a means of extending the field of their operations, and not of restricting them. In the light of the authorities, the rule and the reasons therefor, and the facts, we are clearly of the opinion that the contract was not in restraint of trade, and not void. It was simply a contract, for a consideration, for the enlistment of the services of an agent for the plaintiffs in their business. The court below was therefore correct in his last view of the contract. It follows that he was wrong in his first position in sustaining the demurrer to the original answer.

[Balance of opinion omitted.]

BLAKE, C. J., and HARWOOD, J., concur.[26]

ARNOT v. PITTSTON & ELMIRA COAL CO.

(Court of Appeals of New York, 1877. 68 N. Y. 558.)

RAPALLO, J. This action is brought to recover the price of about 2,700 tons of coal, sold and delivered to the defendant by the Butler Colliery Company in the month of August, 1869. The plaintiff claims under an assignment from the last-named company.

The findings of the referee establish that this coal was delivered pursuant to a contract between the two companies, dated August 3, 1869, and the defense mainly rests upon the alleged illegality of that contract. The referee has found that the circumstances under which the contract was made were as follows:

The Butler Colliery Company was a Pennsylvania corporation, engaged in mining and vending coal, at or near Pittston, Pennsylvania. The defendant was also a Pennsylvania corporation, engaged in the same business, but in addition had a

26—*Accord:* Schwalm v. Holmes, 49 Cal. 665; Long v. Towl, 42 Mo. 545; Brown v. Rounsavell, 78 Ill. 589; Superior Coal Co. v. Lumber Co., 236 Ill. 83; Clark Adm'r v. Crosby, 37 Vt. 188; Roller v. Ott, 14 Kan. 609; Pacific Factor Co. v. Adler, 90 Cal. 110; Fuller v. Hope, 163 Pa. St. 62; Anheuser-Busch Brewing Ass'n v. Houck, 27 S. W. 692 (Tex.).

Similarly, exclusive contracts of purchase have been held valid: Fuqua v. Pabst Brewing Ass'n, 36 S. W. 479, 480 (Tex.); Kellogg v. Larkin, 3 Pinney 123; Twomey v. People's Ice Co., 66 Cal. 233.

coal depot at Elmira, New York, where it was largely engaged in vending anthracite coal, the product of the Pittston mines, and in distributing it, by canal and railway, from Elmira, to dealers and consumers, through a very large extent of country north and west of that point. Elmira was connected with Pittston by canal, and was the chief market for coal in western New York, and prices of coal were there established for the extensive district before mentioned.

The purpose of the defendant in making the contracts in question was so to control the shipment and supply of coal for the Elmira market as to maintain an unnaturally high price of coal in that market, and to prevent competition in the sale of coal therein, and, but for that purpose, the defendant would not have entered into the contract in question with the Butler Colliery Company. Of all these facts the Butler company had notice at the time of making the agreement.

As a further means of accomplishing the same purpose, the defendant had made contracts adapted to promote it with all the other mining proprietors at Pittston. Of these contracts the Butler company did not have actual notice.

The agreement in question, entered into for the purpose which has been stated, was as follows: The defendant agreed that it would take all the coal which the Butler company should desire to send north of the state line, not exceeding 2,000 tons per month, at the regular market-price established from time to time by the Wyoming Coal Exchange, less fifteen per cent. per ton commission, and that settlements should be made on the tenth of each month for all the coal delivered during the preceding month.

The Butler Colliery Company agreed that it would not sell coal to any party other than the defendant, to come north of the state line, during the continuance of the agreement, which was during the season of canal navigation for 1869.

The other provisions of the agreement related to mere matters of detail, not affecting the legal question involved.

It is found as a fact in the case, that the product of the Butler Colliery Company largely exceeded 2,000 tons per month.

It cannot escape observation that by this agreement the Butler Colliery Company did not agree to sell or deliver to the

defendant all of the product of its mines, nor any specific quantity or proportion thereof. It was entirely optional with it whether or not to deliver any coal to the defendant. But the defendant did agree to take all the coal which the Butler company might desire to send north, to the extent of 2,000 tons per month. This undertaking would have been utterly void for want of mutuality, had it not been for the agreement of the Butler company that it would not sell coal to any other party, to come north of the state line. The only consideration for the agreement of the defendant to take of the product of the Butler company to the extent of 2,000 tons per month, consisted in the stipulation of that company not to sell to any one but the defendant. Without that stipulation, the paper called a contract would have amounted to nothing. Neither party would have been bound to deliver or accept any coal. That stipulation was all that gave vitality to the contract.

Bearing in mind the fact found, that the product of the Butler company's mines was largely in excess of 2,000 tons per month, the object of the agreement is plain. The defendant, without binding itself to take the whole product of the mines of the Butler company, endeavored by this agreement to keep all of the coal of that company out of the market, except the limited amount which it agreed to take, and thus to artificially enhance the price of that necessary commodity. This purpose was the basis of the whole agreement, and, as is found by the referee, was understood by both parties at the time of entering into the contract.

That a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be questioned at this day. (Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. R. 173; People v. Fisher, 14 Wend. 9; 4 Denio, 352; 5 id. 434; 44 N. Y. 87, and cases cited.)

Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such ar-

rangements are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand. No illustration of the mischief of such contracts is perhaps more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited. Parties entering into contracts of this description must depend upon each other for their execution, and cannot derive any assistance from the courts.

The plaintiff, however, contends, that notwithstanding the illegality of the stipulation of the Butler Colliery Company not to sell coal to other companies, he is still entitled to recover for the coal actually delivered to the defendant.

The coal was, as found by the referee, delivered under the illegal contract. The purpose of the vendee was against public policy, and the vendor knew it. This brings us straight to the question, whether the vendor, delivering goods under such a contract, can recover for the price. I think that under the circumstances of the present case, as found by the referee, he cannot. If an absolute purchase had been made by the defendant of the Butler Coal Company of any specified quantity of coal, or even of all the coal which the Butler company could produce, that contract would have been legal, notwithstanding that the object of the purchaser was to secure a monopoly and that the vendor knew it. He had a right to dispose of his own goods, and (under certain limitations) a vendor of goods may recover for their price, notwithstanding that he knows that the vendee intends an improper use of them, so long as he does nothing to aid in such improper use, or in the illegal plan of the purchaser. This doctrine is established by authority, and is sufficiently liberal to vendors. But—and this is a very important distinction—if the vendor does any thing beyond making the sale, to aid the illegal scheme of the vendee, he renders himself *particeps criminis*, and cannot recover for the price. (Tracy v. Talmadge, 14 N. Y. 162.)

Now, to apply these principles to the case before us. If the

Butler Colliery Company had sold to the defendant any specified number of tons of coal, or even the whole product of its mines, it had the right so to do and could recover for the price agreed upon, even though it knew that the object of the purchaser was to obtain a monopoly of the article. But when it agreed to sell only a part of its product to the defendant, and stipulated in the same agreement, and as part thereof, that it would not sell the residue to any other party to go north, knowing that the object of the defendant was to create a monopoly, and that such stipulation was intended as one of the means of averting competition, it made itself a party to the illegal scheme of the defendant. These mutual engagements cannot be separated. It is perfectly patent that one was the consideration for the other, and that the defendant would not have bought the coal in question unless the Butler company had agreed to aid it in preventing competition.

The illegality of the contract seems, by the opinion of the referee, to have been admitted by the parties when the case was submitted for his adjudication. In his opinion, which shows that he fully comprehended the subject, he yielded with apparent reluctance, to a decision of Assistant Vice-Chancellor Hoffman, in Jarvis v. Peck (Hoff. Ch. 479). The question presented in that case was different from the one now before us. The question there was, whether, when a bond and mortgage were given for two considerations, one legal and the other illegal, the bond and mortgage could be sustained on the legal consideration. Assistant Vice-Chancellor Hoffman argued, that, if the legal consideration was sufficient, the illegal one might be disregarded. Chancellor Walworth approved the result, on the ground that both covenants were legal. I do not think that this case throws much light upon the present one. The principle of Assistant Vice-Chancellor Hoffman's decision seems to have been considerably shaken, to say the least, in the case of the Saratoga Bank v. King (44 N. Y. 87). It is difficult to reconcile those cases.

At the General Term the judgment of the referee was sustained upon two grounds; first, that the illegal provision of the agreement was independent of, and separate from, the legal part. This point has, I think, been sufficiently discussed. The second ground is, that the Butler Colliery Company, after

having made the first month's delivery under the contract, rescinded it and refused to carry it out, and that this action is not upon the contract, but in disaffirmance of it, and to recover the value of the property which the defendant has obtained under it. This position introduces a new phase of the case. If the Butler company made the contract understandingly, as found by the referee, it is difficult to see how it could acquire any greater rights against the defendant by breaking it, than it would have had by keeping faith and performing it. To meet this difficulty it is suggested that the Butler company never made the illegal agreement. That it was made by an agent who exceeded his authority, and that when it came to the knowledge of the company it repudiated and disaffirmed it, and that this action is in disaffirmance of the contract. This position is not sustained by the facts. The action is not in disaffirmance of the contract. If the contract were rescinded there would be no sale of the coal, and the claim of the Butler Coal Company would be for its re-delivery, or for damages for the conversion. But such is not the character of this action. The present plaintiff could not maintain such an action. He has no title to the coal, but is simply assignee of the claim of the Butler Coal Company for bill of coal sold and for advances made under the agreement. The complaint avers the sale and delivery of the coal at an agreed price, and claims to recover that price, together with certain advances made at defendant's request, less certain commissions, all of which claims, as the evidence and findings show, conform to the provisions of the contract. The plaintiff alleges in the complaint the assignment to him of this indebtedness, and thus seeks to enforce the claim of the Butler company so far as it had accrued under the contract, up to the time when it repudiated the obligations on its part which were favorable to the defendant. The case of Peck v. Burr (10 N. Y. 294) is, I think, an authority directly adverse to the position of the plaintiff, and shows that no recovery can be had for the partial performance of an illegal contract, rescinded or repudiated after such part performance. (See also Knowlton v. Congress & Empire Spring Company, 57 N. Y. 518, 530.)

But, furthermore, the referee did not rest his judgment on any such ground as now suggested, nor do his findings justify such a ground. He finds that the contract was made by the

Butler Colliery Company. That it knew that the purpose of the defendant in making it was to obtain a monopoly of coal in the Elmira market and prevent competition therein, and that, but as a means of accomplishing that purpose, it would not have made the contract. He finds that the coal was delivered pursuant to that contract; that after its delivery the Butler company refused to deliver any more coal to defendant, and made sales to other parties north of the stipulated line. But there is no finding that the Butler company rescinded the agreement on the grounds of its illegality, or of any want of power in its agent to make it. The finding is that the rescission and refusal to perform were without reason or excuse. Upon these findings we do not think the alleged rescission gives the plaintiff any better right to recover for the part performance, than he would have had if the Butler company had performed all its stipulations.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur ; MILLER, J., not sitting.

Judgment reversed.[27]

SOUTHERN FIRE BRICK CO. v. GARDEN CITY SAND CO.

(Supreme Court of Illinois, 1906. 223 Ill. 616.)

The Garden City Sand Company, the Hillsdale Fire Brick & Clay Company (both Illinois corporations, and Maria Warner and Jacob B. Warner, of Indianapolis, Ind., filed their joint bill in the Superior Court of Cook county, April 4, 1903, against

27—See also Santa Clara Valley Mill Co. v. Hayes, 76 Cal. 387; Pacific Factor Co. v. Adler, 90 Cal. 110; Detroit Salt Co. v. National Salt Co., 134 Mich. 103 (contract for sale of entire product); Clancey v. Onondago Fine Salt Co., 62 Barb. 395.

In Anheuser-Busch Brewing Ass'n v. Houck, 27 S. W. 692, 696 (Tex.), it was held that an exclusive contract for the sale of beer to one of a number of sellers of beer who were associated together to suppress competition and secure a monopoly, was not in violation of the common law, because the subject-matter dealt with was beer. The contract was held illegal only because of the provisions of the statute.

the Southern Fire Brick & Clay Company, also an Illinois corporation, and Dick N. Lanyon, by which they sought to enjoin the defendants from mining fire clay upon a certain tract of land in Vermilion county, Ind., and from selling the same to any parties other than the complainants at any time prior to September 10, 1909, and from making the clay into fire brick or other clay products, and for an accounting for fire clay already manufactured and sold. An amended and supplemental bill was filed September 24, 1904, alleging that on September 10, 1901, a contract was entered into in writing between Dick N. Lanyon, first party, James A. Heber and Willis S. Bonebrake, second party, the Garden City Sand Company, third party, the Hillsdale Fire Brick & Clay Company, fourth party, and J. B. Warner and Maria Warner, fifth party, which provided as follows:

The second party, James A. Heber and William S. Bonebrake, agreed to mine, grind, and operate for the first party, Dick N. Lanyon, his fire clay grinding plant located at Jonesdale Switch, Vermilion county, Ind. Said first and second parties agreed that they would deliver f. o. b. cars at said switch first-class marketable fire clay at 77½ cents per ton, in such quantities and at such times as the third, fourth, and fifth parties might order. The first party agreed to erect and equip a new plant at his own expense for the grinding of the clay, and the second parties were to give their individual personal attention to the operation of said plant. The first party also agreed not to operate any other fire clay grinding plant on any land that he owned or controlled in the state of Indiana, and the first and second parties agreed not to sell fire clay to any other persons than the third, fourth, and fifth parties during the time of the contract. The second, third, fourth, and fifth parties agreed to cease to operate a certain plant located at Russell Switch, Ind., but, in case the new plant could not supply the demand, the old plant at Russell Switch was to be reopened. The third, fourth, and fifth parties agreed that they would not buy fire clay produced in the state of Indiana, except such as was produced by the parties to the contract, and they would make the greatest possible effort to sell all the fire clay so produced, and would jointly order and pay for not less than an average of forty tons for every working day during the period

of the contract, for which they were to pay 77½ cents per ton, and not enter into any combination or trust for the purpose of limiting the output of either plant. The contract was to be in full force and effect for a period of eight years, and after its execution on October 26, 1901, was filed for record in the recorder's office of Vermilion county, Ind.

The bill further alleged that Lanyon began the erection of the plant on his land at Jonesdale Switch, but that it was never completed; that on September 17, 1902, the defendant, the Southern Fire Brick & Clay Company, received from Lanyon and wife a warranty deed conveying about ninety-three acres of the lands contained in the contract, with full notice of the contract and its terms, and commenced the erection of a plant upon the same, and was subsequently notified by complainants that, if necessary, legal steps would be taken to restrain it from operating a plant or selling fire clay in violation of the terms of the contract; that on May 28, 1902, the complainants served notice on the first and second parties that more than enough time to equip the plant which was to be built by Lanyon had expired, and demanded that forty tons per days be delivered to them, as provided in the contract; that notwithstanding the warning and notice the Southern Fire Brick & Clay Company constructed its plant and placed the product upon the open market for sale. It is further alleged that the complainants were the first persons to introduce and place upon the market fire clay of this quality, under the name of "Dome Fire Clay" as a trade-mark, and they had built up a large trade therein, and the Southern Fire Brick & Clay Company had entered the market in direct competition with the complainants, and represented that it would sell at reduced prices the same clay under the same name. The complainants further alleged that they were ready, willing, and able to accept and handle the fire clay to be furnished by the contract, but that the first and second parties had failed and refused to deliver it, the prayer being for an injunction, as above stated.

The answer of the defendants admitted most of the material allegations of the bill, but denied that complainants had any interest in or lien upon the lands in controversy, and averred they had an adequate and complete remedy at law. Issue being joined, the cause was referred to a master to take the evidence

and report his conclusions. On January 18, 1904, during the taking of the evidence, the defendant Lanyon notified the complainants, in writing that he had constructed on his lands described in the contract a plant, and was ready to enter upon and carry out his part of the contract and awaited the order of the complainants.

The master, in his report, found that the bill was filed to secure the specific performance of the contract and for an injunction to restrain the violation of the negative covenants thereof; that such an action would not lie; that the injunction prayed for would not obtain fire clay for the complainants, but would merely prevent the defendants from selling the same elsewhere; also that the complainants had an adequate remedy at law. On the coming in of that report the cause was re-referred to the same master and additional evidence taken and a second report made, in which the master found that the contract was in the form of a trust in restraint of trade, and that the sole object of the complainants' bill was, not to obtain fire clay, but to prevent the defendant company from entering the market in competition with complainants. Objections were filed to the report, which stood as exceptions, and they were overruled by the chancellor and the bill dismissed. The complainants prosecuted an appeal to the Appellate Court for the First District, where the decree of the superior court was reversed. This appeal is from that judgment of reversal.

WILKIN, J. (after stating the facts). The first question discussed in the argument of counsel is whether the agreement of September 10, 1901, is a valid contract, as was held by the Appellate Court, or is in restraint of trade and violative of the anti-trust law of this state or of the United States, as found by the superior court, and therefore void. The appellants, in support of the latter contention, insist mainly upon that part of the contract by which the first party agrees not to operate any other fire clay grinding plant on any land owned or controlled by him in the state of Indiana, or to sell to any other person during the time of the contract, and in which the third, fourth, and fifth parties agree not to buy fire clay produced in that state other than from the first and second parties.

The federal statute which, it is claimed, prohibits such a con-

tract, provides that "every contract or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." The statute of this state provides: "If any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or any partnership or individual or other association of persons whosoever, . . . shall enter into, become a member of or party to any pool, agreement, contract, combination or confederation to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state, such corporation, partnership, or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to indictment and punishment, as provided in this act." Hurd's Rev. St. 1905, c. 38, p. 725, § 269a.

The object of these statutes is to prohibit the formation of trusts and combinations and remove all obstructions in restraint of trade and free competition. It was not the purpose of either law to hinder or prohibit contracts on the part of corporations or individuals made to foster or increase trade or business. But a contract may incidentally restrain competition or trade without violating the statutes, if its chief purpose is to promote and increase the business of those who enter into it. "Agreements in general restraint of trade are void, but those in reasonable partial restraint, founded upon a valid consideration, may be sustained. But this rule does not apply to corporations engaged in a public business. A contract embracing parts of several states, and contracts to sell the goods of a certain manufacturer, not to lease a certain store for a particular business, not to transact a particular business in a certain town, particularly if the period is limited, agreements that certain land shall not be used for ferry purposes, and an agreement by a physician not to practice within a six-mile territory, have been held valid. Agreements not to do business in a certain state or elsewhere where it would compete with a certain person, agreements embracing an entire state and agreements confined to a certain territory, where such territory is the only one in which the business may be carried on, have been held invalid." 2 Ill. Cyc. Dig. 658, § C, and cases cited in notes. The authorities agree

that contracts in partial restraint of trade, in order to be valid, must be reasonable as to time, place, terms, etc., manifesting an intention to simply protect the party relying upon the covenant in the reasonable restraint of unjust discrimination against him. Such contracts usually grow out of sales of property with the good-will of a business, profession, partnership, etc., but they are not confined to such contracts. Speaking of the federal statute in the well-considered case of Whitwell v. Continental Tobacco Co., 60 C. C. A. 290, 64 L. R. A. 689, it is said: "If it [the contract] promotes or accidentally restrains competition, while its main purpose and chief effect are to foster the trade and increase the business of those who made and operated it, then it is not a contract, combination, or conspiracy in restraint of trade within the true meaning of this act, and is not subject to its denunciation."

Are the foregoing terms of the contract of September 10, 1901, violative of the law under the rules of construction above set forth. That is, are the restrictions partial, reasonable, and calculated to foster the business rather than to destroy competition? Looking into the facts and circumstances surrounding the parties at the time the contract was entered into, we find that Lanyon, the first party, possessed a large tract of land containing fire clay in the state of Indiana which was undeveloped and produced no adequate income as compared with its capabilities. He had the money to develop it and make it productive, but was without experience in the business of dealing in the product and without means, within himself, of obtaining a market for the same. Heber and Bonebrake were experienced miners of fire clay, and in a small way engaged in the business, which, if properly extended, would make Lanyon's property valuable. The appellee corporations had for many years been engaged in selling the product and were looking for opportunities to increase their business. Naturally the several interests of these parties drew them together and prompted them to make the contract in question. It was of mutual benefit and advantage to each of them. Without it each party would labor at a disadvantage and fail to realize the full limit of his or its resources and opportunities. The contract seems just and reasonable in the light of these facts. The corporations might reasonably refuse to enter into the contract or purchase the 40 tons

of fire clay daily, unless they could be protected against the selling of the same product by Lanyon in competition with them. The contract was to run for eight years—a time not unreasonable for the development of the business entered upon. The limitation applied to only about 180 acres of land in a territory of many hundreds of acres underlaid with the same fire clay deposits. The contract in no way sought to control the labor or experience of all or any considerable number of experienced fire clay workers. The evidence also shows that large deposits of this same fire clay are found in localities outside of the state of Indiana, i. e., in Illinois, Ohio, Pennsylvania, and perhaps other states. Considering the contract as a whole, in the light of the facts surrounding the parties, we are of the opinion that it is not invalid, that the object of it was to foster and establish a legitimate business, and, although to a limited extent it may have restrained competition, there was not such a limitation or restriction as should defeat its validity under the law.

It needs little argument to show that the case is clearly distinguishable from that of Arnot v. Pittston & Elmira Coal Co., 23 Am. Rep. 190, relied upon by counsel for appellant and said by them to be absolutely and directly in point. In that case, as found by the referee, the purpose of the defendant in making the contract was to so control the shipment and supply of coal for the Elmira market as to maintain an unnaturally high price of coal in that market and to prevent competition in the sale of coal therein, and but for that purpose the defendant would not have entered into the contract with the Butler Colliery Company. In this case, as we understand the facts, there was no such purpose or intention whatever. That case is distinguishable from this in other material facts. [The court then deals with the question as to whether the contract can be specifically enforced in equity and concludes that it may be.]

We find no reversible error, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHICAGO, ST. L. & N. O. R. CO. v. PULLMAN SOUTHERN CAR CO.

(Supreme Court of United States, 1891. 139 U. S. 79.)

MR. JUSTICE HARLAN delivered the opinion of the court:

This action was brought by the Pullman Southern Car Company to recover from the Chicago, St. Louis & New Orleans Railroad Company the damages alleged to have been sustained on account of the destruction by fire of two of the plaintiff's sleeping cars, the Great Northern and the Louisiana, while on the premises of the defendant. There was a verdict and judgment for the sum of $19,000, with interest from September 20, 1886, the date of judicial demand, at the rate of 5 per cent per annum until paid, with costs. The assignments of error relate entirely to instructions given on behalf of the plaintiff, and to the refusal to give instructions asked by the defendant.

The action is based upon a written agreement between these corporations, dated April 5, 1879, showing that the business of the plaintiff was to operate drawing-room and sleeping cars which it hired, under written contracts for a term of years, to be used and employed on and over the lines of railway companies, receiving therefor income and revenue by the sale to passengers of seats, berths, and accommodations therein; and that the defendant was desirous of availing itself of their use, on its own routes, and also of connections, by means of such drawing-room and sleeping cars, with other railroads over which the plaintiff was running its cars. In order to effect the objects of the parties it was, among other things, agreed as follows:

(1) The plaintiff was to furnish drawing-room and sleeping cars "sufficient to meet the requirements of travel," on and over the defendant's railway, and such roads as the latter then or thereafter controlled as owner, lessee, or otherwise; the cars so furnished to be satisfactory to the general manager or superintendent of the railroad company, and to be in part certain named cars, 10 in number, among which were the Louisiana and the Great Northern, then operated on the defendant's lines. (2) Each of the plaintiff's cars was to be manned, at its own cost, by one or more of its employees, as might be needful for the collection of fares and the comfort of passengers; such employees to be subject to the rules and regulations established

by the defendant for its own employees. (3) "In consideration of the use of the aforesaid cars," the defendant was to haul them on passenger trains on its own lines of railroad, and on passenger trains on which it might, by virtue of contracts or running arrangements with other roads, have the right to use them, "in such manner as will best accommodate passengers during the use of said cars." (4) By article sixth of the agreement, all necessary lubricating material, ice, fuel, and material for lights were to be supplied, and the washing and cleansing of the cars furnished under the contract to be done, by the defendant at its expense, which should also renew and replace, as often as necessary, links, pins, bell-cord, and couplings for air-brake hose, without charge to the plaintiff. (5) The plaintiff was to keep the cars furnished under the contract in good order and repair; renew and improve them, when necessary, at its own expense; keep them up to the average standard of the best and most approved sleeping cars on any road using an equal number of cars, "excepting repairs and renewals provided for in article sixth of this agreement, and such as are made necessary by accident or casualty, it being understood that the railway company shall repair all damages to said cars of every kind occasioned by accident or casualty during the continuance of this contract, except that the Pullman Company assumes all responsibility for any loss or damage occurring to said cars arising from defective heating apparatus or lights furnished by it." (6) As proper compensation for the maintenance of the running gear and bodies of the cars, the defendant was to pay plaintiff "three cents per car per mile for every mile run by said cars upon the road of the railway company or upon the roads of other companies, by direction of the officers of the railway company, while in service under this contract;" and at all times, when requested by the plaintiff, to make promptly such repairs to the cars furnished under the contract as might from time to time become necessary, and, without request, make such repairs as were required "to insure their safety, rendering bills monthly to the Pullman Company for repairs to cars, and charging for the same only the actual cost of material and labor expended on such repairs, with an addition of ten per cent to cover general expenses, all settlements and payments for mileage and repairs to be made monthly between said companies."

(7) Whenever the revenue from sales of seats and berths equaled an average of $7,500 per car per annum upon the number of cars furnished under the contract, then, and while such revenue continued, the defendant should not pay mileage for any car so furnished; the plaintiff, in such case, to bear the expense of all repairs and improvements to its cars, "except such repairs as are rendered necessary by accident or casualty, and such as are provided for in article sixth of this agreement, which shall be made by the railway company, as hereinbefore mentioned." (8) The plaintiff was to have the exclusive right, for a term of 15 years from the date of the agreement, to furnish drawing-room and sleeping cars for the defendant's use on all its passenger trains on roads then or subsequently controlled or owned by it, and on roads over which it had the right to run such cars; the defendant not to "contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years." (9) In case either party failed to cleanse or repair any of the cars, according to the conditions of the agreement, and the party so in default should neglect and refuse to perform its agreement in this respect within a reasonable time after notice of such default, the other party had the right to cleanse and make or cause to be made all necessary repairs and renewals to said cars, at the cost of the party in default. (10) If either party failed, at any time, to keep and perform its covenants, as set forth in the agreement, the one not in default, after the expiration of a reasonable time from the service of written notice of such default, was at liberty to declare the contract at an end. (11) The defendant was given the option to terminate the contract at the end of five, eight, or eleven years, upon written notice to the plaintiff, served six months before the day fixed for such termination; and, if the contract was so terminated, without default upon the part of the plaintiff, the defendant was required to purchase the cars and equipments of the Pullman Company "then in use, or assigned and accepted for use," under the contract, or such interest therein as the defendant may not have previously acquired under the provisions of this contract, "at the actual cash value of the same," with the right to use them without charge for patent-rights for their interior arrangements. For the purposes of the option given to terminate the contract, it was

agreed "that the cars now [then] running on said railroad, and which should form part of the cars and equipments to be furnished under this contract, together with such additional cars and equipments as may hereafter be assigned to the railway company, shall be appraised," etc. (12) The taxes upon all cars furnished to the defendant by the plaintiff were to be paid equally by the parties. . . .

3. It is assigned for error that the court refused to instruct the jury that the agreement sued on was void, as against public policy, because of the exclusive rights given to the plaintiff for the term of fifteen years in respect to drawing-room and sleeping cars furnished by it to the defendant, supplemented by the stipulation that the defendant would not "contract with any other party to run the said class of cars on and over said lines of road during said period of fifteen years;" and because the law will not permit individuals to oblige themselves by a contract, when the thing to be done or omitted is injurious to the public. Navigation Co. v. Winsor, 20 Wall. 64, 66; Chappel v. Brockway, 21 Wend. 157, 159. Such a contract, it is argued, is in general restraint of trade. The authorities cited in support of this contention have no application to such a contract as the one before us. The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them. Express Cases, 117 U. S. 1, 24, 25. We cannot perceive that such a contract is at all in restraint of trade. The plaintiff was at liberty, so far as that contract was concerned, to make similar arrangements for the accommodation of passengers on all other railroads in the country, even those that are rivals or competi-

tors in business with the defendant. It is, however, a fundamental condition in all such contracts that their provisions must not be injurious to the public. As said by this court in Cherokee Nation v. Railway Co., 135 U. S. 641, 657, a railroad is a public highway, established primarily for the convenience of the people and to subserve public ends. A railroad corporation cannot, therefore, without the sanction of the government creating it, make any agreement that militates against the public convenience, or that will defeat the public objects for which it was established. If the contract in suit was liable to objection upon these grounds, a different question would be presented for our determination. But we are of opinion that public policy did not forbid the railroad company from employing the Pullman Southern Car Company to supply drawing-room and sleeping cars to be used by its passengers, and, as a means of inducing the plaintiff to perform this public service and to incur the expense and hazard incident thereto, from giving it an exclusive right to furnish cars for that purpose. The defendant did not, by such an agreement, abandon the duty it owed to the public; for the cars so furnished, while in its possession and use, became, as between it and its passengers, its own cars, subject to such regulations as it might properly establish for the comfort and safety of passengers on its trains. Pennsylvania Co. v. Roy, 102 U. S. 451, 457. And the contract is to be interpreted in view of the condition, implied by law, that the plaintiff should furnish cars not only adequate and safe but sufficient in number for the use of the public desiring to travel over the defendant's roads. These conditions exist independently of the particular clause giving the railroad company the option to terminate the agreement at the end of five or eight or eleven years. Being imposed by law, as necessary to the public interests, they could not be dispensed with by agreement of the parties. The designation of particular periods of time, at the end of either of which the defendant might, of right and upon notice, terminate the agreement, did not tie its hands so that it could not continuously discharge its duty to the public in respect to the adequacy or safety of cars in which it conveyed passengers. The stipulation, therefore, that the plaintiff, not being in default, should have the exclusive right for 15 years to furnish drawing-room and sleeping cars for the defendant's use, and that the

defendant should not, during that period, contract for cars of that kind with any other party, rightly construed, is not unreasonable, and, properly performed, will promote the convenience of the public, in that it enables the defendant to have on its lines, at all times, and as the requirements of travel demand, drawing-room and sleeping cars for use by passengers. It is a stipulation that does not interfere in any degree with its right and duty to disregard the contract whenever the plaintiff fails in furnishing cars that are adequately safe and sufficient in number for the travel on defendant's lines. The suggestion that the agreement is void, upon grounds of public policy, or because it is in general restraint of trade, cannot, for the reasons stated, be sustained. [Remainder of the opinion is omitted. On other grounds the judgment was reversed and the cause remanded for a new trial in conformity with the opinion.]

UNION TRUST & SAVINGS BANK v. KINLOCH LONG-DISTANCE TEL. CO.

(Supreme Court of Illinois, 1913. 258 Ill. 202.)

DUNN, C. J. The Farmers' & Merchants' Bank of Vandalia, as the owner of certain bonds of the Vandalia Telephone Company, and the Union Trust & Savings Bank of East St. Louis, as the trustee in a trust deed securing such bonds, filed a bill to foreclose the trust deed, which was dated June 1, 1907, and conveyed the telephone exchange, switchboard, poles, wires, instruments, and all property of every description of the Vandalia Telephone Company. The Kinloch Long-Distance Telephone Company of Missouri was made a defendant upon the allegation that it claimed some interest in the premises, and it answered, setting up its interest. The cause was heard on the bill, the separate answers of the defendants, replication, and evidence, and a decree of foreclosure was rendered finding that the Kinloch Company had no lien on or interest in the property. The Appellate Court for the Fourth District affirmed the decree and granted a certificate of importance and appeal to the Kinloch Company alone. No question is made as to the foreclosure, but only as to the validity and effect of the contract hereafter men-

tioned between the long-distance and the telephone companies, by which names the telephone companies designated themselves, and will hereafter be called.

The telephone company is an Illinois corporation, authorized to construct, maintain, and operate a telephone system and do a general telephone business, and in April, 1906, was constructing and intending to operate a telephone exchange in the city of Vandalia and lines reaching other places in Fayette county. The long-distance company is a Missouri corporation, authorized by its charter to construct, own, operate, and maintain local exchanges and long-distance telephone lines throughout the states of Missouri and Illinois, and also authorized, by having complied with the laws of this state, to exercise here the rights and privileges granted to foreign corporations. These corporations on April 27, 1906, entered into a contract whereby the long-distance company granted to the telephone company a license to attach cross-arms to 12 poles of the long-distance company in the city of Vandalia, and the telephone company granted a license to the long-distance company to connect its telephone system with that of the telephone company through its switchboards, so that there could be an interchange of business at all times between the parties, the license thus granted to be irrevocable during the existence of the agreement, and the agreement to remain in force during the life of the telephone company's franchise to operate in the city of Vandalia and during any renewals or extensions thereof. Other material provisions of the contract are as follows:

"Fourth. No connection with any other line or lines, except those actually owned, controlled and operated by the telephone company, is contemplated or intended by the long-distance company in this agreement, and no connection with any other line will be given, or allowed to be given, by the telephone company to the long-distance company's lines, under penalty of forfeiture of the rights herein contained, unless special agreement in writing is entered into between the parties hereto and the third parties who desire to connect to the long-distance company's system through the telephone company's lines, in which agreement the telephone company becomes responsible to the long-distance company for every message delivered to the long-distance company's lines by the third parties, and makes said

parties' lines in every other respect a part of its own system and bound by the terms and conditions of this agreement. Nothing in this section, however, shall be construed to prevent the long-distance company from connecting with other companies and exchanges at points outside of said city of Vandalia.

"Fifth. The telephone company agrees to deliver to the long-distance company all messages originating on its own line or exchange and which terminate at points reached by the long-distance company or its connecting lines, and the long-distance company agrees to deliver to the telephone company all messages it receives which terminate at points reached by the telephone company in the county of Fayette, aforesaid. If the lines of the telephone company reach points outside of said county of Fayette, which points are also reached by other 'independent' or 'opposition' lines, the long-distance company hereby agrees to distribute the business destined for such common point as equally as practicable between the telephone company and such other 'independent' or 'opposition' line or lines, but the long-distance company reserves the right to transmit all business to such common point over such line or lines as will enable it to render the best service."

"Twelfth. The telephone company shall not sell or lease any of its wires or exchanges to any telephone company, or to any corporation or individual whatsoever, so as to impair the provisions of this contract, without the consent of the long-distance company; nor have the right to connect or exchange business with any company at or for points reached by the long-distance company or its connecting lines; nor have the right to do anything which will in any manner impair the obligations of this contract or impair the efficiency of the long-distance business or its connection with the long-distance company."

The answer of the long-distance company, after setting up this contract, alleged that it was operating lines for long-distance telephone service reaching numerous cities, towns and villages of the states of Illinois, Missouri, Kansas, Indiana, Ohio and Kentucky; that the service of the telephone company was limited to the city of Vandalia and the county of Fayette; that there was no competition between the two companies, but the contract was entered into to enable the telephone company to furnish to its subscribers and to the public long-distance telephone service;

that the parties to the contract assumed a greater public duty than either could have assumed without the aid of the other, and that they have operated in competition with the Bell telephone system and have furnished long-distance telephone service at reasonable rates; that at the time the trust deed was executed the contract was in force, both parties were carrying it out and were mutually using the property of one another in doing so, the appellees had full knowledge of these facts, and for that reason the long-distance company had an interest in the property which was not subject to the lien of the trust deed. Upon exception by the appellees all the allegations in the answer having any reference to the contract were stricken out as impertinent.

It is manifest from the terms of the contract that its object was to restrict long-distance telephone service, so far as the city of Vandalia and Fayette county were concerned, to the Kinloch Company. The patrons of the telephone company were deprived of the opportunity of communication with persons in distant cities except over the Kinloch lines, though such persons had telephones connected with another company's lines running to Vandalia, and the telephone company contracted not to give them this opportunity so long as it was engaged in the telephone business in Vandalia. The contract was adapted to secure a monopoly of the business to the Kinloch Company, and was entered into for that purpose. By it the telephone company deprived itself of the power to render to the public a part of the service which it was organized to render. Combinations and contracts of corporations and of individuals having for their object the restraint of trade, the destruction of competition, the creation of a monopoly, and the raising of prices are unlawful, even though they violate no statute. The contract is in restraint of trade and commerce, and is therefore void unless the circumstances of the particular case exempt it from the general rule.

The rule that at common law contracts in general restraint of trade are illegal and void is well settled, but agreements in partial restraint of trade only may be good under certain circumstances if reasonable in their nature, and made upon a sufficient consideration. The cases in which such contracts in partial restraint of trade have been regarded as reasonable have usually been cases in which the vendor of property or business

has been restricted in its use so as not to injure the vendee, or the vendee has been restricted so as not to injure the business of the vendor, or a partner or employee has been restrained from competition with the partnership or employer to the injury of the business. In all cases the restraint of trade has been auxiliary to the main purpose of the contract, and has been necessary to protect one party from injury by the unfair use of the subject-matter of the contract by the other party. More v. Bennett, 140 Ill. 69, 15 L. R. A. 361, 33 Am. St. Rep. 216; Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315. The ordinary rule that contracts in partial restraint of trade are not invalid does not, however, apply to corporations engaged in a public business in which all the public are interested. Whatever tends to prevent competition between them or to create a monopoly is unlawful. Chicago Gaslight Co. v. People's Gaslight Co., 121 Ill. 530, 2 Am. St. Rep. 124; People v. Chicago Gas Trust Co., 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319. The business of such corporations is public in its nature, and is the exercise of a franchise granted by the state, not for the private benefit of the corporation, only, but for the benefit of the public as well. A corporation receiving such a grant owes a duty to the public, and it cannot, without the consent of the state, disable itself from performing any part of the functions which its charter authorizes it to perform. A contract to do so is a violation of its duty to the state and is void, as against public policy. Chicago Gaslight Co. v. People's Gaslight Co., *supra;* People v. Chicago Gas Trust Co., *supra;* South Chicago City Railway Co. v. Calumet Street Railway Co., 171 Ill. 391; Thomas v. West Jersey Railroad Co., 101 U. S. 71, 25 L. Ed. 950; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. Ed. 979.

The duty of the corporations to use their franchises for the public interest cannot be restrained by contract, and it is no justification for an agreement which tends to prevent the discharge of that duty that the telephone company was not under an express duty to give long-distance telephone service to the public. It was a public service corporation which had the power, by virtue of the franchise granted it by the state, to extend its lines when and where the interests of the public and its own interest demanded. It is argued that the effect of the contract

was to create competition, and not to destroy it. It is said that the Bell system had a local exchange at Vandalia, connecting with its long-distance lines, when the Vandalia Telephone Company was organized in 1906, and that the effect of the contract with the Kinloch Company was to enable the telephone company to increase its service by giving long-distance connections and to give the public at Vandalia two local and two long-distance telephone systems. It is not the effect of the contract that there are two long-distance telephone lines in Vandalia. Without the contract the telephone company would be at liberty to contract with both the Kinloch and Bell systems for long-distance connections. Under such contracts the patrons of the telephone company could be connected directly with any telephone on either system, and the patrons of either system in distant cities could be connected directly with patrons of the telephone company. Such service, however desirable, is now impossible. It will continue to be impossible, unless contracts can be made with both long-distance companies. These contracts cannot be compelled, but none of the corporations can by any contract deprive themselves of the power to make them. It may be that the telephone company cannot be compelled to give long-distance service or to connect its exchange with any other system, or, having connected with one system, to permit a connection with another. It may decline to undertake any service which cannot be begun and completed over its own lines. If it does undertake such service it may select its own lines and it may confine itself to one agent, but it may not bind itself to do so and contract away its right and power to use more than one agency, and thus limit its power to serve the public to that part of the public reached by the one agency. The object of telephone systems is to enable individuals to talk to one another at distances too great for ordinary conversation. A line connecting two cities with a single instrument at each end would be of comparatively little use. It is the possibility of connection with a large number of instruments that gives usefulness to the system. The use of the telephone has come to be quite generally regarded not as a luxury or convenience, but a necessity, and it is essential to the greatest public convenience that all users of telephones should be able to secure, as nearly as

possible, direct connection with all other users. This perfection of service is not now possible, but a telephone company is avoiding the performance of its duty to the public when it contracts to restrict its field of operations to communications to and from the patrons of one long-distance line. Any contract thus to deprive itself of the power to render to the public that service which it was incorporated to give is violative of the public right. The language used in South Chicago City Railway Co. v. Calumet Street Railway Co., *supra,* is applicable here: "To say the defendant was not bound to extend its lines, though it might be necessary to do so to serve the public convenience is one thing; but to say that it shall not do so because of the binding force of its contract with an individual or corporation is quite another and very different thing."

If neither of the long-distance companies at Vandalia would contract with the telephone company for long-distance service without an exclusive clause in the contract, the latter had still the right to construct its own long-distance lines and the long-distance companies the right to establish local exchanges. A general interchange of business among all the companies would be more beneficial to the public. While this cannot be compelled, it cannot be said that competition would be increased by the combination of two of the systems through an exclusive contract for the interchange of business. While no statute has been enacted declaring such exclusive contracts criminal or giving a right of action to persons prejudiced by them, the courts have declared the public policy of the state, in accordance with the common law, to be opposed to such contracts which tend to put the power to render public service in the hands of one corporation and to take it away from all others. The legislature has the power to change this policy. It is a legislative question whether the public interest will be promoted by monopolistic rather than competitive service. In the absence of legislative action, the contract in controversy must be held to be illegal and void.

The Supreme Court of Missouri has held a contract for the exclusive interchange of business very similar to the one now under consideration to be for the purpose of competition and not of monopoly. Home Telephone Co. v. Sarcoxie Light & Telephone Co., 236 Mo. 114, 36 L. R. A. (N. S.) 124. It was so

held in Cumberland Telephone & Telegraph Co. v. State, 100 Miss. 102, 54 South. 670, 39 L. R. A. (N. S.) 277. The opposite view is sustained by the case of United States Telephone Co. v. Central Union Telephone Co. (C. C.) 171 Fed. 130; same case on appeal (C. C. A.) 202 Fed. 66; and to some extent by State v. Cadwallader, 172 Ind. 619; and Central New York Telephone & Telegraph Co. v. Averill, 199 N. Y. 128,[28] 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878. Such contracts can be regarded as favoring competition only on the theory that they are necessary to enable a weaker competitor to contend against one stronger and already established. This might be the effect for a time; but, when by exclusive contracts control of territory had been secured, then by new contracts and combinations all competition could be eliminated, and the last state of that community would be worse than the first. It is not an answer to say that the effect of the contract has not been to destroy competition, that competition still exists, and that the service is rendered at reasonable prices. The material consideration is, not that the effect of the contract has been to raise prices, but that the power exists to do so; not the degree of injury inflicted on the public, but the tendency to inflict injury. Harding v. American Glucose Co., 182 Ill. 551, 64 L.

28—In this case it was held that a private subscriber's contract which contained a clause that the instruments used by such subscriber "are not to be connected with or used in connection with any exchange, office or telephone, except those of the first party, or its connections, and only by lines connecting said switchboard with the company's office and switchboard as within provided," was illegal. The court said, p. 138: "The evil in such an agreement is its antagonism to the interests of the public. If a telephone company may make a contract of exclusion with one of its customers it may make such a contract with all—and thus preclude all from any telephonic communication with persons who happen to be served by a rival company. It is true that the customers who had voluntarily entered into the agreement of exclusion would have no just ground of complaint themselves; but how about the customers of the rival company who are thereby shut out from communication by telephone with their neighbors? They are not parties to the contract and yet they suffer its consequences, although they constitute a portion of the public for whose benefit the franchise was granted to the corporation whose action deprives them of the more extended telephone service which otherwise they might enjoy."

On p. 139, the court said: "To recapitulate the reasons which lead

R. A. 738, 74 Am. St. Rep. 189; Salt Co. v. Guthrie, 35 Ohio St. 666; State v. Standard Oil Co., 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541; State v. Portland Natural Gas Co., 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314.

Cases have been cited involving the contracts of railroad companies for the exclusive use of sleeping cars, express cars, wharves, and docks. The character of such contracts is essentially different from that involved here. The nature of the use to be made of the property, the character of the service to be rendered, the agents to be employed and the agencies to be maintained, were such as would interfere materially with the railroad company's control of its own business if the business provided for in such contracts were to be free to all applicants. The same difficulty does not exist in regard to the telephone service, in which it is entirely practicable to take on long-distance connections with many companies, and the cases cited have therefore little analogy here.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

to the conclusion that this contract (the exclusive clause) is injurious to the public interest generally, the argument may be simply stated. The public franchises which telephone corporations enjoy are granted to promote the transmission of vocal messages between the largest numbers of persons who can be brought into communication with one another under satisfactory economic conditions. This purpose is frustrated by any agreement which operates to prevent the rendition of telephone service where otherwise it could be obtained. A contract between a telephone corporation and one of its subscribers whereby the latter excludes all other telephone service from his premises deprives all the patrons of that other telephone service from telephonic communication with such subscriber and all the occupants of his premises. Though the number affected by one such exclusive contract may not be large, if exclusion may be exacted from one customer it may be exacted from all, and so a corporation first in the field might establish a monopoly to the detriment of a large proportion of the community and their deprivation of telephonic intercommunication. This illustration serves to show the danger to the public which would arise from permitting any such exclusive contracts at all. The validity of a single one cannot be recognized without peril to the public interest.''

Section 4

CONTRACTS ON THE PART OF BUYERS TO KEEP UP THE PRICE ON RE-SALE

GROGAN v. CHAFFEE

(Supreme Court of California, 1909. 156 Cal. 611.)

THE COURT PER CURIAM. A judgment of reversal having been heretofore rendered herein, a rehearing was ordered. The opinion originally filed was prepared by Sloss, J., and read, in part, as follows:

"The plaintiff appeals from a judgment against him, following an order sustaining a demurrer to his amended complaint. The demurrer is based upon both general and special grounds. On this appeal, however, the respondent limits his argument in support of the ruling on the demurrer to the ground that the complaint fails to state facts sufficient to constitute a cause of action. We are satisfied that there is no merit in any of the other specifications, and shall address ourselves to the single proposition discussed by counsel.

"The case stated by the complaint is this: The plaintiff has for 10 years been engaged in the manufacture and production of pure olive oil by a process of his own discovery. The oil so produced is sold and used for food, medical and commercial purposes, and plaintiff has extensively advertised to the public the fact that he manufactures a pure olive oil, and that such oil is guaranteed to be pure and wholesome. In his advertising the plaintiff has used certain designs copyrighted by him, and these designs are placed on every bottle or package of oil manufactured and sold by him, as a trade-mark. By reason of these methods of advertising and dealing, the plaintiff's oil has become well known, and a large quantity thereof is sold throughout the United States, and more particularly in the city of Pasadena, and elsewhere in the county of Los Angeles. The plaintiff has affixed to every bottle or package of his oil a notice stating that the article 'is sold upon the condition that the purchaser, if he retails these goods, will maintain my fixed retail selling price on them; and that, if he wholesales them, he will sell them subject to this same condition.' This notice specifies the fixed retail selling price as $1.35 per half gallon

can and $2.50 per gallon can. All persons buying said olive oil agree not to sell or deliver any of it at a price less than that provided for in the notice.

"The defendant is a retail grocer, engaged in business in the city of Pasadena. He has bought of plaintiff olive oil under the express contract and condition that the same should not be sold at a price or prices less than those fixed by plaintiff. He has, however, refused to comply with his contract, and sells and offers for sale said oil at the price of $1.20 per half gallon, and has advertised such offer by publication in a newspaper and by posters and notices posted in the windows of his store. This conduct has been continued by defendant notwithstanding plaintiff's demand that he comply with his contract. The complaint alleges that plaintiff has sustained irreparable damage, that it is impossible to ascertain the damage sustained and to be sustained, and that there is no adequate remedy at law. The prayer is for an injunction restraining defendant from advertising, selling, or offering for sale the oil at prices less than those fixed by the contract, and for damages.

"In support of the ruling sustaining the demurrer it is urged that the contract relied on by plaintiff is unenforceable as being in restraint of trade.

"We have here no question of an attempted monopoly. 'A monopoly exists where all, or so nearly all, of an article of trade or commerce within a community or district, is brought within the hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within such control to the exclusion of competition of free traffic therein. Herriman v. Menzies, 115 Cal. 16, 35 L. R. A. 318, 56 Am. St. Rep. 81. It was the tendency to create a monopoly, thus defined, that was the objectionable feature of the agreements declared invalid in such cases as Pacific Factor Co. v. Adler, 90 Cal. 117, 25 Am. St. Rep. 102; Mill, etc., Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Am. St. Rep. 242. See, also, Cummings v. Union Blue Stone Co., 164 N. Y. 1, 79 Am. St. Rep. 620; Cohen v. Envelope Co., 166 N. Y. 292. The contract here relied on does not relate to any olive oil except that manufactured by plaintiff. There is no suggestion that this comprises all, or any large proportion, of the olive oil manu-

factured or sold in the market supplied by plaintiff. While plaintiff alleges that he manufactures oil by a process of his own discovery, there is nothing exclusive in the product resulting from this process. All that he claims for his oil is that it is pure and wholesome. The court must assume, as a matter of common knowledge, that others may and do manufacture pure olive oil in considerable quantities.

"Under these circumstances we see no reason why the contract alleged by plaintiff should not, as between the parties to it, be held to be valid. It violates no canon of public policy. By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. The producer was, in the first instance, under no obligation to sell his oil, and when he did sell it had the right to exact, as part of the consideration for the sale, a promise by the purchaser that he would not sell it at less than a stipulated price. There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts similar to the one under discussion have been considered in a number of cases, and have generally been upheld where, as here, they had no tendency to create a monopoly. Fowle v. Park, 131 U. S. 88, 658, 33 L. Ed. 67; Bement v. National Harrow Co., 186 U. S. 70, 46 L. Ed. 1058; Park & Sons Co. v. National Druggists' Association, 175 N. Y. 1, 62 L. R. A. 632, 96 Am. St. Rep. 578; Garst v. Harris, 177 Mass. 72; Dr. Miles Med. Co. v. Goldthwaite (C. C.) 133 Fed. 794; Dr. Miles Med. Co. v. Platt (C. C.) 142 Fed. 606; Dr. Miles Med. Co. v. Jaynes Drug Co. (C. C.) 149 Fed. 838; Walsh v. Dwight, 40 App. Div. 513. Many of these decisions, it is true, deal with contracts concerning the sale of patented or proprietary articles, and are based, to some extent, upon the principle that a monopoly right is inherent in a patent or in an article produced according to a formula known only to its manufacturer. It has been questioned whether the fact that an article is produced under a secret formula is of any importance in determining the validity of contracts regulating its sale. Hartman v. John D. Park & Sons Co. (C. C.) 145 Fed. 358; s. c., on appeal, John D. Park & Sons Co. v. Hartman,

82 C. C. A. 158, 12 L. R. A. (N. S.) 135. However this may be, we are cited to no case which holds that a contract like the one at bar is invalid as between the parties to it, whether it deals with an article produced under patent or secret formula or one that may be produced by any one. The tendency of the modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade. It is not every limitation on absolute freedom of dealing that is prohibited. As is said by the Supreme Court of the United States in Gibbs v. Consolidated Gas Co., 130 U. S. 396, 409, 32 L. Ed. 979: 'Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than 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.' So in People's Gaslight Co. v. Chicago Gaslight Co., 20 Ill. App. 492, the court says: 'The tendency of the courts is to regard contracts in partial restraint of competition with less disfavor than formerly, and the strictness of the ancient rule has been greatly modified by the modern decisions.' Many decisions announcing views similar to those declared in these quotations are cited with approval by this court in Herriman v. Menzies, *supra,* and it must be taken to be settled that the sections of Civ. Code, §§ 1673, 1674, 1675, relating to contracts in restraint of trade, are to be construed in the light of these principles. Herriman v. Menzies, 115 Cal. 16, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. In Smith v. S. F. & N. P. Ry. Co., 115 Cal. 584, 604, 35 L. R. A. 309, 56 Am. St. Rep. 119, this court said: 'The rule invalidating contracts in restraint of trade does not include every contract of an individual by which his right to dispose of his property is limited or restrained. Section 1673 of the Civil Code makes void every contract by which one is restrained from "exercising a lawful profession, trade or business," except in certain instances. But this is far different from a contract limiting his right to dispose of a particular piece of property, except upon certain conditions. As the owner of property has the right to withhold it from sale, he can also, at the time of its sale, impose conditions upon its use without violating any rule of public policy. . . .'

"The necessary result of what we have said is that the complaint must be held sufficient. It is alleged that the defendant bought oil under an express agreement that he would not sell it at less than given prices, and that he had sold and threatened to sell it at less than such prices. This is a violation of plaintiff's rights under his contract. Whether this contract could be enforced against persons who might come into possession of plaintiff's oil, with notice of the restriction imposed by him on its sale, but without having made any direct agreement to respect such restriction is a question not here presented. See Garst v. Hall & Lyon Co., 179 Mass. 589, 55 L. R. A. 631."

The rehearing was ordered to enable the court to give further consideration to the views of the United States Circuit Court of Appeals for the Sixth Circuit, as declared in Park & Sons Co. v. Hartman, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, and restated in Miles Med. Co. v. Park & Sons Co., 90 C. C. A. 579. Judge Lurton was the author of each of these opinions. The first contains a very elaborate and learned discussion of the law governing some of the questions involved.

It may be said that neither of these cases involved the question here presented; i. e., the enforceability as between the parties of a contract of the kind here shown. The corporation complainant in each instance sought to obtain relief against persons who had entered into no contractual relation with it. It must, however, be confessed that the views there expressed upon the general question of the validity of a system of contracts like that here involved is opposed to what was declared by us in our opinion. Most of the cases cited by us in our opinion heretofore filed are reviewed by Judge Lurton in Park v. Hartman and are either disapproved or sought to be distinguished. It does not appear to us, however, that the attempt to distinguish has in all instances been entirely successful, and, notwithstanding the great respect entertained by us for so able and learned a court as that which decided the cases of Park v. Hartman and Miles V. Park, we must remain of the opinion that the conclusion there reached, so far as it is applicable to the case before us, is contrary to the weight of authority.

In our former opinion something was said about the effect upon this litigation of the so-called Cartwright act (St. 1907, p.

984, c. 530), which had been enacted after the date of this appeal. That statute has recently been amended. St. 1909, p. 593, c. 362. The constitutionality of the amending act is not here questioned, nor is it suggested that the contract relied on appears on the face of the complaint to be obnoxious to the terms of the law as it now stands. Whether or not a defense to the action could be based on the Cartwright act is a question not now before us. At the present time, and on the record and argument here presented, there is no occasion to discuss the construction or applicability of the statute.

The judgment is reversed, with directions to the superior court to overrule the demurrer, granting leave to the defendant to answer.[29]

BEATTY, C. J., dissented.

SECTION 5

COMBINATIONS AND COMPETITIVE METHODS

HILTON v. ECKERSLEY

(Queen's Bench and Exchequer Chamber, 1855.
6 Ellis & Bl. 47.)

Action on a bond for £500, of which plaintiff was obligee and defendant obligor.

The plea set out the bond, whereby William Johnson, of Wigan, in the county of Lancaster, cotton spinner; Nathaniel Eckersley (defendant), cotton spinner and manufacturer, and eleven others each described as cotton spinner or spinster and one also as manufacturer, all of Wigan aforesaid, and five others, each described as cotton spinner, all of Hindley, in

29—*Accord:* Elliman, Sons & Co. v. Carrington & Son, L. R. [1901] 2 Ch. 275 (damages allowed); Garst v. Harris, 177 Mass. 72 (damages allowed); Garst v. Charles, 187 Mass. 144 (injunction allowed against the defendant who secured a dealer to purchase for the purpose of breaking the contract upon a re-sale to the defendant); Clark v. Frank, 17 Mo. App. 602 (contract to maintain the price of thread); New York Ice Co. v. Parker, 21 Howard Practice (N. Y.) 302 (contract to maintain price of ice).

the county of Lancaster, were respectively and separately bound to Caleb Hilton (plaintiff), of Wigan aforesaid, attorney at law, in £500, subject to the following condition:

"Whereas the above bounden, William Johnson, Nathaniel Eckersley," &c. (naming the eighteen obligors), "are respectively owners or occupiers of mills and premises in Wigan and the neighborhood, in the county of Lancaster, for the spinning and manufacturing of cotton, yarn, and cloth, and employ therein many workpeople and servants; and whereas there are certain societies, or combinations, or implied arrangements, or understood agreements, subsisting in the said county amongst divers persons, whereby persons otherwise willing to be employed in the said works are deterred, by a reasonable fear of social persecution and other injuries, from hiring themselves to work in the said establishments, and whereby the legal control and management of the said obligors [30] of their property and establishments are injuriously interfered with; and whereas the said combinations are sustained by funds arbitrarily levied and extorted by way of tax or rate upon the persons employed by the same obligors respectively, and receiving wages from them; and it hath become necessary in the opinion of the said obligors to take measures for vindicating their legal rights to the control and management of their own property; which will also best sustain the rights of the laborer to the free disposal of his skill and industry: and therefore the said several obligors have agreed to carry on their said works, in regard to the amount of wages to be paid to persons employed therein, and the times or periods of the engagement of workpeople, and the hours of work, and the suspending of work, and the general discipline and management of their said works and establishments in conformity to law, for the period of twelve calendar months from the date of the above written bond, in conformity with the resolution of a majority of the said obligors present at any meeting to be convened as hereinafter mentioned: and,

30—Throughout the condition, the word "obligees" was written instead of "obligors." The plea set out the condition as it was written, but no point was made in consequence of this mistake, the case being argued as if the condition had been correctly written; and the text is corrected accordingly. (Rep.)

for the purpose of carrying the said agreement into effect, the said obligors have entered into the above written bond or obligation, conditioned as hereinafter mentioned: Now the condition of the above written bond or obligation is such that, if the said several obligors, and their respective partners in the business carried on at the said works, shall, for the period of twelve calendar months from the date of the above written bond or obligation, carry on and conduct, or wholly or partially suspend the carrying on of, their said works and establishments, in regard to the several matters aforesaid, in conformity with the resolutions in that behalf of a majority of the said obligors present at a meeting to be held as hereinafter mentioned, then the above written bond or obligation, in regard only of the persons respectively so performing this condition, shall, as to the sum of £500, in which he is bond, become void, or otherwise the same to remain in full force. And it is hereby declared that, on the 3rd and 8th days of October instant, meetings of the said obligors were held at the Victoria Hotel, at the hour of four in the afternoon; at which meetings a chairman and secretary were appointed; and which said meetings had authority to make, and did make and prescribe, times, rules, and regulations for the holding and conducting of ordinary meetings and the convening of special meetings; and which times, rules, and regulations may, at any ordinary or special meeting, be varied or rescinded, and others substituted; and all resolutions agreed to by a majority of the obligors present at any such meeting shall be deemed the resolutions of the said meeting; and every meeting so held as aforesaid shall be deemed to be a meeting within the meaning of the above written condition. Provided, always, and it is hereby declared, that all moneys which shall be received by the said Caleb Hilton, his executors or administrators, upon the above written bond, shall be held by him or them in trust for the equal benefit of all the obligors, their respective executors, administrators, and assigns. Provided also that the said bond shall not be put in suit without the consent of a majority of the said obligors present at a meeting to be held as aforesaid. Provided, also, that it shall be lawful for a majority of the said obligors present at any such meeting to pass a resolution releasing and discharging the said

obligors respectively from the further performance of the said condition. In witness," &c. Allegation that, save as appears by the said condition, there was no consideration for the execution of the said bond by the defendant. And that, by reason of the premises, the said bond was and is a bond in restraint of trade, illegal and void.

Demurrer. Joinder.

The case was argued in the Court of Queen's Bench, in last Easter Term, [April 27th, 1855. Before Lord CAMPBELL, C. J., ERLE and CROMPTON, Js.] by Cowling for the plaintiff and Mellish for the defendant. It is considered sufficient, for the argument, to refer to the argument in the Exchequer Chamber and the judgments delivered in the two courts.

Cur. adv. vult.

On this day, there being a difference of opinion upon the Bench, the learned Judges delivered judgment seriatim.

CROMPTON, J.—In this case the plaintiff declared upon a bond for £500. The defendant in his plea set out the bond; by which it appeared that the defendant and seventeen others were bound to the plaintiff, each in a separate and distinct sum of £500. The plea then set out the condition of the bond; whereby, after reciting that the obligors were respectively owners of mills, in Wigan and the neighborhood, for spinning and manufacturing, and employed therein many workpeople and servants, and that there were certain societies or combinations amongst divers persons, whereby persons, otherwise willing to be employed, were deterred by fear of social persecution and other injuries from hiring themselves to work, and whereby the legal control of the said obligors of their property was injuriously interfered with; and that, whereas the said combinations were sustained by funds arbitrarily levied and extorted by way of tax or rate upon the persons employed by the said obligors and receiving wages from them, and it had become necessary, in the opinion of the said obligors, to take measures for vindicating their legal rights to the control and management of their own property, which would also best sustain the rights of the laborer to the free disposal of his skill and industry; and therefore the said several obligors had agreed to carry on their said works, in regard to the

amount of wages to be paid to persons employed therein, and the times or periods of the engagement of workpeople, and the hours of work, and the suspending of work, and the general discipline and management of their said works and establishment, in conformity to law, for the period of twelve calendar months from the date of the above written bond, in conformity with the resolutions of a majority of the said obligors present at any meeting to be convened; and after reciting that, for the purpose of carrying the said agreement into effect, the said obligors entered into the above written bond: the condition of the obligation was declared to be that, if the said several obligors and their respective partners should, for twelve calendar months from the date of the bond, carry on and conduct, or wholly or partially suspend the carrying on of, their said works and establishments in regard to the several matters aforesaid in conformity with the resolutions in that behalf of a majority of the said obligors present at a meeting to be held as mentioned in the agreement, then the above-written bond, in regard only of the persons respectively so performing this condition, should, as to the sum of £500 in which he was bound, become void; or otherwise the same to remain in full force. The condition then proceeded to state the days and place of meeting, and that all resolutions agreed to by a majority of the obligors present should be deemed the resolutions of the said meeting, and that every meeting so held should be held to be a meeting within the meaning of the above written condition: also that the plaintiff should hold all moneys recovered by him in trust for all the obligors, etc.: provided that the bond should not be put in suit without the consent of a majority of the obligors present at a meeting: provided, also, that it should be lawful for a majority of the said obligors present to pass a resolution releasing the said obligors respectively from the performance of the said condition. The plea then stated that, except as it appeared by the condition, there was no consideration for the execution of the bond by the defendant; and that the bond was in restraint of trade, illegal and void. The plaintiff having demurred to this plea, the demurrer was argued before us in the course of last Easter Term. And the question for our consideration is, Whether a bond of this nature can be enforced at law.

I am of opinion that the bond is void, as being against public policy. I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture. The precedents of indictments for combinations of two or more persons to raise wages, and for other offenses of this nature, which were all framed on the common law and not under any of the statutes on the subject, sufficiently show what the common law was in this respect. In Rex v. Mawbey, 6 T. R. 619, 636, Grose, J., assumed the illegality of such combinations as well known law. Combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower, wages, were equally illegal.

By recent enactments, carefully worded, combinations to raise or lower the rate of wages, and to regulate the hours of labor, are made no longer punishable. But these enactments do not make such combinations legal agreements in the sense that the breach of them can be enforced at law; and still less do they apply to make enforceable at law an agreement, not being a mere stipulation among the parties themselves which any one might withdraw from at his pleasure, but binding and tying themselves up, under a penalty, to close their works if a majority of a particular body shall dictate to them so to do. I think this bond void, as being in restraint of the freedom of trade, and from its mischievous and dangerous tendency, pointed out in the argument, with respect to strikes and combinations. The general principle of contracts in restraint of trade being void is perfectly well established: and this case does not appear to me to fall within any of the exceptions and relaxations which have been allowed as to that principle.

Most of such cases have occurred where one party has sold a trade or profession to another, or where one party has learned the trade and its secrets from the other, and where, on such considerations, stipulations have been entered into whereby the one party undertakes not to exercise the trade or profession within reasonable limits as to time and distance. In the present case, the agreement is that, in a certain event, all the parties contracting are to close their works. And the consideration of the promise of each is the promise of the others likewise to

close their works. So that the public are not recompensed for the ceasing of one party by the other parties being able to carry on their trade with increased facilities. It is, I believe, the first case where the mutually abstaining from trade has been the consideration for a bond of this nature. The case of a bond, whereby a number of persons, who manifestly appear to constitute a great body of master manufacturers, mutually bind themselves to close their works at the will of the majority present at a meeting, and whether or no they individually think it right or desirable so to do, seems to me entirely beyond any relaxation that has ever been made of the general rule applicable to agreements in restraint of trade. Here, instead of the arrangement being that one party shall not carry on trade in order that another may do it more advantageously, the object is that all shall close as a means of compulsion against the workmen.

One of the most objectionable parts of this bond is that it takes away the freedom of action of the individual to carry on the trade, and to open and close his works according as it may be for his interest or that of the public. It appears to me obviously mischievous that the parties should give up this right of judging for themselves, and place themselves and their trades under the dictation either of a majority or of a committee of delegates, which seems the same in principle.

The agreements or combinations allowed, or rather rendered not punishable, by the modern Acts of Parliament, are much less mischievous, and seems less contrary to the free course of trade, if every party can withdraw from the association at his free will and pleasure. And it is accordingly permitted by the Legislature that either masters or workmen may join in agreeing to work or be worked for according to certain rates or times. At least the Legislature has sanctioned this, so far as to prevent its being punishable. But, as soon as the party agrees to bind himself by penalties to give up his right of retiring from such combination, that freedom of trade which it is the policy of the law to protect seems directly interfered with. Suppose, in the present case, that the workmen agree to proper and reasonable terms, and that the majority still insist on closing: the individual obligor is bound to shut up his own mill, and to be in effect a party to the closing of seventeen others, although

he is perfectly satisfied that in doing so he is acting contrary to his own interests, as well as to the interests of the workmen, the trade, and the public.

The same observation applies to the case of the workmen themselves. If this bond is legal, in the sense of being enforceable at law, a promise on the part of any individual workman not to retire from the strike, or to pay a weekly subscription to it, or to pay a penalty if he went to work without the leave of the majority of a meeting, or disobeyed the dictation of the delegates, would be binding upon him: and no workman would be able to free himself from the tyranny of such dictation, whatever might be the state of his family, however reasonable he might think the offer of his masters as to wages, and although he might be perfectly satisfied, in his own mind, that the longer continuance of the strike was ruining himself, his family, and his fellow-workmen, and was doing incalculable injury to the public.

It is said, indeed, that the object of the bond is to defend the parties, and to enable them to meet the combination of workpeople. But I think that agreements of this nature, on the one side or other, or both, really tend to prolong the mischief: and, however right it may be that the masters or workmen should respectively stand by and assist each other in resisting what they consider unfair demands, yet that the giving up their individual right of judging and acting for themselves in matters so greatly affecting the public is mischievous and dangerous in the extreme. I think it not to be endured that majorities and delegates, of workmen or masters, should in effect be allowed to legislate upon questions immediately affecting the happiness of the working classes and the prosperity of the trade and commerce of the whole nation.

If agreements like the present were enforceable at law, I see no reason why (as observed by Mr. Mellish) they should not be enforceable in equity: and our Courts of Equity might be called upon to enjoin masters against opening their mills, or workmen from going to work or discontinuing a strike; whilst our county courts would have to make decrees for the contributions to strike, or to enforce penalties from workmen who have felt it their duty to resume employment.

It was contended, on the part of the plaintiff, by Mr. Cow-

ling, that some part of this agreement might be good, and that the bond, with reference to such part, would not be invalid. But I think that the illegality pervades the whole agreement, and that, part of the consideration of the bond being that the works should be closed according to the dictation of the majority, the whole instrument is illegal, even if part of the engagement of each obligor were held according to Mr. Cowling's argument to be legal.

I am clearly of opinion that the whole instrument is tainted with illegality; and I therefore think that our judgment ought to be given for the defendant.

ERLE, J.—The question, whether the bond declared on is void, is raised under the circumstances appearing in the condition: which recites that the obligors are manufacturers in Wigan and Hindley, and that combinations of workmen, preventing free labor by fear of social persecution, injuriously interfere with the management of their manufactories; and that these combinations are sustained by funds extracted from workmen employed by the obligors; and that measures are necessary to protect as well the obligors in the free management of their capital as the workmen in the free disposal of their labor: wherefore the obligors have agreed, in regard to the amount of wages, the periods of engagement, the hours of work, and the general management of their establishments, to act in conformity with the lawful resolutions of a majority of the obligors present at a meeting; and declares that the bond shall be void if this agreement is performed. The masters have thus contracted to co-operate for the protection of their interests against injurious results from existing combinations of workmen.

It was contended that this agreement was unlawful, on account of being in restraint of trade. But, according to the recital, the purpose of the agreement and its tendency was for the advancement of trade. The workmen, by combining not to work for one master while they are supported by wages from the others, may ruin each separately: and, unless the masters can protect themselves more effectually than by indictment, there is danger of the trade being destroyed, and the capital being removed from the neighborhood or from the country to a more secure place. Also, as the agreement is to act in con-

formity with the resolutions of the majority, and those resolutions may require the business to be carried on to the fullest possible extent, the agreement ought not to be held void as in restraint of trade unless it was shown by averment that it do so operate.

Even if the agreement was construed to be in restraint of trade because it interfered with the free will of the masters in their management, still it does not follow that it is illegal; as agreements in restraint of trade are legal if required for the protection of the lawful interests of the contracting parties. Thus, masters may contract to restrain their servants and apprentices from trade in a certain neighborhood. So also the purchaser of the good-will of a business may restrain the vendor from trading within a certain area: and the landlord of a house may restrain his lessee from trade therein, if it would be likely to lower the value of the property. The right to agree for a restraint of trade on account of the protection of a lawful interest is fully explained in Hitchcock v. Coker, 6 A. & E. 438 (E. C. L. R. vol. 33), and Mallan v. May, 11 M. & W. 653. In the present case the obligors are shown by the recital to have an important interest, for the protection of which this agreement was necessary; and there is no reason for saying that the restraint was greater than was required for that protection.

The opinion that this agreement is valid at common law derives confirmation from a consideration of the statute law. The Legislature, by various statutes, from the reign of Ed. 1 to that of G. 4, prohibited agreements, either of masters or of workmen, for the purpose either of lowering or raising wages, or of altering hours, or otherwise affecting their mutual relations. These agreements were by some statutes enacted to be, and by others declared to be, illegal; and the parties entering into them were liable to punishment. By stat. 6 G. 4, c. 129, an entire change of the law was made. By section 2 all the statutes prohibiting such agreements are enumerated and absolutely repealed. By section 3 future prohibition is confined to endeavors, by force, threats, intimidation, molestation, or obstruction, to affect wages or hours, which are made illegal and punishable; and, by sections 4 and 5, it is declared that neither masters nor workmen shall be punishable for any agreements

in respect of wages or hours unless they infringe the prohibitions in the 3rd section.

Since this statute, such agreements as the present, if illegal, must be made so by the common law. But no principle or decided case has been adduced showing such to have been the law before these statutes passed: and it seems to me that the Legislature intended by this statute to make all agreements to which it relates legal, if not comprised within the section of prohibition; the statute repealing, as well the clauses of former statutes which render these agreements illegal, as those that made them punishable.

The Judges, in expounding this statute, have used language denoting that in their opinion the agreements either of masters or of workmen respecting wages or hours are legal: and, if an agreement is legal, it follows that it may be enforced by law. I refer to the charge of TINDAL, C. J., in Regina v. Harris, Car. & M. 661, note (a), and the summing up of ROLFE, B., in R. v. Jones and Others, [Qu. Regina v. Selsby, note (a) to Rowland's Case, 2 Den. C. C. R. 384] and of ERLE, J., in Regina v. Rowlands, 17 Q. B. 671, 686, note (b), (E. C. L. R. vol. 69); 2 Den. C. C. R. 388, note (a), with the judgment of PATTESON, J., thereon in Rowland's Case, 2 Den. C. C. R. 389, note (a).

Considerations of policy confirm this view of the law. It is supposed that attempts to affect wages by intimidation would be more rare, and that the misery resulting from strikes would be diminished, if it was held that no agreements for the purpose of affecting wages or hours should be enforced by the law. But it seems to me that the opposite effect would result. If all such agreements were excluded from the law, I assume that they would still be made; because they were frequently made, even when prohibited under severe penalties, and are now in constant course: and the Legislature probably thought them irrepressible by prohibition. Then, if, when made, they cannot be enforced by law, the parties making them resort to social persecutions, fear and force for their enforcement: and, as the control, where law is excluded, frequently devolves upon men either unprincipled or ill informed, greater misery is caused by the control of such leaders than would arise from the sanctions of the law. If the agreements could be enforced by law, they would be made with a knowledge of rights and liabilities: and

the enforcement of them would be within the limits of the law, and for the most part free from purposeless evil. If the law protected them, it would be for the law to decide whether they were in restraint of trade beyond what was required for the protection of any lawful interest; and, if so, to declare them void for the excess. While, on the other hand, if they should be valid, they would be enforced only as far as they were judged to be reasonable.

Therefore, in my opinion, judgment should be for the plaintiff.

LORD CAMPBELL, C. J. [This judgment was read by CROMPTON, J.] I concur with my brother Crompton in thinking that there ought in this case to be judgment for the defendant. And, agreeing with him in most of the reasons he has given for his opinion, I have not much to add in support of it.

But I am not prepared to say that the combination which has been entered into between the parties to this bond would be illegal at common law, so as to render them liable to an indictment for a conspiracy. Such a doctrine may be deduced from the dictum of GROSE, J., in Rex v. Mawbey, 6 T. R. 636: "As in the case of journeymen conspiring to raise their wages: each may insist on raising his wages, if he can; but if several meet for the same purpose, it is illegal, and the parties may be indicted for conspiracy." Other loose expressions may be found in the books to the same effect: and, if the matter were doubtful, an argument might be drawn from some of the language of the statutes respecting combinations. But I cannot bring myself to believe, without authority much more cogent, that, if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor and liable to be punished by fine and imprisonment. The object is not illegal; and, therefore, if no illegal means are to be used, there is no indictable conspiracy. Wages may be unreasonably low or unreasonably high: and I cannot understand why in the one case workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters in the other can be

considered guilty of a crime in trying by lawful means to lower them.

Nor can I say that there is any statutable enactment which goes the full length of rendering this bond illegal and void. The 3rd section of stat. 6 G. 4, c. 129, comes very near it, and shows the great dislike of the Legislature to such proceedings. For it is thereby enacted that, "if any person shall use or employ violence to the person or property of another, or threats or intimidation, *or shall molest or in any way obstruct another* for the purpose of forcing or inducing such person to belong to any club or association, *or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied or of his refusing to comply with any* rules, orders, resolutions, or regulations" "to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof," every person so offending may be imprisoned and kept to hard labor for three calendar months. If suing upon such a bond could be considered as *molesting* or *obstructing* the obligor within the meaning of this section, the bond would be illegal and void. But the *molestation* and *obstruction* here contemplated would probably be considered to be an unlawful act of the same kind with those specifically described.

I am therefore obliged to bring the bond within the category of written instruments which are not avoided by positive statute, and are not so far illegal at common law as that the framing of them is a criminal offence, but which cannot be enforced by action, being considered void as against public policy. I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases. And I cannot help thinking that, where there is no illegality in bonds and other instruments at common law, it would have been better that our courts of justice had been required to give effect to them unless where they are avoided by Act of Parliament. By following a different course, the boundary

between judge-made law and statute-made law is very difficult to be discovered. But there certainly is a large class of decisions, which will be found collected in the report of the recent Bridgewater Case in the House of Lords, [Egerton v. Earl Brownlow, 4 H. L. Ca. 1] to the effect that, if a contract or a will is, in the opinion of the judges before whom it comes in suit, clearly contrary to public policy, so that by giving effect to it the interests of the public would be prejudiced, it is to be adjudged void.

When I look at this bond, I have no hesitation in concluding that the association which it establishes ought not to be permitted, and that the enforcing of the bond will produce public mischief. I therefore feel compelled as a judge, to say that it is void. The object of the association of the master manufacturers of Wigan is very laudable to put down an illegal association of the workmen, the funds of which are arbitrarily levied by extortion, and to protect the just rights of the masters which have been infringed. But the means sought to be employed are such as I think the law will not sanction. There are agreements which, although to a certain degree in restraint of trade and of the free action of individuals, may be enforced by action: but I am not aware of any contract, so far in restraint of trade and of the free action of individuals as this bond, to which courts of justice have given effect. I do not think that any averment is necessary as to what has been done under it, or as to any mischiefs which it has actually produced. We are to consider what may be done under it, and what mischiefs may thus arise. All the master manufacturers in a large district are obliged for a twelvemonth to carry on their trade in the manner in which a majority of them may direct; and during that time they may all be compelled entirely to shut up their manufactories and to dismiss their men: they are obliged to contribute to the funds of the association, and cannot withdraw from it, although they may think that its object has been effectually gained, or however much they may disapprove of its proceedings. If such an association is good for such a district, it would be equally good for the whole county of Lancaster, or for the whole realm of England. And, if the will of a majority may be the rule of action for all who are associated, so may the will of a single individual. Again,

there must be entire reciprocity between liberty to the masters and liberty to the men: and it seems to me that a decision in favor of this bond would establish a principle upon which the fantastic and mischievous notion of a "Labor Parliament" might be realized for regulating the wages and the hours of labor in every branch of trade all over the empire. The most disastrous consequences would follow to masters and to men, and to the whole community.

I should have been much better pleased if a clear rule has been expressly laid down to me by the Legislature: but, being required to form and to act upon my own opinion, I am bound to say that I think this bond is contrary to public policy, and that we ought to give judgment for the defendant.

Judgment for defendant.

---

aff'd

IN THE EXCHEQUER CHAMBER

(Feb. 20.)

The plaintiff below alleged error in the above judgment. The defendant denied the allegation.

The case was argued in last Michaelmas Term [November 16th, 1855. Before WILLIAMS, CROWDER, and WILLES, Js., and PARKE, ALDERSON, and PLATT, Bs.] and Vacation. [November 29th, 1855. Before the same Judges, and CRESSWELL, J.]

COWLING, for the party alleging error (plaintiff below). The plea containing no averment of fact, but relying on what appears upon the face of the bond and condition as set out, the facts recited must be assumed to be true. It does not appear that the obligors comprehend all the cotton manufacturers in the neighborhood of Wigan and Hindley. It is shown that the association is purely defensive, and that its object is to liberate the trade from a control by a combination of workmen. Such an object, at any rate, is not merely legal but praiseworthy. That, it is true, would not constitute a defense of the proceeding if the object were to be furthered by illegal means. But no such means appear. The number of the obligors is eighteen; but the obligation is not less legal than it would be if there

were only three. Nor can any objection be urged against the duration of the obligation for twelve months which would not be valid if it were to last only for three. It is not, properly speaking, a bond in restraint of trade: there is no agreement either to give up or to suspend trade: that could have been done without any agreement. The trade is already suspended or checked; and the agreement is entered into for the purpose of enabling it to go on freely. [ALDERSON, B.—If the agreement had merely the effect of closing all the mills when there was a strike against a single mill, that should be shown: all that appears is that the steps to be taken were at the discretion of the majority.] The majority even of the obligors could not, under this agreement, suspend the trade for more than a few months. Nor is it to be necessarily inferred that any suspension will take place at all. [ALDERSON, B.—Do you say that, if there were no combination among the workmen, this association would be legal? If not, can one illegality cure another?] An illegal act may well render that legal which would be otherwise illegal, just as a poison may act as an antidote to another poison. [ALDERSON, B.—May you poison another because he means to poison you?] What acts medicinally is no poison at all. The plea of *son assault demesne* is a good answer to an action for an assault, because a blow struck in pure self-defense is not a battery. It appears that CROMPTON, J., was much impressed by the circumstance that every obligor here gives up his private judgment in deference to that of the majority. But why should he not? He could not if, by his doing so, trade was restrained: but the contrary appears on this record. The association is for doing away with that restraint of trade which would otherwise be affected by the combined workmen coercing the single employers in succession. A joint resistance to this can be secured only by union; and it is essential to a union that it should be governed by the discretion of the majority. A partnership is guided by the will of the majority of partners. The public benefit is more likely to be secured by the government of a majority than by that of a minority. In Mallan v. May, 11 M. & W. 653, where the covenant was held partly good and partly bad, as being in restraint of trade, the Court said that circumstances may exclude the presumption that a partial restraint of trade is bad; adding:

"If there are circumstances recited in the instrument (or probably if they appear by averment), it is for the Court to determine whether the contract be a fair and reasonable one or not; and the test appears to be, whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided." The same doctrine may be collected from Egerton v. Earl Brownlow, 4 H. L. Ca. 1, and is laid down in Mitchel v. Reynolds, 1 P. Wms. 186. [See note to S. C., 1 Smith's Lea. Ca. 301 (4th ed.).] In the instance of trading guilds, the majority had the control. [ALDERSON, B.—They were founded by the Crown.] Not invariably; there were voluntary guilds. And there are many instances of associations acting with a public object, in which the majority governs. Such is the Stock Exchange Committee. Of course the plaintiff does not contend that the mere fact that the contract is not criminal is sufficient to show that it may be enforced in law. [ALDERSON, B.—Suppose a set of manufacturers entered into a bond conditioned for keeping their mills closed during the prevalence of cholera.] That could not be illegal. [ALDERSON, B.—Suppose the condition were for obeying the regulations of a sanitary committee?] Why should that not be done? There can be no prejudice to public interests from the selection of a competent directing authority. Joint owners of a ship ordinarily contract for the employment of the ship according to the will of the majority. Parties may agree to be bound by the award of an arbitrator or the certificate of an engineer; and the agreement will be enforced. CROMPTON, J., appears to have considered that this is in the nature of a combination to lower wages; but it is in fact a combination for putting down a strike. The language of GROSE, J., in Rex. v. Mawbey, 6 T. R. 636, has been referred to. But, when that case was before the Court, the law was not as it is now: the Legislature had in numerous instances fixed the rate of wages: a combination for the purpose of raising wages was then illegal; Rex v. Journeymen Tailors of Cambridge, 8 Mod. 11. In stat. 23 Ed. 3, cc. 1, 2, 3, are found early restraints of this kind; a later act, stat. 5 Eliz. c. 4, § 15, which was before the Court in Rex v. Huleott, 6 T. R. 583, was repealed by stat. 53 G. 3, c. 40. [Other clauses were repealed by stat. 54 G. 3, c. 96.] Numbers of similar statutes are

repealed by stats. 5 G. 4, c. 95, and 6 G. 4, c. 129. The modern policy of the Legislature may be collected from a speech of Mr. Huskisson, made at the time when the matter was under the consideration of a committee of the House of Commons. [13 Hansard's Parliamentary Debates, N. S. 354, 5.] The object has certainly been to allow of combinations, but to check unjustifiable dictation. The language of ROLFE, B., in Regina v. Selsby, [note (a) to Rowlands' Case, 2 Den. C. C. R. 384] and of ERLE, J., on the trial of Regina v. Rowlands, [note (b) to Regina v. Rowlands, 17 Q. B. 686 (E. C. L. R. vol. 79); 2 Den. C. C. R. 388, note (a)] asserts the legality of combinations to raise wages, and is not confined to the question of the legal criminality of such combinations. [ALDERSON, B.—In one of the prohibitory statutes, 39 and 40 G. 3, c. 106, § 1, the contract is made void: that is rather in your favor, as showing that the contract was not void at common law. [CROWDER, J.—Was there any necessity here for the time being so defined that it might continue after the combination of the workmen should be at an end?] It is not easy to say when a combination is at an end; and, if no limit were named, the agreement would be objectionable as being perpetual. [ALDERSON, B.—Could a suit be maintained against a workman, in a county court, for breach of the agreement to combine, on the ground that the agreement was a measure of defense against a combination of masters?] The judge would decide, as matter of fact, whether it was a defensive measure. [ALDERSON, B.—Suppose twenty electors enter into a bond to vote for a particular candidate, on the ground that there is a similar combination in favor of the opposite candidate.] That is a breach of what the law considers a duty, namely, giving a free vote.

Mellish, *contra*. The question is, not whether such a contract is punishable criminally, but whether it can be enforced. Whether it operates in restraint of trade must be determined, not from the object of the transaction, but from the effect of the instrument itself. Every stipulation in the condition is in restraint of trade. There does not appear to be any power given to the majority enabling them to compel an obligor to keep his mill open, or to give wages up to a certain amount; they can compel only the closing of the mills and

keeping the wages down. That construction follows from the recital of the supposed evil which was to be met. There is no consideration here besides the mutual restraint: and that distinguishes this from all the cases where there has been an independent consideration; and the same distinction shows that analogies drawn from contracts of partnership are inapplicable. If this agreement be lawful on the part of the masters, a similar counter agreement would be lawful on the part of the workmen. The record does not show that the workmen have combined in this way. What the "other injuries" are does not appear: and the assertion that money has been arbitrarily levied and extorted is too vague. The plea of *son assault demesne* relies upon the right of self-defense. [ALDERSON, B.—It sets up an excuse for an act; that is all.] Assuming, however, that an exactly similar combination existed among the workmen; it would be much better that it should not be enforced on either side than that it should be enforced on both sides. Such contracts are entered into in moments of irritation and passion; and it is very important that parties should not be bound by them. Are they to be enforced in equity, by a decree for specific performance? [PARKE, B.—Courts of Equity have a discretion which we have not.] The discretion would be exercised only on the supposition that the contract was contrary to general policy: that supposition is enough to support the argument for the defendant. The object of stat. 6 G. 4, c. 129, was to set trade and work free; and it is with that view entirely that the restrictive statutes are repealed; though it is remarkable that section 2 assumes 2 Stat. 33 ed. 1 to contain enactments respecting trade or workmen, which is not the fact. But the provisions of stat. 6 G. 4, c. 129, go no further than to exempt the combinations there mentioned from punishment. Nor is there any reference to agreements to submit to the direction of a majority. The doctrine laid down in Mitchel v. Reynolds, 1 P. Wms. 181, and other cases, that a restraint of trade may be upheld where there is a good consideration for it, is entirely inapplicable to a case where the restraint is itself the consideration. That a contract may be void, as being in restraint of trade, because, though properly limited as to time, it is not limited as to space, appears from Ward v. Byrne, 5 M. & W. 548. The judges must determine

whether the contract is, from its nature, contrary to public policy, as in Egerton v. Earl Brownlow, 4 H. L. Ca. 1. [PARKE, B.—Suppose parties entered into a bond not to cultivate their land otherwise than might be agreed upon at a meeting of the obligors; or not to marry without leave of the majority.] Such bonds could not be enforced. [PARKE, B.—Covenants against marriage are discussed in Low v. Peers, Wilmot's Notes, 364. In Exch. Ch. affirming the judgment of K. B. in Lowe v. Peers, 4 Burr. 2225.]

Cowling, in reply. Since Hitchcock v. Coker, 6 A. & E. 438 (E. C. L. R. vol. 33), the notion, that the contract is to be upheld or not according as the Court thinks the consideration adequate or not, has been exploded. Cases are collected in note (a) to Hunlocke v. Blacklowe, 2 Wms. Saund. 156a. The record fully shows a combination of workmen for opposing which this contract was entered into. The evils suggested in the argument on the other side arise, not from such contracts as this, but from the combinations which it is intended to obviate.

Cur. adv. vult.

ALDERSON, B., now delivered the judgment of the Court.

This was an action by which the plaintiff sought to enforce a bond against the defendant. The condition of the bond recited that the defendant and seventeen other obligors, being respectively owners and occupiers of mills and other premises in Wigan and the neighborhood, carried on their business of spinners and weavers of cotton yarn and cloth, and employed many workpeople and servants; and that certain societies or combinations subsisted in the neighborhood amongst divers persons, whereby persons willing to be employed were deterred by a reasonable fear of social persecution and other injuries from hiring themselves to work at the said establishments; and that thereby the legal control of the obligors over their property and establishments was injuriously interfered with; and that these combinations were sustained by funds arbitrarily levied and extracted from the workmen employed by the obligors and receiving wages from them; and that it was necessary to take measures for vindicating their legal rights

to the control and management of their own property, which would best sustain the rights of the laborer to the free disposal of his skill and industry: and that, to effect this, the obligors had agreed to carry on their works in regard to the amount of wages to the laborer to be employed therein, and the times and periods of the engagements of workpeople, and the hours of work, and the suspending of work, and the general discipline of their works and establishments (in conformity to law) for the period of twelve months from the date of the bond, in conformity with the resolutions of a majority of the said obligors present at any meeting to be convened as therein mentioned; and that, for that purpose, they had entered into the bond; and the condition of the bond was therein stated to be that, if the several obligors and their partners should so carry on their works for twelve months in conformity with the resolutions of such majority, the bond as to £500, in which each was to be bound, should be void; otherwise to be in full effect. The plea concluded with an averment that, save as aforesaid, there was no consideration for execution of the bond by defendant; and that the bond was in restriction of trade, and illegal and void.

To this plea there was a demurrer. And, on its being argued before the judges of the Court of Queen's Bench, the majority of that Court gave judgment in favor of the plea. We are of opinion that the judgment was right, and ought to be affirmed.

The question is, whether this is a bond in restraint of trade: and we think it is so. Prima facie, it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion. Now here the obligors to this bond have clearly put themselves into a situation of restraint.

First: Each of them is prevented from paying any amount of wages except such as the majority may fix, whatever may be the circumstances of the work to be done and his own opinion there on. *Secondly,* they can only employ persons for such times and periods as the majority may fix on, however much the minority may deem it for their own interest to do otherwise. The hours of work, the suspending of work, partially or

altogether, the discipline and management of their establishments, is to be regulated by others forming a majority, and taken from every individual member. And all this for a fixed period of twelve months. All these are surely regulations restraining each man's power of carrying on his trade according to his discretion, for his own best advantage, and therefore are restraints on trade not capable of being legally enforced.

We do not mean to say that they are illegal, in the sense of being criminal and punishable. The case does not require us; and we think we ought not to express any opinion on that point.

But then it is said that these regulations, otherwise illegal, are prevented from being so considered by the circumstances against which they were intended to operate. It appears that a counter combination existed on the part of certain workmen, and that the alleged object of this bond was to counteract this, and to set the willing and industrious workmen free from its powers. But, supposing this to be the object, and that we may even consider it as laudable, we cannot agree that it is laudable or right to use such means of counteraction. The maxim *injuria non excusat injuriam* is a sound one, both in common sense and at common law. This is only to put one wrong as counterbalancing another wrong, to place the industrious workman in the fearful situation of being oppressed by a majority of masters in order to prevent him from being oppressed by a majority of his fellow-workmen. And, besides, here it is to be observed that the masters' combination is not limited to the duration of the suggested combination of the workmen. It is to last for twelve months absolutely: so that, if the combinations assigned as the excuse for it broke up, as they almost always do, in a short period, this restraint upon the obligors would still continue in force after the object against which it seems to have been directed had long ceased to exist.

This bond, therefore, if not altogether illegal and punishable, is framed to enforce at all events a contract by which the obligors agree to carry on their trade, not freely as they ought to do, but in conformity to the will of others; and this, not being for a good consideration, is contrary to the public policy.

We see no way of avoiding the conclusion that, if a bond of this sort between masters is capable of being enforced at law,

an agreement to the same effect amongst workmen must be equally legal and enforceable: and so we shall be giving a legal effect to combinations of workmen for the purpose of raising wages, and make their strikes capable of being enforced at law. We think that the Legislature have been contented to make such strikes not punishable: and certainly they never contemplated them as being the subject of enforcement by a suit at law, on the part of the body of delegates, against any workmen who might have been seduced by some designing person to sign an engagement with penalty to continue in the strike as long as a majority were for holding out.

We think, for these reasons, that the judgment of the Court of Queen's Bench is right and ought to be affirmed.

Judgment affirmed.

HORNBY v. CLOSE

(Queen's Bench, 1866. L. R. 2 Q. B. 153.)

Case stated by justices of the west riding of Yorkshire under 20 and 21 Vict. c. 43.

An information was laid on the 12th of January, 1866, at Bradford, in the said riding, by John Hornby (the appellant), boilermaker, the president of the Bradford Branch Society of the United Order of Boilermakers and Iron Shipbuilders, on behalf of the said society, a copy of the rules of which society have been duly deposited with the register of friendly societies in England, pursuant to the statute, charging that Charles Close (the respondent), boilermaker, on the 16th of December, 1865, at Bradford aforesaid, being then and there a member of the said society, and having in his possession certain moneys of the said society, amounting to £24, 18s. 5½d., did then and there unlawfully withhold the same from the said society, contrary to the form of the statute (18 and 19 Vict. c. 63, § 24).

A summons upon the above information was issued, and on the hearing the charge against the respondent, as laid in the information, was fully proved.

A copy of the "Rules and Regulations of the United Society of Boilermakers and Iron Shipbuilders of Great Britain and

Ireland'' was put in, and admitted to be correct. A copy of such rules was transmitted with the case. The following was the title-page of the rules: ''Rules and regulations to be observed and strictly enforced by the United Society of Boilermakers and Iron Shipbuilders of Great Britain and Ireland. Instituted for the purpose of mutual relief of its members when out of employment, the relief of their sick, and burial of their dead, and other benevolent purposes, as inserted in their rules.''

Rule 1, after repeating the purpose of the society as set out in the title-page, by section 3, ''It shall consist of an unlimited number of members, being persons legally working at the trade of boilermaking and iron shipbuilding, and residing in any part of Great Britain or Ireland.''

Rules 2-9 related to the officers, their duties and salaries, consisting of president, stewards (each of whom, by rule 3, § 2, is to visit the sick members twice in each week, on separate days), guardians and marshal, secretary, treasurer, trustees, auditors, and committee.

By rule 11, § 1, no person shall be admitted a member who is not a legal boilermaker or iron shipbuilder, or under twenty years of age; but every competent person applying shall be admitted, on payment of an entrance fee of 7s. 6d. to £1, according to age, and a subscription of 3s. 6d. every four weeks; section 2, the person proposed must have worked not less than five years at the trade.

Rule 15. Relief to be given to sick members for first twenty-six weeks, 10s. per week; second twenty-six weeks, 5s.; and after this, 4s. per week.

Rule 20, § 1. Any free and full member thrown out of employment through depression in trade, or circumstances satisfactory to the members of this branch, shall receive a traveling card or certificate, etc. Section 2. The traveling relief to be 1s. 8d. for each of the six working days.

Rule 22, § 1. Any member, disabled by loss of sight or limb, to receive a bonus, if he has paid for twelve months, £10; for two years, £20; for three years, £30; for four years, £40; for five years, £50; for six years, £60.

Rule 23. A superannuated member who shall have subscribed for eighteen years and be aged fifty, to receive 5s. per week for life.

Rule 25, § 1, makes provision as to the funeral of members and their wives, viz., £12 on the death of a member, and £6 on the death of his wife.

It was contended for the respondent, that the society was not a society within section 44 of the 18 and 19 Vict. c. 63; and further, that it was a society established for purposes which are illegal, being against public policy, in restraint of trade, and depriving the workman of the free exercise of his own will in the employment of his labor, and also in restraining him from getting employment or continuing in employment, or obtaining employment for a non-member of the society; and lastly, that the society was an organization for, or tending to, the encouraging and maintaining of strikes.

In support of these objections, the following passages in the rules and regulations of the society were relied on:

Rule 28. Piece-work.—Piece-work disputes and benefits from contingent fund. Section 1. That in districts where members are *compelled to work piece-work,* and it be proved to the satisfaction of the executive council that the firm is reducing the prices below the usual and reasonable prices, they shall allow the men resisting the reduction 7s. per week for two weeks, after being out six days; after which they shall receive their traveling cards, according to rule 20.

Section 2. That any member or members in a shop, either on piece-work or day-work, where a dispute arises connected with our trade or society, no member or members shall be allowed to call at such shop or shops after being made acquainted with such dispute, or for doing so to be fined the sum of 10s. And that any member of this society, either angle-iron smith, plater, riveter, or holder-up, encouraging any holder-up or laborer to violate this rule, by allowing him to practice with his tools, or otherwise instructing him in other branches of the trade contrary to these rules, shall, on proof thereof, be fined for the first offense 5s., for the second 10s., and for the third to be expelled the society.

Rule 29. Disputes on day-work and benefits. Section 1. Should a dispute arise in any shop, the members of that shop shall make it known to their branch, which, if it only affects the interest of two or three members, such branch to have power to settle it, and grant to members wishing to travel 12s.

cards, or 12s. per week donation. But should a general dispute arise in any shop, which cannot be amicably settled by the branch, it shall be referred to the executive council, who shall give them instructions on the subject. All members losing their employment through such disputes, after being sanctioned by the executive, shall receive the sum of 12s. per week, so long as they remain out of employment. This rule to be applied to all disputes excepting the settlement of piece-work prices.

Rule 42, § 1 (part of). Any member using his influence to obtain employment for a non-member, shall be fined for such offense 10s.

Rule 20, § 4. Any member leaving his employment, on his own responsibility, to seek for other employment, shall not be entitled to traveling relief until he has again been in employment one month.

The justices were of opinion that the objections urged on behalf of the respondent were valid; that the society in question was not within the 44th section of the 18 and 19 Vict. c. 63; and that the rules of society in question showed or set forth an illegal purpose; and consequently they dismissed the complaint.

The question was, whether the determination upon the facts and grounds previously stated is or is not erroneous in point of law.

Mellish, Q. C. (Mcnamara with him), for the appellant. The society is not certified, nor could it have been certified as a friendly society, under 18 and 19 Vict. c. 63, but its rules have been deposited with the registrar; and the question is, whether it is a society within section 44, so as to be able to avail itself of section 24.[31]

31—18 and 19 Vict. c. 63, § 9. "It shall be lawful for any number of persons to form and establish a friendly society, under the provisions of this act, for the purpose of raising by voluntary subscriptions of the members thereof, with or without the aid of donations, a fund for any of the following objects: 1. For insuring a sum of money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the wife or child of a member. 2. For the relief or maintenance of the members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood, or the endowment of members or nomi-

Section 9 defines the object of friendly societies; and no doubt when section 44 speaks of a society "for any purpose," it must be intended any analogous purpose. Now it cannot be disputed that very many of these rules are strictly for benevolent objects within the act. Thus, rule 3, § 2, as to visiting the sick; rule 15, as to relief; rule 20, §§ 1 and 2, as to traveling relief to members when seeking work during depression in trade; rule 22, as to bonus to disabled members, and rule 23, superannuation allowance to aged members, are surely all purposes within the act. And the rules relied upon by the respondent are not sufficient to take the society out of the scope or benefit of the act. The objects of those rules are not illegal; they are not illegal at common law, nor made so by the act; and even if they are void as in restraint of trade, on the principle of Hilton v. Eckersley, 6 E. & B. 47, 66 (E. C. L. R. vol. 88), 24 L. J. Q. B. 353, 25 L. J. Q. B. 199, that would not render the purpose of the society itself illegal: and the Court of Queen's Bench and Exchequer Chamber expressly refrained from saying that these combinations had anything criminal in them.

The respondent did not appear.

nees of members at any age. 3. For any purpose which shall be authorized by a Secretary of State, or in Scotland by the Lord Advocate, as a purpose to which the powers and facilities of this act ought to be extended . . . and if such persons so intending to form and establish such society shall transmit rules for the government, guidance, and regulation of the same to the registrar, and shall obtain his certificate that the same are in conformity with law as hereinafter mentioned, then the society shall be deemed to be fully formed and established from the date of the certificate."

By section 24: "If any officer, member, or other person, being or representing himself to be a member of such society, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition, shall obtain possession of any moneys, securities, books, papers, or other effects of such society, or having the same in his possession shall withhold or misapply the same, or shall wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such society," jurisdiction is given to justices on complaint on behalf of the society to proceed against the officer charged in manner directed by 11 and 12 Vict. c. 43, and to order him to deliver up the effects of the society, or to repay the money applied improperly, together with a penalty not exceeding 20*l.*, and in default to imprison him with or

COCKBURN, C. J. We ought not to hesitate a moment in saying that we think the magistrates were perfectly right in holding that this society did not come within the operation of the Friendly Societies Act, so as to give the magistrates jurisdiction. I quite agree with Mr. Mellish that, supposing the main purpose of the society were within the 9th section, as being benevolent, it would not, by reason of one or two of the rules being beyond that purpose, cease to be a society within the act. It is therefore, in each case, material to inquire what the purposes of the society were. Here we find the very purposes of the existence of the society not merely those of a friendly society, but to carry out the objects of a trades' union. Under that term may be included every combination by which men bind themselves not to work except under certain conditions, and to support one another, in the event of being thrown out of employment, in carrying out the views of the majority. I am very far from saying that the members of a trades' union constituted for such purposes would bring themselves within the criminal law; but the rules of such a society would certainly operate in restraint of trade, and would therefore, in that sense, be unlawful; and on the

without hard labour for a term not exceeding three months; with a proviso that the society may, nevertheless, proceed by indictment; but not if a conviction has been obtained.

By section 40, disputes between members and the officers of the society are to be decided in the manner provided by the rules, which decision shall be conclusive without appeal. By section 41, where the rules do not provide a mode of settlement, such disputes are to be decided by the county court.

Section 44: "In the case of any friendly society established for any of the purposes mentioned in section 9, or for any purpose which is not illegal, having written or printed rules, whose rules have not been certified by the registrar, provided a copy of such rules shall have been deposited with the registrar, every dispute between any members of such society and the trustees, treasurer, or other officer, or the committee of such society, shall be decided in manner hereinbefore provided with respect to disputes, and the decision thereof, in the case of societies to be established under this act, and the sections (40, 41) in this act provided for such decision, and also the section (24) in this act which enacts a punishment in case of fraud or imposition by an officer, member, or person, shall be applicable to such uncertified societies," with a proviso that an uncertified society shall have no other of the advantages conferred by the act.

principle on which the Court of Error, in Hilton v. Eckersley, affirming the decision of this Court, held that a bond, given by masters to observe rules in their business which were in restraint of trade, was so far illegal that it could not be enforced in a court of law, we hold that these rules of a society of workmen being in restraint of trade are also so far illegal; that is to say, when we find one of the main objects of a society is that of a trades' union, many of its rules being in restraint of trade, so that if an action were brought to enforce a civil right in respect of any of them they would be held not enforceable at law, in the same sense we hold the society is not "for a purpose which is not illegal," and so not within the act. Therefore, for these two reasons we hold the present society not within section 44; first, because it is for a purpose not analogous to that of a benevolent or friendly society such as is mentioned in section 9; and secondly, because those rules, although they may not be illegal in the sense of bringing the parties to them within the criminal law, are in restraint of trade, and so far illegal.

BLACKBURN, J. I am of the same opinion. The magistrates had no jurisdiction, unless the society was within section 44, which extends certain of the clauses of the act to a friendly society whose rules have been deposited but not certified, being "a friendly society established for any of the purposes mentioned in section 9, or for any purpose which is not illegal." Mr. Mellish very properly admitted that "any purpose" must be confined to any purpose analogous to those mentioned in section 9; for a literal construction of any purpose whatever would be contrary to all rules of interpretation. And the first question is, is this society for any analogous purpose? Now, as the Lord Chief Justice has said, the purposes of a trades' union are clearly not analogous to those of a friendly society. A little deviation from the strict purpose of a friendly society might not take the society out of the scope of the act; but here a main object certainly—if not the main object, I think the main object—was that of a trades' union, and therefore the magistrates were fully justified in declining to act. Secondly, I go further, and think the rules illegal in the sense of void, according to the principle of Hilton v. Eckersley, 6

E. & B. 47, 66 (E. C. L. R. vol. 88), 24 L. J. Q. B. 353, 25 L. J. Q. B. 199,—a case of combination by masters, but the same principle must apply to combinations of men,—that they are not enforceable at law. The Court of Exchequer Chamber in that case carefully avoid going further, and saying whether or not the objects of the masters were illegal in the sense of being criminal; and, acting on the authority of that case in the Exchequer Chamber, and adopting the view of CROMPTON, J., in the court below, I wish to guard myself from being supposed to express any opinion on the present case. I do not say the objects of this society are criminal. I do not say they are not. But I am clearly of opinion that the rules referred to are illegal, in the sense that they cannot be enforced; and on this ground, also, I think the society not within section 44, as not being "for a purpose not illegal." Whatever the inclination of my opinion, it is unnecessary to decide whether illegality of any of the rules would taint the whole, because here the illegal objects formed not a small part, but a principal, if not the whole, object of the society.

MELLOR, J. I am also of the same opinion. I desire to express no opinion as to whether the rules referred to are illegal in the sense of being criminal. Some of the substantial objects of the society are those of a trades' union, and for the maintenance of its members when on strike, and these objects cannot be separated from the other objects, if any, of the society. Nor can I doubt that many members joined the society on the very footing that there were such rules and for the very sake of the illegal objects. As my Lord and my Brother Blackburn have said, although some of the objects of the society may be those of a friendly society, yet these other and substantial objects of a trades' union are not analogous to those of a friendly society, not being benevolent; and the rules not being legal in the sense of enforceable at law, on the principle of the decision in Hilton v. Eckersley, the society was not within the act, and the magistrates had no jurisdiction over the case.

LUSH, J. I am entirely of the same opinion. One main purpose of the society, if not the main purpose, was to form a

trades' union. That being so, the purpose of the society was not analogous to that of a friendly society; and further, this purpose was illegal, in the sense that it was a purpose which could not be enforced in a court of law.

Judgment for the respondent.[32]

NORTH WESTERN SALT CO. v. ELECTROLYTIC ALKALI CO.

(House of Lords, 1914. L. R. [1914] App. Cas. 461.)

Appeal from a decision of the Court of Appeal reversing a decision of SCRUTTON, J., [1913] 3 K. B. 422.

The following statement of facts is taken from the judgment of the Lord Chancellor.

"The appellant company are a combination of salt manufacturers, and they are alleged to include substantially the whole of the salt manufacturers in the north-west of England, and to have obtained the practical control of the inland market in England for the sale of vacuum salt, stoved and unstoved. Stoved salt is salt which is used for household purposes and which has been subjected to special drying processes to fit it for such purposes. Vacuum salt is salt, whether afterwards stoved or not, which has been prepared by a process in which the waste steam from the works is carried under the salt pans, instead of fires being put under these salt pans.

"The contract between the appellants and the respondents, who were salt manufacturers, was made on November 9, 1907. By its terms the respondents agreed to sell to the appellants 72,000 tons of vacuum salt, of which 12,000 were to be stoved salt. Delivery was to spread over the four years between January 1, 1908, and December 31, 1911, in about equal monthly quantities. These quantities represented 18,000 tons a year, of which 3,000 were to be of stoved salt, unless the respondents in November in any year exercised an option to deliver unstoved salt only in the following year. The price was to be

32—See The King v. Journeymen-Taylors of Cambridge, 8 Modern 11 (1721); Farrer v. Close, L. R. 4 Q. B. 602 (where the court was evenly divided); Old v. Robson, 62 L. T. N. S. 282.

8*s.* a ton for both kinds of salt, delivered into trucks at the sellers' works or into craft at their canal wharf. Stoved salt was to be loaded in bags, to be provided by the buyers, but to be filled and stitched at the expense of the sellers. The sellers were to be free to manufacture other salt for their own use, but not for sale, excepting so much as was required to satisfy a certain current contract. The sellers were to have the option of repurchasing from the buyers the stoved vacuum salt manufactured by themselves to the extent of 3,000 tons annually at the buyers' current prices. If the sellers made stoved vacuum salt they were to be elected distributors in respect of 3,000 tons annually, on the same terms and conditions as the buyers' other distributors. The sellers agreed not to lease or sell any of their land during the contract for salt making or boring for brine for salt making, but they might sell brine for other purposes than salt making. They were to be free to reduce or cease their making of salt. The agreement was to be taken as a settlement of all questions arising out of a previous agreement of August 25, 1906.

"There were, of course, other salt manufacturers, and these were also under contract to sell salt to the appellants, and they acted as distributors of salt for the appellants under an agreement for distribution, the terms of which did not substantially vary during the period covered by the contract sued on. The effect of these terms was that if the salt manufacturers exercised their option to repurchase the stoved salt, and then resold it, they would have to pay out of the price they received, not only the current selling prices, but certain amounts which they might receive for putting the salt into bags and stitching them, and the amount of these charges could be claimed by the appellants as additions to their current selling price. There were also loading and other charges, the amounts of which might be similarly claimed.

"The appellants' current price for table salt, apart from all additions,—the naked price as it was called—was fixed on March 30, 1908, at 18*s.*, and the respondents intimated their exercise of the option to repurchase. Controversy arose as to the terms and effect of the option when exercised, and as to whether the respondents were bound to sign a distributors' agreement, and in what terms. Meantime the respondents be-

gan, in breach of their contract, to sell stoved salt to customers. They appear to have concealed these sales from the appellants. The latter, however, discovered what had been done and claimed damages.

"In the event the present action was brought. In their points of claim the appellants simply stated the contract of November 9, 1907, alleged breaches, and claimed damages. They set out particulars of the sales alleged to have been made in breach by the respondents, and stated the character of the dispute which had arisen as to the measure of damages. The respondents' points of defence were confined to a denial of the alleged breaches as regards the bulk of the stoved salt in question. The case made was that they had in substance repurchased and properly sold the stoved salt in question, and that they had duly paid or brought into Court all the money the appellants were entitled to. As to another and smaller quantity of the salt in controversy, they admitted sales in breach of contract, but disputed the measure and amount of the damages claimed, and they brought into Court sums which they alleged were sufficient to satisfy all proper claims. In their reply the appellants joined issue generally, and alleged that the respondents were only entitled to sell salt repurchased on the terms contained in the distributors' agreement, under which they ought, as a preliminary to such resale, to have lodged with the appellants the contracts for sale. This it was alleged that the respondents had not done, and the appellants further relied on certain inland conditions which were issued in accordance with the distributors' agreement, and with which it was said that the respondents had not complied.

"The respondents did not in their points of defence set up the invalidity or non-enforceability of the contract of November 9, 1907, and it was admitted at the Bar that it was through no slip, but after consideration, that this was not done. The only questions raised by the pleadings were, firstly, whether the respondents had not in substance repurchased under the option in the contract, and then properly resold, and, secondly, as to the measure of damages.

"The action was tried in the Commercial Court before Scrutton, J. The learned counsel for the respondents, in the course of cross-examining one of the appellants' witnesses,

raised the point as to the legality of the agreement. Counsel for the appellants objected that no such point had been pleaded. Scrutton, J., sustained the objection. He held that unless illegality appeared on the face of the plaintiffs' case the point could not be put in cross-examination, having regard to the fact that no such point was raised by the pleadings, pursuant to what was required by the Rules of the Supreme Court. He refused to leave to amend, but he said that if, after hearing the plaintiffs' case, he was satisfied that the claim was as matter of law illegal or unenforceable, he would be bound to take judicial notice of this and to disallow the claim. He finally gave a judgment for the plaintiffs on the question of validity, and for the rest, confined it to the other questions which I have indicated. It dealt mainly with the measure of damages.

"The case went to the Court of Appeal, where a majority of the Court, consisting of Vaughan Williams and Farwell, L. JJ., held that the contract was in restraint of trade and bad, and that the action should be dismissed with costs. Kennedy, L. J., dissented. The Court was willing to grant a new trial, if both parties desired it, in which further evidence as to the circumstances could be brought forward, but the defendants elected to take a final judgment. The majority of the learned judges in the Court of Appeal held that the contract sued on must be read in connection with the distributors' agreement, and that this agreement must be read as connected with another agreement dated September 11, 1906, between the plaintiffs and certain other salt manufacturers in the north-west of England. They considered that when these agreements were construed together the contract of 1907 must be held illegal as being in restraint of trade, and as forming part of a scheme for securing a monopoly by restricting output and raising prices. 'In the present case,' said Farwell, L. J., 'no circumstances in my opinion could justify such a contract made for the mere purpose of raising prices, with the inseparable incident of depriving the members of the public of the choice of manufacturers, while hoodwinking them into the belief that such choice is open to them; in any case, the special circumstances would have to be pleaded and proved by the plaintiffs.'

"In his dissenting judgment Kennedy, L. J., held that there was no evidence on which, so far as the interests of the community were concerned, it could be held to be proved that the contract was contrary to public policy. It was, in his opinion, principally and essentially a contract for sale which was made between manufacturers and sellers of salt dealing with each other on equal terms, and regulating by partial and temporary restrictions, and for good consideration, the manufacture and sale of salt by one of them beyond a specified quantity, but only as part of a scheme for mutual profit. He found no sufficient evidence that the provisions of the contract of 1907 sued on were so injurious that it ought to be held invalid as offending against public policy."

The House took time for consideration.

1914, Feb. 12. Viscount Haldane, L. C. My Lords, this is an appeal by the plaintiffs in an action brought to recover damages for breach of a contract relating to the sale of salt. The question to be determined is whether the contract was enforceable. His Lordship stated the facts as above set out and continued:

Some doubt has been raised as to whether the general agreement with the other salt manufacturers of September 11, 1906, was put in evidence. But I assume for the present that it was in evidence, and I turn to it. It is contended that it must be looked at because of the provision of the contract sued on, which says (clause 7) that the respondents, if they make any stoved vacuum salt, are to be elected distributors on the same terms and conditions as the appellants' present distributors. These terms and conditions are contained in a document dated August 7, 1908, which was submitted to the respondents as already stated, and which they refuse to sign. It is headed "Distributors' Appointment," and it purports to define the terms on which a person appointed to be one of the appellants' salt distributors may purchase salt from the appellants and sell it. It defines the quantity that may be so purchased at prices to be fixed by the appellants, and the conditions on which it may be resold at prices to be similarly fixed, and it contains provisions regulating the amount to be sold, the discounts, the use of craft and rolling stock, the freight and

other charges, and the customers to whom sales may be made. It provides that the appellants are not to be bound to deliver salt except at the works where it is produced, and that they may, on receiving any order, decide at which of the works of any of their members it is to be delivered. The document contains a statement that similar appointments had been given to other distributors, who were named, and in some cases it was stated that the appointment contained a clause providing that it should not prejudice rights under an agreement of September 11, 1906, being the general agreement already referred to between the appellants and the other salt manufacturers.

This last-mentioned agreement, which purports to be made with fourteen salt manufacturers of Cheshire, Lancashire, Worcester, and Stafford, comprising both companies and firms, contains provisions largely resembling those in the contract sued on. The purpose of both contracts was to enable the appellant company to control the sales and prices of salt within its sphere of influence, and as the members of the appellant company were the salt manufacturers themselves, this was not impracticable.

My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality.

Now, in the case before us it is to me obvious that the Court of Appeal could not be sure that it had got before it the whole

of the materials which were necessary if it was to be justified in deciding on the legality of what it took to be a scheme for securing the monopoly by restricting output and raising prices, and for depriving the public of the choice of manufacturers, while hoodwinking them into the belief that such choice was open to them.

Unquestionably, the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labor disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. In the present case there was no attempt to establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement. On material questions of fact such as these the Court of Appeal had not the proper evidence before it, and the pleadings of the respondents had thrown on the appellants no duty to bring forward such evidence.

The general agreement of 1906, which was referred to in the document relating to the appointment of distributors, was not the agreement sued on. It constituted only a surrounding circumstance in the case, and it is impossible to predict how that case might have appeared had the appellants presented full evidence of all the circumstances. The Court of Appeal ought, in my opinion, in the absence of amended pleadings and full evidence, to have refused to enter into what was a mere speculation on an intricate and wide question of fact. If this be so, then the only question which can legitimately be considered is whether the contract sued upon is one which on the face of it ought not to be enforced. As I read the judgments of the majority of the Lord Justices, they seem to have thought that the contract, although possibly valid if taken by itself, was not so in view of inferences of fact to be drawn from the character of the outside agreements to which it referred. But if there is not sufficient evidence to enable a court to review

the situation in its entirety, then the Court is confined to what appears on the face of the contract sued upon, including any documents incorporated with it. As the outside agreements and documents to which I have referred were not so incorporated, I think that they could not be looked at in an action with the restricted issues which the pleadings before us raise.

I come back, therefore, to the contract on which the action is based. My Lords, the law as to contracts in restraint of trade is not doubtful. In order to be valid a clause imposing a restraint must be reasonable, and he who says that the restraint is so must make it out. But he will discharge this burden if he can point to other parts of the contract which show the reasonableness of the restraining clause. If the contract read as a whole appears on the face of it not to be unreasonable in the interest either of the parties or of the public, that is enough, and the question is not one of evidence. Evidence may, indeed, be given as to the character of the business and the circumstances. But it cannot be given on the question of the reasonableness of what appears on the face of the document when construed in the light of the circumstances as to which evidence is admissible. The question is one of law for the Court, and is not an issue of fact.

My Lords, when the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded I find nothing else in the detailed provisions of the contract excepting machinery

for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality. Nor do I find that the public interest was necessarily or even probably injured.

I have already adverted to the fact that competition from abroad and from other parts of the United Kingdom was not affected. It may be, for all that appears, that agreements of this kind were the only effective method of preventing domestic competition from being carried to a length which would ultimately prove not merely ruinous to the parties themselves, but injurious to the public, even outside that portion of it which was dependent on the prosperity of the salt manufacturing industry. No doubt if there were a monopoly attempted to be set up which was calculated to enhance prices to an unreasonable extent, that would, if it so appeared on the face of the contract, be ground for refusing to enforce it. But an effective attempt to set up such a monopoly or so to enhance prices can but rarely appear on the face of an agreement between two traders. Whether such an attempt is really being made is almost always a question of fact. It certainly does not appear as being made on the face of the agreement in question. It may well be that prices such as 18*s.* or 23*s.* which were to be charged for the appellants' salt, were fair prices. The fact that the manufacturer is only to receive 8*s.* cannot, standing by itself, be treated as sufficient evidence to the contrary. For it may be well worth while for a firm like the respondents, which obviously had to face much competition, to take a low price in order to secure a steady market, and the appellants' prices may have been no higher than a manufacturer might under ordinary circumstances have expected to get.

Nor am I impressed by the view of Farwell, L. J., that the arrangements stipulated for by the appellants for directing the supply of orders to be made from the factories which they thought most convenient in particular cases was detrimental to the public who might be hoodwinked thereby. Such distribution arrangements are common in business. One of their obvious purposes is to save cost of carriage, and there is no reason to suppose that the business world is either ignorant that they may exist, and so is likely to be deceived, or is in-

capable of taking care of itself. In an appeal which recently came before the Judicial Committee of the Privy Council (Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co., [1913] A. C. 781) my noble and learned friend Lord Parker delivered on behalf of the committee a judgment in which the law on these subjects was fully reviewed. Among other statements in that judgment there is one which bears closely on the question before us. After explaining the difference between a monopoly in the strict sense of a restrictive right granted by the Crown, and a monopoly in the popular sense in which what is meant is that a particular business has been placed under the control of some individual or group, he says ([1913] A. C. at p. 796), that it is "clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will be on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties the onus will be no light one."

My Lords, I desire to adopt this proposition as applicable to the question before us. For the reasons I have given, I do not think that, consistently with the principle so expressed, a Court of Justice is at liberty to infer from the terms of the contract in controversy that it is directed to establishing either a pernicious monopoly or a state of things injurious to the public. And I agree with what was said by LINDLEY, L. J., one of the most cautious and accurate judges of our time, in Maxim-Nordenfelt Co. v. Nordenfelt, ([1893] 1 Ch. 630, at p. 646): "The interest of the public is no doubt adverse to monopolies and to restrictions on trade; but then its interest is to allow its members to carry on those businesses which they themselves prefer, and to abandon and sell to the best advantage those businesses which for any reason they do not wish to continue."

The result of the consideration I have given to this appeal is that I think that this House should declare that the contract in question has not been shown to be in unreasonable restraint of trade, and that it was, therefore, enforceable by the appellants. As the Court of Appeal did not proceed to dispose of the points raised by the respondents as to the measure of damages, the case must be remitted to it for that purpose with

the declaration I have suggested. The appellants are entitled to their costs of the appeal to this House and also to their costs of the last hearing in the Court of Appeal. I move accordingly.

LORD MOLTON.[33] The contract sued upon is not *ex facie* illegal. So far as is material to this question, it may be described as a contract whereby the defendants have the option to buy up to a certain amount of stoved salt at a certain price, but there is a condition attached to this option that if they exercise it they shall not resell the goods except at certain prices and in a certain way. It was a hopeless task to argue that such a contract is *ex facie* against public policy, and accordingly the argument in the Court of Appeal and in this House turned mainly on the nature and status of a separate and independent contract made by the plaintiffs with other persons which was not incorporated in, and did not form part of, their contract with the defendants. It was contended that this latter contract was in restraint of trade and hurtful to the public, and that the contract with the defendants was in aid of this contract, and that therefore it also was invalid. There can be no doubt that if this issue had been raised on the pleadings the plaintiffs might have called relevant evidence as to the circumstances under which these contracts were made and as to their object and effect. This they had no opportunity of doing by reason of the defendants electing not to raise the issue by their pleadings, and we cannot pronounce on the question whether the surrounding circumstances were such as to render the contract with the defendants illegal because we have not the requisite material before us.

The consequence is that this appeal should be allowed with costs. The case must be remitted to the Court of Appeal on the question of damages.

LORD PARKER OF WADDINGTON.[34] Even assuming that the facts and documents in question, if unexplained, would establish the existence of an attempt on the part of the plaintiffs to establish such a monopoly, your Lordships cannot disregard the fact that the plaintiffs have had no opportunity of ex-

33—Part only of the opinion is given.

34—Part only of the opinion is given.

plaining them. The full facts, if known, might profoundly modify any inferences your Lordships might be induced to draw from the imperfect information now before the House.

For example, the circumstances under which the plaintiffs entered into the agreement of September 11, 1906, with the salt manufacturers of Cheshire, Lancashire, Worcester, and Stafford may have been analogous to those which the Privy Council recently considered in the case of Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co., ([1913] A. C. 781), in order to determine whether the trade restrictions continued in the "vend" agreement therein referred to were necessarily detrimental to public interest. The competition between salt producers within the area covered by the agreement of September 11, 1906, either *inter se* or with salt producers outside this area may have been so drastic that some combination limiting output and regulating competition within the area so as to secure reasonable prices may have been necessary, not only in the interests of the salt producers themselves, but in the interest of the public generally, for it cannot be to the public advantage that the trade of a large area should be ruined by a cut-throat competition. Under these circumstances, though it was no doubt open to the Court of Appeal, taking the view they did of evidence, to direct a new trial, it was not, in my opinion, open to them to hold the contract invalid on the imperfect information before them. It appears that the defendants refused to concur in asking the Court of Appeal for a new trial, nor have they asked for this on the present appeal. Under these circumstances, I think the only course is to allow the appeal, and remit the case to the Court of Appeal to be dealt with on the footing that the contract was valid.

LORD SUMNER.[35] By this contract A. buys all B.'s product for a given and not protracted period, and buys it to sell again. B. has the right to buy back, or virtually to keep out, a certain quantity, if he desires to make a dealer's as well as a manufacturer's profit. To prevent B. from underselling A. he is put under terms as to his sales over. In law B. is prob-

35—Part only of the opinion is given.

ably a buyer from A. and a seller to third parties; practically his position hardly differs from that of A.'s *del credere* agent. To restrict an agent's authority can hardly be illegality in the principal, and there is little more here. Further, B. is restrained from opening up any more salt-bearing ground, directly or indirectly. In the case of a mineral which is not inexhaustible and cannot be renewed, that may as well make for the public good as not. No doubt the difference between the selling price fixed for the producers, the respondents, and the buying price open to the public is extreme, but we do not know enough of the conditions of competition or of the other elements in the ultimate selling price beyond bare cost of production to act upon it. Doubtless the parties entered into the contract in order to make money out of it, probably by keeping up prices, but that is not conclusive.

Order of the Court of Appeal reversed: Declare that the contract of November 9, 1907, has not been shewn to be in unreasonable restraint of trade and that it was therefore enforceable by the appellants.

COLLINS v. LOCKE

(Privy Council, 1879. L. R. 4 App. Cas. 674.)

The judgment of their Lordships was delivered by Sir Montague E. Smith:[36]

The action in which this appeal has been brought arises out of a contract entered into between certain persons carrying on the business of stevedores in the port of Melbourne for regulating and distributing among them the stevedoring of ships in that port.

By the deed, which contains the agreement, the four parties to it, viz., the firm of George Washington Robbins and Francis Robbins Collins (the defendant in the action and the present appellant), Alfred John Johnson, and Locke (the plaintiff, and the respondent in this appeal), covenanted with each other, first, that "as between the parties" Messrs. Robbins

36—Only the opinion of the court is given.

should "be absolutely entitled to the business of stevedoring all ships which should arrive in the port of Melbourne consigned to the firm of Dalgety, Blackwood & Co.," and that each of the other parties (using the words above cited as to each) should be absolutely entitled to the business of stevedoring all ships which should arrive in the port consigned to certain other firms, viz., the defendant to those consigned to J. H. White & Co., Johnson to those consigned to MacFarlane & Co., and the plaintiff to those consigned to Holmes, White & Co., R. Towns & Co., and King, Meng & Co., and that the parties should be absolutely entitled for their own use to the profits arising from such stevedoring respectively. This first covenant concludes as follows: "And neither of them the said several parties hereto shall not (sic), nor will, save as hereinafter expressly provided, undertake or be in any way concerned in or interfere in the stevedoring, either in whole or in part, of any ship or vessel consigned to any of the said persons or firms hereinbefore particularly mentioned otherwise than according to the provision in that behalf hereinbefore contained."

The second and third clauses of the deed are in the following terms:

"2. That if any or either of the said firms hereinbefore named shall refuse to allow the stevedoring of any ship or ships consigned to them to be done by the party who, under the last preceding clause shall be entitled thereto, but shall require any other or others of the said parties hereto to do the stevedoring thereof, then and in such case such party so required shall and will give an equivalent to the person who shall lose the stevedoring of such ship or ships, such equivalent to be determined, in case of disagreement between the parties, by two disinterested persons, to be nominated by Mr. James Allison Crane, and an umpire to be named by such arbitrators, in case they disagree.

"3. That the stevedoring of all ships not consigned to any of the hereinbefore mentioned firms shall be taken and stevedored in the following order; that is to say, the first ship to arrive after the date hereof to be stevedored by the said John Kindlan Collins, the second by the said Francis Robbins, the third by the said George Washington Robbins, and the fourth

by the said Alfred Joseph Johnson, and so on in such order during the continuance of these presents, it being expressly agreed that the said James Locke shall not be entitled to the stevedoring of any ships or vessels save those consigned to the said firms of Holmes, White & Co., R. Towns & Co., and King, Meng & Co."

The above clauses disclose the object and nature of the contract, but questions arose on other clauses of the deed.

The fifth clause provides that if any of the firms mentioned in the first clause should cease to carry on business, or if the number of ships consigned to any of them should be materially diminished, a readjustment should be made of the distribution of the ships, and in case any firm should cease to carry on business, the party losing such firm should be entitled to make a selection of another firm in Melbourne, subject to arbitration in case of disagreement.

The ninth clause is a covenant for the payment of £1,000 as liquidated damages for the breach of any of the covenants, and the tenth contains a provision for the submission of disputes to arbitrators, the terms of which will be more fully referred to hereafter.

R. Towns & Co., one of the firms assigned to the plaintiff, was dissolved, and a new firm, Stewart, Couch & Co., succeeded to its business, and was selected by the plaintiff under the clause of the agreement above referred to.

The declaration, after setting out the deed, alleged three breaches. The first and second have been abandoned by the plaintiff's counsel, and the action is thus reduced to the last breach. The averments which precede that breach allege that the plaintiff had selected Stewart, Couch & Co., in the place of R. Towns & Co., that certain ships arrived in Melbourne consigned to Stewart, Couch & Co., and that although that firm did not refuse to allow the stevedoring of these ships to be done by the plaintiff, yet the defendant did the stevedoring of them, whereby the plaintiff lost the profit which would otherwise have accrued to him.

On the first plea nothing arises. The second denies the breaches. The third sets out the arbitration clause, and avers that no arbitrators had been appointed, nor award made. The fourth sets out the deed at length, and avers that there was

no consideration for it, save as appears by the deed; the object of the plea being to raise the question that the deed was void as being in restraint of trade. The fifth denies that the plaintiff selected Stewart, Couch & Co. in place of R. Towns & Co.; and the last plea avers that the other parties to the deed did not agree to such selection.

The plaintiff demurred to the third and fourth pleas, and took issue on the others.

The particulars in the action mentioned three ships, the Jason, Clara, and Eastern Monarch, as having been stevedored by the defendant in breach of the agreement, but it has been admitted that the action is not maintainable in respect of the Jason.

The evidence given at the trial was short and meager. The following are the facts appearing upon it, so far as they are material to the points remaining to be decided upon this appeal.

The Clara arrived at Melbourne consigned to Stewart, Couch & Co. No question arises upon the unloading, which was done by the plaintiff. The Clara then passed out of the hands of Stewart, Couch & Co. into those of Poole, Picken & Co., who employed the defendant to stevedore her for the outward voyage, which he did.

The Eastern Monarch also arrived at Melbourne consigned to Stewart, Couch & Co. The defendant both loaded and unloaded her. Stewart, Couch & Co. had nothing to do with the stevedores. This ship also passed into the hands of other merchants, viz., Bright and J. H. White, who employed the defendant to load her. It does not appear who were the persons who employed him to unload the ship.

A verdict was found for the plaintiff, with the following damages, viz.: £125 for the Clara, and £155 for the Eastern Monarch. A rule *nisi* was obtained to set aside the verdict and enter it for the defendant, on the ground that the third plea was proved, or to reduce the damages to £20, on the ground that under the terms of the agreement the plaintiff was only entitled to recover the profit of unloading the Eastern Monarch.

The other points referred to in the rule relate to the breaches which are now abandoned.

The Supreme Court, after argument, discharged the above

rule, and has also given judgment for the plaintiff upon the demurrers to the third and fourth pleas.

There was really no issue in fact taken upon the third plea, and no verdict could properly be entered upon it. The question on it is raised by the demurrer.

The point as to the reduction of the damages depends upon what may be held to be the right construction of the agreement. It was contended on this point by the defendant that the agreement was confined to the work done for ships whilst in the hands of those who were the consignees on their arrival in the port; but this would not seem to have been the intention of the parties, to be gathered from the general tenor and the particular language of the agreement. The ships allotted to each of the parties are "those which shall arrive in the port of Melbourne consigned to particular firms." This language is apparently used to describe the class or set of ships to which each party is to be absolutely entitled until their next departure from the port.

The agreement, particularly with reference to clause 3, seems to be an attempt to make provision for distributing the stevedoring business of all ships arriving in the port amongst the parties to the deed, and one mode adopted for ascertaining the set or class of ships to which each is to be entitled is by reference to the firms to which ships are on arrival consigned. It is of course quite usual, and is shewn to be so by the evidence given in the case, that ships should be chartered or loaded by others than the original consignees; and if the defendant's construction of the agreement were correct, it would follow that the parties would have provided only for the unloading of ships upon which there is comparatively little profit, and would in many, if not in most cases, have left out of their agreement the larger and more profitable business of loading them with the outward cargoes.

Their Lordships, therefore, agree with the judges of the Supreme Court in the construction they have placed upon the agreement on this point, and think that so much of the rule as prayed for a reduction of damages was rightly discharged. They may, however, observe here that the plaintiff, who insists on the construction which enables him, if the action is otherwise maintainable, to retain the full amount of damages

awarded by the jury, cannot escape from the effect of this construction upon the question of the validity of the agreement with reference to the objection that it is void as being in restraint of trade.

That question arises on the demurrer to the fourth plea.

The objects which this agreement has in view are to parcel out the stevedoring business of the port amongst the parties to it, and so to prevent competition, at least amongst themselves, and also it may be to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

The questions for consideration appear to them upon the authorities to be, whether and how far the prohibitions of this deed, having regard to its objects, are reasonable.

The numerous cases which have been decided on this subject are collected in the notes to Mitchel v. Reynolds in the first volume of Smith's Leading Cases. It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable. The Courts are not disposed to measure the adequacy of the consideration, if a real and *bona fide* consideration exists, and the modern decisions have mostly turned on the question of the reasonableness of the restraint in relation to the objects of the contract. It was said by Lord Ellenborough, in delivering the judgment of the Court in Gale v. Reed [8 East, 86]: "The restraint on one side meant to be enforced should in reason be co-extensive only with the benefits meant to be enjoyed on the other." He went on to say: "As the carrying the restraint further would be arbitrary and useless between the parties, a construction which would have that effect must be reluctantly resorted to," and for that reason a construction which would not have this effect was given to the particular agreement in that case.

In the case of Horner v. Graves [7 Bing. 743], Tindal, C. J., in delivering the judgment of the Court, said: "We do not

see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable."

The law as to the reasonableness of the restraint in contracts of this kind was very fully considered in the judgment of the Court of Exchequer in the case of Mallan and Others v. May [11 M. & W. 653]. There by a deed under which the defendant became assistant to the plaintiffs in their business of surgeon dentists, he covenanted that he would not carry on that business in London, "or in any of the towns or places in England or Scotland where the plaintiffs might have been practicing before the expiration of the defendant's service." The declaration contained two breaches; the first for practising in London, the second for practising in another place where the plaintiffs had practised. The Court adopted the principle of the decision in Horner v. Graves [7 Bing. 743], and holding the contract to be divisible, decided that the prohibition against practising in London was reasonable and good, but that the covenant against practising in other towns and places went beyond what the protection of any interests of the plaintiffs required, and was, therefore, an unreasonable restriction. The Court accordingly gave judgment for the plaintiffs on the first breach, and for the defendant on the second. The principles on which this case was decided were upheld by the Exchequer Chamber in Priee v. Green [16 M. & W. 346].

Applying the rule to be collected from the authorities, it appears to their Lordships that the provision contained in the second clause of the deed, viz., that if either of the named persons should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the first clause, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, to be determined by arbitrators, is not unreasonable, since it provides in a fair and reasonable way for each

party obtaining the benefit of the stevedoring of the ships to which by the contract he was to be entitled. Each party might in turn derive benefit from this clause, and one of the four firms would always get the profit of the ship stevedored, though the work might be done by another of them. As regards the merchant, also, he can have his ship stevedored by the party whom he may require to do it, at least there is no prohibition against his having it so done.

But the operation of the covenant at the end of the first clause, upon which the third breach in the action is founded, is productive of wholly different results. That covenant is only modified by clause 2 as regards the original consignees, and therefore in the case of ships passing out of the hands of the named firms to which they were consigned on arrival, and being chartered or loaded by other merchants (which is the present case), the effect of the covenant is, that as to such ships, if the merchants loading them should not choose to employ the party to the agreement who, as between themselves, was entitled to do the stevedoring, all the parties to the agreement are deprived of the work; in the words of Mr. Justice Fellows such ships are, "so to speak tabooed to them all." The covenant in such cases restrains three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of employing any of these parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well founded their objections may be to employ him. Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed.

Yet a construction of the clause producing the above-mentioned consequences is that on which the plaintiff insists, and on which he is compelled to rely to sustain his only remaining breach. He is not in a position to maintain his action upon

the second clause of the agreement, because Stewart, Couch & Co. did not refuse to employ him to do the work, and even if he could have brought his case within that clause, he must have failed in this action, because, as was rightly held by the Court below in dealing with the second breach, the action will not lie under clause 2 until the amount of the equivalent to be paid has been ascertained in the manner required by that clause.

The part of the agreement which is open to objection, though differing in its circumstances and in the degree of the restraint which it imposes on the freedom of trade, is not distinguishable in its nature from that which was held to be void in Hilton v. Eckersley [6 E. & B. 47; Ibib. 67]; whilst it cannot be justified on the ground upon which Mr. Justice Erle (who differed from the majority of the Court) thought the contract in that case might be supported, viz., that it might be necessary for the protection of the lawful interests of the parties. The object of the contracting parties in that case was to protect their interest as masters against combinations of workmen by an agreement to conduct their works, or wholly or partially to suspend them for a time, as the majority should resolve; and the learned judge thought that this object justified the mutual restraint of trade which they imposed on each other.

Upon the construction, therefore, which the plaintiff has placed upon the covenant in question, and which upon the whole their Lordships are of opinion is correct, they think, for the reasons above stated, that it creates an unreasonable restraint upon the parties in their trade, and ought not to receive the aid of the Courts to enforce it. They have already said that this objection does not apply to clause 2 of the deed, and they consequently think that judgment on the demurrer to the fourth plea should be entered for the defendant as to the first and third breaches, but for the plaintiff as to the second breach.

The remaining question is that raised by the demurrer to the third plea, though, after the opinion which their Lordships have just expressed, the decision of it is only material as regards costs.

The question so raised is, whether the general arbitration

clause (clause 11) affords an answer to the action, there having been no arbitration and no award under it.

Since the case of Scott v. Avery, in the House of Lords [5 H. L. C. 811], the contention that such a clause is bad as an attempt to oust the courts of jurisdiction may be passed by. The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one. That question must be determined in each case by the construction of the particular contract, and the intention of the parties to be collected from its language. The provision in the second clause of this contract falls, as their Lordships have already said, within the first-mentioned category, because the equivalent to be given in lieu of the profit would not be payable until the amount of it had been ascertained in the manner prescribed. But the 11th clause, according to the intention to be collected from the whole deed, appears to them, though by no means with clearness, to be a collateral and independent agreement. It extends to all doubts, differences, and disputes which should arise touching the agreement, and stipulates that all matters in difference should be submitted to arbitrators.

The learned counsel for the defendant strongly relied on the part of the clause which is in these words: "And the award of the arbitrators shall be conclusive, and any of the parties shall not be entitled to commence or maintain any action at law or suit in equity in respect of the matters so submitted as aforesaid, except for the amount or amounts by the said award determined to be paid by any one or more of the said parties to the other or others of them, or otherwise in accordance with the terms and conditions of the said award, as to the acts or deeds to be made, done, executed, and performed."

This passage, no doubt, contains negative words, but there is ambiguity in the words "in respect of the matters so submitted as aforesaid," as to whether they were meant to apply to all matters which were to be submitted to arbitrators under the clause, or to the matters which, after they arose, had been specifically submitted in the manner prescribed. Looking out

of this clause, it is material to consider clause 9, which is as follows: "That in case of any breach or non-performance by any of the parties hereto of any or either of the covenants or agreements hereinbefore contained, such party so committing such breach, or not performing such covenant or agreement, shall and will well and truly pay unto each of the other parties hereto respectively, their or his executors, administrators, or assigns, the sum of one thousand pounds, as and for liquidated damages for such breach or non-performance, but without prejudice nevertheless to the right of any of the said parties hereto to enforce the specific performance of the covenants and agreements hereinbefore contained, or any or either of them."

It may be inferred from this clause that the parties contemplated that an action might be brought for these damages, and with reference to the proviso to the clause, that they intended to reserve the right to bring a suit for specific performance. Their Lordships are, therefore, disposed to think that the negative words in the arbitration clause were only intended to apply to matters actually submitted to arbitration. They will not, therefore, disturb the judgment of the Court below on this point.

The other points mentioned by the appellant's counsel were disposed of during the argument.

In the result, their Lordships are of opinion that the rule *nisi*, so far as it prays to enter the verdict for the defendant on the first and second breaches, should be made absolute, and as to the rest should be discharged; that the judgment for the plaintiff on the demurrer to the third plea should be affirmed; and that the judgment for the plaintiff on the demurrer to the fourth plea should be reversed as to the first and third breaches, and judgment entered as to these breaches for the defendant, and they will humbly advise Her Majesty accordingly.

The appellant having succeeded only on the point of the partial invalidity of the agreement, in respect to which both parties are equally in fault, their Lordships will make no order as to the cost of this appeal.

MOGUL STEAMSHIP CO. v. McGREGOR, GOW & CO.

(House of Lords, 1891. L. R. [1892] App. Cas. 25.)

Appeal from a decision of the Court of Appeal [23 Q. B. D. 598]. The action was brought by the appellants against the respondents. The statement of claim alleged as follows:

1. The plaintiffs have suffered damage by reason of the defendants (other than Sutherland, Barnes, Holt, and Swire), as and being owners of numerous steamers trading between ports in the Yangtsekiang River and London, and the defendants Sutherland, Barnes, Holt, and Swire, as and being interested in the steamers owned by the defendants the Peninsular and Oriental Steam Navigation Company and the Ocean Steamship Company, conspiring together and with other persons at present unknown to the plaintiffs to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs from shippers to be carried from ports in the said river to London, for reward to the plaintiffs in that behalf.

2. The conspiracy consisted and consists of a combination and agreement by and amongst the defendants (other than Sutherland, Barnes, Holt, and Swire) as and being owners of steamers trading as aforesaid and having by reason of such combination and agreement control of the homeward shipping trade, and the defendants Sutherland, Barnes, Holt, and Swire, as and being interested in the steamers owned as aforesaid, pursuant to which shippers were and are bribed, coerced and induced to agree to forbear and to forbear from shipping cargoes by the steamers of the plaintiffs.

3. In the alternative the conspiracy consisted and consists of a combination and agreement by and amongst the defendants, as and being owners of and interested in steamers as aforesaid, pursuant to which the defendants, with the intent to injure the plaintiffs and prevent them obtaining cargoes for their steamers trading between the said ports, agreed to refuse and refused to accept cargoes from shippers except upon the terms that the said shippers should not ship any cargoes by the steamers of the plaintiffs, and by threats of stopping the shipment of homeward cargoes altogether, which threats they had the power and intended to carry into effect, did and do prevent shippers from shipping cargoes by the

plaintiffs' steamers and threaten and intend to continue so to do.

The plaintiffs claimed damages and an injunction to restrain the defendants from continuing the said wrongful acts. An application for an interim injunction was refused by Lord Coleridge, C. J., and Fry, L. J. [15 Q. B. D. 476]. The following are the material facts proved at the trial of the action before Lord Coleridge, C. J., without a jury.

The appellant company was incorporated in 1883 and took over the steamers owned by Gellatly & Co., and among them the SS. Pathan, Afghan, and Ghazee, which were in China in the tea seasons of 1884 and 1885. Gellatly & Co. were the principal owners in and managers of the appellant company, and were also the London outward loading brokers of the Ocean Steamship Company. The respondents were owners of, or managing owners interested in, steamers engaged in the trade between China and England and elsewhere.

The "tea season" in China lasts about five to six weeks, beginning from the latter part of May. Tea exported during the season from Hankow for England is either shipped there (600 miles up the river Yangtsze) direct for England or sent to Shanghai (at the mouth of the river) and there re-shipped. The defendants desire to secure this trade for themselves to maintain freights at remunerative rates. With this object they had in some previous years agreed among themselves to regulate the amount of tonnage to be sent up to Hankow and the freights to be demanded. In the spring of 1884 they held a conference, as the result of which they issued to merchants and shippers in China the following circular:

"Shanghai, 10th May, 1884.

"To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. & O. S. N. Co.'s M. M. Co.'s O. S. N. Co.'s Glen, Castle, Shire and Ben lines and to the SS. Oopack and Ningchow, we shall be happy to allow a rebate of 5 per cent. on the freights charged.

"Exporters claiming the returns will be required to sign a declaration that they have not made or been interested in any shipments of tea or general cargo to Europe (excepting the

ports above named; by other than the said lines. Shipments by the SS. Albany, Pathan, and Ghazee on their present voyages from Hankow will not prejudice claims for returns. Each line to be responsible for its own returns only, which will be payable half-yearly, commencing the 30th of October next. Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even although its other branches may have given entire support to the above lines.

"The foregoing agreement on our part to be in force from present date till the 30th of April, 1886."

The plaintiffs (who were not members of the conference) were admitted to the benefits of the arrangement in respect of their vessels, the Pathan and Ghazee, for the homeward voyage of that season only.

In 1885 the defendants held another conference and came to a written agreement, dated the 7th of April, which regulated as between the defendants the tea trade with China and Japan, and provided for a certain division of cargoes for the determination of the rates of freight and for the continuance of the rebate of 5 per cent. It also provided that if "outsiders" should start for Hankow, Conference steamers must meet them there, the selection of tonnage to be employed for this purpose being left to the Shanghai agents of the lines in consultation together, the number to be limited as much as consistent with effective opposition. That should there not be a Conference steamer in port or named for despatch within a week with available cargo space, shipments made by an outsider during that period should not invalidate the claim for the rebate of 5 per cent. on the freights. That agents of Conference steamers in China and Japan should be prohibited from being interested directly or indirectly in opposing steamers, or in the loading of sailing vessels of outsiders. And that the agreement might be terminated at any time on notice being given by the party wishing to retire to each of the others, but only by principals at home and not by agents abroad. Copies of this agreement were sent by the defendants to their agents at Shanghai. The plaintiffs desired to

join this conference, but were excluded from it and from all its benefits, and in May, 1885, sent the Pathan and Afghan to Hankow to endeavor to secure homeward cargoes. The defendants' agents at Shanghai thereupon sent to shippers at Hankow the following circular:

"Private. Shanghai, 11th May, 1885.

"Referring to our circular dated the 10th of May, 1884, we beg to remind you that shipments for London by the SS. Pathan, Afghan, and Aberdeen, or by other non-Conference steamers at any of the ports in China or at Hong Kong, will exclude the firm making such shipments from participation in the return during the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the Conference lines."

The defendants also despatched some Conference steamers to Hankow to oppose the Pathan and Afghan and secure the freights, if possible, to the exclusion of non-Conference vessels, and with this object they underbid the plaintiffs and caused a general reduction of freights at Hankow. In the result the Pathan and Afghan obtained freights, but at very low and unremunerative rates. A letter of the 1st of May was put in from the chairman of the P. & O. Co. to their agent at Shanghai to the effect that if a firm of agents at Hankow (who acted there both for that company and for the plaintiffs) should carry out their intention of loading the plaintiffs' vessels home the P. & O. Co. would have to close their relations with them. On the 28th of May, Gellatly & Co. were dismissed from the agency of the Ocean Steamship Company.

The action was brought on the 29th of May, 1885. It was agreed that the damages should, if necessary, be ascertained by a reference. Lord Coleridge, C. J., made an order entering judgment for the defendants with costs [21 Q. B. D. 544]. That order was affirmed by the Court of Appeal (Bowen and Fry, L. JJ., Lord Echer, M. R., dissenting [23 Q. B. D. 598]). Dec. 18. Lord Halsbury, L. C.:

My Lords, notwithstanding the elaborate examination which this case has undergone, both as to fact and law, I believe the

facts may be very summarily stated, and when so stated the law seems to me not open to doubt.

As associated body of traders endeavor to get the whole of a limited trade into their own hands by offering exceptional and very favorable terms to customers who will deal exclusively with them; so favorable that but for the object of keeping the trade to themselves they would not give such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade to themselves.

I do not think that I have omitted a single fact upon which the appellants rely to show that this course of dealing is unlawful and constitutes an indictable conspiracy.

Now it is not denied and cannot be even argued that prima facie a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice." This is the language of Baron Alderson in delivering the judgment of the Exchequer Chamber [Hilton v. Eckersley, 6 E. & B. at pp. 74, 75], and no authority, indeed no argument, has been directed to qualify that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a "matter contrary to law."

Now, after a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful it seems to me that the greater part of commercial dealings, where there is rivalry in the trade, must be equally unlawful.

There are doubtless to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyzes what is the real meaning of such phrases it is manifest that all that is intended to be implied by them is that any rival trading which shall be started against the association will be

rendered unprofitable by the more favorable terms, that is to say, the reduced freights, discounts, and the like which will be given to customers who will exclusively trade with the associated body. And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade to yourself. If such an injury, and the motive of its infliction, is examined and tested, upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful, a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness.

The learned counsel who argued the case for the appellants, with their usual force and ability, were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction, violence, molestation, or interference was proved against the associated body of traders, and, as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful.

The sending up of ships to Hankow, which in itself, and to the knowledge of the associated traders, would be unprofitable, but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition, is the one fact which appears to be pointed to as out of the ordinary course of trade. My Lords, after all, what can be meant by "out of the ordinary course of trade"? I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself.

I entirely adopt and make my own what was said by Lord

Justice Bowen in the Court below: "All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.'"

Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will, and nothing has been done except in rival trading which can be supposed to interfere with the appellants' interests.

I think this question is the first to be determined: What injury, if any, has been done? What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism [21 Q. B. D. 551] (if its meaning was rightly interpreted, which I very much doubt) on the observations made by my noble and learned friend, Lord Bramwell, in Reg. v. Druitt [10 Cox, C. C. 592], if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanor, and I cannot think the Chief Justice meant to throw any doubt upon such a proposition.

But in this case the thing done, the trading by a number of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the

course of trade by a person who singly trades for his own benefit and apart from partnership or sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections. The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors (if they might be supposed to have knowledge of the transaction) would be acting in combination for the general result, and would, whether for the benefit of the individual, or for an associated body of traders, make it not the less combined action than if the combination were to share profits with independent traders; and if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defense that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination.

A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in restraint of trade. There are two senses in which the word "unlawful" is not uncommonly, though, I think, somewhat inaccurately used. There are some contracts to which the law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade: and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word "unlawful," which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as *contrary to law,* is not applicable to such contracts.

It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated. A judge in very early times expressed great indignation at such a contract; and Mr. Justice Crompton undoubtedly did say

(in a case where such an observation was wholly unnecessary to the decision, and therefore manifestly *obiter*), that the parties to a contract in restraint of trade would be indictable. I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle.

In the result, I think that no case whatever is made out of a conspiracy such as the appellants here undertook to establish; and it is not unimportant, for the reasons I have given, to see what is the conspiracy alleged in the statement of claim. The first paragraph alleges the conspiracy to be "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs." The word "prevent" is sufficiently wide to comprehend both lawful means and unlawful; but as I have already said, in proof there is nothing but the competition with which I have dealt.

The second paragraph alleges that in pursuance of the conspiracy people were "bribed, coerced, and induced to agree to forbear and to forbear from shipping cargoes by the steamers of the plaintiffs."

If the word "bribed" is satisfied by the offering lower freights and larger discounts, then that is proved; but then the word "bribed" is robbed of any legal significance. "Coerced" is not justified by any evidence in the case, and the word "induced" is absolutely neutral, and no unlawful inducement is proved.

The third paragraph uses language such as "intention to injure the plaintiffs," "threats of stopping the shipment of homeward cargoes," and the like. But I ask myself whether if the indictment had set out the facts without using the ambiguous language to which I have referred in the statement of claim, it would have disclosed an indictable offense? I am very clearly of opinion it would not.

I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom

as to render it unprofitable for rival customers to pursue the same trade is unlawful, and I am clearly of opinion that it is not.

I think, therefore, that the appeal ought to be dismissed with costs, and I so move your Lordships.

LORD WATSON: My Lords, at the hearing of this appeal in April last, your Lordships had the benefit of listening to a learned and exhaustive discussion of the law applicable to combination or conspiracy. It appeared to me at the time, and further consideration has confirmed my impression, that much of the legal argument addressed to us had a very distant relation to the circumstances of the present case, which are simple enough. The evidence, oral and documentary, contains an unusual amount of figurative language, indicating a wide difference of opinion as to the legal aspect of the facts, but presents no conflict in regard to the facts themselves.

The respondents are firms and companies owning steam vessels which ply regularly, during the whole year, some of them on the Great River of China between Hankow and Shanghai, and others between Shanghai and European ports. During the tea season, which begins in May and lasts for about six weeks, most shippers prefer to have their tea sent direct from Hankow to Europe; but it suits the respondents' trade better to have the tea which they carry brought down to Shanghai by their ordinary river service, and then transhipped for Europe. Accordingly they do not send their ocean steamers up the river, except when they find it necessary in order to intercept cargoes which might otherwise have been shipped from Hankow in other than their vessels.

The appellants are also a ship-owning company. They do not maintain a regular service either on the Great River or between Europe and Hankow; but they send vessels to Hankow during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade, which appear, in ordinary circumstances, to have been considerable.

The respondents entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent

the appellants and other outsiders from obtaining a share of the trade.

The consequence of their acting upon the agreement was that the appellants, having sent their ships to Hankow, were unable to obtain cargoes at remunerative rates; and they claim as damages due to them by the respondents, the difference between their actual earnings and the freights which their vessels might have earned had it not been for the combined action of the respondents. As the law is now settled, I apprehend that in order to substantiate their claim, the appellants must shew, either that the object of the agreement was unlawful, or that illegal methods were resorted to in its prosecution. If neither the end contemplated by the agreement, nor the means used for its attainment were contrary to law, the loss suffered by the appellants was *damnum sine injuria.*

The agreement of which the appellants complain left the contracting parties free to recede from it at their pleasure, and is not obnoxious to the rule of public policy, which was recognized in Hilton v. Eckersley [6 E. & B. 47]. The decision in that case, which was the result of judicial opinions not altogether reconcilable, appears to me to carry the rule no farther than this—that an agreement by traders to combine for a lawful purpose, and for a specified time, is not binding upon any of the parties to it if he chooses to withdraw, and consequently cannot be enforced in *invitum.* In my opinion it is not an authority for the proposition that an outsider can plead the illegality of such a contract, whilst the parties are willing to act, and continue to act upon it. I venture to think that the decision of this appeal depends upon more tangible considerations than any which could be derived from the study of what is generally known as public policy.

There is nothing in the evidence to suggest that the parties to the agreement had any other object in view than that of defending their carrying-trade during the tea season against the encroachments of the appellants and other competitors, and of attracting to themselves custom which might otherwise have been carried off by these competitors. That is an object which is strenuously pursued by merchants great and small in every branch of commerce; and it is, in the eye of the law, perfectly legitimate. If the respondents' combination had

been formed, not with a single view to the extension of their business and the increase of its profits, but with the main or ulterior design of effecting an unlawful object, a very different question would have arisen for the consideration of your Lordships. But no such case is presented by the facts disclosed in this appeal.

The object of the combination being legal, was any illegal act committed by the respondents in giving effect to it? The appellants invited your Lordships to answer that question in the affirmative, on the ground that the respondents' competition was unfair, by which they no doubt meant that it was tainted by illegality. The facts which they mainly relied on were these: that the respondents allowed a discount of 5 per cent. upon their freight accounts for the year to all customers who shipped no tea to Europe except by their vessels; that, whenever the appellants sent a ship to load tea at Hankow, the respondents sent one or more of their ocean steamers to underbid her, so that neither vessel could obtain cargo on remunerative terms; and lastly, that the respondents took away the agency of their vessels from persons who also acted as shipping agents for the appellants and other trade competitors outside the combination.

I cannot for a moment suppose that it is the proper function of English Courts of Law to fix the lowest prices at which traders can sell or hire, for the purpose of protecting or extending their business, without committing a legal wrong which will subject them in damages. Until that becomes the law of the land, it is, in my opinion, idle to suggest that the legality of mercantile competition ought to be gauged by the amount of the consideration for which a competing trader thinks fit to part with his goods or to accept employment. The withdrawal of agency at first appeared to me to be a matter attended with difficulty; but on consideration, I am satisfied that it cannot be regarded as an illegal act. In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage.

My Lords, in this case it has not been proved, and it has not been suggested, that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination. The only means by which they endeavoured to obtain shipments for their vessels, to the exclusion of others, was the inducement of cheaper rates of freight than the appellants were willing to accept. I entertain no doubt that the judgment appealed from ought to be affirmed. I am quite satisfied with the reasons assigned for it by BOWEN and FRY, L. JJ.; and the observations which I have made were not meant to add to these reasons, but to make it clear that in my opinion the appellants have presented for decision no question of fact or law attended with either doubt or difficulty.

LORD MACNAGHTEN: My Lords, the judgment which I am about to read is the judgment of my noble and learned friend Lord Bramwell, who is unable to be present here this morning and has asked me to read it for him.

LORD BRAMWELL: My Lords, the plaintiffs in this case do not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them. The plaintiffs admit that materially and morally they have been at liberty to do their best for themselves without any impediment by the defendants. But they say that the defendants have entered into an agreement in restraint of trade; an agreement, therefore, unlawful; an agreement, therefore, indictable, punishable; that the defendants have acted in conformity with that unlawful agreement, and thereby caused damage to the plaintiffs in respect of which they are entitled to bring, and bring this action.

The plaintiffs have proved an agreement among the defendants, the object of which was to prevent shipowners, other than themselves, from trading to Shanghai and Hankow. The way in which that was to be accomplished was by giving benefits to those who shipped exclusively by them, by sending vessels to compete with the plaintiffs', and by lowering their,

the defendants', rates of freight so that the plaintiffs had to lower theirs to their great loss. There are other matters alleged, but they are accessorial to the above, which is the substance of the complaint.

The plaintiffs also say that these things, or some of them, if done by an individual, would be actionable. This need not be determined directly, because all the things complained of have their origin in what the plaintiffs say is unlawfulness, a conspiracy to injure; so that if actionable when done by one, much more are they when done by several, and if not actionable when done by several, certainly they are not when done by one. It has been objected by capable persons, that it is strange that that should be unlawful if done by several which is not if done by one, and that the thing is wrong if done by one, if wrong when done by several; if not wrong when done by one, it cannot be when done by several. I think there is an obvious answer, indeed two; one is, that a man may encounter the acts of a single person, yet not be fairly matched against several. The other is, that the act when done by an individual is wrong though not punishable, because the law avoids the multiplicity of crimes: *de minimis non curat lex;* while if done by several it is sufficiently important to be treated as a crime. Let it be, then, that it is no answer to the plaintiffs' complaint that if what they complain of had been done by an individual there would be no cause of action. There is the further question whether there is a cause of action, the acts being done by several.

The first position of the plaintiffs is that the agreement among the defendants is illegal as being in restraint of trade, and therefore against public policy, and so illegal. "Public policy," said BURROUGH, J. (I believe, quoting HOBART, C. J.), "is an unruly horse, and dangerous to ride." [Richardson v. Mellish, 2 Bing. at p. 252.] I quote also another distinguished judge, more modern, CAVE, J.: "Certain kinds of contracts have been held void at Common Law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." [(1891) 1 Q. B. 595.] I think the present case is an illustration of the wisdom of these remarks.

I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy, and void. How can the judge do that without any evidence as to its effect and consequences? If the shipping in this case was sufficient for the trade, a further supply would have been a waste. There are some people who think that the public is not concerned with this—people who would make a second railway by the side of one existing, saying "only the two companies will suffer," as though the wealth of the community was not made up of the wealth of the individuals who compose it. I am by no means sure that the conference did not prevent a waste, and was not good for the public. Lord Coleridge thought it was—see his judgment.

As to the suggestion that the Chinese profited by the lowering of freights, I cannot say it was not so. There may have been a monopoly or other cause to give them a benefit; but, as a rule, it is clear that the expense of transit, and all other expenses, borne by an exported article *that has a market price*, are borne by the importer, therefore, ultimately, by the consumer. So that low freights benefit him. To go on with the case, take it that the defendants had bound themselves to each other; I think they had, though they might withdraw. Let it be that each member had tied his hands; let it be that that was in restraint of trade; I think upon the authority of Hilton v. Eckersley [6 E. & B. 47], and other cases, we should hold that the agreement was illegal, that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground they must make out that it was an offence, a crime, a misdemeanor. I am clearly of opinion it was not. Save the opinion of Crompton, J. (entitled to the greatest respect, but not assented to by Lord Campbell or the Exchequer Chamber), there is no authority for it in the English law.

It is quite certain that an agreement may be void, yet the parties to it not punishable. Take the case I put during the argument: a man and woman agree to live together as man and wife, without marrying. The agreement is illegal, and could not be enforced, but clearly the parties to it would not

be indictable. It ought to be enough to say that the fact that there is no case where there has been a conviction for such an offense as is alleged against the defendants is conclusive.

It is to be remembered that it is for the plaintiffs to make out the case that the defendants have committed an indictable offence, not for the defendants to disprove it. There needs no argument to prove the negative. There are some observations to be made. It is admitted that there may be fair competition in trade, that two may offer to join and compete against a third. If so, what is the definition of "fair competition"? What is unfair that is neither forcible nor fraudulent? It does seem strange that to enforce *freedom* of trade, of action, the law should punish those who make a perfectly honest agreement with a belief that it is fairly required for their protection.

There is one thing that is to me decisive. I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law; perhaps not enforceable *inter se*, but not indictable. The Legislature has now so declared. The enactment is express, that agreements among workmen shall be binding, whether they would or would not, but for the acts, have been deemed unlawful, as in restraint of trade. Is it supposable that it would have done so in the way it has, had the workmen's combination been a punishable misdemeanor? Impossible. This seems to me conclusive, that though agreements which fetter the freedom of action in the parties to it may not be enforceable, they are not indictable. See also, the judgment of FRY, L. J., on this point. Where is such a contention to stop? Suppose the case put in the argument: In a small town there are two shops, sufficient for the wants of the neighborhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending shopkeeper that if he comes they will lower prices, and can afford it longer than he. Have they committed an indictable offence? Remember the conspiracy is the offence, and they have conspired. If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might shew that from his skill he would have beaten one or both of the others. See in this case the

judgment of Lord Esher, that the plaintiffs might recover for "damages at large for future years." Would a ship owner who had intended to send his ship to Shanghai, but desisted owing to the defendants' agreement, and on being told by them they would deal with him as they had with the plaintiffs, be entitled to maintain an action against the defendants? Why not? If yes, why not every shipowner who could say he had a ship fit for the trade, but was deterred from using it?

The Master of the Rolls cites Sir William Erle, that "a combination to violate a private right in which the public has a sufficient interest is a crime, such violation being an actionable wrong." True, Sir William Erle means that where the violation of a private right is an actionable wrong, a combination to violate it, if the public has a sufficient interest, is a crime. But in this case, I hold that there is no private right violated. His Lordship further says: "If one goes beyond the exercise of the course of trade, and does enact beyond what is the course of trade, in order—that is to say, with intent—to molest the other's free course of trade, he is not exercising his own freedom of a course of trade, he is not acting in but beyond the course of trade, and then it follows that his act is an unlawful obstruction of the other's right to a free course of trade, and if such obstruction causes damage to the other he is entitled to maintain an action for the wrong." [23 Q. B. D. 607.] I may be permitted to say that this is not very plain. I think it means that it is not in the course of trade for one trader to do acts the motive of which is to damage the trade of another. Whether I should agree depends on the meaning to be put on "course of trade" and "molest." But it is clear that the Master of the Rolls means conduct which would give a cause of action against an individual. He cites Sir William Erle in support of his proposition, who clearly is speaking of acts which would be actionable in an individual, and there is no such act here.

The Master of the Rolls says the lowering of the freight far beyond a lowering for any purpose of trade was not an act done in the exercise of their own free right of trade, but for the purpose of interfering with the plaintiffs' right to a free course of trade; therefore a wrongful act as against the plain-

tiffs' right; and as injury to the plaintiffs followed, they had a right of action. I cannot agree. If there were two shopkeepers in a village and one sold an article at cost price, not for profit therefore, but to attract customers or cause his rival to leave off selling the article only, it could not be said he was liable to an action. I cannot think that the defendants did more than they had a legal right to do. I adopt the vigorous language and opinion of FRY, L. J.: "To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts." [23 Q. B. D. 625, 626.] It is a strong thing for the plaintiffs to complain of the very practices they wished to share in, and once did.

I am of opinion that the judgment should be affirmed.

LORD MACNAGHTEN: My Lords, for myself I agree entirely in the motion which has been proposed, and in the reasons assigned for it in the judgments which have been delivered and in those which are yet to be delivered; and I do not think I can usefully add anything of my own.

LORD MORRIS: My Lords, the facts of this case demonstrate that the defendants had no other, or further, object than to appropriate the trade of the plaintiffs. The means used were: firstly, a rebate to those who dealt exclusively with them; secondly, the sending of ships to compete with the plaintiffs' ships; thirdly, the lowering of the freights; fourthly, the indemnifying other vessels that would compete with the plaintiffs'; fifthly, the dismissal of agents who were acting for them and the plaintiffs.

The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain by appropriation of the trade, and the means he uses be lawful weapons. Of the first four of the means used by the defendants, the rebate to customers and the lowering of the freights are the same in principle, being a bonus by the defendants to customers to come and deal exclusively with them. The sending of ships to compete, and the indemnifying other ships, was "the competition" entered on by the defendants with the plaintiffs. The fifth means used, viz., the dismissal of agents, might be questionable ac-

cording to the circumstances; but in the present case, the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and the defendants. Dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade.

All the acts done, and the means used, by the defendants were acts of competition for the trade. There was nothing in the defendants' acts to disturb any existing contract of the plaintiffs, or to induce any one to break such. Their action was aimed at making it unlikely that any one would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably prevent them. The use of rhetorical phrases in the correspondence cannot affect the real substance and meaning of it.

Again, what one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise. I entertain no doubt that a body of traders, whose motive object is to promote their own trade, can combine to acquire, and thereby in so far to injure the trade of competitors, provided they do no more than is incident to such motive object, and use no unlawful means. And the defendants' case clearly comes with the principle I have stated.

Now, as to the contention that the combination was in restraint of trade, and therefore illegal. In the first place, was it in restraint of trade? It was a voluntary combination. It was not to continue for any fixed period, nor was there any penalty attached to a breach of the engagement. The operation of attempting to exclude others from the trade might be, and was, in fact, beneficial to freighters. Whenever a monopoly was likely to arise, with a consequent rise of rates, competition would naturally arise.

I cannot see why judges should be considered specially gifted with prescience of what may hamper or what may increase trade, or of what is to be the test of adequate remuneration. In these days of instant communication with almost all parts of the world competition is the life of trade, and I am not aware of any stage of competition called "fair" intermediate

between lawful and unlawful. The question of "fairness" would be relegated to the idiosyncrasies of individual judges. I can see no limit to competition, except that you shall not invade the rights of another.

But suppose the combination in this case was such as might be held to be in restraint of trade, what follows? It could not be enforced. None of the parties to it could sue each other. It might be held void, because its tendency might be held to be against the public interest. Does that make, *per se*, the combination illegal? What a fallacy would it be that what is void and not enforceable becomes a crime; and cases abound of agreements which the law would not enforce, but which are not illegal; which you may enter into, if you like, but which you will not get any assistance to enforce.

My Lords, I have merely summarized my views, because I adopt entirely the principles laid down by Lord Justice Bowen in his judgment with such felicitous illustrations, and I concur in the opinion already announced by your Lordships, that the judgment of the Court of Appeal should be affirmed.

LORD FIELD: My Lords, I think that this appeal may be decided upon the principles laid down by Holt, C. J., as far back as the case of Keeble v. Hickeringill, cited for the appellants. [11 Mod. 74, 131, and note to Carrington v. Taylor, 11 East. 574.] In that case the plaintiff complained of the disturbance of his "decoy" by the defendant having discharged guns near to it and so driven away the wild fowl, with the intention and effect of the consequent injury to his trade. Upon the trial a verdict passed for the plaintiff, but in arrest of judgment it was alleged that the declaration did not disclose any cause of action. Holt, C. J., however, held that the action, although new in instance, was not new in reason or principle, and well lay, for he said that the use of a "decoy" was a lawful trade, and that he who hinders another in his trade or livelihood is liable to an action if the injury is caused by "a violent or malicious act;" suppose "for instance," he said, "the defendant had shot in his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong." But, he added, if the defendant, "using the same

employment as the plaintiff," had set up another decoy so near as to spoil the plaintiff's custom, no action would lie, because the defendant had "as much liberty to make and use a decoy" as the plaintiff. In support of this view he referred to earlier authorities. In one of them it had been held that for the setting up of a new school to the damage of an ancient one by alluring the scholars no action would lie, although it would have been otherwise if the scholars had been driven away by violence or threats.

It follows therefore from this authority, and is undoubted law, not only that it is not every act causing damage to another in his trade, nor even every intentional act of such damage, which is actionable, but also that acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action.

Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way and under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him, and not the pursuit of lawful rights. No doubt, also, there have been cases in which agreements to do acts injurious to others have been held to be indictable as amounting to conspiracy, the ultimate object or the means being unlawful, although if done by an individual no such consequence would have followed, but I think that in all such cases it will be found that there existed either an ultimate object or malice, or wrong, or wrongful means of execution involving elements of injury to the public, or, at least, negativing the pursuit of a lawful object.

Now, applying these principles to the case before your Lordships, it appears upon the evidence that the appellants and respondents are shipowners, and have for many years been engaged, sometimes in alliance, at other times in competition, in the carrying trade of the eastern seas to and from Europe and elsewhere. A very important portion of this trade consists of a large amount of freight to be earned at the ports of Hankow and Shanghai during the season by carrying to Europe the teas brought there for shipment, and it was

of the respondents' action in that business during the season of 1885 that the appellants complain. They do not allege that the respondents have been guilty of any act of fraud or violence, or of any physical obstruction to the appellants' business, or have acted from any personal malice or ill-will, but they say that the respondents acted with the calculated intention and purpose of driving the appellants out of the Hankow season carrying trade by a course of conduct which, although not amounting to violence, was equally effective, and so being in fact productive of injury to them was wrongful and presumably malicious.

It appeared upon the evidence that both parties have been for some years trading in competition at Hankow for tea freights, which amounted to a very considerable sum, and the earning of which was spread over a short annual season. The trade was carried on by a large number of independent shipowners, and the tonnage which was employed may be roughly divided into two classes: First, tonnage engaged in regular lines to and from ports in the China and Japan seas all the year through, loading both outwards and inwards; and secondly, tonnage loading generally outwards to ports in Australia or elsewhere, and only seeking freights and taking up "homeward" berths at Hankow during the short period when freights are abundant there and scarce elsewhere. The several respondents and the "Messageries Maritimes" of France represent substantially the first class of shipowners. The appellants and other shipowners, who are no parties to this record, but some of whom were in alliance with the appellants, in the same interest, forming a very influential class of traders, may be taken to represent the second.

The two ports of Hankow and Shanghai are the centres of these competing interests, and it is hardly necessary to add that the competition was very severe, and the accumulation of tonnage for "homeward" freights produced by the circulation of an excessive number of ships rendered rates so unremunerative that in each of the years 1879, 1883, and 1885, a combination of shipowners, known as a "conference," was formed, consisting in the main of the first class of owners, with the object of limiting the amount of tonnage to be sent

up the river, and thus securing enhancement and regularity of rates.

That the parties to these agreements did not suppose that they were doing anything violent or malicious, or were parties to a conspiracy, rendering themselves liable to action or indictment, is clear from the fact that in 1879 Messrs. Gellatly & Co., who then owned the ships of which the appellants are now the owners, and in 1884 the appellants (whose managers Messrs. Gellatly were and are) were parties to them, and in 1885 desired to become so, and only brought their present action because the other parties to the conference of that year refused to extend its provisions to them and others in the same commercial position.

The grounds upon which this refusal was based by the respondents were purely of a commercial and in no way of a personal character. They said that in forming what they considered as the regular China and Japan trade out and home they supplied the trade with tonnage in season and out of season, and that it was hard upon them that at times when cargo necessary for their requirements, in order to fill the space required for outward shipments, and to make their adventure remunerative, was to be obtained, that cargo should be absorbed by vessels that only entered the trade when trade homewards was slack elsewhere.

It is absolutely unnecessary to consider whether these grounds were morally or commercially justifiable. They were not unlawful, and they were of a nature legitimately, if not necessarily, to be taken into account in carrying on the respondents' business with profit. Indeed, the question between the parties at that time was not whether such combination should exist or not, but where the line should be drawn. It was in this state of things that the season of 1885 opened.

Under the conference agreement of 1884 it had been agreed between the conference owners and the appellants that the latter should load homewards from Hankow for that season two of their Australian outward-going ships upon conference terms and rates; and when in the latter part of 1884 negotiations were set on foot for the establishment of a conference in 1885 the appellants were desirous of at least retaining the same position in future. They therefore requested Mr. Holt,

one of the respondents, an influential member of the conference and personal friend of Mr. Gellatly, to bring the matter before them. In the meanwhile the effect of unrestricted competition had been such as to produce what was termed "a collapse of freights," with the result that negotiations for a new conference ended in an agreement to that effect, bearing date the 7th of April, the terms of which were in most, if not in all important respects, similar to the agreement of 1884.

The first object of the parties to this agreement was to limit as between themselves the number of ships, and it therefore provided that if no other ships than those of the conference owners went, no more than six conference ships should go up the river to Hankow; but then in order to meet the threatened competition of the appellants and others it was provided that if "outsiders" started, additional steamers should meet them, such conference steamers to be limited in number "as much as was consistent with effective opposition." Principles were also laid down for rates of freight and distribution of cargo and freights among conference owners, and in order to induce shippers to ship with them exclusively it was provided that returns should be made upon the same terms as previously arranged by agreement of 1884 (to which the appellants have been parties) to all exporters who should confine their shipments to conference ships.

Whilst the negotiations for this agreement were pending, Mr. Gellatly, a large shareholder in the appellant company, in company with Mr. Thompson, a shipowner with large tonnage at command, who was also desirous of becoming a member of the conference, had both correspondence and interviews with several of the conference owners, in which they claimed to be admitted to the terms of it, but the latter persistently objected upon the ground that I have before stated, and in the result Mr. Gellatly and Mr. Thompson declared that their vessels should certainly go up to Hankow the ensuing season, as, no matter what the rates were, they thought (as indeed appears to have been the result) that the loss to the conference would be greater than to them.

No agreement could therefore be come to between the two parties, and in the result the appellants and Mr. Thompson placed ships of very considerable tonnage, which had made

their outward voyage to Australian ports, upon the Hankow berth, and the respondents sent up the additional ships provided for by the conference agreement, not only to compete with the appellants' and Mr. Thompson's ships, but also to deter others from following.

On the 11th of May the respondents also sent out a circular to shippers, referring to a similar circular issued under the conference agreement of 1884, by which they reminded those to whom it was sent that shipments for London by the SS. Pathan and Afghan (two of the appellants' ships) and the Aberdeen (Mr. Thompson's), or by other non-conference steamers, at any of the ports in China or at Hong Kong, would exclude those making such shipments from participation in the returns to shippers.

The competition thus created was persisted in during the whole first tea season, each party procuring, or endeavoring to procure, freights, and circulating their ships at reduced rates, with the result that the three opposing ships of the appellants and Mr. Thompson, the Pathan, the Afghan, and the Aberdeen, loaded full cargoes home at very low rates, and many of the conference ships had to go away empty.

It was under these circumstances that the appellants brought the present action, in which they in substance complain, first, of the return of 5 per cent. to the shippers who have not shipped with the appellants, and of the circular to that effect; secondly, of the placing upon the berths of extra ships in order to meet the appellants' and other vessels; and thirdly, the reduction of freights to an unremunerative extent with the object of securing cargo. I fail, however, to see that any of those things are sufficient to support this action. Everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was bona fide so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the proposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm. All the acts complained of were in themselves lawful, and if they caused loss to the ap-

pellants, that was one of the necessary results of competition.

It remains to consider the further contention of the appellants that these acts of the respondents, even if lawful in themselves if done by an individual, are illegal and give rise to an action as having been done in the execution of the conference agreement, which is said to amount to a conspiracy, as being in restraint of trade, and so against public policy, and illegal; but this contention, I think, also fails. I cannot say upon the evidence that the agreement in question was calculated to have or had any such result, nor, even if it had, has any authority (except one, no doubt entitled to great weight, but which has not met with general approval) been cited to shew that such an agreement even if void is illegal, nor any that, even if it be so, any action lies by an individual.

For these, and the other reasons given by the learned Lords Justices BOWEN and FRY, and which I need not recapitulate, I think that the appeal fails, and ought to be dismissed.

LORD HANNEN: My Lords, it is not necessary that I should recapitulate the facts of this case; they have been fully stated in the opinions which have been already delivered. The charge against the defendants is that they conspired together to prevent the plaintiffs from obtaining cargoes for their ships by bribing, coercing, and inducing shippers to forbear from shipping cargoes by the plaintiffs' steamers; and it is further complained that the defendants, with intent to injure the plaintiffs, agreed to refuse, and refused to accept cargoes, except upon the terms that the shippers should not ship any cargoes by the plaintiffs' steamers.

The means by which these alleged objects were sought to be attained were: (1) Offering to shippers and their agents a rebate of 5 per cent. on the agreed freights, to be made to those who, during a fixed period, shipped only by the defendants' steamers. (2) Sending steamers to Hankow to compete with the steamers of persons not members of the defendants' conference or combination, so as to drive them from the trade of that place. (3) Removing from the agency of defendants' steamers those persons who acted in the interest of non-conference steamers.

It was contended that the agreement between the defend-

ants to act in combination which was proved to exist, was illegal as being in restraint of trade. I think that it was so, in the sense that it was void, and could not have been enforced against any of the defendants who might have violated it: Hilton v. Eckersley [6 E. & B. 47]. But it does not follow that the entering into such an agreement would, as contended, subject the persons doing so to an indictment for conspiracy, and I think that the opinion to that effect expressed by CROMPTON, J., in Hilton v. Eckersley [6 E. & B. 47] is erroneous.

The question, however, raised for our consideration in this case is whether a person who has suffered loss in his business by the joint action of those who have entered into such an agreement, can recover damages from them for the injury so sustained. In considering this question it is necessary to determine upon the evidence what was the object of the agreement between the defendants and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain ports. It cannot, I think, be reasonably suggested that this is unlawful in any sense of the word. The object of every trader is to procure for himself as large a share of the trade he is engaged in as he can. If then the object of the defendants was legitimate, were the means adopted by them open to objection? I cannot see that they were. They sought to induce shippers to employ them rather than the plaintiffs by offering to such shippers as should during a fixed period deal exclusively with them the advantage of a rebate upon the freights they had paid. This is, in effect, nothing more than the ordinary form of competition between traders by offering goods or services at a cheaper rate than their rivals.

With regard to the sending of ships to Hankow to compete with the plaintiffs' ships, that appears to have been done in order that the defendants' customers might have the opportunity of sending their goods without forfeiting their right to a rebate. No obstruction was offered by these ships to the ships of non-conference owners, and by their presence at Hankow shippers were left simply to determine whether it was to their pecuniary interest to ship by the defendants' vessels or by others. The removing from the agency of the defendants'

vessels those persons who acted in the interest of non-conference steamers, appears to me a legitimate mode of securing agents whose exertions would be exclusively devoted to the furtherance of the defendants' trade.

I arrive at the conclusion, therefore, that the objects sought and the means used by the defendants did not exceed the limits of allowable trade competition, and I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself.

I consider that a different case would have arisen if the evidence had shewn that the object of the defendants was a malicious one, namely, to injure the plaintiffs whether they, the defendants, should be benefited or not. This is a question on which it is unnecessary to express an opinion, as it appears to be clear that the defendants had no malicious or sinister intent as against the plaintiffs, and that the sole motive of their conduct was to secure certain advantages for themselves.

It only remains for me to refer to the argument that an act which might be lawful for one to do, becomes criminal, or the subject of civil action by any one injured by it, if done by several combining together. On this point I think the law is accurately stated by Sir William Erle in his treatise on the law relating to Trades Unions. The principle he lays down is equally applicable to combinations other than those of Trades Unions. He says (page 23): "As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms which one person may exercise and declare singly, many, after consultation, may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms, but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination."

In considering the question, however, of what was the motive of the combination, whether it was for the purpose of injuring others, or merely in order to benefit those combining, the fact of several agreeing to a common course of action may

be important. There are some forms of injury which can only be effected by the combination of many. Thus, if several persons agree not to deal at all with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual. But it appears to me that, in the present case, there is nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers, than their rivals, the plaintiffs, were willing to offer.

For these reasons I think that the judgment of the Court of Appeal should be affirmed.

Order of Lord COLERIDGE, *C. J., and order of the Court of Appeal affirmed, and appeal dismissed with costs.*

ALLEN v. FLOOD

(House of Lords, 1898. L. R. [1898] App. Cas. 1.) [37]

The facts material to this appeal (omitting matters not now in question) were as follows: In April, 1894, about forty boiler-makers, or "iron-men," were employed by the Glengall Iron Company in repairing a ship at the company's Regent Dock in Millwall. They were members of the boiler-makers' society, a trade union, which objected to the employment of shipwrights on ironwork. On April 12 the respondents Flood and Taylor, who were shipwrights, were engaged by the company in repairing the woodwork of the same ship, but were not doing ironwork. The boiler-makers, on discovering that the respondents had shortly before been employed by another firm (Mills & Knight) on the Thames in doing ironwork on a ship, became much excited and began to talk of leaving their

37—This case fills pages 1 to 181 of the volume of reports. Arguments of counsel have been omitted. The positions of the judges have been stated and a summary of their views reprinted from the article of L. C. Krauthoff in the Reports of the American Bar Association, Vol. 21, 359-365.

employment. One of them, Elliott, telegraphed for the appellant Allen, the London delegate of the boiler-makers' society. Allen came up on the 13th, and being told by Elliott that the iron-men, or some of them, would leave at dinner-time, replied that if they took the law into their own hands he would use his influence with the council of the society that they should be deprived of all benefit from the society and be fined, and that they must wait and see how things settled. Allen then had an interview with Halkett, the Glengall Company's manager, and Edmonds the foreman, and the result was that the respondents were discharged at the end of the day by Halkett. (An action was then brought by the respondents against Allen for maliciously and wrongfully and with intent to injure the plaintiffs procuring and inducing the Glengall Company to break their contract with the plaintiffs and not to enter into new contracts with them, and also maliciously, etc., and also unlawfully and maliciously conspiring with others to do the above acts.

At the trial before KENNEDY, J., and a common jury, Halkett and Edmonds were called for the plaintiffs, and gave their account of the interview with Allen. In substance it was this:[38] Allen told them that he had been sent for because

38—Part of the evidence is given verbatim in the judgment of Lord Halsbury, L. C., as follows, pp. 69-71: "And now I will quote, as nearly as I can, the language which is alleged to have been used by Allen in his communications. I quote first what was stated by Mr. Halkett, who was the managing director of the Glengall Iron Company. Allen said, 'He had received word from *some* of the boiler-makers that were working in our yard that they wanted to see him, and he came round and had an interview with these men, and they told him that we had two shipwrights engaged in our employment who were known to have done ironwork before in Mills & Knight's yard, and that unless these two men were discharged from our employment that day all the ironworkers belonging to his society would leave off work that day; and they gave as the only reason that these men were guilty of doing ironwork in Mills & Knight's yard. . . . The substance of what he said was that they were *really trying to put an end to this practice* of doing ironwork by the shipwrights—to stop shipwrights being engaged in ironwork. That it was not from any ill-feeling against ourselves nor against any men in particular—Flood and Taylor; but they—that is, the boiler-makers—had made up their minds—or we have made up our minds—that wherever it is

Flood and Taylor were known to have done ironwork in Mills & Knight's yard, and that unless Flood and Taylor were discharged all the members of the boiler-makers' society would be "called out" or "knock off" work that day: they could not be sure which expression was used; that Halkett had no option; that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork, and wherever these men were employed, or other shipwrights who had done ironwork, the boiler-makers would cease work—in every yard on the Thames. Halkett said that if the boiler-makers (about 100 in all were employed) had been called out it would have stopped the company's business, and that in fear of the threat being carried out he told Edmonds to discharge Flood and Taylor that day, and that if he knew of any shipwrights having worked on ironwork elsewhere, when he was engaging men, for the sake of peace and quietness for themselves he was not to employ them. Allen was called for the defence. His account of the interview is discussed in the judgment of Lord Halsbury, L. C.

known that any shipwrights have been engaged doing ironwork, their workmen—that is, the boiler-makers—would cease work on the same ship on the same employment.'

"Then a question was asked, 'Did he say anything in regard to Flood and Taylor in respect of other yards besides yours?' And the answer was, 'Not in a particular sense; in a general sense that these men would be followed—that these men were known—it was so difficult to get them known; that these men were known, and wherever these men were employed the same action would be taken there as had been taken in our place.' He also said, 'you have no option. If you continue to engage these men our men will leave. . . . It was in consequence of that that the men were discharged. It was the fear of the threat being carried out—of the men leaving—the boiler-makers. If the boiler-makers had left or had been called out it would seriously have impeded our business. . . . The threat to withdraw these ironworkers extended to every workman we had in our employment at whatever place.' He goes on to say (after an embarrassing interruption) that 'the threat was to withdraw the ironworkers in the employment of the Glengall Iron Company from every ship or every job upon which the Glengall Iron Company were engaged on which the men of their union were employed.'

"Mr. Edmonds, the foreman of the Glengall Iron Company, deposed as follows: 'Mr. Halkett sent for me and when I got in the room he said, "Mr. Allen has come here and says that if those two men"—that is, Flood and Taylor—"are not discharged all of the ironmen will

KENNEDY, J., ruled that there was no evidence of conspiracy, or of intimidation or coercion, or of breach of contract, Flood and Taylor having been engaged on the terms that they might be discharged at any time. In the ordinary course their employment would have continued till the repairs were finished or the work slackened.

In reply to questions put by KENNEDY, J., the jury found that Allen maliciously induced the Glengall Company (1) to discharge Flood and Taylor from their employment; (2) not to engage them; that each plaintiff had suffered £20 damages; and that the settlement of the dispute was a matter within Allen's discretion. After consideration KENNEDY, J., entered judgment for the plaintiffs for £40. This decision was affirmed by the Court of Appeal (Lord ESHER, M. R., LOPES and RIGBY, L. JJ.).[39] Against these decisions Allen brought the present appeal. It was argued first before Lord HALSBURY, L. C., and Lords WATSON, HERSCHELL, MACNAGHTEN, MORRIS, SHAND, and DAVEY, on December 10, 12, 16, 17, 1895, and again (the following judges having been summoned to attend—HAWKINS, MATHEW, CAVE, NORTH, WILLS, GRANTHAM, LAWRANCE and WRIGHT, JJ.)—on March 25, 26, 29, 30, April 1, 2, 1897, before the same noble and learned Lords, with the addition of Lords ASHBOURNE, and JAMES of Hereford.

knock off work or be called out.'' I will not be sure what term he used. I asked Mr. Allen the reason why. He said because those two men had been working at Messrs. Mills & Knight's on ironworks. I told him I thought it was very arbitrary on his part to do anything like that. I told him I thought it was not right that Messrs. Mills & Knight's sins should be visited upon us.'

Q.—'' 'Did anything else take place?'

A.—'' 'For the reason that we were not employing the shipwrights on ironwork, and never had done so—not at the Glengall. There was a lot of other conversation, but that is not material to this case. He says that was the case, and if these men were not discharged, their men would be called out or ''knock off'' —I will not be sure what term he used. Me and Mr. Allen had a few words, but that is immaterial to this. I think that is all that is material to this case.'

Q.—'' 'Was anything said about other yards?'

A.—'' 'Yes. When I spoke about it not being right to visit Mills & Knight's sins on us, he said the men would be called out from any yard they went to—they would not be allowed to work anywhere in London river.' ''

39—[1895] 2 Q. B. 21.

At the close of the arguments the following question was propounded to the judges: Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?

The following justices summoned answered the question in the affirmative: HAWKINS, J., CAVE, J., NORTH, J., WILLS, J., GRANTHAM, J., LAWRANCE, J.

The following justices summoned answered the question in the negative: MATHEW, J., WRIGHT, J.

In the House of Lords the decision of the Court of Appeal [1895] 2 Q. B. 21, was reversed. Lord HALSBURY, L. C., and Lords ASHBOURNE and MORRIS dissenting.

In favor of reversal were Lords WATSON, HERSCHELL, MACNAGHTEN, SHAND, DAVEY and JAMES of Hereford.

The following is Mr. L. C. Krauthoff's summary of the views of the judges:

The course which the plaintiffs' case took, in respect of the pleadings, the evidence, and the propositions advanced at the several arguments, discloses the difficulties with which their counsel found themselves confronted:

1. The suit was brought on the theory of a conspiracy, in the evident hope that thereby some added weight would be given to the claim of injuria asserted on behalf of the plaintiffs.

2. It was alleged that existing contracts had been actually induced to be broken, with manifest reference to the rule of Lumley v. Gye [40] and Bowen v. Hall.[41]

3. It was then charged the Glengall Company had been induced not to enter into new contracts with the plaintiff, an allegation which was originally apparently intended to mean not to employ the plaintiffs on other work in the future, but which the exigencies of the case drove the plaintiffs to construe into an allegation covering a re-employment of the plaintiffs on the same work, from day to day.

4. The allegation of "malice" and the claim that not entering into a new contract stood, in this respect, on the same legal basis as the breach of an existing unexpired or unperformed

40—2 E. & B. 216.

41—6 Q. B. D. 333.

contract, were adoptions of Lord ESHER'S dicta in Bowen v. Hall [42] and Temperton v. Russell.[43]

5. It was also alleged that unlawful means (threats, intimidations and coercion) had been resorted to by the defendants.

On the trial the plaintiffs failed in their allegations of conspiracy, of the breach of existing contracts, and of unlawful means,[44] and the judgment of the Court of Appeal in affirmance of the conclusions of KENNEDY, J., on these questions, was not taken to the House of Lords by cross-appeal. The Lord Chancellor, however, deemed it necessary to his reasoning to question the correctness of these rulings.[45]

6. After KENNEDY, J., had thus ruled, the plaintiffs were driven to assert a peculiar right, not dependent upon Bowen v. Hall, or Temperton v. Russell, but based upon the claim that one's trade or occupation and the reasonable hope or expectation that he would succeed in the one or be employed in the other, was a species of right, an interference with which, at least when prompted by malice, constituted an actionable wrong.

KENNEDY, J., in delivering his considered judgment, adopted the newly suggested proposition as having been laid down *obiter,* by HOLT, C. J., in Keeble v. Hickeringill,[46] and as having been recognized in a number of subsequent cases.

In the Court of Appeal, Lord ESHER, M. R., and Lord LUDLOW did not notice this phase of the case, but planted the affirmance broadly on the proposition that to successfully persuade one not to enter into a contract or to terminate an existing employment, even if lawfully terminable on the party's own motion, or as the result of friendly advice, or of persuasion in good faith, was an actionable wrong, if done from an indirect motive, i. e. with intent to "injure" the plaintiff or to benefit the defendant at his expense.

A careful consideration of the conclusions announced in the

42—6 Q. B. D. 333.

43—(1893) 1 Q. B. 715.

44—"The case as launched broke down," per Lord Macnaghten (148).

45—(1898) A. C. 80, 83, 87.

46—11 East, 574n.

several opinions delivered to and by the House of Lords discloses these to be the propositions upon which the case turned:

a. There was substantial unanimity that as a general rule a bad motive alone could not create a cause of action.[47]

b. The minority, however, contended that the case at bar was an exception, in that the plaintiffs had a *right* in the premises, and that an *interference* with that right (a) by one whose acts were not merely in the exercise of a *right* he had, but actuated by malice [48] (using the word in a popular sense as proving a purpose to "punish" the plaintiffs),[49] or (b) by the use of illegal means,[50] was actionable.

c. The majority of those who favored an affirmance conceded that their proposition could be applied only in case a trade or occupation was thus maliciously obstructed.[51]

d. The minority further contended that the only standing which the defendant's principals, the iron-men, had as against the plaintiffs, was a privilege to decline to work with them, provided they exercised this privilege in good faith,[52] or to

47—Cave, J.: "Malice alone never constitutes a cause of action, or in other words, does not make that a wrong which otherwise would not be a wrong," (29). Wills, J.: As to "acts which a man has a definite legal right to do without any qualification and which cannot be actionable, motive is immaterial, . . . no matter what may be the consequences to others" (46, 51). Lord Watson: "Malice derives its essential character from the circumstance that the act done constitutes a violation of the law" (92). Also, Earl of Halsbury, L. C. (84); Lord Herschell (123-125); Lord Macnaghten (151-153); Lord Shand (167); Lord Davey (172); Mathew, J. (25); Wright, J. (65).

48—Earl of Halsbury, L. C. (76-80, 83-84).

49—Earl of Halsbury, L. C. (85); Lord Ashbourne (111, 114); Lord Morris (159); Hawkins, J. (21); Cave, J. (37); North, J. (39); Wills, J. (45); Grantham, J. (52, 53).

50—Earl of Halsbury, L. C., said that this "was in truth the whole question in the case" (89), and Hawkins, J., that "the plaintiffs' grievance is for using wrongful means" (16).

51—Lord Watson: "The majority of the consulted judges who approve the doctrine (of Lord Esher) have only dealt with it as applying to cases of interference with a man's trade or employment" (100). See Hawkins, J. (14, 15); Cave, J. (29-35); Wills, J. (50-51); Grantham, J. (55); Lawrance, J. (58). The same view was adopted by the Earl of Halsbury, L. C. (71, 75); Lord Ashbourne (112-113); and Lord Morris (155-158).

52—Earl of Halsbury, L. C. (75-78, citing, also several American cases, 83, 86); Hawkins, J. (19, 21, 23, 24).

leave the employment of the Glengall Company, provided their purpose in doing so was not thereby to "injure" the plaintiffs, or to "coerce" their employer.[53]

e. It was further laid down that because, instead of actually leaving such employ, the representative of the iron-men had "threatened" that they would do so,[54] and by means of such "threat," communicated to the Glengall Company, had "coerced" and "intimidated" the latter into "discharging" the plaintiffs, the defendant was liable for having used illegal means.[55]

f. And it was further contended that although the plaintiffs' employment was lawfully terminable at will by the Glengall Company,[56] and that although an action could not be maintained against one who merely "procured" a termination thereof,[57] yet if such procurement was done with "malice" (in its popular sense of a bad motive),[58] the act was actionable.

Concerning these propositions, the decision was:

53—Earl of Halsbury, L. C. (82-85). With the exception of Wills, J. (who differed in part, 51), the consulted judges who favored affirmance, applied Lord Esher's rule of indirect motive.

54—Hawkins, J. (23).

55—Earl of Halsbury, L. C. (74, 80, 87); Lord Ashbourne (113); Lord Morris (159); Hawkins, J. (21); North, J. (44); Grantham, J. (53, 54); Lawrance, J. (59, 61).

56—As to which the Earl of Halsbury, L. C. (68); Hawkins, J. (13, 14, 21), and North, J. (43), doubted.

57—This concession runs through all the judgments in which it is held, directly or by assumption, that unless illegal means be resorted to, no action lies.

58—Earl of Halsbury, L. C. (84, 85); Hawkins, J.: "I confess for my own part that I should prefer to confine the term 'malice' to its ordinary and popular acceptance" (18); North, J.: "In the popular meaning of the word" (41); Wills, J.: "A spiteful feeling" (45). The fact that it was the purpose of Allen and of the iron-men to "punish" the plaintiffs, was strongly relied on to prove what Grantham, J. (53), characterized as "malice of the worst kind"; Earl of Halsbury, L. C. (85); Lord Ashbourne (111, 114); Lord Morris (159); Hawkins, J. (21); Cave, J. (37); North, J. (39); Wills, J. (45). Wright, J., said (63): "The only kind of malice which can be suggested in the present case is malice in its popular sense, importing a malicious motive, spite, and ill-will." To the same effect, Lord Watson (94), and Lord Herschell (120).

a. It is a universal rule of the common-law that an act lawful in itself is not converted by a malicious, i. e. bad or indirect, motive into an unlawful or tortious act.[59]

b. While the plaintiffs no doubt had a right to carry on their occupation without interference, this meant an *unlawful* interference;[60] the position taken by the iron-men was the exercise of a right which they had to leave their employment at will, and to select the persons for and with whom and the conditions under which they were willing to work;[61] this right was of as high a dignity and status in the law as the right asserted on behalf of the plaintiffs;[62] it was indeed a distinct and absolute right, and was not destroyed or qualified because the exercise of it, on the particular occasion, may have been morally reprehensible or impelled by a bad motive;[63] nor was its exercise limited to instances of commercial competition.[64]

c. The fact that from the very nature of things such contests usually arise in respect of a trade or occupation did not prove the existence of a peculiar right in persons following the same; but the right to be free from unlawful disturbance

59—Lord Watson (92 *et seq.*: an able discussion); Lord Herschell (123-125); Lord Macnaghten (151-153); Lord Shand (167); Lord Davey (172); Lord James of Hereford (179); Mathew, J. (25); Wright, J. (65).

60—Lord Watson (102-107); Lord Herschell (121-123, 127, 138); Lord Shand (166); Lord Davey (173); Lord James of Hereford (179-180).

61—Lord Watson: "It is the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work" (98). Lord Herschell: "The iron-workers were no more bound to work with those whose presence was disagreeable to them than the plaintiffs were bound to refuse to work because they found that this was the case" (131). Lord Macnaghten (148); Lord Shand (166); Lord Davey (173).

62—"The plaintiffs had a right to dispose of their labor as they pleased, limited only by the *equal right* of the defendant" to do the same (Cave, J., 37).

63—Lord Watson: "I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him" (98); Lord Herschell (138-139); Lord Macnaghten (151-153); Lord Shand (166); Lord Davey (173); Lord James of Hereford (179).

64—Lord Herschell (140-141); Lord Davey (173); Lord Shand (164-166).

or interference was a general one, and was possessed by every person without regard to his avocation in life, or the place or nature of his enjoyment of such right.[65]

d. As the iron-men had a right to thus leave their employment, it was not a resort to illegal means, but indeed their moral duty, to notify their employer of their intention. Notice of a purpose to do a lawful act or to exercise a legal right, is not a "threat," and is no more illegal than the actual doing of such act or exercise of such right would be.[66] As the iron-men and each of them had a right to refuse to work in association with the plaintiffs and to leave their employment in case the employer decided to so conduct his business as to bring about such association, it was in no sense "coercion" to put him to an election in the premises; and because the incidents of the situation made it to his interest to accede to the demand made, so that (unless indeed he was willing to assume the resulting loss) he had no real option in the matter, his yielding was no proof of intimidation.[67] In every such case, the controlling inquiry is one of means, and these can never be unlawful if what was in fact done marks an exercise of a right, or a declaration of a purpose to do that which is not in itself unlawful.

e. The difference between a valid unexpired contract, and no contract whatever or one terminable at will, was represented by "a chasm."[68] Even if the doctrine of Lumley v. Gye be a sound one, the one gave and represented rights; the other none.[69] As in the case at bar each party could sever the relation at will, the act of one in doing so could be made the basis of an action against a third person for having pro-

65—Lord Watson (100); Lord Herschell (137); Lord Davey (173-174); Mathew, J. (26: an admirable analysis of the proposition); Wright, J. (66).

66—Lord Herschell (28-30: an unanswerable argument); Lord Watson (99, 129-130); Lord Macnaghten (148, 151); Lord Shand (164-166); Lord James of Hereford (177).

67—Lord Watson (99); Lord Herschell (117-118); Lord Macnaghten (150); Lord James of Hereford (176).

68—Lord Herschell (121).

69—Lord Watson (96, 108); Lord Davey: "In the one case there is a violation of right; in the other case there is not" (171); Wright, J. (62).

cured such act only upon proof that the latter used unlawful means, i. e. thereby committed a tort causing damage.

QUINN v. LEATHEM

(House of Lords, 1901. L. R. [1901] App. Cas. 495.)

The respondent brought an action in Ireland against five defendants. Craig, Davey, Quinn (the appellant), Dornan and Shaw, alleging causes of action which are summarised in the judgment of Lord Brampton. At the trial before Fitz-Gibbon, L. J., and a special jury at Belfast in July, 1896, evidence was given for the plaintiff to the following effect. Craig was president, Quinn treasurer, and Davey secretary of a trade union registered as the Belfast Journeymen Butchers and Assistants' Association. By rule 11 of the association it was the duty of all members to assist their fellow unionists to obtain employment in preference to non-society men.

The plaintiff, a flesher at Lisburn for more than twenty years, in July, 1895, was employing Dickie and other assistants who were not members of the union. At a meeting of the association at which Craig, Quinn, Dornan and Shaw were present, and which the plaintiff attended by Davey's invitation, the plaintiff offered to pay all fines, debts and demands against his men, and asked to have them admitted to the society. This was refused, and a resolution was passed that the plaintiff's assistants should be called out. Craig told the plaintiff that his meat would be stopped at Munce's if he did not comply with their wishes. Munce, a butcher, had been getting about £30 worth weekly of meat from the plaintiff for twenty years.

The plaintiff in his evidence said: "For the last four years Munce has had an agreement with me to take my fine meat at so much a pound. He expected me to send it to him every week, and there was no week he did not get it. I had no written agreement with him. Whenever I killed I sent it, but I was not bound—only by word of mouth. It was only that if I send it he would take it." What this meant did not clearly appear, but Munce's clerk who was called said,

"Munce had no contract with the plaintiff: if he wanted his meat he could take it or reject it if he chose; it came weekly and was never refused. Neither was bound either to take or supply it."

In September, Davey wrote to the plaintiff that if he continued to employ non-union labour the society would be obliged to adopt extreme measures. After some negotiations with Munce, Davey wrote to him that having failed to make a satisfactory arrangement with the plaintiff, they had no other alternative but to instruct Munce's employees to cease work immediately the plaintiff's beef arrived. On September 20 Munce sent a telegram to the plaintiff, "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work," and Munce ceased to deal with the plaintiff. The plaintiff said that in consequence of this he was put to great loss, a quantity of fine meat having been killed for Munce.

Dickie, who had been ten years in the plaintiff's employ, was called and said that he was employed by the week, that he was called out by the society, that he gave the plaintiff no notice when he left, that he left in the middle of the week, and that the plaintiff did not pay him for the broken week. There was no evidence of damage to the plaintiff, pecuniary or otherwise, caused by Dickie's breach of contract.

Evidence was given that "black lists" were issued by the society, containing (*inter alia*) the names of tradesmen who had dealings with the plaintiff, and one of whom was induced not to deal with him, but there was no evidence connecting Quinn with these lists.

The learned judge's notes of the evidence proceeded thus:

At the close of the plaintiff's case "O'Shaughnessy, Q. C., asked for a non-suit or direction for the defendants on the grounds: First. That to sustain the action a contract made with Leathem must be proved to have been made and broken through the acts of the defendants, and that there was no evidence of such contract or breach. Second. That there was no evidence of pecuniary damage to the plaintiff through the acts of the defendants. Third. That the ends of the defendants and the means taken by them to promote those ends

as appearing in evidence were legitimate, and there was no evidence of actual damage to the plaintiff.

"I declined to withdraw the case from the jury. O'Shaughnessy, Q. C., then stated that he called no evidence for the defendants. Chambers addressed the jury for the plaintiff. O'Shaughnessy, Q. C., replied for the defendants. I charged the jury, leaving them the following questions, to which I append their findings: 1. Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?—Answer: Yes. 2. Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence or any of them not to deal with the plaintiffs or not to continue in his employment, and were such persons so induced not so to do?—Answer: Yes. 3. Did the defendants Davey, Dornan and Shaw, or any of them, publish the 'black list' with intent to injure the plaintiff in his business, and if so did the publication so injure him?—Answer: Yes.

"The jury found for the plaintiff, with £250 damages, of which £50 was for damages on the cause of action relating to the 'black lists,' and £200 was for damages on the other causes of action. I directed the jury that there was no evidence against the defendants Craig and Quinn upon the cause of action relating to the 'black lists,' and I directed them to assess the damages (if any) on that cause of action separately. On the above findings, on the application of Serjeant Dodd, I gave judgment for the plaintiff upon the other causes of action against all the defendants, with £200 damages, and against the defendants Davey, Dornan and Shaw upon the cause of action relating to the 'black lists' for the further sum of £50 damages.

"At the conclusion of my charge, O'Shaughnessy, Q. C., for the defendants, made the following objections and requisitions:

"1. That I have given the jury no definition of damage, and he asked me to define damage as 'actual loss.'

"I told the jury that pecuniary loss, directly caused by the conduct of the defendants, must be proved in order to establish a cause of action, and I advised them to require to be

satisfied that such loss to a substantial amount had been proved by the plaintiff. I declined to tell them that if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved. I told them that if the plaintiff gave the proof of actual and substantial loss necessary to maintain the action, they were at liberty in assessing damages to take all the circumstances of the case, including the conduct of the defendants, reasonably into account.

"2. That I had told the jury that the liability of the defendants depended on a question of law, and that as the defendants could not give their testimony as to their own intentions, observations which I had made upon their non-production amounted to misdirection.

"I did not tell the jury that the liability of the defendants depended on any question of law. I told them that the questions left to them were questions of fact to be determined on the evidence, but that they included questions as to the intent of the defendants, and, in particular, their intent to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests. I did not tell the jury that the defendants could be directly asked what their own intention was, but I did tell them that their intention was to be inferred from their acts and conduct as proved, and that in acting upon the evidence given by the plaintiff they were at liberty to have regard to the fact that the defendants, who might have given the best evidence on the subject, had not been produced to explain, qualify or contradict any of the evidence given for the plaintiff as to their overt acts.

"3. That the cause of action relating to the 'black list' was separate and should be separately left to the jury.

"I acceded to this objection, and directed the jury that there was not sufficient evidence to connect the defendants Craig and Quinn with the publication of the 'black lists.' As against the other three defendants, I told the jury that their acts in relation to the 'black lists' might be considered upon the issues relating to their intent and conduct generally.

"4. That there was no question to go to the jury because no actual injury had been proved, as there was no evidence

that any binding contract with the plaintiff had been broken through the action of the defendants, and there was no evidence of any money loss.

"Having told the jury that the proof of actual pecuniary loss directly caused to the plaintiff by the wrongful acts of the defendants must be established by the plaintiff as the foundation of the action, I declined to withdraw the case from them, having regard especially on the question of breach of a binding contract to the withdrawal of Dickie from the plaintiff's employment, and generally to the evidence as to the pecuniary loss on the sale of meat prepared for Munce, to the loss of his custom, and to the threat to withdraw his men if the plaintiff's meat arrived and was received at his shop. I advised the jury not to find for the plaintiff unless satisfied that he had sustained actual money loss in his business to a substantial amount. Upon the meaning of the words 'wrongfully and maliciously' in the questions, I told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests. As to the 'black lists.' I told the jury that their publication would be actionable if done, without justification, for the purpose and with the effect of injuring the plaintiff in his business, by holding him up to unpopularity or disfavour with or by intimidating those who would otherwise have dealt with him. Finally, I told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of

this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade. Whether the acts of the defendants were or were not in that sense actionable was the question which I told the jury they had to try upon the evidence. At the conclusion of my charge, at the request of O'Shaughnessy, Q. C., for the defendants, I divided this single question into the written questions which I submitted to the jury as above stated.

"I approved of the verdict. The amount of damages was larger than I might myself have given, if it were within my province to assess damages. But I cannot say that any excess which there may be in the mere amount of damages is either so great, or having regard to the circumstances of the defendants and of the case, so material as to justify me in expressing disapproval of the verdict upon that ground alone."

The learned judge gave judgment for the plaintiff for £200 on the first and second causes of action against all the defendants, and for the further sum of £50 damages on the third cause of action against the defendants Davey, Dornan, and Shaw only, with costs.

A motion was made "to set aside the verdict and judgment and enter a verdict for the defendants, or, in the alternative, for a new trial on the ground of misdirection of the learned judge in refusing to direct for the defendants; leaving to the jury the case as against all the defendants on the evidence; and in that on the evidence no actionable wrong was shewn; in that he refused to direct for the defendants in the absence of evidence of damage fit to be submitted to a jury; and on the further ground that the learned judge misdirected the jury in that he refused to tell the jury their findings of damages was confined to damages shewn in the evidence, and, in the alternative, for a new trial on the ground that the damages were excessive and out of all proportion to the amount suggested in evidence, and that the learned judge further allowed the jury to take into account on the question

of liability and damages a certain paper in the case called the 'black list,' and upon other grounds." This motion was refused with costs by the Divisional Court (ANDREWS, J., O'BRIEN, J., and Sir P. O'BRIEN, C. J., PALLES, C. B., dissenting).

In the Irish Court of Appeal (Lord ASHBOURNE, L. C., PORTER, M. R., WALKER and HOLMES, L. JJ.) the decision below was affirmed with costs, the judgment for the plaintiff being amended by omitting the part as to the recovery of £50 damages. [Leathem v. Craig [1899] 2 I. R. 667.] Quinn alone brought the present appeal.

Aug. 5. Earl of HALSBURY, L. C. My Lords, in this case the plaintiff has by a properly framed statement of claim complained of the defendants, and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff, that the defendants did this in pursuance of a conspiracy framed among them, that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment, and that all this was done with malice in order to injure the plaintiff, and that it did injure the plaintiff. If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community, nor indeed do I understand that any one has doubted that, before the decision in Allen v. Flood [[1898] A. C. 1], in this House, such fact would have established a cause of action against the defendants. Now, before discussing the case of Allen v. Flood, and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas

every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision of the case of Allen v. Flood.

Now, the hypothesis of fact upon which Allen v. Flood was decided by a majority in this House, was that the defendant there neither uttered nor carried into effect any threat at all: he simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men, which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favour of his fellow members. It is true that I personally did not believe that was the true view of the facts, but, as I have said, we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision. My Lords, in my view what has been said already is enough to decide this case without going further into the facts of Allen v. Flood, but I cannot forbear accepting with cordiality the statement of them prepared by two of your Lordships, Lord Brampton and Lord Lindley, with so much care and precision.

Now, in this case it cannot be denied that if the verdict stands there was conspiracy, threats, and threats carried into execution, so that loss of business and interference with the plaintiff's legal rights are abundantly proved, and I do not understand the very learned judge who dissented to have doubted any one of these propositions, but his view was grounded on the belief that Allen v. Flood had altered the law in these respects, and made that lawful which would have clearly been actionable before the decision of that case. My Lords, for the reasons I have given I cannot agree with that conclusion. I do not deny that if some of the observations made in that case were to be pushed to their logical

conclusion it would be very difficult to resist the Chief Baron's inflexible logic; but, with all the respect which any view of that learned judge is entitled to command and which I unfeignedly entertain, I cannot concur. This case is distinguished in its facts from those which were the essentially important facts in Allen v. Flood. Rightly or wrongly, the theory upon which judgment was pronounced in that case is one whereby the present is shewn to be one which the majority of your Lordships would have held to be a case of actionable injury inflicted without any excuse whatever.

My Lords, there was a subordinate question raised which I must not pass over. It is suggested that FitzGibbon, L. J., did not put all the questions which were necessary to raise all the points which the learned counsel desired to argue. Now, I think the charge of the Lord Justice was absolutely accurate, and when, in deference to the wishes of the learned counsel for the defendant himself, he consented to put such questions as were then desired, it would be intolerable that it should afterwards be made the subject of complaint that he not at the same time put other questions which he was not asked to put at all.

My Lords, for these reasons I am of opinion that there is no difficulty whatever in this case, and I move that this appeal be dismissed with costs.

LORD MACNAGHTEN. [Read by Lord Brampton in Lord Macnaghten's absence.] My Lords, notwithstanding the strong language of the late O'Brien, J., and the arguments of the Lord Chief Baron, I cannot help thinking that the case of Allen v. Flood has very little to do with the question now under consideration. In my opinion, Allen v. Flood laid down no new law. It simply brushed aside certain dicta which in the opinion of the majority of this House were contrary to principle and unsupported by authority. Those dicta are first to be found in the judgment delivered by Lord Esher on behalf of himself and Lord Selborne in Bowen v. Hall [6 Q. B. D. 333]. They were repeated by Lord Esher and Lopes, L. J., in Temperton v. Russell [[1893] 1 Q. B. 715]; but they were not, I think, necessary for the decision in either case. They did form the ground of decision in Allen v. Flood in its

earlier stages. But in the end the law was restored to the condition in which it was before Lord ESHER's views in Bowen v. Hall [6 Q. B. D. 333] and Temperton v. Russell, were accepted by the Court of Appeal. The head-note to Allen v. Flood, might well have run in words used by PARKE, B., in giving the judgment of an exceptionally strong court, nearly half a century ago (Stevenson v. Newnham [(1853) 13 C. B. 297])—"*an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.*" That, in my opinion, is the sum and substance of Allen v. Flood, if you eliminate all matters of merely passing interest—the charge of the learned judge, the findings of the jury (unintelligible, I think without a careful examination of the evidence), and the discussion of the evidence itself in the two different aspects in which it was presented—once for the consideration of the House, and again for the consideration of the learned judges by whom the House was assisted.

The case really brought under review on this appeal is Temperton v. Russell. I cannot distinguish that case from the present. The facts are in substance identical: the grounds of decision must be the same. Now, the decision in Temperton v. Russell was not overruled in Allen v. Flood, nor is the authority of Temperton v. Russell, in my opinion, shaken in the least by the decision in Allen v. Flood. Disembarrassed of the expressions which Lord ESHER unfortunately used, the judgment in Temperton v. Russell seems to me to stand on surer ground. So far from being impugned in Allen v. Flood, it had, I think, the approval of Lord WATSON, whose opinion seems to me to represent the views of the majority better far than any other single judgment delivered in the case. Lord WATSON says [[1898] A. C. 108.] that he did not think it necessary to notice at length Temperton v. Russell, because it was to his mind "very doubtful whether in that case there was any question before the Court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful." Then he goes on to say: "The only findings of the jury which the Court had to consider were—(1) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2) that the defendants had maliciously conspired to induce

and had thereby induced certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in Lumley v. Gye [2 E. & B. 216]. According to the second finding the persons induced merely refused to make contracts, which was not a legal wrong on their part but the defendants who induced were found to have accomplished their object to the injury of the plaintiffs by means of unlawful conspiracy—a clear ground of liability according to Lumley v. Gye, if, as the Court held, there was evidence to prove it." It must be admitted, I think, that the second reference to Lumley v. Gye, in the passage I have just quoted is a slip—a rare occurrence in a judgment of Lord WATSON'S. But I do not think that the slip (if it be a slip) impairs the effect of what Lord WATSON said. Obviously Lord WATSON was convinced in his own mind that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong.

Precisely the same questions arise in this case as arose in Temperton v. Russell. The answers, I think, must depend on precisely the same considerations. Was Lumley v. Gye rightly decided? I think it was. Lumley v. Gye was much considered in Allen v. Flood. But as it was not directly in question, some of your Lordships thought it better to suspend their judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference.

The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. Gregory v. Duke of Brunswick [6

M. & G. 205, 953.] is one authority and there are others. There are valuable observations on the subject in ERLE, J.'s charge to the jury in Duffield's Case [(1851) 5 Cox C. C. 404.] and Rowland's Case [(1851) 5 Cox C. C. 436]. Those were cases of trade union outrages; but the observations to which I refer are not confined to cases depending on exploded doctrines in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Lord FITZGERALD, then FITZGERALD, J., in Reg. v. Parnell and Others [(1881) 14 Cox C. C. 508]. That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of BOWEN, L. J., and Lords BRAMWELL and HANNEN in the Mogul Case [23 Q. B. D. 598; [1892] A. C. 25]. A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong.

I have only to add that I agree generally with the judgments delivered in the Courts below, and particularly with the judgment of ANDREWS, J., in the Queen's Bench, and the judgment of HOLMES, L. J., in the Court of Appeal. I do not think that the acts done by the defendants were done "in contemplation or furtherance of a trade dispute between employers and workmen." So far as I can see, there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys. What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants who were not members of the union.

I also think that the provision in the Conspiracy and Protection of Property Act, 1875, which says that in certain cases

an agreement or combination is not to be "indictable as a conspiracy," has nothing to do with civil remedies.

LORD SHAND. [Read by Lord DAVEY in Lord SHAND'S absence.] My Lords, after the able and full opinions of the learned judges of the Court of Appeal in Ireland holding that the verdict and judgment for the plaintiff ought to stand, the grounds of my opinion that the judgment ought to be affirmed and the appeal dismissed may be shortly stated. I refrain from any detailed reference to the numerous cases cited in the argument. These have been considered and discussed by the judges of the Court of Appeal, and I concur in the reasoning of the majority of their Lordships, and they have been already dealt with in my judgment in the case of Allen v. Flood.

In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labor, yet that combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed.

The learned judge before whom the case was tried, with reference to the words "wrongfully and maliciously" in the first question, told the jury that the questions to be answered by them were matters of fact only to be determined on the evidence, and in particular involved the question whether the intention of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interest. The verdict affirms that this was the fact, for after the direction of the learned judge no other interpretation can be given to the finding that the acts complained of were done by the defendants "wrongfully and maliciously."

This being clearly so, the question now raised is really whether, in consequence of the decision of this House in the case of Allen v. Flood, and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure

or ruin another, and not to advance the parties' own trade interests, and injury has resulted, no action will lie, or, to put the question in a popular form, whether the decision in Allen v. Flood has made boycotting lawful.

Apart from the decision in that case, the judgment of the learned judges in Ireland would have been unanimous in affirming the principle to which FitzGibbon, L. J., gave effect. The general law cannot, I think, be more happily stated than in the passage from the judgment of Lord Bowen in the Mogul Case [23 Q. B. D. 614.], which was quoted by the Lord Chancellor with an expression of his strong approval in the case of Allen v. Flood [[1898] A. C. at p. 74]. [His Lordship read the passage.] The Lord Chancellor also spoke with approval, as I should certainly do, of the views to a similar effect stated by Sir William Erle in his work on Trade Unions.

It may be true that in certain cases the object of inflicting injury, and success in that object, requires combination or conspiracy with others in order to be effectual. That was not so in all of the cases enumerated by Lord Bowen; but no question on that point arises in the circumstances of this particular case, for according to the evidence and the verdict of the jury the defendants by combined action wrongfully and maliciously induced a number of persons to refrain from dealing with the plaintiff. That is sufficient for the decision of the case, although, in my opinion, it is further proved that they succeeded in inducing a servant and a customer of the plaintiff to break existing contracts with him. On the whole, it seems to me clear that the defendants were guilty of unlawful acts, unless the judgment in the case of Allen v. Flood [[1898] A. C. 1.] has introduced a change which has rendered such acts lawful.

As to the vital distinction between Allen v. Flood and the present case, it may be stated in a single sentence. In Allen v. Flood, the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests." It is unnecessary

to quote from the judgments of the majority of the learned judges in Allen v. Flood to shew their opinions on the importance of this essential point. Lord Hershchell, for example, said [[1898] A. C. at p. 132.]: "The object which the defendant and those whom he represented had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end." And the other noble and learned Lords in the majority expressed themselves to a similar effect. For myself, what I said was this [[1898] A. C. at p. 163.]: "If anything is clear on the evidence, it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did; that this was his motive of action, and not a desire, to use the words of the learned judge, 'to do mischief to the plaintiffs in their lawful calling.' The case was one of competition in labour, which, in my opinion, is in all essentials analogous to competition in trade, and to which the same principles must apply."

The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen in what he said and did was only exercising the right of himself and his fellow workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong.

It is only necessary to add that the defendants here have no such defense as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of Allen v. Flood, as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendant's argument.

I concur with your Lordships in holding that there is not sufficient ground for disturbing the verdict on the question

of damages, and in holding that the special provision of the 3rd section of the Conspiracy Act of 1875 has no application to the circumstances of this case.

LORD BRAMPTON. My Lords, this case now awaiting your Lordships' final judgment is one which, looked at simply as affecting the parties to it, is of no serious pecuniary concern; but it involves, nevertheless, questions of widespread importance to every trader and to every employer and servant engaged in trade.

It is an action originally brought in the High Court in Ireland by Henry Leathem, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons, named respectively John Craig (now dead), John Davey, Henry Dornan, and Robert Shaw, as defendants, to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years before July, 1895, Leathem had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly twenty or thirty pounds' worth of the best meat; and he had in his employ as assistants several men at weekly wages.

In February, 1893, a trade union society was registered under the Trade Union Acts, 1871 and 1876, by the name of "The Belfast Journeymen Butchers and Assistants' Association." Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dornan and Shaw, joined subsequently as mere ordinary members. Leathem was not a member, nor were any of his assistants. The members of the society amongst themselves soon adopted an unregistered rule that they would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July, 1895, this had been productive of any conflict between Leathem's men and the union.

Early in that month, however, Leathem, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. The occurrences at this meeting

shewed the existence of an angry feeling, and an overbearing determination on the part of the defendants to compel Leathem to employ none but union men, which culminated in the lawless conduct the subject of this action.

Leathem had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years. He was desirous of keeping him and all the others employed by him in his service, but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury. "I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked some out and said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes."

The chairman spoke truly; for on September 6 the secretary of the society wrote to Leathem, asking "whether he had made up his mind to continue to employ non-union labour," adding, "If you continue as at present, our society will be obliged to adopt extreme measures in your case." He wrote also to Mr. Munce on September 13, stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leathem & Sons, as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on September 14, a very sensible reply: "It is quite out of my province to interfere with the liberty of any

man. But why refer to me in the matter? I do not think it fair for you to come to me, seeing it appears to be the Messrs. Leathem that you wish to interfere with." A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on September 17 he wrote to the secretary the reply of his father, "that he could not interfere to bring pressure to bear on Mr. Leathem to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man." The 18th of September brought a definite announcement from the secretary to Mr. Munce that, having failed to make a satisfactory arrangement with Mr. Leathem, they had no other alternative but to instruct his (Munce's) employees "to cease work immediately Leathem's beef arrives." Thereupon Mr. Munce was constrained to send to Leathem on September 20 a telegram: "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work." On and from that day Munce took no more meat from Leathem, to his substantial loss.

Another mode adopted by several of the defendants with a view to prevent persons dealing with Leathem was the publication throughout the district of Lisburn of "black lists" containing and holding up to odium, not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Amongst others, a man named McBride, a customer of Leathem, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to influence two other men named Davis and Hastings. With the object of further inconveniencing Leathem in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leathem. It is true they gave due notice of their intention to do so, and as regards them, therefore, no separate cause of action could be maintained. But it is significant that after they had left their service they were paid by the society during the time they were out of work weekly sums of money as

compensation for the wages they would have earned with Leathem. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so wrongfully broke his contract with his employers, and there was an abundance of evidence that he was induced to do that wrongful act through the unjustifiable influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leathem's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leathem because the rest were out, and promised to pay him what he had from Leathem; that he left, and was paid by Rice for the society and was then in Dornan's service.

The case came on for trial at the Belfast Assizes in July, 1896, before FitzGibbon, L. J., and a special jury. The pleadings charged in the first four counts, as separate causes of action, (1) the procuring Munce to break contracts he had made with Leathem; (2) the publication by the defendants of "black lists"; (3) the intimidation of Munce and other persons to break their contracts; and (4) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these counts alleged that the acts complained of were done "wrongfully and maliciously, and with intent to injure the plaintiff, and to have occasioned him actual loss, injury, and damage." The fifth and last count charged, also as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed.

The evidence adduced I have already set forth substantially. At the conclusion of it Mr. O'Shaughnessy, Q. C., for the defendants, submitted that they were entitled to a nonsuit upon the grounds that there was no evidence of a contract between Munce and Leathem, nor of any pecuniary damage to the plaintiff by reason of the acts of the defendants, and that the acts of the defendants were legitimate. The learned Lord Justice refused to nonsuit, and I think he rightly refused. For there was clearly evidence for the consideration of the jury upon

one or more of (I think upon all) the causes of action. I need not discuss that point further, for it was practically disposed of during the argument before this House.

No evidence was called for the defendants. I regret that no shorthand note of the summing-up of the Lord Justice was furnished to your Lordships. We have, however, a copy of the learned judge's own notes and memoranda. From a careful perusal of these I am satisfied that every indulgence that could have been reasonably given to the learned counsel in presenting his case to the jury was allowed him, and I am satisfied that he must be taken to have acquiesced in the form in which the questions submitted for the consideration of the jury were left to them, even though it might otherwise have been open to criticism.

After commenting upon the evidence relied upon by the plaintiff as proof of actionable misconduct, he told the jury that they had to consider whether the interest and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him as distinguished from acts legitimately done to secure or advance their own interests; that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, by reasonable and legitimate means were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, he told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants, to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention, which had inflicted actual money loss upon the plaintiff in his trade. And having so told the jury, he proposed to put to them as the question they had

to try upon the evidence, Whether the acts of the defendants were or were not in that sense actionable?

I have thought it right, as near as possible, to follow the language of the Lord Justice, for that charge was delivered before Allen v. Flood, was decided in this House. In substance I think it was correct, having regard to the case before him. In some respects it seems to me that it was a little too favourable to the defendants, but even had it been otherwise it was uttered in the presence of the defendants' counsel, who desired and was allowed then and there to make such objections as he thought fit to it. He made four only: first, that the judge had given no definition of damage; second, that he had told the jury that the liability of the defendants depended on a question of law. These two questions were to my mind conclusively answered in the summing-up: see p. 33 of Appendix.

A third objection was that the question relating to the black list should be separately left to the jury. It was then so left, and as to that the judge directed them that there was not sufficient evidence to connect Quinn and Craig with the black lists. By this I take it he meant not as an independent cause of action, there being, in fact, no evidence of Quinn's personal participation in the publication of those lists. But that left him still affected by them as overt acts of the conspiracy, for each of which every one of the conspirators is liable, and the evidence touching the black lists was beyond all question admissible under the conspiracy count.

The fourth objection was that there was no evidence of any binding contract having been broken through the action of the defendants; but the judge then again declined to withdraw that question of contract from the jury, and I think he was right in so refusing at that stage of the trial; and at a later stage, after the whole matter had been disposed of under the conspiracy count, he rightly refrained from putting the question at all, because it had become unnecessary. At the request of the learned counsel, however, he divided the single general question he at first proposed into the three separate questions— (1) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?

(2) Did the defendants, or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so? (3) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and, if so, did the publication so injure him? The jury answered each of these questions in the affirmative, and assess the damages against all the defendants at £200; and with regard to the third question, they found against the defendants Dornan, Davey, and Shaw, with an additional £50 as damages against them only. Judgment was given in accordance with that verdict.

If, my Lords, before that judgment was given the counsel for either party had felt it of importance that the specific issues raised upon each count should be determined by the jury, the learned judge would, no doubt, have applied himself to attain that object; but when, as it oftentimes happens in the course of a trial, it is obvious to everybody concerned in it that the case may conveniently be determined by the answer of the jury to one general comprehensive question involving the whole of the material matters at issue, and all parties either expressly or tacitly acquiesce in that view, and such question is accordingly put to and answered by the jury, neither party can afterwards hark back to the original issues raised by the pleader on the record long before it was possible for him to know how the case can best be dealt with when the evidence is all disclosed. Here the real substantial question was whether there had existed between all or any two or more of the defendants an unlawful conspiracy to injure the plaintiff in his trade, and, if so, whether the plaintiff had been specially injured thereby, all the wrongful acts charged in the previous counts being treated as overt acts of such conspiracy. To support that conspiracy count it was not essential that every overt act alleged should be proved, but only a sufficient number of them to support the count. The issues on that count having been found by the jury, and damages assessed in favor of the plaintiff, the separate issues become immaterial, since they had already been treated as incorporated

for all purposes of the action in it. I note, in confirmation of this, that the Lord Justice pointedly told the jury that proof of a conspiracy was essential to the support of the action.

In substance, this finding of the jury amounted to a general verdict against all the defendants, except on the issue relating to the black lists, with £200 damages, and as to that issue against Davey, Dornan, and Shaw only, with separate and further damages, £50.

Rightly understood I think the judgment in Allen v. Flood is harmless to the present case. But I need hardly say that, in order properly to understand and appreciate it, it is essential to ascertain what were the material facts assumed to exist by their Lordships who assented to that judgment, and what were the principles of law applied by them to those facts. This necessity will be more apparent when it is realized that unanimity of opinion as to the facts certainly did not prevail, that the judges who were called upon to render their assistance to the House were requested to answer this one simple question only, namely, "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" This evidence was only to be found in the Appendix handed to each of the judges as containing the evidence referred to, and to that evidence the judges naturally applied themselves, and upon it their opinions were formed. That evidence of the plaintiffs' witnesses most certainly did not altogether coincide with some very material facts assumed by their Lordships; this will account for variance in the views expressed as to the legal rights and alleged wrongful acts of the parties. It would be an endless task to endeavour to reconcile all these differences of fact and opinion; I will not, therefore, make the attempt.

Some of this confusion arose no doubt from the course taken, rightly or wrongly, at the trial, when all questions of conspiracy, intimidation, coercion, or breach of contract were withdrawn from the jury, the only matters of fact found by them being that Allen maliciously induced the Glengall Company to discharge Flood and Taylor from their employment, and not to engage them again, and that each plaintiff had suffered £20 damages.

I collect from the case, as reported, that it was assumed by

their Lordships that the Glengall Company were under no contractual obligation to retain the plaintiffs Flood and Taylor in their service for any duration of time, but might dismiss them from their employment at any moment it was their will so to do, and that the boiler-makers were working under the same conditions; that Allen in making the communication which induced the Glengall Company to dismiss the plaintiffs was doing only that which he had a legal right to do, and they held, therefore, that the plaintiffs had no legal cause of action against either the Glengall Company or the defendant, and that the mere fact as found by the jury that the defendant was actuated by a malicious motive could not convert a rightful into a wrongful act.

This latter proposition, that the exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise, was established as clear law by this House in Bradford Corporation v. Pickles [[1895] A. C. 587.], and it is now too late to dispute it, even if one were disposed to do so, which I am not. It must not, however, be supposed that a malicious intention can in no case be material to the maintenance of an action. It is commonly used to defeat the defence of privilege to do or to say that which without privilege would be wrongful and actionable.

Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person who honestly believes that he has reasonable and probable cause, though he has it not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable and probable cause a malicious motive operating upon the mind of such prosecutor is added, that which would have been a rightful (in the sense of a justifiable) act if done without malice becomes with malice wrongful and actionable. What would constitute such malice it is not material for the purposes of this case to define. Of course, if when he instituted criminal proceedings the prosecutor knew he had no reasonable ground for the steps he was taking, the definition of malice given by Bayley, J., in Bromage v. Prosser [4 B. & C. 247; 28 R. R. 241] would distinctly apply, and no further proof of malice would be required; but if he really believed he had such rea-

sonable cause, although in fact he had it not, and was actuated not by such belief alone, but also by personal spite or a desire to bring about the imprisonment of or other harm to the accused, or to accomplish some other sinister object of his own, that personal enmity or sinister motive would be quite sufficient to establish the malice required by law to complete a cause of action—that is, if such malice was found as a fact by the jury.

In this case the alleged cause of action is very different from that in Allen v. Flood. It is not dependent upon coercion to break any particular contract or contracts, though such causes of action are introduced into the claim; but the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business, and by so doing to invade his undoubted right, thus described by Alderson, B., in delivering the judgment of the Exchequer Chamber in Hilton v. Eckersley [6 E. & B. 74.]: "Prima facie it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion."

To this I would add the emphatic expression of the Lord Chancellor, Lord Halsbury, in the Mogul Case [[1892] A. C. 38.]: "All are free to trade upon what terms they will"; and of Lord Bramwell, who in Reg. v. Druitt [10 Cox. C. C. 600.], in a passage quoted by Lord Halsbury in the same case [[1892] A. C. at p. 73.], said: "The liberty of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body." Again, Sir W. Erle thus expresses himself: "Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." [Erle on Trade Unions, p. 12.] I

am not aware that the rights thus stated have ever been seriously questioned. I rest my judgment upon the principle expressed in these few sentences. I seek for no more.

The remedy for the invasion of a legal right is thus stated by Lord Watson in his judgment in Allen v. Flood [[1898] A. C. at p. 92.]: "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed."

I cannot suppose any intelligent person reading the evidence adduced on the trial of this case failing to come to the conclusion that the acts complained of amounted to a serious and wrongful invasion of the plaintiff's trade rights, and I am at a loss to comprehend upon what ground it is that the defendants seek to justify or excuse their action towards him.

As members of a trade union society they have no more legal right to commit what would otherwise be unlawful wrongs than if the association to which they are attached had never come into existence. They have no more right to coerce others pursuing the same calling as themselves to join their society, or to adopt their views or rules, than those who differ from them and belong to other trade associations would have a right to coerce them. The Legislature in conferring upon trades unions such privileges as are contained in the Trade Union Acts, 1871 and 1876, does not empower them to do more than make rules for the regulation of their own conduct and to provide for their own mutual assistance, and leaves each member as free to cease to belong to it and to repudiate every obligation for future observance of its rules as though he had never joined it; and most certainly it has not conferred upon any association or any member of it a licence to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way he thinks fit, provided only that it is lawful: see Erle, J., in Reg. v. Rowlands [(1851) 2 Den. C. C. 364.]; and although a combination of members of a trade union for certain purposes is no longer unlawful and criminal as a conspiracy merely because the objects of that combination are in restraint of trade, no protection is given to any combination or conspiracy which be-

fore the passing of the Act of 1871 would have been criminal for other reasons.

Not a word is to be found in the Trade Union Acts or in the Conspiracy Act of 1875 sanctioning such conduct as that complained of. Indeed, one cannot read the 7th section of the latter Act imposing penalties for undue coercion and intimidation without seeing that it had no intention to tolerate such proceedings as in this case are complained of, but rather to protect those upon whom coercive measures might be practised. I may also note that the 3rd section of that Act does not apply to civil proceedings by action.

It would not be useful to examine again all the numerous cases upon the citation and discussion of which much time has been expended, for not one of them would really assist the appellant in defence of his or his co-conspirators' conduct.

The Mogul Case [[1892] A. C. 25.] contains no doubt a mass of valuable, interesting, and useful law as to the length to which competing traders may go in pushing and endeavouring to promote their respective interests, and yet keep within bounds that are legal, though the stronger and more wealthy of them may sometimes press hardly upon the weaker whose capital is limited. One trader may by his mode of carrying on his trade hold out attractions and allurements which may enlist so many of his rival's customers as will well-nigh, perhaps wholly, destroy his trade.

But not a word will be found in that case justifying an active interference with the right of every trader to carry on his business in his own manner, so long as he does not interfere with a similar legal right which is vested in his neighbour and observes the correlative duty pointed out by Sir W. Erle.

My noble friend, the Lord Chancellor, accurately summed up the position of things in the Mogul Case [[1892] A. C. 25.] in these words: "What legal right was interfered with? What coercion of the mind, will, or person is effected? All are free to trade on what terms they will, and nothing has been done except in rival trading which could be supposed to interfere with the appellant's interests."

But I will not linger upon a consideration of what may be done in competition, for competition is not even suggested as a justification of the acts now complained of—acts of wanton

aggression the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade.

It cannot be—it was not even suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirements, or in support of any lawful right of the association or any member of it, or to obtain or maintain fair hours of labour or fair wages, or to promote a good understanding between employers and employed and workman and workman, or for the settlement of any dispute, for none had existence. It would, indeed, be a strange mode of promoting such good understanding to coerce a tradesman's customers to leave him because he would not, at the bidding of the association, dismiss workmen who desired to continue in his service and whom he wished to retain to make way for others he did not want.

I will deal now with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, to embark upon a history of the law relating to the subject, or to the old and obsolete writ of conspiracy. It would be useless for our present purpose.

I will endeavour briefly to state how I view the matter practically, so far as it concerns this case.

A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved. This is the substance of the decision in Barber v. Lesiter. [7 C. B. (N. S.) 175.] I quote as a very instructive definition of a conspiracy the words of a great lawyer, Willes, J., in Mulcahy v. Reg. [(1868) L. R. 3 H. L. at p. 317.], in delivering the unanimous opinion of himself, Blackburn, J., Bramwell, B., Keating, J., and Pigott,

B., which was adopted by this House: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means. . . . The number and the compact give weight and cause danger."

It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present.

In 1870 COCKBURN, C. J., in delivering the unanimous judgment of CHANNELL, B., CLEASBY, B., KEATING and BRETT, JJ., in Reg. v. Warburton [L. R. I. C. C. 276.], said: "It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i. e., amount to a civil wrong."

It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if by those acts substantial damage was caused to the person against whom the conspiracy was directed: my own opinion is that they would.

In dealing with the question it must be borne in mind that a conspiracy to do harm to another is, from the moment of its formation, unlawful and criminal, though not actionable unless damage is the result.

The overt acts which follow a conspiracy form of themselves no part of the conspiracy: they are only things done to carry out the illicit agreement already formed, and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the

intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished.

Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison. Many illustrations of these views might be suggested, but I need them not if I have made myself understood.

The cases bearing upon the subject are not very numerous; the whole subject was fully discussed in the Mogul Case ([1892] A. C. 25.) in each of its stages—to it I simply refer. Rex v. Journeymen Tailors of Cambridge [(8 Geo. 1) 8 Mod. 11.] was an indictment for a common law conspiracy by workmen to raise wages. On objection taken to the indictment it was upheld for the reason given that the conspiracy was illegal, although the matter about which they conspired might have been lawful for them or any to do if they had not conspired to do it; and Rex v. Eccles [1 Lea. C. C. 274.], before Lord Mansfield, was an indictment for a conspiracy by indirect means to deprive and hinder one Booth from using and exercising his trade of a tailor, and in pursuance of that conspiracy hindering and preventing him from following his said trade to his great damage. It was held unnecessary to set out the means by which the intended mischief was effected, "for the offence does not consist in doing those acts, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offence." See also per GROSE, J., in R. v. Mawbey. [(1796) 6 T. R. 619; 3 R. R. 282.]

If I rightly understand the judgment of DARLING, J., in Huttley v. Simmons [[1898] 1 Q. B. 181.], he treated Allen v. Flood, as a binding authority compelling him to hold that the object of the conspiracy as proved was not unlawful; in that

view he rightly decided that the count for conspiracy could not be maintained. If he had held that, although the objects of the conspiracy was unlawful, yet if the overt acts were not so, because they would not have been unlawful if done by one individual without any conspiracy, and had decided on that ground, I should have differed.

I am conscious that I have occupied more of your Lordships' time than I had intended, but the case is of real importance, and I feel that such unlawful conduct as has been pursued towards Mr. Leathem demanded serious attention. I think the law is with him, and that the damages awarded by the jury are under the circumstances very moderate. It is at all times a painful thing for any individual to be the object of the hatred, spite, and ill-will of any one who seeks to do him harm. But that is as nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately, as often as opportunity occurs regardless of law, and actuated by malevolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organized and ruinous oppression.

I think the judgment in the Court below ought to be affirmed and this appeal dismissed with costs.

LORD ROBERTSON. [Read by Lord DAVEY in Lord ROBERTSON'S absence.] My Lords, in my opinion the judgment appealed against was right for the reasons given by HOLMES, L. J.

LORD LINDLEY. [Read by Lord DAVEY in Lord LINDLEY'S absence.] My Lords, the case of Allen v. Flood, has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs. [[1895] 2 Q. B. 22, 23;

[1898] A. C. 3.] The action was tried before KENNEDY, J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgment against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. [[1898] A. C. p. 19, Lord Watson; p. 115 Lord Herschell; pp. 147-150 Lord Macnaghten; pp. 161, 165 Lord Shand; p. 175 Lord Davey; p. 178 Lord James.] There being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action.

My Lords, this decision, as I understand it, establishes two propositions: one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionably by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in Allen

v. Flood; it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, first, that in Allen v. Flood, criminal responsibility had not to be considered. It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful," i. e., to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble Lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself he actionable, whatever the motive or intention of the informant may have been.

My Lords, the question whether Allen had more power over the men than some of their Lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no Court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by noble Lords from the evidence relating to Allen in the case before them.

I will pass now to the facts of this case, and consider (1.) what the plaintiff's rights were; (2.) what the defendants' conduct was; (3.) whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalises strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law

prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable is point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified —the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late BOWEN, L. J., in his admirable judgment in the Mogul Steamship Company's Case [23 Q. B. D. 613, 614.], may be referred to in support of the foregoing conclusion, and I do not understand the decision in Allen v. Flood to be opposed to it.

If the above reasoning is correct, Lumley v. Gye [2 E. & B. 216.] was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. Temperton v. Russell ought to have been decided and may be

upheld on this principle. That case was much criticised in Allen v. Flood, and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out Allen v. Flood. But in Temperton v. Russell there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in Allen v. Flood. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not

amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of *damnum absque injuria,* but of *damnum cum injuria.*

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the Mogul Steamship Co. v. MacGregor [[1892] A. C. 25.] and Allen v. Flood, and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to Allen v. Flood, in favour of the appellant. His sheet-anchor is Allen v. Flood, which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and if he had done so, I conceive that he would have committed a wrong

towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in Allen v. Flood, Lord Herschell [[1898] A. C. at pp. 128, 138.] expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in Allen v. Flood, there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is prima facie unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware

of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst the American cases I would refer especially to Vegelahn v. Guntner [167 Mass. 92.], where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the Mogul Steamship Co. [[1892] A. C. 25; 23 Q. B. D. 598.] that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. Allen v. Flood, emphasises the same doctrine. The principle was strikingly illustrated in the Scottish Co-operative Society v. Glasgow Fleshers' Association [35 Sc. L. R. 645.], which was referred to in the course of the argument. In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs shewed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to shew.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between

associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings; it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is prima facie, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

My Lords, the appellant relied on several authorities besides those already referred to, which I will shortly notice. No coercion of the plaintiff's employer, customers, servants, or friends had to be considered in Kearney v. Lloyd. [26 L. R. Ir. 268.] This is fully shewn in the various judgments now under review.

In Huttley v. Simmons [[1898] 1 Q. B. 181.] the plaintiff was a cab-driver in the employ of a cab-owner. The defendants were four members of a trade union who were alleged to have maliciously induced the cab-owner not to employ the plaintiff, and not to let him have a cab to drive. The report does not state the means employed to induce the cab-owner to refuse to have any dealings with the plaintiff. The learned judge who tried the case held that as to three of the defendants the plaintiff had no case, and that as to the fourth, against whom the jury found a verdict, no action would lie because he had done nothing in itself wrong, apart from motive, and that the fact that he acted in concert with others made no difference. It is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated.

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts.

I pass now to consider the effect of the statute 38 & 39 Vict. c. 86. This Act clearly recognises the legality of strikes and lock-outs up to a certain point. It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or any one else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts and degrees: picketing is a distinct annoyance, and if damage results is an actionable nuisance at common law, but if confined merely to obtaining or communicating information it is rendered lawful by the Act (s. 7). Is a combination to annoy a person's customers, so as to compel them to leave him unless he obeys the combination, permitted by the Act or not? It is not forbidden by s. 7; is it permitted by s. 3? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in Lyons v. Wilkins [[1896] 1 Ch. 811.], in the case of Schoenthal, which arose there, and is referred to in the judgment of Walker L. J. at p. 99 of the printed judgments in this case. This particular point had not to be reconsidered when Lyons v. Wilkins [[1896] 1 Ch. 811.] came before the Court of Appeal after the decision in Allen v. Flood. [See [1899] 1 Ch. 255.] But Byrne, J., modified the injunction granted on the first occasion [See [1899] 1 Ch. at pp. 258, 259.] by confining it to watching and besetting. He might safely have gone further and have restrained the use of other unlawful means; but the strike was then over, and his modification was not objected to, and cannot be regarded as an authority in favour of the appellant's contention.

It must be conceded that if what the defendants here did had been done by one person it would not have been punishable as a crime. I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of s. 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section even on an indictment for a conspiracy.

But assuming that there was a trade dispute within the meaning of s. 3, and that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked and is well known. An illegal agreement, whether carried out or not, is the essential element in a criminal case; the damage done by several persons acting in concert, and not the criminal conspiracy, is the important element in the action for damages. [See 1 Wm. Saund. 229b, 230, and Barber v. Lesiter, 7 C. B. (N. S.) 175.] In my opinion, it is quite clear that s. 3 has no application to civil actions: it is confined entirely to criminal proceedings. Nor can I agree with those who say that the civil liability depends on the criminality, and that if such conduct as is complained of has ceased to be criminal it has therefore ceased to be actionable. On this point I will content myself by saying that I agree with ANDREWS, J., and those who concurred with him. It does not follow, and it is not true, that annoyances which are not indictable are not actionable. The law relating to nuisances, to say nothing of the law relating to combinations, shews that many annoyances are actionable which are not indictable, and the principles of justice on which this is held to be so appear to me to apply to such cases as these.

My Lords, I will detain your Lordships no longer. Allen v. Flood, is in many respects a very valuable decision, but it may be easily misunderstood and carried too far.

Your Lordships are asked to extend it and to destroy that individual liberty which our laws so anxiously guard. The appellant seeks by means of Allen v. Flood, and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trades unions in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby.

My Lords, so to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do what is not yet authorized by any statute or legal decision.

In my opinion this appeal ought to be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.
Lords' Journals, August 5, 1901.

THE MASTER STEVEDORES' ASSN. v. WALSH

(Court of Common Pleas for the City and County of New York, 1867. 2 Daly, 1.)

This was a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The plaintiffs are a corporation of which the defendant is a member and is, as its name imports, an association of master stevedores. The association adopted a by-law or "pledge" to the effect that there should be no variation from the prices adopted by the association, and that if any member, after an investigation by a committee, should be found guilty of working for less than the prices fixed, he should forfeit to the association twenty-five per cent. of the amount of such bill as fixed, which penalty might be collected in the name of the corporation by due process of law.

The complaint alleges that the by-law was subscribed to by the defendant, that the corporation had fixed the rate of discharging railroad iron from vessels at thirty-two cents a ton, and that the defendant had discharged fifteen hundred tons in violation of this regulation; that he was consequently found guilty by the association of working for less than the recognized price, and incurred a penalty of $125, for the recovery of which the action is brought.

DALY, F. J. The complaint is demurred to upon the ground that no action lies upon the facts stated, the specific objection raised by the demurrer being that the by-law is illegal, because the object it is designed to effect is one that is forbidden by law, and that no action can consequently be maintained upon it.

It is declared by the Rev. Stat. (vol. 1, p. 691, §§ 8 and 9), that it shall be unlawful for two or more persons to conspire to commit any act injurious to trade or commerce, and that the persons so conspiring shall be deemed guilty of a misdemeanor. In the People v. Fisher (14 Wend. 9), it was held that it was a violation of this statute for a body of journeymen shoemakers in the village of Geneva, in this State, to enter into an association for the purpose of preventing any shoemaker in the village from working below certain rates, which

object the association sought to obtain by imposing a penalty of ten dollars upon any shoemaker in the village who worked for less, and by a mutual agreement among the members of the association that they would not work for any master shoemaker who should employ a journeyman who infringed their rules, unless the journeyman so infringing paid the ten dollars to the association, and which object was carried into effect by a number of the members of the association quitting the employment of a master shoemaker, who had employed a journeyman at rates below those which the association had agreed upon.

The feature which distinguishes this case from the one under consideration is, that coercive measures were there resorted to to compel a compliance, not only on the part of master shoemakers, but of journeymen not members of the association, with the regulations the combination had established. This was undertaking to interfere with the rights of others, and it has frequently been held that combinations to prevent any journeyman from working below certain rates, or to prevent master workmen from employing one except at certain rates are unlawful, and that the parties engaging in such combination may be indicted for a conspiracy. (Case of the Journeymen Cordwainers of the City of New York, printed by J. Riley, New York, 1810. Case of Journeymen Cordwainers of Pittsburg, printed at Pittsburg, 1811. Case of the Philadelphia Boot and Shoemakers, Yates' Select Cases, 144. The Philadelphia Journeymen Tailors' Case, Phil. 1827, pp. 103, 160. People v. Trequler, 1 Wheeler's Criminal Cases, 142.)

In the present case, the by-law was limited in its operation to the members composing the corporation, and is sought to be enforced against one who had voluntarily subscribed to it. In this respect it is distinguished from the case of The People v. Fisher, and from the other cases above cited; but if all the reasons which Chief Justice Savage assigned for the judgment of the Court, in The People v. Fisher, are to be received as law, they would apply to this case.

They are substantially as follows: That any confederacy or united agreement among journeymen, for the purpose of raising their wages, is an indictable offense at the common law; that journeymen may each, singly, refuse to work unless they

receive an advance of wages, but if they do so by preconcert or association, they may be punished for a conspiracy; that if the journeymen bootmakers of the village of Geneva, by extravagant demands enhance the price of labor at that place, boots made elsewhere may be sold cheaper, and it is, therefore an act injurious to trade, so far as respects the trade of village of Geneva in that particular article, which is all that is necessary to bring the offense within the statute; that the best interests of society require that the price of labor be left to regulate itself, or be limited by the demand of it; that a combination or confederacy to enhance or reduce the price of it, or of any article of trade or commerce, is injurious; that without officious and improper interference, the price of labor will be regulated by the demand for it, but the right does not exist to enhance it by any fixed artificial means; that a mechanic is not obliged by law to work for any particular price. He has a right to say that he will not make a boot for less than a certain price, but he has no right to say that no other bootmaker shall make one for less. If one individual does not possess such a right over the conduct of another, no number of individuals can possess it. All combinations, therefore, to effect such an object are injurious, not only to the particular individual opposed, but to the public at large. That if journeymen boot-makers may say what boots shall be made for, it would be optional with them to say $10 or $50 shall be paid, which would be a monopoly of the most odious kind; that if journeymen can in this way fix their own wages, they would have the power to regulate the price of any manufactured article, and the community might be enormously taxed; that if the journeymen bakers should refuse to work except for enormous wages, and should compel all the journeymen bakers in a city to stop work, the community would be without bread. Such combinations would be productive of derangement and confusion, and if generally entered into would be prejudicial to trade and to the public interest; the truth being that they are wrong in every instance, as industry requires no such means to support it, competition being the life of trade.

Much of what is here said is undoubtedly right, and it is forcibly put. Many of the reasons were applicable to the case before the court, which was correctly determined in ac-

cordance with the adjudged cases. The objection, however, is, that some of the propositions stated are not tenable, and that there is an omission throughout, to distinguish between what is entirely lawful for either journeymen or master workmen to do in their collective capacity, upon the subject of wages, and those unlawful combinations where the object is to control the rate of wages by the use of coercive measures.

It is not, nor has it ever been, a rule of the common law that any mutual agreement among journeymen for the purpose of raising their wages, is an indictable offense, or that they are guilty of a conspiracy if, by preconcert and arrangement, they refuse to work unless they receive an advance of wages. The Chief Justice admitted that he had found but few adjudications upon the subject, and that the offense of conspiracy had been left in greater uncertainty by the common law than most offenses. He remarked that precedents in the absence of adjudications were some evidence of what the law is, and he referred to several, but none of them warrant the conclusion that they were founded upon any rule of the common law. He referred to but two adjudged cases: The King v. The Journeymen Tailors of Cambridge, 8 Modern, 11, and The Tub Women v. The Brewers of London, the last of which cases, he says, has been cited as sound law by all subsequent criminal writers. There is no report of any case under such a name of The Tub Women v. The Brewers of London. It is merely mentioned by name in the case first above cited, as authority for the proposition that a conspiracy of any kind is illegal, though the matter about which the parties conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it. The first volume of the Modern Reports, in which this reference is found, is one of the least reliable of the English reports, being full of inaccuracies, blunders, and misstatements. Burrows, in his reports, speaks of it as "a miserable, bad book," and says, that upon being cited, the Court of King's Bench treated it with the contempt that it deserved (1 Burr. 386; 3 id., 1326); and by an excellent authority upon the books of reports and their reporters, it is characterized by the epithet of execrable (Wallace's Common Law Reporters, 3 ed. p. 226). The title "The Tub Women v. The Brewers of London," is undoubtedly a mistake, and it

has been conjectured that the case referred to is The King v. Sterling and others, reported in 1 Lev. 125; 1 Sid. 274; 1 Keb. 350. (See the conjectures of Mr. Emmett and of Mr. Sampson respecting it, in Yates' Select Cases, pp. 164, 211, 212). I entertain no doubt but that this conjecture is correct, and a brief statement of that case will suffice to show what was determined by it. The defendants—brewers of London—were found guilty of a conspiracy, for agreeing that they would brew no small beer—which was the drink of the poor—for a certain length of time, nor ale, except at a certain price, with the intent of moving the common people to pull down the excise-house and to bring the excisemen into public odium, that they might be impoverished and disabled from paying their rent to the government, to the diminution of the revenue; which was a very clear case of conspiracy, the design being to impair the public revenue, to inflict pecuniary injury upon all the excisemen, and to stir up a public tumult. Assuming it to be, as I have no doubt it is, the case referred to under the supposititious title of the "The Tub Women v. Brewers of London," it would have been more correct to have said that it warrants the conclusion that though the brewers, or any of them, had the right to cease brewing, or to raise the price of their ale, it was unlawful for them to combine to do so for such an object as the one above stated. The case is an authority simply for a familiar principle of the criminal law, that it is a conspiracy to combine to do a lawful act for an unlawful purpose, or by unlawful means.

As respects the remaining case (The King v. The Journeymen Tailors of Cambridge), it is also found in this discredited volume of reports, in further condemnation of which I may cite the remark of an eminent English judge, Justice Wilmot, that, "nine cases out of ten in this book are totally mistaken" (The King v. Harris, 7 Term R. 238). But even the case, as reported there, affords no ground for the inference that there was any such rule at the common law as Chief Justice Savage supposed. In 1721, when the case was decided, there were acts of Parliament regulating the rate of wages. The defendants, according to the report, were indicted for refusing to work unless they received higher rates than the statute allowed. And, as far as can be gathered from the confused

statement of the reporter, the conviction was held to be good, because they had conspired to raise their wages beyond what the law permitted. These early English statutes, regulating the price of labor, being wholly inapplicable to us in our colonial condition, were never in force in this country, and formed no part of the law of the Colony of New York, at the adoption of our State Constitution in 1777. This decision, therefore, was limited to England, deriving its whole effect from the English statute, the provisions of which it was held the defendants had conspired to defeat.

Chief Justice Gibson declared, in 1821, that it had never been decided in England that it was unlawful for journeymen to agree that they would not work, except for certain wages, or for master workmen to agree that they would not employ any journeymen, except at certain rates (Commonwealth v. Carlisle, 1 Hall's Journal of Jurisprudence for 1822, p. 225). And in corroboration of the statement of this very accurate and eminent jurist, I would add that I have examined down to the present time, and have found no case, either in this country or in England, in which any such decision has been rendered. In some of the elementary writers there are passages giving countenance to such a doctrine, and there are some observations of judges to the same effect. Justice Gross said, in The King v. Mawrey, 6 Term R. 636, that in many cases an agreement to do a certain thing has been considered the subject of indictment for a conspiracy, though the same act, if done separately by each individual, without any agreement among themselves would not have been illegal; as in the case of journeymen conspiring to raise their wages, each may insist upon raising his wages if he can, but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy. But this was put simply by way of illustration, as there was no such question in the case, and was evidently made without examination, as no authorities are referred to; and in the case of the Philadelphia Boot and Shoemakers, Yates' Select Cases, 144, and in the case of the Philadelphia Journeymen Tailors, Phil., 1827, pp. 103, 160, Recorder Levy said that a single journeyman may refuse to work, but many journeymen jointly must not; but there the object of the combination was to coerce employers as well as

third persons, and the point was not necessarily involved. In the New York Cordwainers' Case, *supra,* on the contrary, after an elaborate argument of the question, the court declared that they would not say that an agreement not to work except for certain wages would amount to a conspiracy, without unlawful means were resorted to to enforce it. This case was tried in this city in 1809. Justice Radcliffe, an eminent Judge of the Supreme Court, was on the bench, having associated with him another distinguished judge, Josiah O. Hoffman, and their united opinion upon such a question, after it had been learnedly discussed before them by four of the ablest counsel then in this State—Emmet, Colden, Griffin, and Sampson—is entitled to more consideration than the opinion, expressed by way of illustration, by Justice Gross, or the passing observation of Recorder Levy.

In the case of the Philadelphia Journeymen Tailors, printed at Philadelphia, 1827, Recorder Reed, upon a full examination of the subject, and after reviewing the opinion of his predecessor, Recorder Levy, held that an agreement among journeymen not to work unless they received certain wages, where it did not extend beyond themselves, and where no other means were used, was not illegal, though it would be, if the object was to operate upon others not voluntarily entering into the agreement. Journeymen, he said, have an undoubted right, by an agreement among themselves, to regulate their own conduct, to ask as much as they please for their services; but the moment they undertake to interfere with the rights of others, or enter into combinations for such a purpose, the act is criminal and they become conspirators.

In the Commonwealth v. Hunt (4 Metc. 111), Chief Justice Shaw considered this question, and laid down the broad proposition that men are free to work for whom they please, or not to work if they so prefer, and that it is not criminal for them to agree together to exercise this right in such a manner as may best subserve their own interest; and in the case of the Hartford Carpet Weavers, tried before the Superior Court in Connecticut, in 1836, printed at Hartford, 1836, Chief Justice Williams told the jury that if the real nature of the agreement between the defendants was an agreement not to work below certain prices, that that was not an indictable offense,

nor the subject of a civil action; that it had been so determined in that court, and under this ruling, the defendants were acquitted. This case is entitled to great weight. It was the third trial. A great deal of time was given to it, more than seventy witnesses having been examined. It was elaborately argued by counsel, and the ruling of the Chief Justice was made after the case had been considered upon appeal.

The absence of any adjudication upon this question at the common law may be attributable to the fact that there were statutes in England, from the passage of the Laborers' Act in the reign of Edward III., down to the reign of George IV., regulating the rate of wages, and forbidding agreements or combinations to evade these statutes; laws made in the interest of employers, in the creation of which those who were most affected by them had no share. By the Act of 5 Geo. IV, c. 95, all these statutes were repealed, and as this important statute was prepared with great care, its provisions may be appropriately referred to, both as indicating the state of common law, and as furnishing a good exposition of what the law ought to be upon this subject. It prohibits all persons from attempting by threats, intimidation, or violence, to force any workman to quit his employment, or to prevent him from hiring himself to, or accepting work from any person, or for the purpose of compelling him to join any club or association, or to contribute to any common fund, or to pay any fine or penalty for not doing so, or for refusing to comply with any regulations made to obtain an advance, or to reduce the rate of wages, or to lessen the hours of labor, or the quantity of work; but the act, at the same time, declares that it shall be lawful for any persons to meet together, for the sole purpose of consulting upon or determining the rate of wages, which the persons so assembling shall require or demand, or the hours or time they will work in their respective employments, and that they may enter into any agreements, verbal or written, among themselves, for the purpose of fixing the rate of wages which the parties so agreeing may demand, and that the persons so uniting and agreeing shall not be liable to any prosecution or penalty for so doing.

The distinction which this statute makes between the legality of association among workmen for the protection of their in-

terest, by agreeing as a body not to work below certain prices, and an illegal combination formed for the purpose of making it compulsory upon all the journeymen in a particular branch of business, and upon the employers to conform to certain prices by imposing penalties upon the journeymen in a city or town who refuse to do so, or by agreeing as a body not to work for any employer who will employ such a journeyman, or one who will not pay the penalty or become a member of the combination, or which seeks to accomplish such a purpose by violence, intimidation, or other unlawful means, is one that has been slowly arrived at in England, and toward which the courts in this country have been gradually approximating, for the reason that it has its foundation in the plainest principles of justice. The apprehension that if this be conceded, it would place employers wholly at the mercy of their workmen, who would have it in their power to exact any sum for their services, however extravagant, is altogether an imaginary one. It is not possible, by any organization among journeymen, to bring about such a result. The history of English legislation upon the subject of wages, and of the operations of trades-unions, show that it is neither in the power of prohibitory laws nor of artificial combinations to control arbitrarily the price of labor, and that no combination can devise any general regulation or scheme that will bring to the same level the skillful and the incompetent, the diligent and the idle. All such matters regulate themselves. If labor is in demand, the rate of compensation will be enhanced in proportion; and if it is not, no combination among workmen can prevent the falling of prices. Voluntary associations among workmen, or agreements among them not to work except for certain prices, are effectual only when their demands are just and reasonable, and when they attempt anything more, they not only fail of their object, but are themselves the chief sufferers. Workmen in every branch or calling are too universally diffused, too dependent upon their necessities, and too diverse in their interests, to make it possible by organization to accomplish anything beyond this, for if those in any one place ask what is exceptionable or unreasonable, by the natural law of demand and supply, others will come in and take their places.

But it may be in their power to secure by associated effort what it would not be possible for any one of them to accomplish alone; and that they should have the right to associate together for the mutual protection of their individual interest is so plain, that it is singular that it should ever have been questioned. Journeymen may be as well acquainted as their employers with the causes which affect the price of labor, and in this country are generally well informed in such matters. They may be quite as well able to judge whether the ordinary profits of employers justify a reduction or an increase in the rate of wages. Why, then, should they not have the right to come together to consider the condition of the branch of industry in which they are operatives, to impart information to each other, to exchange their views, and discuss in a body a matter in which they are so deeply interested? Merchants meet daily upon 'Change, that they may be thoroughly informed upon all matters relating to the traffic in which they are engaged; and why should not journeymen meet together to consider and act upon a subject so important to them as the general rate of wages. The exact sum which should be required for a day's wages may be fluctuating and uncertain, through the operation of other causes than those of demand and supply, such as the instability of the currency, by which the value of the paper representative of a dollar changes as the circulating medium is increased or diminished. These are matters for the consideration of workmen as well as all other causes affecting the price of their labor; and if they come together, and as the result of their deliberations conclude that a certain rate would be just and reasonable, and that they will not work for less, it would be the height of injustice to call such an act a crime, by declaring that it was, in the language of the statute, unlawfully conspiring to commit an act injurious to trade or commerce, for which each of them may be indicted and punished.

It is better for the law to leave such matters to the action of the parties interested—to leave master workmen or journeymen free to form what associations they please in relation to the rate of compensation, so long as they are voluntary. They mutually act upon each other. If the workmen demand too much, or the masters offer too little, such a state of things

cannot continue long, or be productive of any serious inconvenience to the community, as that party must ultimately give way whose pretensions are not founded in reason and justice (Regina v. Harris, 1 Carr. and Marsh. 662). It is otherwise, however, where organizations are formed to intimidate employers, or to coerce other journeymen; and it matters little what are the measures adopted, if the object of them is to interfere with the rights or control the free action of others. It was held, under the English statute I have referred to, that it did not authorize workmen to combine for the purpose of dictating to a master whom he should employ (Rex. v. Rykerdyke, 1 M. and Kobs, 179,); and the several convictions in this country have been in cases where coercive measures were resorted to, either to prevent master workmen from employing journeymen except at certain rates or to intimidate journeymen from engaging below such rates, or to compel them to become members of the combinations. Every man has the right to fix the price of his own labor—to work for whom he pleases, and for any sum he thinks proper; and every master workman has equally the right to determine for himself whom he will employ, and what wages he will pay. Any attempt by force, threat, intimidation, or other coercive means, to control a man in the fair and lawful exercise of these rights is therefore an act of oppression, and any combination for such a purpose is a conspiracy.

It may, therefore, be laid down as the result of this examination, that it is lawful for any number of journeymen or of master workmen to agree, on the one part that they will not work below certain rates, or on the other that they will not pay above certain prices; but that any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation, or agreement fixing the rate of wages, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeyman below certain rates, unless the journeyman pays the penalty imposed by the combination, or by menaces, threats, or intimidations, violence, or other unlawful means, is a conspiracy for which the parties entering into it may be indicted.

The act under which the defendants are incorporated (Laws

of New York, 1863, p. 494), declares the object of the corporation to be "the better to promote the business and interests of the several members of the association," and a general power is given to make by-laws not inconsistent with the provisions of the act of incorporation, or of the laws of the State. There was nothing in the by-law inconsistent with the act of incorporation, or with the laws of the State. As individuals, the master stevedores might collectively enter into an agreement not to work under certain rates, and when formed into a corporation, they could, as a corporate body, make a by-law of that nature, being one, in the language of the statute, "to promote the business and interest of the association." If the by-law is one which it is in the power of the corporation to make, it has the power also to attach to it a penalty for the purpose of enforcing it. All who become members of the corporate body are bound by it, and where the penalty is incurred an action may be brought in the name of the corporation to recover it (The Tobacco Pipe Makers v. Woodroffe, 7 Barn. & C. 838; King v. Clerk, 1 Salk. 349; Company of Feltmakers v. Davis, 1 B. & P. 100; Vinters' Company v. Passy, 1 Burr. 239, 250; Guardians of Trinity House v. Crispin, T. Jones R. 144; Leathy v. Webster, Sayre, 251; Grant on Corporations, 76, 78, 82, 86, 87). The proper mode of enforcing a by-law is by a pecuniary penalty, for the corporation cannot, either directly or indirectly, impose any forfeiture of goods, or of stock or other corporate interests for the breach of it (Matter of the Long Island Railroad Company, 19 Wend. 37), and the penalty must be certain (Leathy v. Webster, supra). The words of the by-law are, that the party shall forfeit to the association twenty-five per cent. of the amount of such bill as fixed by the association, *which penalty* may be collected by due process of law. Though the word forfeit is used, this is not a forfeiture (Grant on Corporations, 84, 85, 303), but a pecuniary penalty, and it is sufficiently certain.

This was not a by-law in restraint of trade, for it imposes no restraint upon one party which is not beneficial to the others, and is not, as has been shown, prejudicial to the interests of the public (Chappel v. Brockaway, 21 Wend. 157; Lawrence v. Kidder, 10 Barb. 641). The demurrer must be overruled, with costs.

SNOW v. WHEELER

(Supreme Judicial Court of Mass., 1873. 113 Mass. 179.)

BILL IN EQUITY brought by William A. Snow and five others, on behalf of themselves and other members of the North Brookfield Lodge, No. 28, of the order of the Knights of St. Crispin, against Daniel W. Wheeler, Cornelius Duggan, and the People's Savings Bank of Worcester, to compel the defendants Wheeler and Duggan to draw an order upon the defendant bank to enable the plaintiffs to withdraw from the bank a deposit made by Wheeler and Duggan, in their names as trustees, but acting as a committee of the lodge.

The defendant bank answered, admitting that $770.72 was deposited in the name of "D. W. Wheeler or Cornelius Duggan, trustees," but declined to pay the money to the lodge without an order signed by Wheeler and Duggan, and asserted their willingness to pay the money under the direction of the court.

The other defendants answered denying the existence of the North Brookfield Lodge, No. 28, of the order of the Knights of St. Crispin, but admitted that they received the money from one assuming to be the treasurer of such a lodge, and that they deposited it in the bank as trustees, the bank declining to receive it in the name of the lodge. They denied that they have been requested by any one, authorized so to do, to sign an order to withdraw the deposit. And denied that the plaintiffs had any right to prosecute the suit on behalf of others than themselves.

The case was referred to a master, a part of whose report was as follows:

"The North Brookfield Lodge, No. 28, of the order of the Knights of St. Crispin, is an unincorporated and voluntary association in the town of North Brookfield, in the county of Worcester, composed of persons employed as workmen in the manufacture of boots and shoes, but not including proprietors of boot and shoe manufacturing establishments who employ workmen, or their foremen. Each member upon being admitted to the association, subscribes his name to the constitution and by-laws, and also signs the following obligation: 'I will not teach or cause to be taught any new hand, any part

or parts of the boot or shoe trade without the permission of the lodge of which I am a member.'

"The North Brookfield Lodge is one of numerous lodges in this state organized under similar constitutions. Delegates from these lodges constitute what is called the 'Grand Lodge of the Order of Knights of St. Crispin, for the State of Massachusetts.' Similar grand lodges exist in many of the United States and in the British Provinces in North America. Delegates from the grand lodges and subordinate lodges in the United States and British Provinces, constitute what is called the 'International Grand Lodge of the Order of the Knights of St. Crispin.' The North Brookfield Lodge was organized in 1868, under a charter from a body in Milwaukee, styling itself the 'National Grand Lodge of the Knights of St. Crispin,' which has since become a subordinate lodge. The National Grand Lodge was founded in Milwaukee in 1868, by Newell Daniels and seven others, and was the original lodge from which all the others have sprung. On the organization of the grand lodge and the international grand lodge by delegates, the Milwaukee lodge became a mere subordinate lodge of the order.

"At a meeting of the members of the North Brookfield Lodge, held August 2, 1869, the following vote was passed:

" 'Voted, That there be a committee of two chosen to deposit such money as there is on hand, in the People's Savings Bank, Worcester,' and the defendants, Daniel W. Wheeler and Cornelius Duggan, who were both members of the lodge, were chosen as such committee. Said committee received from the treasurer of the lodge the sum of six hundred and fifty dollars, and August 31, 1869, deposited the same in the People's Savings Bank, in Worcester. Said sum was entered upon the books of the bank in the name of 'D. W. Wheeler or Cornelius Duggan, trustees,' the bank declining to enter it in the name of the lodge. The money has never been withdrawn from the bank, and now amounts with the accumulations to $770.72. The money was derived from initiation fees and monthly dues paid in by the members. September 6, 1869, a bill of $8.00 was paid by the lodge to Wheeler and Duggan for their expenses to Worcester to make the deposit.

"At a meeting of the members of the lodge held November

28, 1870, T. P. Snow and Daniel Sullivan were chosen a committee to wait upon Wheeler and Duggan and request them to sign an order so that the lodge could draw the funds deposited in the People's Savings Bank. December 19, 1870, the committee reported that they had not signed the order, but the committee thought they would sign it without doubt. February 13, 1871, W. A. Snow and A. B. Tatro were appointed a committee to see Duggan in regard to the funds in the Worcester bank. January 15, 1872, Sullivan was appointed a committee to see Duggan and get his signature to an order for the money in the People's Savings Bank in Worcester. February 12, 1872, Sullivan reported that Duggan refused to sign an order for the money deposited in the savings bank. February 26, 1872, the lodge voted that the trustees, with the sir knight, knight, treasurer, and recording scribe, be empowered to commence a suit for the recovery of the funds of the lodge, provided Judge Cowley deemed it advisable. The defendant Wheeler was requested by the committee chosen November 28, 1870, to sign an order for the withdrawal of the money in the bank, to which Wheeler replied that he would sign the order on two conditions: that the lodge should give the money to some object satisfactory to a majority of the members of the lodge, and relieve him from liability; and that he should receive a discharge from the lodge. Wheeler testified that he was ready to pay over the money whenever it should be determined to whom it belonged. Duggan was requested to sign an order for the withdrawal of the fund from the bank, by the committee appointed November 28, 1870, and also by the committee appointed January 15, 1872, but in both instances he refused to sign it. The plaintiffs are officers and members of the lodge, as follows: William A. Snow, sir knight; John R. Nichols, knight and trustee; Daniel Sullivan, treasurer and financial scribe; Joshua C. Simmons, corresponding and recording scribe; Joseph Short, trustee; and Amede B. Tatro, an ordinary member. The whole number of the members of the lodge is 553. Cornelius Duggan has died since the commencement of this suit. There was never any vote of the lodge adopting its constitution and by-laws, but they were signed by each member at the time of his admission. The lodge, being a subordinate lodge, was never organized under

any authority derived from St. 1870, c. 281. Some of the members of the lodge have requested Wheeler not to pay over the money in the trustees' hands to the plaintiffs.

"The following votes and doings appeared upon the records of the proceedings of the lodge: 'September 20, 1869. Complaint being made that a brother had a green hand in his employ, and that he also exposed the secrecy of the order by giving him the signs. The case was referred to a committee.'

" 'September 27, 1869. Two sir knights from Montreal were present. The English S. K. was first introduced, and he made a speech in regard to a strike existing there. The French sir knight was next introduced, who spoke in the French language upon the same subject. A motion was made that we pay a hundred dollars out of the treasury to assist the Crispins in Montreal. An amendment to that motion was made to take up a collection in the lodge also. The motion and amendment were carried.'

" 'January 18, 1869. By vote the lodge consented to allow Brother Mathews to take his brother-in-law in his employ to serve out the remaining five months' apprenticeship, he having already served seven months at the business in Webster, Mass.'

" 'February 8, 1869. A motion carried to raise money to be paid out of the treasury, at the rate of 25 cents tax per head on each member to be assessed, and replaced in the treasury. This money to be sent to the National Grand Lodge for the relief of existing grievances in Milford.' [This related to the controversy with Samuel Walker in Milford, out of which sprung the suit of Samuel Walker against Michael Cronin, reported 107 Mass. 555.]

" 'April 5, 1869. Chose a committee of three to investigate in regard to allowing Brother Nealy to take his nephew as an apprentice. The committee consists of Edward Dowling, Hiram Thompson and Cornelius Duggan.'

" 'April 12, 1869. Committee on Brother Nealy's case reported not in favor of allowing him to take his nephew as an apprentice.'

" 'August 2, 1869. Complaint being made that a person (not a crispin) named Morean, is learning new help, and states that he cares nothing for the order. Voted, to have a com-

mittee of three go and remonstrate with him, and also investigate other grievances of the like, which is said to be existing, and report to the lodge; this committee to be a standing committee for three months. Harry Eaton, Lucius M. Prouty, Wm. Clark, committee.'

" 'August 9, 1869. Complaint having been made that Brother Kittredge had been learning a boy, and he having made his statement here, which not being satisfactory to the lodge, Voted, that said Brother Kittredge should desist from learning the boy. Voted, that there be a committee from each room in the big shop to see all new comers in said shop and induce them to join, and if belonging to other lodges, to join by card. Mr. Morean, who was visited by the committee last week, having stated that he would join the order, if the lodge would allow him the privilege of keeping the boy who is at work for him, and the man having lost two fingers, which would trouble him to work alone, on that account the lodge voted to allow him the privilege if he would join. Seven persons were chosen on the above committee.'

" 'August 16, 1869. Voted, that all new help coming here to work, shall be obliged to get a transfer card before they can go to work.'

" 'September 6, 1869. The case of Brother Crawford was brought up. Brother Newman made report that Crawford stated that he would have no more to do with the order. Brother Newman's report, as one of the committee, was accepted. Brother Snow made a motion that Crawford be suspended. The motion was carried by a unanimous vote. Motion was made that there be a committee to wait upon the Batcheller firm and state the case. Motion was carried. D. W. Wheeler, Tilley P. Snow, and H. H. Green chosen committee. Motion was made and carried that the sense of the meeting be taken whether the brothers would stop work in case the firm refuse to discharge Crawford. It was a unanimous vote that they would turn out.' "

The master gave many other extracts from the records of the lodge, which were of the same general character.

The preamble of the constitution of the lodge, which, with the by-laws, and with the constitutions of the other lodges mentioned, was annexed to the master's report, declared the

object of the organization to be "to rescue our trade from the condition it has fallen into, and to raise ourselves to that respectable position in society that we, as free citizens, are entitled to, and to secure us forever against any further encroachments from manufacturers."

The case was heard by GRAY, C. J., and reserved upon the pleadings and master's report for the consideration and determination of the full court.

COLT, J. [This case was argued in writing, and considered by all the judges.] This bill is brought on behalf of a voluntary association, the individual members of which are too numerous to be joined as plaintiffs, and it is therefore brought in the name of a few, for themselves and all the other members. Birmingham v. Gallagher, 112 Mass. 190. It is heard upon the pleadings and master's report.

The individuals named as defendants were members of the association, and received its funds from the treasurer as a committee chosen to deposit the same for safekeeping in the bank, which is named as a co-defendant in the bill. The money was deposited in their names, as trustees, and they now refuse to restore it to the control of the association—the defendant bank refusing to pay without an order signed by the trustees, but submitting itself to the decree of the court.

The only question before us is, whether upon the facts stated in the master's report, and contained in the documents referred to, the trust set forth must have been assumed by the defendants for an illegal purpose. The plaintiffs are clearly entitled to recover their own money thus detained by parties who received it in a fiduciary capacity, unless it appears that the money was delivered to them, or must be held when recovered by the plaintiffs, for a purpose immoral, illegal or contrary to public policy.

The object and purposes of the association which the plaintiffs represent are shown by the constitution and by-laws of the lodge, which are made part of the case; these are subscribed to by each member at the time of his admission, with an additional agreement "not to teach or cause to be taught any new hand any part or parts of the boot or shoe trade without the permission of the lodge of which I am a member." Its mem-

bers are wholly composed of individuals employed as workmen in the manufacture of boots and shoes, but it does not include proprietors or their foremen.

It is insisted that the agreements thus established between the members of the order are in unlawful restraint of trade, and therefore illegal, as being against public policy. But in the opinion of the court the point is not well taken. In the relations existing between labor and capital, the attempt by coöperation on the one side to increase wages by diminishing competition, or on the other to increase the profits due to capital, is within certain limits lawful and proper. It ceases to be so when unlawful coercion is employed to control the freedom of the individual in disposing of his labor or capital. It is not easy to give a definition which shall include every form of such coercion; it is enough that in the compact before us there is no evidence of any purpose to use such unlawful means in any form. In Walker v. Cronin, 107 Mass. 555, 564, it is said that "every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition or the exercise of like rights by others, it is *damnum absque injuria.*"

In Carew v. Rutherford, 106 Mass. 1, 14, it is said, "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can." "He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions." And in Commonwealth v. Hunt, 4 Met. 111, 134, Shaw, C. J., declares that the legality of such association will depend upon the means to be used for the accomplishment of its objects and whether they be innocent or otherwise.

In the case at bar there is no evidence afforded by the documents submitted to us that the purposes of this association are unlawful by the rule stated. Unlawful coercion certainly

does not appear to be intended. And the right of the members to instruct whom they choose in the mysteries of their trade cannot be denied. The case presented is not one where there is evidence to justify us in finding that the objects and purposes of the association are fraudulently and colorably declared as a cover for a secret unlawful agreement of its members. It will be time enough to deal with such a case when it arises.

In this view, it is not necessary critically to examine the instances of alleged illegal conduct which it is said are found upon the records of the association, or to inquire whether they amount to illegal restraint of that freedom in trade which the law secures to all, because specific wrongful acts cannot be shown to defeat the plaintiffs' claim, unless it be also shown that such acts come within the scope and purpose of the organization. Each act of wrong, outside the declared and real purpose of the lodge, stands by itself, to be answered for only by those who join in its perpetration.

Decree for the plaintiffs, with costs against the individual defendants only.

THOMAS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, Southern Dist. of Ohio, Western Div. 1894. 62 Fed. 803.)

Per TAFT, Circuit Judge,[70] . . .

Now, it may be conceded in the outset that the employés of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employé may compel him

70—Only an extract from the opinion of Taft, Circuit Judge, is given.

to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood), that if Phelan had come to this city when the receiver reduced the wages of his employés by 10 per cent., and had urged a peaceable strike, and had succeeded in maintaining one, the loss to the business of the receiver would not be ground for recovering damages, and Phelan would not have been liable to contempt even if the strike much impeded the operation of the road under the order of the court. His action in giving the advice, or issuing an order based on unsatisfactory terms of employment, would have been entirely lawful.[71]

CURRAN v. GALEN

(Court of Appeals of New York, 1897. 152 N. Y. 33.)

Appeal from supreme court, general term, Fifth department.

Action by Charles Curran against Louis Galen and others. From a judgment of the general term (28 N. Y. Supp. 1134, mem.) affirming a judgment for plaintiff, defendants appeal. Affirmed.

The plaintiff demands damages against the defendants for having confederated and conspired together to injure him by taking away his means of earning a livelihood and preventing him from obtaining employment. He sets out in his complaint

71—See also Wabash R. Co. v. Hannahan, 121 Fed. 563, 567, 569.

that he was an engineer by trade, and that, previously to the acts mentioned, he was earning, by reason of his trade, a large income, and had constant employment at remunerative wages. He sets forth the existence of an unincorporated association in the city of Rochester, where he was a resident, called the Brewery Workingmen's Local Assembly, 1,796, Knights of Labor, which was composed of workingmen employed in the brewing business in that city, and was a branch of a national organization known as the Knights of Labor. He alleges that it assumes to control by its rules and regulations the acts of its members in relation to that trade and employment, and demands and obtains from its members implicit obedience in relation thereto. Plaintiff then alleges in his complaint that the defendants Grossberger and Watts wrongfully and maliciously conspired and combined together, and with the said local assembly, for the purpose of injuring him and taking away his means of earning a livelihood, in the following manner, to wit: That in the month of November, 1890, Grossberger and Watts threatened the plaintiff that unless he would join said local assembly, pay the initiation fee, and subject himself to its rules and regulations, they and that association would obtain plaintiff's discharge from the employment in which he then was, and would make it impossible for him to obtain any employment in the city of Rochester or elsewhere, unless he became a member of said association. In pursuance of that conspiracy, upon plaintiff's refusing to become a member of said association, Grossberger and Watts and the association made complaint to the plaintiff's employers, and forced them to discharge him from their employ, and, by false and malicious reports in regard to him, sought to bring him into ill repute with members of his trade and employers, and to prevent him from prosecuting his trade and earning a livelihood. The answer, in the first place, admitted all that was alleged in respect to the organization of the local assembly, as to how it was composed, and as to its being a branch of the national organization of the Knights of Labor, and as to its assuming to control the acts of its members, and to demand from them implicit obedience. It then denies, generally and specifically, each and every other allegation in the complaint. As a second and separate answer and defense to the complaint,

the defendants set up the existence in the city of Rochester of the Ale Brewers' Association, and an agreement between that association and the local assembly described in the complaint, to the effect that all employés of the brewery companies belonging to the Ale Brewers' Association "shall be members of the Brewery Workingmen's Local Assembly, 1,796, Knights of Labor, and that no employé should work for a longer period than four weeks without becoming a member." They alleged that the plaintiff was retained in the employment of the Miller Brewing Company "for more than four weeks after he was notified of the provisions of said agreement, requiring him to become a member of the local assembly"; that defendants requested plaintiff to become a member, and, upon his refusal to comply, "Grossberger and Watts, as members of said assembly, and as a committee duly appointed for that purpose, notified the officers of the Miller Brewing Company that plaintiff, after repeated requests, had refused for more than four weeks to become a member of said assembly"; and that "defendants did so solely in pursuance of said agreement, and in accordance with the terms thereof, and without intent or purpose to injure plaintiff in any way." The plaintiff demurred to the matter set up as a separate defense to the complaint, upon the ground that it was insufficient, in law, upon the face thereof. The special term and general term have sustained the demurrer, and the question is whether this matter set up by way of special defense is sufficient to exonerate the defendants from the charge, made in the complaint, of a conspiracy to injure the plaintiff and to deprive him of the means of earning his livelihood.

Per Curiam. In the decision of the question before us we have to consider whether the agreement upon which the defendants rely in defense of this action, and to justify their part in the dismissal of the plaintiff from his employment, was one which the law will regard with favor and uphold when compliance with its requirements is made a test of the individual's right to be employed. If such an agreement is lawful, then it must be conceded that the defendants are entitled to set it up as a defense to the action, forasmuch as they allege that what they did was in accordance with its terms.

In the general consideration of the subject, it must be premised that the organization or the co-operation of workingmen is not against any public policy. Indeed, it must be regarded as having the sanction of law when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate. Pen. Code, § 170. It is proper and praiseworthy, and perhaps falls within that general view of human society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve, or can achieve less readily. But the social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend or to accomplish injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would, to use the language of Mr. Justice Barrett in People v. Smith, 5 N. Y. Cr. R., at page 513, "impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate."

Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the principle contended for here; for there would certainly be a compulsion or a fettering of the individual glaringly at variance with that freedom in the pursuit of happiness which is believed to be

guarantied to all by the provisions of the fundamental law of the state. The sympathies or the fellow feeling which, as a social principle, underlies the association of workingmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed towards the repression of individual freedom, upon what principle shall it be justified? In Reg. v. Rowlands, 17 Adol. & E. (N. S.) *671, the question involved was of the right by combination to prevent certain workingmen from working for their employers, and thereby to compel the latter to make an alteration in the mode of conducting their business. The court of queen's bench, upon a motion for a new trial for misdirection of the jury by Mr. Justice Erle below, approved of his charge, and we quote from his remarks. He instructed the jury that "a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are conceded, but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is, at present, to allow either of them to follow the dictates of their own will with respect to their own actions and their own property, and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

The organization of the local assembly in question by the workingmen in the breweries of the city of Rochester may have been perfectly lawful in its general purposes and methods, and may otherwise wield its power and influence usefully and justly, for all that appears. It is not for us to say, nor do we intend to intimate, to the contrary; but so far as a purpose appears from the defense set up to the complaint that no employé of a brewing company shall be allowed to work for a

longer period than four weeks without becoming a member of the Workingmen's Local Assembly, and that a contract between the local assembly and the Ale Brewers' Association shall be availed of to compel the discharge of the independent employé, it is, in effect, a threat to keep persons from working at the particular trade, and to procure their dismissal from employment. While it may be true, as argued, that the contract was entered into, on the part of the Ale Brewers' Association, with the object of avoiding disputes and conflicts with the workingmen's organization, that feature and such an intention cannot aid the defense, nor legalize a plan of compelling workingmen not in affiliation with the organization to join it, at the peril of being deprived of their employment and of the means of making a livelihood.

In our judgment, the defense pleaded was insufficient, in law, upon the face thereof, and therefore the demurrer thereto was properly sustained.

The judgment appealed from should be affirmed, with costs.

All concur, except HAIGHT, J., not sitting.

Judgment affirmed.

NATIONAL PROTECTIVE ASSN. v. CUMMING

(Court of Appeals of New York, 1902. 170 N. Y. 315.)[72]

PARKER, C. J. The order of the appellate division should be affirmed, on the ground that the facts found do not support the judgment of the special term. In the discussion of that proposition, I shall assume that certain principles of law laid down in the opinion of Judge VANN are correct, namely:

"It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work or refuse to work at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from any one. If the terms do not suit, or the employer does not please,

72—Only the opinions are given.

the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not in violation of law." Stated in other words, the propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it. But there is, I take it, no legal objection to the employé's giving a reason, if he has one, and the fact that the reason given is that he refuses to work with another who is not a member of his organization, whether stated to his employer or not, does not affect his right to stop work; nor does it give a cause of action to the workman to whom he objects, because the employer sees fit to discharge the man objected to, rather than lose the services of the objector.

The same rule applies to a body of men, who, having organized, for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but, if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual; but, if they elect to state the reason, their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society. And if the conduct of the members of an organization is legal in itself, it does not become illegal because the organization directs one of its members to state the reason for its conduct.

The principles quoted above recognize the legal right of members of an organization to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), and they enumerate some things that may be treated

as the subject of a grievance, namely, the desire to obtain higher wages, shorter hours of labor, or improved relations with their employers; but this enumeration does not, I take it, purport to cover all the grounds which will lawfully justify members of an organization refusing in a body and by prearrangement, to work. The enumeration is illustrative, rather than comprehensive; for the object of such an organization is to benefit all its members, and it is their right to strike, if need be, in order to secure any lawful benefit to the several members of the organization,—as, for instance, to secure the re-employment of a member they regard as having been improperly discharged, and to secure from an employer of a number of them employment for other members of their organization who may be out of employment, although the effect will be to cause the discharge of other employés who are not members.

And whenever the courts can see that a refusal of members of an organization to work with nonmembers may be in the interest of the several members, it will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice, and to inflict injury upon such nonmembers.

A number of reasons for the action of the organization will at once suggest themselves in a case like this. One reason apparent from the findings in this case, as I shall show later, is the desire of the organization that its own members may do the work the nonmembers are performing. And another most important reason is suggested by the fact that these particular organizations, associations of steam fitters, required every applicant for membership to pass an examination testing his competency. Now, one of the objections sometimes urged against labor organizations is that unskillful workmen receive as large compensation as those thoroughly competent. The examination required by the defendant associations tends to do away with the force of that objection as to them. And again, their restriction of membership to those who have stood a prescribed test must have the effect of securing careful as well as skillful associates in their work, and that is a matter of no small importance, in view of the state of the law, which absolves the master from liability for injuries sustained by a

workman through the carelessness of a co-employé. So long as the law compels the employé to bear the burden of the injury in such cases, it cannot be open to question but that a legitimate and necessary object of societies like the defendant associations would be to assure the lives and limbs of their members against the negligent acts of a reckless co-employé; and hence it is clearly within the right of an organization to provide such a method of examination and such tests as will secure a careful and competent membership, and to insist that protection of life and limb requires that they shall not be compelled to work with men whom they have not seen fit to admit into their organization, as happened in the case of the plaintiff McQueed.

While I purpose to take the broader ground, which I deem fully justified by the principles quoted, as well as the authorities, that the defendants had the right to strike for any reason they deemed a just one, and, further, had the right to notify their employer of their purpose to strike, I am unable to see how it is possible to deny the right of these defendant organizations and their members to refuse to work with nonmembers, when, in the event of injury by the carelessness of such co-employés, the burden would have to be borne by the injured, without compensation from the employer, and with no financial responsibility, as a general rule, on the part of those causing the injury; for it is well known that some men, even in the presence of danger, are perfectly reckless of themselves and careless of the rights of others, with the result that accidents are occurring almost constantly which snuff out the lives of workmen as if they were candles, or leave them to struggle through life maimed and helpless. These careless, reckless men are known to their associates, who not only have the right to protect themselves from such men, but, in the present state of the law, it is their duty, through their organizations, to attempt to do it, as to the trades affording special opportunities for mischief arising from recklessness.

I know it is said in another opinion in this case that "workmen cannot dictate to employers how they shall carry on their business, nor whom they shall or shall not employ"; but I dissent absolutely from that proposition, and assert that, so long as workmen must assume all the risk of injury that may

come to them through the carelessness of co-employés, they have the moral and legal right to say that they will not work with certain men, and the employer must accept their dictation or go without their services.

If it be true, as was recently intimated by the supreme court of Pennsylvania in Durkin v. Coal Co., 171 Pa. 193, 29 L. R. A. 808, 50 Am. St. Rep. 801, that an act of the legislature which undertakes to "reverse the settled law upon the subject, and declare that the employer shall be responsible for an injury to an employé resulting from the negligence of a fellow workman," is unconstitutional,—a doctrine from which I dissent (see Tullis v. Railroad Co., 175 U. S. 348, 44 L. Ed. 192), but which it is possible may receive the support of the courts,—then the only opportunity for protection, in the future as well as the present, to workmen engaged in dangerous occupations, is through organizations like these defendant associations, which restrict their memberships to careful and skillful men, and prohibit their members from working with members of other organizations which maintain a lower standard or none at all. For the master's duty is discharged if the workman be competent, and for his recklessness, which renders his employment a menace to others, the master is not responsible.

But I shall not further pursue this subject. My object in alluding to it is to emphasize the fact that there are other purposes for which labor organizations can be effectually used than those quoted above, and also because it is fairly inferable from the facts found that the members of plaintiff association were objectionable to defendants because not up to the latter's standards, so as to make them eligible for membership in defendant organizations, and that this was the motive for defendants' acts in holding a strike, and notifying their employer of their intention to do so. But whether this be so or not, when it can be seen from the facts found that such or other motives of advantage to themselves may have prompted defendants' action, a court which can review only upon the law certainly will not presume that another and an unlawful motive, and one not stated in the findings of fact, prompted the action of the organization and its members. In other words, this court cannot import into the findings of fact a fact

that is not therein expressed. This is not a case of unanimous affirmance, but one of reversal; and, under section 1338 of the Code of Civil Procedure, we are to assume that the appellate division intended to affirm the facts as found by the trial court, and, having so affirmed them, it then reversed because they were insufficient in law to support the judgment. It is our duty, therefore, if we discover that the facts as actually found are insufficient to support the conclusion of law, to sustain the action of the appellate division in reversing the judgment. National Harrow Co. v. Bement & Sons, 163 N. Y. 505, and cases cited.

In Bowen v. Matheson, 14 Allen 499, the court had before it on demurrer a declaration in an action where the defendants' business had been practically broken up, and it said: "In order to be good, the declaration must allege against the defendants the commission of illegal acts. Its allegations must be analyzed to ascertain whether they contain a sufficient statement of such acts." This was followed by an interesting analysis, which resulted in disclosing that no illegal act was alleged, notwithstanding the liberal use of such extravagant words and phrases as "maliciously conspiring together," and "fellow conspirators as aforesaid in pursuance of their conspiracy as aforesaid," whereupon the demurrer was sustained, and a precedent created, which should be followed in this case.

Now, before taking up the findings of fact for analysis in the light of the principles quoted above, as was done in Bowen's Case, and with the view of showing that they do not sustain the judgment of the special term, I wish to again call attention to the rules quoted, and particularly to so much of them as intimates that if the motive be unlawful, or be not for the good of the organization or some of its members, but prompted wholly by malice and a desire to injure others, then an act which would be otherwise legal becomes unlawful. To state it concretely, if an organization strikes to help its members, the strike is lawful. If its purpose be merely to injure nonmembers, it is unlawful. If the organization notifies the employer that its members will not work with nonmembers, and its real object is to benefit the organization and secure employment for its members, it is lawful. If its sole purpose

be to prevent nonmembers working, then it is unlawful. I do not assent to this proposition, although there is authority for it. It seems to me illogical and little short of absurd to say that the everyday acts of the business world, apparently within the domain of competition, may be either lawful or unlawful according to the motive of the actor. If the motive be good, the act is lawful. If it be bad, the act is unlawful. Within all the authorities upholding the principle of competition, if the motive be to destroy another's business in order to secure business for yourself, the motive is good, but, according to a few recent authorities, if you do not need the business, or do not wish it, then the motive is bad; and some court may say to a jury, who are generally the triors of fact, that a given act of competition which destroyed A.'s business was legal if the act was prompted by a desire on the part of the defendant to secure to himself the benefit of it, but illegal if its purpose was to destroy A.'s business in revenge for an insult given.

But for the purpose of this discussion I shall assume this proposition to be sound, for it is clear to me that, applying that rule to the facts found, it will appear that the appellate division order should be sustained.

While I shall consider every fact found by the learned trial judge, I shall consider the findings in a different order, because it seems to me the more logical order. He finds "that the defendants, Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations and members of the board of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various pieces of work upon buildings in the course of erection . . . by threatening the . . . employers that if they did not discharge the members of the plaintiff association, and employ the members of the Enterprise and Progress Associations in their stead, the said walking delegates would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes . . . in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that said em-

ployers, by reason of said threats and the acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association, and employed the members of the Enterprise and Progress Associations in their stead."

Now there is not a fact stated in that finding which is not lawful, within the rules which I have quoted *supra*. Those principles concede the right of an association to strike in order to benefit its members; and one method of benefiting them is to secure them employment,—a method conceded to be within the right of an organization to employ. There is no pretense that the defendant associations or their walking delegates had any other motive than one which the law justifies,—of attempting to benefit their members by securing their employment. Nowhere throughout that finding will be found even a hint that a strike was ordered, or a notification given of the intention to order a strike, for the purpose of accomplishing any other result than that of securing the discharge of the members of the plaintiff association, and the substitution of members of the defendant associations in their place. Such a purpose is not illegal within the rules laid down in the opinion of Judge VANN, nor within the authorities cited therein. On the contrary, such a motive is conceded to be a legal one. It is only where the sole purpose is to do injury to another, or the act is prompted by malice, that it is insisted that the act becomes illegal. No such motive is alleged in that finding. It is not hinted at. On the contrary, the motive which always underlies competition is asserted to have been the animating one. It is beyond the right and the power of this court to import into that finding, in contradiction of another finding or otherwise, the further finding that the motive which prompted the conduct of defendants was an unlawful one, prompted by malice, and a desire to do injury to plaintiffs, without benefiting the members of the defendant associations.

I doubt if it would ever have occurred to any one to claim that there was anything in that finding importing a different motive from that specially alleged in the finding, had not the draftsman characterized the notice given to the employers by the associations of their intention to strike as "threats."

The defendant associations, as appears from the finding

quoted, wanted to put their men in the place of certain men at work who were nonmembers, working for smaller pay, and they set about doing it in a perfectly lawful way. They determined that if it were necessary they would bear the burden and expense of a strike to accomplish that result, and in so determining they were clearly within their rights, as all agree. They could have gone upon a strike without offering any explanation until the contractors should have come in distress to the officers of the associations, asking the reason for the strike. Then, after explanations, the nonmembers would have been discharged, and the men of defendant associations sent back to work. Instead of taking that course, they chose to inform the contractors of their determination, and the reason for it.

It is the giving of this information—a simple notification of their determination, which it was right and proper and reasonable to give—that has been characterized as "threats" by the special term, and which has led to no inconsiderable amount of misunderstanding since. But the sense in which the word was employed by the court is of no consequence, for the defendant associations had the absolute right to threaten to do that which they had the right to do. Having the right to insist that plaintiff's men be discharged, and defendants' men put in their place, if the service of the other members of the organization were to be retained, they also had the right to threaten that none of their men would stay unless their members could have all the work there was to do.

The findings further stated that the defendants Cumming and Nugent were the walking delegates of the defendant associations, and as such were members of the board of delegates of the building trades in New York, and were therefore in control of the matters in their respective trades. The trial court also found "that the defendant Cumming threatened to cause a general strike against the plaintiff association and against the plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise Association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence.

Now, this finding should be read in connection with and in

the light of the other findings which I have already read and commented on, and which show that the purpose of the strike was to secure the employment of members of the defendant associations in the places filled by the members of plaintiff's association, who were willing to work for smaller wages,—a perfectly proper and legitimate motive as we have seen. But if the other findings be driven from the mind while considering this one, which the opinions of the appellate division indicate was not justified by the evidence, it will be found that it fairly means no more than that the defendant associations did not purpose to allow McQueed and the members of his association to work upon any jobs where members of defendant associations were employed; that they were perfectly willing to allow them to have small jobs, fitted, perhaps, for men who were willing to work for small wages, but that the larger jobs, where they could afford to pay and would pay the rate of wages demanded by defendant associations, they intended to secure for their members alone,—a determination to which they had a perfect right to come, as is conceded by the rules which I have quoted.

Having reached that conclusion, defendants notified McQueed, who had organized an association when he failed to pass the defendants' examination, that they would prevent him and the men of his association from working on a certain class of jobs. They did not threaten to employ any illegal method to accomplish that result. They notified them of the purpose of the defendants to secure this work for themselves, and to prevent McQueed and his associates from getting it, and in doing that they but informed them of their intention to do what they had a right to do; and, when a man purposes to do something which he has the legal right to do, there is no law which prevents him from telling another, who will be affected by his act, of his intention.

A man has a right, under the law, to start a store, and to sell at such reduced prices that he is able in a short time to drive the other storekeepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. Such has been the law for centuries. The reason, of course, is that the doctrine has generally been accepted that free competition is

worth more to society than it costs, and that on this ground the infliction of damages is privileged. Com. v. Hunt, 4 Metc. (Mass.) 111, 134, 38 Am. Dec. 346.

Nor could this storekeeper be prevented from carrying out his scheme because, instead of hiding his purpose, he openly declared to those storekeepers that he intended to drive them out of business in order that he might later profit thereby. Nor would it avail such storekeepers, in the event of their bringing an action to restrain him from accomplishing their ruin by underselling them, to persuade the trial court to characterize the notification as a "threat," for on review the answer would be, "A man may threaten to do that which the law says he may do, provided that, within the rules laid down in those cases, his motive is to help himself."

A labor organization is endowed with precisely the same legal right as is an individual to threaten to do that which it may lawfully do.

Having finished the discussion of the facts, I reiterate that, within the rules of law I have quoted, it must appear, in order to make out a cause of action against these defendants, that in what they did they were actuated by improper motives,—by a malicious desire to injure the plaintiffs. There is no such finding of fact, and there is no right in this court to infer it if it would, and from the other facts found, it is plain that it should not if it could.

The findings conclude with a sentence which commences as follows: "I find that the threats made by the defendants, and the acts of the said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other workmen, constituted an illegal combination and conspiracy." That is not a finding of fact, but a conclusion of law, that the trial court erroneously, as I think, attempted to draw from the facts found, which I have already discussed, and which clearly, in my judgment, require this court to hold that the defendants acted within their legal rights.

In the last analysis of the findings, therefore, it appears that they declare that members of the organizations refused to work any longer, as they lawfully might; that they threatened to strike, which was also within their lawful right, but without

any suggestion whatever in the findings that they threatened an illegal or unlawful act. And such findings are claimed to be sufficient to uphold a judgment that absolutely enjoins the defendant associations and their members from striking. This is certainly a long step in advance of any decision brought to my attention.

I have refrained from discussing the authorities, because it seemed unnecessary, for the reason already stated in this opinion. But it seems not out of place to suggest that the decisions of the English courts upon questions affecting the rights of workmen ought at least to be received with caution, in view of the fact that the later ones are largely supported by early precedents which were entirely consistent with the policy of the statute law of England, but are hostile not only to the statute law of this country, but to the spirit of our institutions. In support of this view, reference to a few early statutes of England will be made.

The statutes (for there are two) of "Labourers," passed in 1349 and 1350 (23 Edw. III. c. 1, and 25 Edw. III. stat. 1), provided "that every man and woman of what condition he be, free or bond, able in body, and within the age of three score years," and not having means of his own, "if he in convenient service (his estate considered) be required to serve, he shall be bounden to serve him which so shall him require." And the statutes provide that, in case of refusal to serve, punishment by imprisonment might be inflicted, and that the laborer should take the customary rate of wages, and no more. These statutes not only regulated the wages of laborers and mechanics, but they confined them to their existing places of residence, and required them to swear to obey the provisions of the statutes. Sir James Fitzjames Stephen, in his History of the Criminal Law of England (volume 3, p. 204), says, "The main object of these statutes was to check the rise in wages consequent upon the great pestilence called the 'Black Death.' "

Nearly 200 years later, and in 1548, a more general statute was passed, which forbade all conspiracies and covenants of artificers, workmen, or laborers "not to make or do their work but at a certain price or rate," or for other similar purposes, under the penalty, on a third conviction, of the pillory and loss

of an ear, and to "be taken as a man 'infamous.' " 2 & 3 Edw. VI. c. 15.

Fourteen years later the prior statutes were to some extent amended and consolidated into a longer act, entitled "An act containing divers orders for artificers, laborers, servants of husbandry, and apprentices." It provided, in effect, that all persons able to work as laborers or artificers, and not possessed of independent means or other employments, are bound to work as artificers or laborers on demand. The hours of work are fixed; power is given to the justices in their next session after Easter to fix the wages to be paid to mechanics and laborers; elaborate rules are laid down as to apprenticeship; and it further provides that for the future no one is to "set up, occupy, use or exercise any craft, mystery or occupation now used" until he has served an apprenticeship of seven years. 5 Eliz. c. 4. This statute remained in force practically for a long period of time, and was not formally repealed until the year 1875.

In the year 1720 an act was passed declaring all agreements between journeymen tailors "for advancing their wages, or for lessening their usual hours of work" to be null and void, and subjecting persons entering into such an agreement to imprisonment, with or without hard labor, for two months. 7 Geo. I. stat. 1, c. 13. Similar enactments were passed as to employés in other manufactures and trades.

The act of 1800 (40 Geo. III. c. 106) provided for a penalty of three months' imprisonment without hard labor, or two months with hard labor, for every journeyman, workman, or other person who "enters into any combination to obtain an advance of wages, or lessen or alter the hours of work . . . or who hinders any employer from employing any person as he thinks proper, or who being hired refuses without any just or reasonable cause to work with any other journeyman or workman employed or hired to work." The same penalty is inflicted upon persons who attend meetings held for the purpose of collecting money to further such effort, and the act also makes it an offense to assist in maintaining men who are on strike. This statute, as well as the others referred to, have at last been swept away, but necessarily their influence has been

not inconsiderable in shaping the decisions of the courts of England.

The order should be affirmed, and judgment absolute ordered for defendants on the plaintiffs' stipulation, with costs.

GRAY, J. I express my concurrence with the conclusion which has been reached by the Chief Judge in his opinion,—that the order of the appellate division should be affirmed.

Briefly stated, my view is that the respondents had the legal right to accomplish their object by all methods not condemned by the law. That object was to secure the employment of the members of their own association in preference to, and to the exclusion of, those of the appellant association. They infringed upon no law in declaring to the employers of members of the appellant organization that they refused to work with them, or that they would abandon their work unless the others were discharged, or in preventing the members of the appellant association from being employed as steam fitters. The case is not within the principle of Curran v. Galen, 152 N. Y. 33. Upon the facts of that case, as they were admitted by the demurrer to the complaint, the plaintiff was threatened, if he did not join a certain labor organization, and so long as he refused to do so, with such action as would result in his discharge from employment, and in an impossibility for him to obtain other employment anywhere; and, in consequence of continuing his refusal to join the organization, his discharge was procured through false and malicious reports affecting his reputation with members of his trade and with employers. There is no such compulsion or motive manifest here. There is no malice found. There is no threat of a resort to illegal methods. We may assume (and the evidence would justify the assumption) that the action of the respondents was based upon a proper motive, relating to the employment of mechanics whose competency and efficiency had been examined into and approved. The contest is between rival labor organizations, it is true. The respondents have succeeded, through the threat that other workmen would leave their work if the members of the appellant organization were not discharged, in procuring the employment of the members of their own association. But no unlawful means were taken, nor were any illegal acts com-

mitted in bringing about that result. It was not an effort to compel the members of the appellant organization to join the respondents' association, as a condition of being allowed to work. There is no finding to that effect. On the contrary, it appears that the appellant McQueed, having failed to pass the required examination to become a qualified member of the respondents' association, proceeded to organize an association of his own. Regarded either as an effort to secure only the employment of efficient and approved workmen, or as a mere struggle for exclusive preference of employment on their own terms and conditions, from either standpoint how can it be said to be within the condemnation of the law or of any statute, when there was no force employed, nor any unlawful act committed? Our laws recognize the absolute freedom of the individual to work for whom he chooses, with whom he chooses, and to make any contract upon the subject that he chooses. There is the same freedom to organize, in an association with others of his craft, to further their common interests as workingmen, with respect to their wages, to their hours of labor, or to matters affecting their health and safety. They are free to secure the furtherance of their common interests in every way which is not within the prohibition of some statute, or which does not involve the commission of illegal acts. The struggle on the part of individuals to prefer themselves, and to prevent the work which they are fitted to do from being given to others, may be keen, and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts.

I concur with the Chief Judge in his analysis of the decision of the trial court, and that the facts as therein stated do not compel the legal conclusion which the learned trial judge reached.

I vote for the affirmance of the order of the appellate division.

VANN, J. (dissenting). The National Protective Association of Steam Fitters and Helpers is a domestic corporation organized to furnish competent steam fitters and helpers in all branches to the general public, to protect its members in the pursuit of that business, and for other purposes. The plaintiff, Charles McQueed, is a member of that corporation, and sues

for the benefit of himself and his fellow members. The defendant O'Brien is the president of the board of delegates; the defendant Duff is the treasurer of the Enterprise Association of Steam Fitters; the defendant Mallaney is the treasurer of the Progress Association of Steam Fitters and Helpers; the defendant Cumming is an officer known as the "walking delegate" of the Enterprise Association; the defendant Nugent is the walking delegate of the Progress Association; and both Cumming and Nugent are ex officio members of the board of delegates. Each of these associations is unincorporated, and consists of more than seven members.

This action is brought to restrain the defendants from preventing the employment of the plaintiff corporation or its members, and from coercing their discharge by any employer through threats, strikes or otherwise, and to recover damages, with other relief.

The issues joined by the answers of the several defendants were tried at special term. The trial justice adopted the short form of decision, but, in stating the grounds upon which he proceeded, found specifically "that the defendants have entered into a combination which, in effect, prevents, and will continue to prevent, the plaintiff McQueed and the other members of the plaintiff association from working at his or their trade in the city of New York; . . . that the defendant Cumming threatened to cause a general strike against the plaintiff association and against the plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise Association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence; . . . that the defendants Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations, and members of the board of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various places of work upon buildings in the course of erection by [naming three different employers who were erecting buildings at different places in the boroughs of Brooklyn and Manhattan], by threatening the said employers that if they did not

discharge the members of the plaintiff association, and employ the members of the Enterprise Progress Association in their stead, the said walking delegates would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes . . . in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that the said employers, by reason of said threats and the acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association, . . . and employed the members of the Enterprise and Progress Associations in their stead; . . . that the threats made by the defendants, and the acts of said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other working men, constituted an illegal combination and conspiracy, injured the plaintiff association in its business, deprived its members of employment and an opportunity to labor, prevented them from earning their livelihood in their trade or business. . . .

A judgment was directed and entered restraining the defendants from "preventing the work, business, or employment of the plaintiff corporation, or any of its members, in the city of New York or elsewhere, and from coercing or obtaining, by command, threats, strikes, or otherwise, the dismissal or discharge by any employer, contractor, or owner of the members of the plaintiff corporation, or the plaintiff McQueed, or any or either of them, from their work, employment, or business, or in any wise interfering with the lawful business or work of the plaintiff corporation or of its members. But the defendants are not, nor is any one of them, enjoined and restrained from refusing to work with the plaintiff or any member of the plaintiff corporation."

The appellate division, according to its order, which is the only evidence of its action that we can consider, did not reverse upon a question of fact; and a reversal upon the law, only, is an affirmance of the facts found, which are thus placed beyond our control, as there was some evidence to support the findings. People v. Adirondack Ry. Co., 160 N. Y. 225, 235; Code Civ. Proc. § 1338.

Thus we have before us a controversy, not between employer and employé, but between different labor organizations, wherein one seeks to restrain the others from driving its members out of business, and absolutely preventing them from earning a living by working at their trade, through threats, made to the common employer of members of all the organizations, to destroy his business unless he discharged the plaintiff's members from his employment.

The primary question is whether the action of the defendants was unlawful, for a lawful act done in a lawful manner cannot cause actionable injury. It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work or refuse to work at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from any one. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act.

Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), provided the object is not to gratify malice, or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not a violation of law. They have the right to go farther, and to solicit and persuade others, who do not belong to their organization, and are employed for no fixed period, to quit work, also, unless the common employer of all assents to lawful conditions, designed to improve their material welfare. They have no right, however, through the exercise of coercion, to prevent others from working. When persuasion ends, and pressure begins, the law is violated; for that is a trespass upon the rights of others, and is expressly forbidden by statute. Pen. Code, § 168. They have no right, by force, threats, or

intimidation, to prevent members of another labor organization from working, or a contractor from hiring them or continuing them in his employment. They may not threaten to cripple his business unless he will discharge them, for that infringes upon liberty of action, and violates the right which every man has to conduct his business as he sees fit, or to work for whom and on what terms he pleases. Their labor is their property, to do with as they choose; but the labor of others is their property, in turn, and is entitled to protection against wrongful interference. Both may do what they please with their own, but neither may coerce another into doing what he does not wish to with his own. The defendant associations made their own rules and regulations, and the plaintiff corporation did the same. Neither was entitled to any exclusive privilege, but both had equal rights according to law. The defendants could not drive the plaintiff's members from the labor market absolutely, and the plaintiff could not drive the defendants' members therefrom. The members of each organization had the right to follow their chosen calling without unwarrantable interference from others. Public policy requires that the wages of labor should be regulated by the law of competition and of supply and demand, the same as the sale of food or clothing. Any combination to restrain "the free pursuit in this state of any lawful business," in order "to create or maintain a monopoly," is expressly prohibited by statute, and an injunction is authorized to prevent it. In re Davies, 168 N. Y. 89, 96; Laws 1897, c. 383; Laws 1899, c. 690.

A combination of workmen to secure a lawful benefit to themselves should be distinguished from one to injure other workmen in their trade. Here we have a conspiracy to injure the plaintiffs in their business, as distinguished from a legitimate advancement of the defendants' own interests. While they had the right by fair persuasion to get the work of the plaintiff McQueed, for instance, they had no right, either by force or by threats, to prevent him from getting any work whatever, or to deprive him of the right to earn his living by plying his trade. Competition in the labor market is lawful, but a combination to shut workmen out of the market altogether is unlawful. One set of laborers, whether organized or not, has no right to drive another set out of business, or prevent

them from working for any person upon any terms satisfactory to themselves. By threatening to call a general strike of the related trades, the defendants forced the contractor to discharge competent workmen who wanted to work for him, and whom he wished to keep in his employment. They conspired to do harm to the contractor in order to compel him to do harm to the plaintiffs, and their acts in execution of the conspiracy caused substantial damage to the members of the plaintiff corporation. While no physical force was used, the practical effect was that members of one labor organization drove the members of another labor organization out of business, and deprived them of the right to labor at their chosen vocation. Depriving a mechanic of employment by unfair means is the same in principle as depriving a tradesman of his customers by unfair means, which has always been held a violation of law.

A conspiracy is a combination to do an illegal act by legal means, or any act by illegal means. Here the means used were illegal, because they tended and were designed to injure a man in his business without lawful excuse. A threat, whether made by one alone, or by many acting in combination, to injure a man in his business unless he will conduct it in a way that he does not wish to, is a tortious act, because it interferes with business freedom; and if it results in injury it is actionable. Every man has the right to carry on his business in any lawful way that he sees fit. He may employ such men as he pleases, and is not obliged to employ those whom, for any reason, he does not wish to have work for him. He has the right to the utmost freedom of contract and choice in this regard, and interference with that freedom is against public policy, because it tends not only to destroy competition, but, in a broad sense, to deprive a man of both liberty and property. People v. Gillson, 109 N. Y. 389, 399, 4 Am. St. Rep. 465; Slaughter House Cases, 16 Wall. 116, 122, 21 L. Ed. 394. Threatening, molesting, intimidating, and obstructing others in their trade or calling is contrary to law, because it is in violation of personal rights, in restraint of trade, and injurious to society. It tends to force able-bodied and competent workmen into idleness, and prevent them from helping to do the work of the country. Workmen cannot dictate to employers how they shall carry on their business, nor whom they shall or shall not employ. The plaintiff's

men had the right to work without molestation by members of other labor unions, exercised either directly against themselves, or indirectly through their employers. They had the right to have their relations with their employers left undisturbed, and this right was intentionally invaded by the defendants, without lawful justification. The object was evil, for it was not to compete for employment by fair means, but to exclude rivals from employment altogether by unfair means. The law gives all men an equal chance to live by their own labor, and does not permit one labor union to seize all the chances, by compelling employers to refuse employment to the members of all other unions. The plaintiffs do not ask for protection against competition, but from "malicious and oppressive interference" with their right to work at their trade.

The object of the defendants was not to get higher wages, shorter hours, or better terms for themselves, but to prevent others from following their lawful calling. Thus one of the defendants said to the plaintiff McQueed: "I will strike against your men wherever I find them, and not allow them to work on any job in the city, except some small place where the Enterprise men are not employed."

The same man said to one of the contractors that he could not have the plaintiff's men in his employment, and unless they were discharged he would order a "general strike of the whole building." They were discharged accordingly, although the contractor testified that they were good workmen, that their work was satisfactory, and that he had no reason for discharging them, other than the threats made. Another contractor testified that two of the defendants told him that he must take the plaintiff's men off and put their men on, "or else the whole building would be tied up, as they would not allow the other men to work." The usual discharge followed, although the men were satisfactory to their employer. The same witness testified that "Mr. Cumming would neither allow my men to work, nor would he allow his men to go to work until the time had been paid for between the interval they struck and the time they were to go to work again."

A member of the plaintiff corporation swore that "Mr. Cumming told us that, if he ever found us on a job in the vicinity of New York, he would strike it by order of the board of dele-

gates. He said they would not allow us to work on any job, except it was a small job,—a cheap job,—and he allowed us to do it." The threat was repeated in substance to the employer, who discharged the witness, and he was not employed on the building afterward.

There was other evidence to the same effect, and, although the defendants denied making these threats, the trial judge accepted the version of the plaintiff's witnesses, and hence we must do the same. I assume, therefore, that the defendants caused the discharge of the plaintiff's men by threatening to cripple their employer's business unless he discharged them, and that they also molested them by threatening to prevent them from working at their trade in the city of New York, by calling a general strike of all trades on any building where they might be employed. The action of the defendants was wrongful and malicious, and their object was to force men who had learned a trade to abandon it and take up some other pursuit. There is no finding that the defendants maintain a higher standard of skill than the plaintiffs.

It may be argued that the employers were not obliged to yield to these threats, and this is true; but noncompliance meant ruin to them, for their work would be completely tied up and their business paralyzed. A threat, with ruin behind it, may be as coercive as physical force. The effect of such threats upon men of ordinary nerve is well known. They could not perform their contracts, and would thus be subjected to great loss. Hence, against their will, they yielded to unlawful demands. Personal liberty was interfered with through coercion of the will. Some of them knew from experience, as the record shows, that the military discipline of the defendant organizations practically compelled instant obedience of an order to strike. When an association is so strong and its discipline so perfect that its orders to strike are equivalent to the commands of an absolute monarch, the effect is the same as the use of physical force. 1 Tied. Cont. Pers. & Prop. p. 433; Erle, Trade Unions, 12, 105.

The purposes of the defendants, as well as the methods pursued by them, were unlawful, and authorized the injunction granted by the trial court in order to prevent irreparable injury and a multiplicity of suits. This was conceded in Reynolds

v. Everett, 144 N. Y. 189, and demonstrated in Davis v. Zimmerman, 91 Hun, 489. Each man would be compelled to bring a separate action every time he was discharged. An action at law, especially against an unincorporated association, would ordinarily do no good, and in most cases ruin would anticipate relief. Damages would not adequately redress the wrong, and the mere statement of the facts shows the impossibility of adequately measuring the damages in this class of actions. That damages were sustained is clear, but what evidence can prove the amount, and what intelligence is keen enough to resolve them into dollars and cents? Unless equity will take jurisdiction, the wrong done is practically without a remedy. Unlawful combinations of capital are restrained without hesitation, and the same test of illegality should be applied to combinations of labor; for both are equal before the law, and both are covered by the same statute (Laws 1897, c. 383; Laws 1899, c. 690). The prejudice said to exist in some minds against interference by courts of equity in labor disputes should not be heeded; for if, upon well-settled principles, the courts have jurisdiction, they must exercise it, or refuse to do their duty. Public opinion may express itself in legislation, but not in judicial decisions.

The fact that a lawful strike inflicts injury upon the employer is not controlling. As was said by a recent writer upon the subject: "The courts recognize the right of workingmen to combine together for the purpose of bettering their condition, and, in endeavoring to attain their object, they may inflict more or less inconvenience and damages upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage inflicted upon the employer is the same; but in the one case the means used are to attain a legitimate purpose, namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party; and while it may be argued that indirectly the discharge of the nonunion employé will strengthen and benefit the union, and thereby indirectly benefit the union workmen,

the benefit to the members of the combination is so remote, as compared to the direct and immediate injury inflicted upon the nonunion workmen, that the law does not look beyond the immediate loss and damage to the innocent parties, to the remote benefits that might result to the union." 1 Eddy, Comb'ns, 416.

The conclusions I have announced are supported by the weight of authority in this country and in England. The leading case in this state is controlling in principle, and requires a reversal of the order appealed from. Curran v. Galen, 152 N. Y. 33. The plaintiff in that case alleged in his complaint that the defendants wrongfully conspired to injure him and take away his means of earning a livelihood; that they threatened to accomplish this unless he would join their association; that in pursuance of the conspiracy, "upon plaintiff's refusing to become a member of said association," the defendants "made complaint to the plaintiff's employers, and forced them to discharge him from their employ, and by false and malicious reports in regard to him, sought to bring him into ill repute with members of his trade and employers, and to prevent him from prosecuting his trade and earning a livelihood." The answer set forth an agreement between a brewer's association and a labor organization, of which defendants were members, to the effect that all employés of the brewery companies belonging to the former should be members of the latter, and that no employé should work for a longer period than four weeks without becoming a member. It was further alleged that the plaintiff was retained in the employment of one of the brewing companies for more than four weeks after he was notified of the provisions of said agreement requiring him to become a member of the local assembly; that the defendants requested him to become a member, and, on his refusal to comply, they, through their committee, notified the officers of said company that the plaintiff, after repeated requests, had refused for more than four weeks to become a member of said assembly; and that they did so solely in pursuance of said agreement, and in accordance with the terms thereof, without intent or purpose to injure plaintiff in any way.

The plaintiff demurred to this defense upon the ground that it was insufficient, in law, upon the face thereof. The demurrer

was sustained in all the courts. 77 Hun, 610, 152 N. Y. 33. All the judges who sat in this court united with Judge Gray in saying that: "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employment and capacities. It would, to use the language of Mr. Justice Barrett in People v. Smith, 5 N. Y. Cr. R., at page 513, 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate.' "

The plaintiff, in a very recent case in England, employed nonunion men, and after trying in vain to have them admitted to the union, was told by its president that unless he discharged them his meat would be stopped at one Munce's, who had been getting about £30 worth weekly from him for 20 years, although there was no permanent contract between them. Upon his refusing to discharge, the defendants, who were officers and members of the union, threatened to instruct Munce's employés to cease work unless he complied with their request. The plaintiff still refused, whereupon Munce informed him that he need not send any more meat unless he arranged with the union, as his men had been ordered to quit work, and thereupon Munce ceased to deal with him. There was a recovery by the plaintiff, which was sustained by all the appellate courts. Leathem v. Craig [1899] 2 Ir. R. 667; Quinn v. Leathem [1901] App. Cas. 495. Five concurring opinions were written in the house of lords, which unanimously held that "a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or

servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable."

The earlier case of Allen v. Flood [1898] App. Cas. 1, upon which the appellate division relied in rendering the judgment now before us, was carefully limited and explained, if not virtually overruled.

The English cases were so thoroughly reviewed that it is unnecessary to make further reference to them. Among other things it was said: "He [referring to the plaintiff] was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law. Its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is unlawful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it. Another who suffers by it has usually no redress. The damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful, and is intended to damage a third person, and he is damaged in fact,—in other words, if he is wrongfully and intentionally struck at through others and is thereby damnified,—the whole aspect of the case is changed. The wrong done to others reaches him; his rights are infringed, although indirectly; and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances." This decision was not founded upon ancient statutes, as some of the early English cases are, but upon the common law.

See, also, the opinion in Taff Vale Ry. Co. v. Amalgamated Soc. [1901] App. Cas. 431, which had not been published when the judgment in Quinn v. Leathem was pronounced.

The position of the federal courts and those of most of the states is to the same effect. Steamship Co. v. McKenna (C. C.) 30 Fed. 48; Casey v. Typographical Union (C. C.) 45 Fed. 135, 12 L. R. A. 193; Hopkins v. Stave Co., 28 C. C. A. 99; In re Debs, 158 U. S. 564, 39 L. Ed. 1092; Plant v. Woods, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330; State v. Donaldson, 32 N. J. Law, 151, 90 Am. Dec. 649; Barr v. Essex Trades Council, 53 N. J. Eq. 101; Printing Co. v. Howell, 26 Or. 527, 28 L. R. A. 464, 46 Am. St. Rep. 640; State v. Glidden, 55 Conn. 46, 3 Am. St. Rep. 23; Crump's Case, 84 Va. 927, 10 Am. St. Rep. 895; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710; Doremus v. Hennessy, 62 Ill. App. 391; State v. Huegin (Wis.) 85 N. W. 1046; Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367; Lucke v. Cutters' and Trimmers' Assembly, 77 Md. 396, 19 L. R. A. 408, 39 Am. St. Rep. 421; Murdock v. Walker, 152 Pa. 595, 34 Am. St. Rep. 678; Beck v. Protective Union, 118 Mich. 497, 42 L. R. A. 407, 74 Am. St. Rep. 421. I add to the discussion the common law governing the subject a quotation from the statute against crimes in this state, as indicating the policy of the law: "If two or more persons conspire, * * * to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property, belonging to or used by another, or with the use or employment thereof, * * * each of them is guilty of a misdemeanor." Pen. Code, § 168.

I think that the action of the defendants was unlawful and was properly restrained, but the injunction, in the form granted, is too broad, and requires modification. It prevents the defendants "from coercing or obtaining by command, threats, strikes, or otherwise, the dismissal or discharge by any employer, contractor, or owner, of the members of the plaintiff corporation," etc. It is not limited to coercion, but prevents the defendant from obtaining, not simply by command, threats, etc., but by any means, the discharge of the plaintiffs. This might prevent fair persuasion or solicitation,

which the defendants may resort to. While this might have been corrected by motion at special term, for the decision of the trial justice does not warrant it, it may be corrected upon appeal.

The order of the appellate division, so far as appealed from, should be reversed, and the judgment of the special term modified by striking out the words "or otherwise" therefrom, and, as modified, affirmed, with costs to the appellants in all courts.

O'Brien and Haight, JJ. (Gray, J., in memorandum), concur with Parker, C. J. Bartlett and Martin, JJ., concur with Vann, J.

Ordered accordingly.[73]

VEGELAHN v. GUNTNER

(Supreme Judicial Court of Mass., 1896. 167 Mass. 92.)

Bill by Frederick O. Vegelahn against George M. Guntner and others for an injunction. An injunction issued pendente lite restraining the respondents from interfering with the plaintiff's business by patrolling the sidewalk in front of or in the vicinity of the premises occupied by him, for the purpose of preventing any person in his employment, or desirous of entering the same, from entering it or continuing in it; or by obstructing or interfering with any persons in entering or leaving the plaintiff's said premises; or by intimidating any person in the employment of the plaintiff, or desirous of entering the same; or by any scheme or conspiracy for the purpose of annoying, hindering, interfering with, or preventing any person in the employment of the plaintiff, or desirous of entering the same, from entering it, or from continuing therein. This injunction was approved.

ALLEN, J. The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent

73—See, however, The People v. Fisher, 14 Wend. 10.

him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half past 6 in the morning till half past 5 in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts.

The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself. Com. v. Perry, 155 Mass. 117; People v. Gillson, 109 N. Y. 389; Braceville Coal Co. v. People, 147 Ill. 71; Ritchie v. People, 155 Ill. 98; Low v. Printing Co. (Neb.) 59 N. W. 362. No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. It is in Massachusetts, as in some other states, even made a criminal offense for one, by intimidation or force, to prevent, or seek to prevent, a person from entering into or continuing in the employment of a person or corporation. Pub. St. c. 74, § 2. Intimidation is not limited

to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in Sherry v. Perkins, 147 Mass. 212. It was declared to be unlawful in Reg. v. Druitt, 10 Cox, Cr. Cas. 592; Reg. v. Hibbert, 13 Cox, Cr. Cas. 82; Reg. v. Bauld, Id. 282. It was assumed to be unlawful in Trollope v. Trader's Fed. (1875) 11 L. T. 228, though in that case the pickets were withdrawn before the bringing of the bill. The patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases; and, when instituted for the purpose of interfering with his business, it became a private nuisance. See Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; Barr v. Trades Council (N. J. Ch.) 30 Atl. 881; Murdock v. Walker, 152 Pa. St. 595; China Co. v. Brown, 164 Pa. St. 449; Coeur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner, 51 Fed. 260; Temperton v. Russell [1893] 1 Q. B. 715; Floyd v. Jackson [1895] 11 L. T. 276; Wright v. Hennessey, 52 Alb. Law J. 104 (a case before Baron Pollock); Judge v. Bennett, 36 Wkly. Rep. 103; Lyons v. Wilkins [1896] 1 Ch. 811.

The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves, by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful. Various decided cases fall within the former class; for example: Worthington v. Waring, 157 Mass. 421; Snow v. Wheeler, 113 Mass. 179; Bowen v. Matheson, 14 Allen, 499; Com. v. Hunt, 4 Mete. (Mass.) 111; Heywood v. Tillson, 75 Me. 225; Cote v. Murphy, 159 Pa. St. 420, 28 Atl.

190; Bohn Manuf'g Co. v. Hollis, 54 Minn. 223; Steamship Co. v. McGregor [1892] App. Cas. 25; Curran v. Treleaven [1891] 2 Q. B. 545, 561. The present case falls within the latter class.

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that, ordinarily, a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime. Sherry v. Perkins, 147 Mass. 212; In re Debs, 158 U. S. 564, 593, 599; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 329; Cranford v. Tyrrell, 128 N. Y. 341, 344; Gilbert v. Mickle, 4 Sandf. Ch. 357; Port of Mobile v. Louisville & N. R. Co., 84 Ala. 115, 126, 4 South. 106; Arthur v. Oakes, 11 C. C. A. 209; Toledo, A., A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 744; Emperor of Austria v. Day, 3 De Gex, F. & J. 217, 239, 240, 253; Hermann Loog v. Bean, 26 Ch. Div. 306, 314, 316, 317; Monson v. Tussaud [1894] 1 Q. B. 671, 689, 690, 698.

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises, in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts. Walker v. Cronin, 107 Mass. 555, 565; Carew v. Rutherford, 106 Mass. 1; Sherry v. Perkins, 147 Mass. 212; Temperton v. Russell [1893] 1 Q. B. 715, 728, 731; Flood v. Jackson [1895] 11 L. T. 276. We therefore think that the injunction should be in the form as originally issued. *So ordered.*[74]

74—*Accord:* Barnes v. Typographical Union, 232 Ill. 424 (Scott and Farmer, JJ., dissenting); Jensen v. Cooks' & Waiters' Union,

FIELD, C. J. (dissenting). The practice of issuing injunctions in cases of this kind is of very recent origin. One of the earliest authorities in the United States for enjoining, in equity, acts somewhat like those alleged against the defendants in the present case, is Sherry v. Perkins (decided in 1888) 147 Mass. 212. It was found as a fact in that case that the defendants entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs as lasters from continuing in such employment, and, in like manner, to prevent other persons from entering into such employment as lasters; that the use of the banners was a part of the scheme; that the first banner was carried from January 8, 1887, to March 22, 1887, and the second banner from March 22, 1887, to the time of the hearing; and that "the plaintiffs have been and are injured in their business and property thereby." The full court says: "The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute. Pub. St. c. 74, § 2; Walker v. Cronin, 107 Mass. 555." "The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against. Gilbert v. Mickle, 4 Sandf. Ch. 357; Spinning Co. v. Riley, L. R. 6 Eq. 551." Gilbert v. Mickle, one of the authorities cited in Sherry v. Perkins, was a suit in equity by an auctioneer against the mayor of the city of New York to restrain him and those acting under him from parading, placing, or keeping before the plaintiff's auction rooms a placard as follows: "Strangers, beware of mock auctions." A temporary injunction was issued, but, on hearing, it was dissolved. Notwithstanding what is said in the opinion of the vice chancellor, his conclusion is as follows:

81 Pac. 1069 (Wash. 1905); Martin v. McFall, 65 N. J. Eq. 91.

On the illegality of the boycott, see Martin v. McFall, *supra;* Loewe v. California State Fed. of Labor, 139 Fed. 71; Casey v. Cincinnati Typographical Union, 45 Fed. 135; Thomas v. Cincinnati N. O. & T. P. Ry., 62 Fed. 803.

"I am satisfied that it is my duty to leave the party to his remedy by an action at law." Spinning Co. v. Riley is a well-known decision of Vice Chancellor Malins. The bill prayed that the defendants might be "restrained from printing or publishing any placards or advertisements similar to those already set forth." The defendants had caused to be posted on the walls and other public places in the neighborhood of the plaintiff's works, and caused to be printed in certain newspapers, a notice as follows: "Wanted all well-wishers to the Operative Cotton Spinning, &c., Association not to trouble or cause any annoyance to the Springhead Spinning Company lees, by knocking at the door of their office, until the dispute between them and the self-actor minders is finally terminated. By special order. Carrodus, 32 Greaves Street, Oldham." The case was heard upon demurrers. The vice chancellor says: "For the reasons I have stated, I overruled these demurrers, because the bill states, and the demurrers admit, acts amounting to the destruction of property." Of this case, the court, in Sherry v. Perkins, say: "Some of the language in Spinning Co. v. Riley has been criticised, but the decision has not been overruled." The cases are there cited in which that decision has been doubted or criticised. Of that decision, this court, in Boston Diatite Co. v. Florence Manuf'g Co., 114 Mass. 69, say: "The opinions of Vice Chancellor Malins in Spinning Co. v. Riley, L. R. 6 Eq. 551, in Dixon v. Holden, L. R. 7 Eq. 488, and in Rollins v. Hinks, L. R. 13 Eq. 355, appear to us to be so inconsistent with these authorities [authorities which the court had cited], and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported." Much the same language was used by the justices in Assurance Co. v. Knott, 10 Ch. App. 142, a part of the headnote of which is: "Dixon v. Holden and Spinning Co. v. Riley overruled." In Temperton v. Russell [1893] 1 Q. B. 435, 438, Lindley, L. J., says of the case of Spinning Co. v. Riley that it was overruled by the court of appeal in Assurance Co. v. Knott.

Since the judicature act, however, the courts of England have interfered to restrain, by injunction, the publication or continued publication of libelous statements, particularly those injuriously affecting the business or property of another, as

well as injunctions similar to that in the present case. St. 36 & 37 Vict. c. 66, § 25, subds. 5, 8; Monson v. Tussaud [1894] 1 Q. B. 671, 672; Lyons v. Wilkins [1896] 1 Ch. 811, 827. But, in the absence of any power given by statute, the jurisdiction of a court of equity, having only the powers of the English high court of chancery, does not, I think, extend to enjoining acts like those complained of in the case at bar, unless they amount to a destruction or threatened destruction of property, or an irreparable injury to it.

In England the rights of employers and employed with reference to strikes, boycotts, and other similar movements have not, in general, been left to be worked out by the courts from common-law principles, but statutes, from time to time, have been passed defining what may and what may not be permitted. The administration of these statutes largely has been through the criminal courts.

As a means of prevention, the remedy given by Pub. St. c. 74, § 2, would seem to be adequate where the section is applicable, unless the destruction of, or an irreparable injury to, property is threatened; and there is the additional remedy of an indictment for a criminal conspiracy at common law, if the acts of the defendant amount to that. If the acts complained of do not amount to intimidation or force, it is not in all respects clear what are lawful and what are not lawful at common law. It seems to be established in this commonwealth that, intentionally and without justifiable cause, to entice, by persuasion, a workman to break an existing contract with his employer, and to leave his employment, is actionable, whether done with actual malice or not. Walker v. Cronin, 107 Mass. 555. What constitutes justifiable cause remains in some respects undetermined. Whether to persuade a person who is free to choose his employment not to enter into the employment of another person gives a cause of action to such other person, by some courts has been said to depend upon the question of actual malice; and, in considering this question of malice, it is said that it is important to determine whether the defendant has any lawful interest of his own in preventing the employment, such as that of competition in business. For myself, I have been unable to see how malice is necessarily

decisive. To persuade one man not to enter into the employment of another, by telling the truth to him about such other person and his business, I am not convinced is actionable at common law, whatever the motive may be.

Such persuasion, when accompanied by falsehood about such other person or his business, may be actionable, unless the occasion of making the statements is privileged; and then the question of actual malice may be important. This, I think, is the effect of the decision in Rice v. Albee, 164 Mass. 88. When one man orally advises another not to enter into a third person's employment, it would, I think, be a dangerous principle to leave his liability to be determined by a jury upon the question of his malice or want of malice, except in those cases where the words spoken were false. In the present case, if the establishment of a patrol is using intimidation or force, within the meaning of our statute, it is illegal and criminal. If it does not amount to intimidation or force, but is carried to such a degree as to interfere with the use by the plaintiff of his property, it may be illegal and actionable. But something more is necessary to justify issuing an injunction. If it is in violation of any ordinance of the city regulating the use of streets, there may be a prosecution for that, and the police can enforce the ordinance; but if it is merely a peaceful mode of finding out the persons who intend to enter the plaintiff's premises to apply for work, and of informing them of the actual facts of the case, in order to induce them not to enter the plaintiff's employment, in the absence of any statute relating to the subject, I doubt if it is illegal, and I see no ground for issuing an injunction against it.

As no objection is now made by the defendants to the equitable jurisdiction, I am of opinion on the facts reported, as I understand them, that the decree entered by Mr. Justice Holmes should be affirmed, without modification.

HOLMES, J. In a case like the present, it seems to me that, whatever the true result may be, it will be of advantage to sound thinking to have the less popular view of the law stated, and therefore, although, when I have been unable to bring my brethren to share my convictions, my almost invariable practice is to defer to them in silence, I depart from that

practice in this case, notwithstanding my unwillingness to do so, in support of an already rendered judgment of my own.

In the first place, a word or two should be said as to the meaning of the report. I assume that my brethren construe it as I meant it to be construed, and that, if they were not prepared to do so, they would give an opportunity to the defendants to have it amended in accordance with what I state my meaning to have been. There was no proof of any threat or danger of a patrol exceeding two men, and as, of course, an injunction is not granted except with reference to what there is reason to expect in its absence, the question on that point is whether a patrol of two men should be enjoined. Again, the defendants are enjoined by the final decree from intimidating by threats, express or implied, of physical harm to body or property, any person who may be desirous of entering into the employment of the plaintiff, so far as to prevent him from entering the same. In order to test the correctness of the refusal to go further, it must be assumed that the defendants obey the express prohibition of the decree. If they do not, they fall within the injunction as it now stands, and are liable to summary punishment. The important difference between the preliminary and the final injunction is that the former goes further, and forbids the defendants to interfere with the plaintiff's business "by any scheme * * * organized for the purpose of * * * preventing any person or persons who now are or may hereafter be * * * desirous of entering the [plaintiff's employment] from entering it." I quote only a part, and the part which seems to me most objectionable. This includes refusal of social intercourse, and even organized persuasion or argument, although free from any threat of violence, either express or implied. And this is with reference to persons who have a legal right to contract or not to contract with the plaintiff, as they may see fit. Interference with existing contracts is forbidden by the final decree. I wish to insist a little that the only point of difference which involves a difference of principle between the final decree and the preliminary injunction, which it is proposed to restore, is what I have mentioned, in order that it may be seen exactly what we are to discuss. It appears to me that the opinion of the majority turns in part on the assumption that

the patrol necessarily carries with it a threat of bodily harm. That assumption I think unwarranted, for the reasons which I have given. Furthermore, it cannot be said, I think, that two men, walking together up and down a sidewalk, and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force. I do not think it possible to discriminate, and to say that two workmen, or even two representatives of an organization of workmen, do; especially when they are, and are known to be, under the injunction of this court not to do so. See Stimson, Labor Law, § 60, especially pages 290, 298-300; Reg. v. Shepherd, 11 Cox, Cr. Cas. 325. I may add that I think the more intelligent workingmen believe as fully as I do that they no more can be permitted to usurp the state's prerogative of force than can their opponents in their controversies. But, if I am wrong, then the decree as it stands reaches the patrol, since it applies to all threats of force. With this I pass to the real difference between the interlocutory and the final decree.

I agree, whatever may be the law in the case of a single defendant (Rice v. Albee, 164 Mass. 88, 41 N. E. 122), that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose or the defendants prove some ground of excuse or justification; and I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force. Walker v. Cronin, 107 Mass. 555; Morasse v. Brochu, 151 Mass. 567; Tasker v. Stanley, 153 Mass. 148.

Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and

still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them.

In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas, for which a rational defense is ready.

To illustrate what I have said in the last paragraph: It has been the law for centuries that a man may set up a business in a small country town, too small to support more than one, although thereby he expects and intends to ruin some one already there, and succeeds in his intent. In such a case he is not held to act "unlawfully and without justifiable cause," as was alleged in Walker v. Cronin and Rice v. Albee. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. Com. v. Hunt, 4 Metc. (Mass.) 111, 134. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them.

I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such a case it cannot matter whether the plaintiff is the only rival of the defendant, and so is aimed at specially, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop, and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages, which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal of, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to

deal with him either as customers or servants. Com. v. Hunt, 4 Metc. (Mass.) 111, 112, 133; Bowen v. Matheson, 14 Allen, 499; Heywood v. Tillson, 75 Me. 225; Steamship Co. v. McGregor [1892] App. Cas. 25. I have seen the suggestion made that the conflict between employers and employed was not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term "free competition," we may substitute "free struggle for life." Certainly, the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests.

I pause here to remark that the word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to "compulsion," it depends on how you "compel." Com. v. Hunt, 4 Metc. (Mass.) 111, 133. So as to "annoyance" or "intimidation." Connor v. Kent, Curran v. Treleaven, 17 Cox, Cr. Cas. 354, 367, 368, 370. In Sherry v. Perkins, 147 Mass. 212, it was found as a fact that the display of banners which was enjoined was part of a scheme to prevent workmen from entering or remaining in the plaintiff's employment, "by threats and intimidation." The context showed that the words as there used meant threats of personal violence and intimidation by causing fear of it.

I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests.

So far, I suppose, we are agreed. But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might

do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle. Com. v. Hunt, 4 Metc. (Mass.) 111; Randall v. Hazelton, 12 Allen, 412, 414. There was combination of the most flagrant and dominant kind in Bowen v. Matheson, and in the Steamship Co. Case, and combination was essential to the success achieved. But it is not necessary to cite cases. It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. I am unable to reconcile Temperton v. Russell [1893] 1 Q. B. 715, and the cases which follow it, with the Steamship Co. Case. But Temperton v. Russell is not a binding authority here, and therefore I do not think it necessary to discuss it.

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent

economists and legislators have given up that notion today. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is dissociated from any threat of violence, and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages. The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842, by the good sense of Chief Justice Shaw, in Com. v. Hunt, 4 Metc. (Mass.) 111. I repeat at the end, as I said at the beginning, that this is the point of difference in principle, and the only one, between the interlocutory and final decree; and I only desire to add that the distinctions upon which the final decree was framed seem to me to have coincided very accurately with the results finally reached by legislation and judicial decision in England, apart from what I must regard as the anomalous decisions of Temperton v. Russell and the cases which have followed it. Reg. v. Shepherd, 11 Cox, Cr. Cas. 325; Connor v. Kent, Gibson v. Lawson, and Curran v. Treleaven, 17 Cox, Cr. Cas. 354.

The general question of the propriety of dealing with this kind of case by injunction I say nothing about, because I understand that the defendants have no objection to the final decree if it goes no further, and that both parties wish a decision upon the matters which I have discussed.

BERRY v. DONOVAN

(Supreme Judicial Court of Mass., 1905. 188 Mass. 353.)

Exceptions from Supreme Judicial Court, Essex County.

Action by one Berry against one Donovan. There was a verdict for plaintiff, and defendant excepted. Exceptions overruled.

KNOWLTON, C. J. This is an action of tort, brought to recover damages sustained by reason of the defendant's malicious interference with the plaintiff's contract of employment. The plaintiff was a shoemaker, employed by the firm of Hazen B. Goodrich & Co. at Haverhill, Mass., under a contract terminable at will. At the time of the interference complained of he had been so employed nearly four years. The defendant was the representative at Haverhill of a national organization of shoe workers, called the Boot and Shoe Workers' Union, of which he was also a member. The evidence showed that he induced Goodrich & Co. to discharge the plaintiff, greatly to his damage. A few days before the plaintiff's discharge a contract was entered into between the Boot and Shoe Workers' Union and the firm of Goodrich & Co., which was signed by the defendant for the union, the second clause of which was as follows: "In consideration of the foregoing valuable privileges, the employer agrees to hire, as shoe workers, only members of the Boot and Shoe Workers' Union in good standing, and further agrees not to retain any shoe worker in his employment after receiving notice from the union that such shoe worker is objectionable to the union, either on account of being in arrears for dues, or disobedience of union rules or laws, or from any other cause." The contract contained various other provisions in regard to the employment of members of the union by the firm, and the rights of the firm and of the union in reference to the services of these employés, and the use of the union's stamp upon goods to be manufactured.

The plaintiff was not a member of this union. Soon after the execution of this contract the defendant demanded of Goodrich & Co. that the plaintiff be discharged, and the evidence tended to show that the sole ground for the demand was that the plaintiff was not a member of the union, and that he persistently declined to join it after repeated suggestions that he should do so.

At the close of the evidence the defendant asked for the following instructions, which the judge declined to give:

"(1) Upon all the evidence in the case the plaintiff is not entitled to recover.

"(2) Upon all the evidence in the case the defendant was

acting as the legal representative of the Boot and Shoe Workers' Union, and not in his personal capacity, and therefore the plaintiff cannot recover.

"(3) The contract between the Boot and Shoe Workers' Union and Hazen B. Goodrich & Co. was a valid contract, and the defendant, as the legal representative of the Boot and Shoe Workers' Union, had a right to call the attention of Hazen B. Goodrich & Co., or any member of the firm, to the fact that they were violating the terms of the contract in keeping the plaintiff in their employment after the contract was signed, and insisting upon an observance of the terms of the contract, even if the defendant knew that the observance of the terms of the contract would result in the discharge of the plaintiff from their employment.

"(4) The contract referred to was a legal contract, and a justification of the acts of the defendant, as shown by the evidence in this case.

"(6) The defendant cannot be held responsible in this action unless it appears that the defendant used threats, or some act of intimidation, or some slanderous statements, or some unlawful coercion to or against the employers of the plaintiff, to thereby cause the plaintiff's discharge; and upon all the evidence in the case there is no such evidence, and the plaintiff cannot recover."

The defendant excepted to the refusal, and to the portions of the charge which were inconsistent with the instructions requested. The jury returned a verdict of $1,500 for the plaintiff. These exceptions present the only questions which were argued before us by the defendant.

The primary right of the plaintiff to have the benefit of his contract and to remain undisturbed in the performance of it is universally recognized. The right to dispose of one's labor as he will, and to have the benefit of one's lawful contracts, is incident to the freedom of the individual, which lies at the foundation of the government in all countries that maintain the principles of civil liberty. Such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. An intentional interference with such a right without lawful justification is malicious in law, even if it is from good

motives and without express malice. Walker v. Cronin, 107 Mass. 555-562; Plant v. Woods, 176 Mass. 492-498, 51 L. R. A. 339, 79 Am. St. Rep. 330; Allen v. Flood (1898) A. C. 1-18; Mogul Steamship Company v. McGregor, 23 Q. B. D. 598-613; Read v. Friendly Society of Operative Stone Masons (1902) 2 K. B. 88-96; Giblan v. National Amalgamated Union (1903) 2 K. B. 600-617.

In the present case the judge submitted to the jury, first, the question whether the defendant interfered with the plaintiff's rights under his contract with Goodrich & Co.; and, secondly, the question whether, if he did, the interference was without justifiable cause. The jury were instructed that, unless the defendant's interference directly caused the termination of the plaintiff's employment, there could be no recovery. The substance of the defendant's contention was that if he acted under the contract between the Boot and Shoe Workers' Union and the employer in procuring the plaintiff's discharge, his interference was lawful.

This contention brings us to an examination of the contract. That part which relates to the persons to be employed contains, first, a provision that the employer will hire only members of the union. This has no application to the plaintiff's case, for it is an agreement only for the future, and the plaintiff had been hired a long time before. The next provision is that the employer will not retain in his employment a worker, after receiving notice that he is objectionable to the union, "either on account of being in arrears for dues, or disobedience of union rules or laws, or from any other cause." The first two possible causes for objection could not be applied to persons in the situation of the plaintiff, who were not members of the union or amenable to its laws. As to such persons the only provision applicable was that the firm would not retain a worker who was objectionable to the union from any cause, however arbitrary the objection or unreasonable the cause might be. This provision purported to authorize the union to interfere and deprive any workman of his employment for no reason whatever, in the arbitrary exercise of its power. Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with

his employment by a third person who made the contract with his employer. Curran v. Galen, 152 N. Y. 33, 37 L. R. A. 802, 57 Am. St. Rep. 496. No one can legally interfere with the employment of another unless in the exercise of some right of his own, which the law respects. His will so to interfere for his own gratification is not such a right.

The judge rightly left to the jury the question whether, in view of all the circumstances, the interference was or was not for a justifiable cause. If the plaintiff's habits or conduct or character had been such as to render him an unfit associate in the shop for ordinary workmen of good character, that would have been a sufficient reason for interference in behalf of his shopmates. We can conceive of other good reasons. But the evidence tended to show that the only reason for procuring his discharge was his refusal to join the union. The question, therefore, is whether the jury might find that such an interference was unlawful.

The only argument that we have heard in support of interference by labor unions in cases of this kind is that it is justifiable as a kind of competition. It is true that fair competition in business brings persons into rivalry, and often justifies action for one's self which interferes with proper action of another. Such action on both sides is the exercise by competing persons of equal conflicting rights. The principle appealed to would justify a member of the union, who was seeking employment for himself, in making an offer to serve on such terms as would result, and as he knew would result, in the discharge of the plaintiff by his employer, to make a place for the new comer. Such an offer, for such a purpose, would be unobjectionable. It would be merely the exercise of a personal right, equal in importance to the plaintiff's right. But an interference by a combination of persons to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition. In such a case the action taken by the combination is not in the regular course of their business as employés, either in the service in which they are engaged or in an effort to obtain employment in other service. The result which they seek to obtain cannot come directly from anything that they do within the regular

line of their business as workers competing in the labor market. It can only come from action outside of the province of workingmen, intended directly to injure another, for the purpose of compelling him to submit to their dictation.

It is difficult to see how the object to be gained can come within the field of fair competition. If we consider it in reference to the right of employés to compete with one another, inducing a person to join a union has no tendency to aid them in such competition. Indeed, the object of organizations of this kind is not to make competition of employés with one another more easy or successful. It is rather, by association, to prevent such competition, to bring all to equality and to make them act together in a common interest. Plainly, then, interference with one working under a contract, with a view to compel him to join a union, cannot be justified as a part of the competition of workmen with one another.

We understand that the attempted justification rests entirely upon another kind of so-called competition, namely, competition between employers and the employed, in the attempt of each class to obtain as large a share as possible of the income from their combined efforts in the industrial field. In a strict sense this is hardly competition. It is a struggle or contention of interests of different kinds, which are in opposition, so far as the division of profits is concerned. In a broad sense, perhaps, the contending forces may be called competitors. At all events, we may assume that, as between themselves, the principle which warrants competition permits also reasonable efforts, of a proper kind, which have a direct tendency to benefit one party in his business at the expense of the other. It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle that it is also directly detrimental to the other. But when action is directed against the other primarily for the purpose of doing him harm, and thus compelling him to yield to the demand of the actor, and this action does not directly affect the property or business or status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the act.

The gain which a labor union may expect to derive from inducing others to join it is not an improvement to be obtained directly in the conditions under which the men are working,

but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business, such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it. If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employé would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country. Employers would be forced to yield to all their demands or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly. A monopoly, controlling anything which the world must have, is fatal to prosperity and progress. In matters of this kind the law does not tolerate monopolies. The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly. It therefore does not justify causing the discharge, by his employer, of an individual laborer working under a contract. It is easy to see that for different reasons an act which might be done in legitimate competition by one or two or three persons, each proceeding independently, might take on an entirely different character, both in its nature and its purpose, if done by hundreds in combination.

We have no desire to put obstacles in the way of employés who are seeking by combination to obtain better conditions for themselves and their families. We have no doubt that laboring men have derived and may hereafter derive advantages from organization. We only say that under correct rules of law, and with a proper regard for the rights of individuals, labor unions cannot be permitted to drive men out of employment because they choose to work independently. If disagreements between those who furnish the capital and those who perform the labor employed in industrial enterprises are to be settled only by industrial wars, it would give a great advantage to combinations of employés, they could be permitted by force to obtain a monopoly of the labor market. But we are hopeful that this kind of warfare will soon give way to industrial peace, and that rational methods of settling such controversies will be adopted universally.

The fact that the plaintiff's contract was terminable at will, instead of ending at a stated time, does not affect his right to recover. It only affects the amount that he is to receive as damages. Moran v. Dunphy, 177 Mass. 485-487, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; Perkins v. Pendleton, 90 Me. 166-176, 38 Atl. 96, 60 Am. St. Rep. 252; Lucke v. Clothing Cutters Association, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; London Guarantee Company v. Horn, 101 Ill. App. 355; Id., 206 Ill. 493, 99 Am. St. Rep. 185.

The conclusion which we have reached is well supported by authority. The principle invoked is precisely the same as that which lies at the foundation of the decision in Plant v. Woods, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330. In that case, although the power that lies in combination and the methods often adopted by labor unions in the exercise of it were stated with great clearness and ability, the turning point of the decision is found in this statement on page 502, 176 Mass., page 1015, 57 N. E., 51 L. R. A. 339, 79 Am. St. Rep. 330: "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition." Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287, Walker v. Cronin, 107 Mass. 555, and the other cases cited in Plant v. Woods, *ubi supra*, as well as the later case of Martell v. White, 185 Mass. 255, 64 L. R. A. 260, all tend to support us in our decision.

We have long had a statute forbidding the coercion or compulsion by any person of any other "person into a written or verbal agreement not to join or become a member of a labor organization as a condition of his securing employment or continuing in the employment of such person." Rev. Laws, c. 106, § 12. The same principle would justify a prohibition of the coercion or compulsion of a person into a written or verbal agreement to join such an organization as a condition of his securing employment, or continuing in the employment of another person.

The latest English cases, which explain and modify Allen v. Flood (1898) A. C. 1, seem in harmony with our conclusion.

Giblan v. National Amalgamated Union (1903) 2 K. B. 600; Quinn v. Leatham (1901) A. C. 495. In the first of these it was held that a labor union could not use its power to deprive one of employment, in order to compel him to pay a debt in which the union was interested. The case of Curran v. Galen, 152 N. Y. 33, 37 L. R. A. 802, 57 Am. St. Rep. 496, in the decision of which the judges of the Court of Appeals were unanimous, fully covers the present case. The principle involved in each of the two cases is the same, and the language of the opinion in that case, in its application to this, is decisive. From the decision of National Protective Association v. Cumming, 170 N. Y. 315, 58 L. R. A. 135, 88 Am. St. Rep. 648, three of the seven judges dissented, and the result is to leave the law of New York in some uncertainty. The majority distinguished that case from Curran v. Galen, just referred to, and held that their decision was not inconsistent with it. They seem to have treated the arrangement to exclude persons not belonging to the union as entered into for legitimate purposes, having reference to actual or probable conditions in the employment; while the minority treated it as similar to the arrangement that appears in Curran v. Galen. See, also, Jacobs v. Cohen (Sup.) 90 N. Y. Supp. 854; Mills et al. v. United States Printing Company (Sup., Dec. 15, 1904) 91 N. Y. Supp. 184.

The law of Illinois is in accord with our conclusion. In London Guarantee Co. v. Horn, 101 Ill. App. 355, Id., 206 Ill. 493, 99 Am. St. Rep. 185, it was held that a refusal of a workman to accede to the request of another in a matter affecting the pecuniary interest of the other would not justify the procurement of his discharge from the employment in which he was engaged under a contract terminable at will. See, also, for kindred doctrines, Doremus v. Hennessey, 176 Ill. 608, 42 L. R. A. 797, 802, 68 Am. St. Rep. 203; Christensen v. The People, 114 Ill. App. 40; Matthews v. The People, 202 Ill. 389, 63 L. R. A. 73, 95 Am. St. Rep. 241; Erdman v. Mitchell, 207 Pa. 79, 63 L. R. A. 534, 99 Am. St. Rep. 783; Perkons v. Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252. Other cases bearing more or less directly upon the general subject are Lucke v. Clothing Cutters' Association, 77 Md. 396, 19 L. R. A. 408, 39 Am. St. Rep. 421; Holder v. Cannon Manufactur-

ing Company, 135 N. C. 392, 65 L. R. A. 161; Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367; Blumenthal v. Shaw, 77 Fed. 954, 23 C. C. A. 590; Barr v. The Essex Trades Council, 53 N. J. Eq. 101; Jersey City Printing Company v. Cassidy, 63 N. J. Eq. 759; Crump v. Com., 84 Va. 927, 10 Am. St. Rep. 839; Old Dominion Steamship Company v. McKenna (C. C.) 30 Fed. 48; Brown and Allen v. Jacobes Pharmacy Company, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126; Bailey v. Master Plumbers' Association, 103 Tenn. 99, 46 L. R. A. 561; Delz v. Winfree, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755. It will be seen that in the different courts there is considerable variety and some conflict of opinion.

We hold that the defendant was not justified by the contract with Goodrich & Co., or by his relations to the plaintiff, in interfering with the plaintiff's employment under his contract. How far the principles which we adopt would apply, under different conceivable forms of contract, to an interference with a workman not engaged, but seeking employment, or to different methods of boycotting, we have no occasion in this case to decide.

The defendant contends that the judge erred in his instruction to the jury in response to the defendant's special request at the close of the charge. The judge said, in substance, that if the defendant caused the firm to discharge the plaintiff by giving the members to understand that, unless they discharged him, they "would be visited with some punishment, under the contract or otherwise, then that interference would not be justifiable." This instruction, taken literally and alone, would be erroneous. Some grounds of interference would be justifiable, while others would not. But considering the instruction in connection with that which immediately preceded it, and with other parts of the charge, it is evident that the judge was directing the attention of the jury to what would constitute an interference, not to what would justify an interference. He had just told them that, if all the defendant did was to call the attention of the firm to the provision of the contract, and the firm then, of their own motion, discharged the plaintiff, the defendant would not be liable. He then pursued the subject with some elaboration, and ended

as stated above. Instead of saying, "then that interference would not be justifiable," he evidently meant to say, "then that would be interference which would create a liability, unless it was justifiable." Taking the charge as a whole, we think the jury were not misled by the inaccuracy of this statement.

Exceptions overruled.

MORE v. BENNETT

(Supreme Court of Illinois, 1892. 140 Ill. 69.)

Appeal from appellate court, first district.

Action by R. Wilson More and others against J. L. Bennett and others for damages for violation of rules of an association of which both parties were members. Judgment sustaining a demurrer to the complaint was affirmed by the appellate court. Plaintiff appeals. Affirmed.

The other facts fully appear in the following statement by BAILEY, J.:

This was a suit in assumpsit brought by R. Wilson More and others, composing the firm of More & Dundas, against J. L. Bennett and others, composing the firm of Bennett, Edwards & Pettit, to recover damages resulting from an alleged breach of certain rules and by-laws of the Chicago Law Stenographers' Association, of which both the plaintiffs and defendants are members. To the declaration, which consists of two special counts, a demurrer was sustained, and, the plaintiffs electing to abide by their declaration, judgment was rendered in favor of the defendants for costs. Said judgment has been affirmed by the appellate court on appeal, and the present appeal is from said judgment of affirmance.

The first count of the declaration alleges, in substance, that the plaintiffs and defendants are all stenographers by profession, and have, from the time of its organization, been members of said association, an association formed to promote the interest of its members by all proper methods, and to establish and maintain reasonable, proper, and uniform

rates for stenographic work done by the members of said association, and to secure to judges, lawyers, and citizens of Chicago efficient, competent, and reliable law reporting, at reasonable, proper, and uniform rates, and to furnish them with the means of obtaining efficient and competent reporters, and to increase the efficiency of law reporting in the county of Cook. That, in accordance with its constitution and by-laws, said association had adopted a schedule of rates which were and are fair and reasonable, and had for more than 15 years prior to the organization of said association been the established rates among law stenographers, and had been and are still recognized as reasonable and established rates by judges and members of the legal fraternity, and by law stenographers of the city of Chicago, there having been during said time no material variation from said rates among law stenographers, said rates being less than those established in certain other large cities of the United States for the same class of work.

Said count further alleges that, in consideration of like promises and agreements on the part of the plaintiffs, and like payment of the membership fee of $5 by each of the plaintiffs to become members of said association, the defendants promised and agreed with the plaintiffs that they would be bound in their charges for work by the schedule of rates adopted by said association. That the defendants might cut rates against persons not members of said association, provided such cutting was in good faith and the rights of the plaintiffs were respected. That in no case where the defendants had any knowledge of the existence of a contract or reporting arrangement between the plaintiffs and any lawyer, corporation, or any other person would they attempt, by underbidding the rate established by said association or other unfair means, to secure such reporting.

That the rates established by said association were as follows:

Not less than 20 cents per folio for single copy; not less than 25 cents per folio for two copies; not less than 28 cents per folio for three copies; and the rate of $10 per day for attendance, with the qualification that, if a reporter was engaged by one of the parties to a suit, he or any other re-

porter, knowing of such engagement, might take the other side of the case for $5 per day; but in no case should the reporter make any offer to any attorney after being informed by such attorney that he had engaged a reporter.

That while said association was in existence, and the plaintiffs and defendants were members thereof, the plaintiffs entered into a contract or reporting arrangement with the county of Cook, by which said county employed the plaintiffs to report the proceedings and furnish transcripts thereof, as said county should require, in a certain celebrated murder case then pending in the criminal court of Cook county, to-wit., the case of The People v. O'Sullivan and others, known as the "Cronin Trial," said employment by said county being on the following terms, to-wit, $10 per day for attendance, and the regular rates for transcripts as established by said association, the plaintiffs agreeing with said county to do said work, if the county should demand it, at as low a rate as any reputable and established stenographer or firm of stenographers should in good faith bid for said work.

That the plaintiffs entered upon the performance of said contract, and were engaged in reporting the proceedings at said trial at said regular rates, yet the defendants, well knowing the premises, and the aforesaid contract or reporting arrangement between the plaintiffs and said county, and after the plaintiffs had been engaged on said case for, to-wit, seven weeks, and at a time when defendants well knew that the plaintiff had performed the most unprofitable part of said contract, and not regarding their said promise so made to the plaintiffs, did not respect the rights of the plaintiffs and the schedule rates so adopted by said association, and the fact that they knew that there was a reporting arrangement or contract between the plaintiffs and said county, but solicited said county, and endeavored to secure from said county, by underbidding and other unfair means, employment as law stenographers to report and furnish transcripts of the proceedings at said trial, and made a certain bid to said county, by which they offered to do said work at a less rate than that established by said association, to-wit, $5 per day for attendance, 20 cents per folio for a single copy, 22

cents per folio for two copies, and all copies above two free of charge.

That thereupon the plaintiffs, because of said bid by the defendants, were required by said county to meet said bid, or to cease their employment on said trial, as by the terms of said employment said county had a right to do; and that the plaintiffs, for the purpose of remaining in employment on said trial, did meet the said bid of the defendants, and afterwards reported and furnished transcripts of the proceedings on said trial at the rates offered by the defendants; by means whereof they were deprived of divers gains and profits which would have accrued to them from the reporting and furnishing transcripts on said trial under the regular rates of said association, and in accordance with their original bid, and have suffered great loss and damage through the wrongful conduct of the defendants, to the damage of the plaintiffs in the sum of $3,000; and therefore they bring their suit, etc.

The second count contains substantially the same allegations as the first, and also the following: That said association numbers among its members only a small portion of the law stenographers of the city of Chicago, and that said association was formed because a system of ruinous competition had sprung up among the stenographers of said city by which the prices of stenographic work were depressed below reasonable rates, and also because a discreditable and dishonorable system of solicitation for business had sprung up, by which efforts were made on the part of stenographers to induce attorneys, corporations, and other persons to break their contracts already made with other stenographers, and that the objects of said association were to prevent said discreditable and dishonorable solicitation, and to promote the interests of the members thereof by all proper methods, and to establish and maintain proper and uniform rates for stenographic work done by its members.

Said second count also set out, *in extenso,* the constitution, by-laws, and schedule of rates of said association, said constitution containing, among other things, the following provisions: "The objects of this association shall be to promote the interests of the members thereof by all proper methods,

particularly to establish and maintain proper rates for stenographic work done by members of the association.

"Any reputable stenographer, regularly engaged in law reporting in Cook county, shall be eligible to membership under the rules hereinafter provided.

"The association may adopt a schedule of rates to be charged by the members for stenographic work done by them, which schedule shall be binding upon every member."

Among the by-laws adopted by said association were the following:

"The membership fee shall be $5. The expenses of the association, above amount received for membership fees, shall be paid out of a fund to be collected by assessment, to be levied by the board of directors from time to time as may be necessary.

"The members of this association shall respect each other's rights, and in no case where a member has knowledge of the existence of a contract or reporting arrangement between a fellow-member and a lawyer, corporation, or any other person shall he attempt, by underbidding or other unfair means, to secure such reporting; but members of this association may cut rates against outsiders, if they choose; such cutting, however, must be done in good faith, or the member will be liable to fine, as provided for other violations of the constitution and by-laws."

Said by-laws also provide, in case of any violation of the rules of said association by any of its members, for a trial of the member accused of such violation by a special arbitration committee, and the imposition of a fine in case of conviction, of not less than $10, nor more than $25, to be paid into the treasury of the association, with the right on the part of the accused to an appeal to a meeting of the entire association to be called for that purpose; and it is further provided that, "in cases where the differences between members require financial adjustment, the said arbitration committee shall decide between the parties," with right of appeal from the decision of said committee to any regular or special meeting of the association, whose decision in the matter is final.

The assignments of error call in question the decision of the circuit court sustaining the demurrer to said declaration.

Mr. Justice Bailey delivered the opinion of the Court:

The question is raised by counsel, and discussed at some length, whether membership in the Chicago Law Stenographic Association established a contractual relation between the plaintiffs and defendants, which gives to the plaintiffs a right of action against the defendants for a violation of any of the rules of said association, as for a breach of contract; and also whether the only remedy for a violation of said rules is not that provided by the by-laws of the association, viz., a fine, to be imposed upon the offender, after a trial and conviction before an arbitration committee, duly appointed for that purpose. But, as we view the case, it will be unnecessary for us to consider these questions, since, admitting that the constitution and by-laws of the association were in the nature of a contract as between the members *inter se,* we are of the opinion that the contract thus established is so far obnoxious to well-settled rules of public policy as to render it improper for the courts to lend their aid to its enforcement.

Whatever may be the professed objects of the association, it clearly appears, both from its constitution and by-laws, and from the averments of the declaration, that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work, by restraining all competition between them. Power is given to the association to fix a schedule of prices which shall be binding upon all its members, and not only do the members, by assenting to the constitution and by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take a less price, is punishable by the imposition of fines, as well as by such other disciplinary measures as associations of this character may adopt for the enforcement of their rules.

The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in general restraint of trade, if it is not, indeed, a subordinate application of the same rule. As said by Mr. Tiedeman: "Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities, or services. All

combinations of capitalists or of workmen for the purpose of influencing trade in their especial favor, by raising or reducing prices, are so far illegal that agreements to combine cannot be enforced by the courts." Tied. Com. Paper, § 190.

Many cases may be found in which the doctrine here stated has been laid down and enforced. Thus in Stanton v. Allen, 5 Denio, 434, where an association among the whole or a large part of the proprietors of boats on the Erie and Oswego canals was formed upon an agreement to regulate the price of freight and passage by a uniform scale to be fixed by a committee chosen by themselves, and to divide the profits of their business according to the number of boats employed by each, with provisions prohibiting the members from engaging in similar business out of the association, it was held that, as the tendency of such agreement was to increase prices and to prevent wholesome competition, as well as diminish the public revenue, it was against public policy and void, by the principles of the common law.

In Hooker v. Vandewater, 4 Denio, 349, the proprietors of five several lines of boats engaged in the business of transporting persons and freight on the Erie and Oswego canals entered into an agreement in which, "for the purpose of establishing and maintaining fair and uniform rates of freight, and equalizing the business among themselves, and to avoid all unnecessary expense in doing the same," they agreed to run for the residue of the season of navigation at certain rates of freight and passage then fixed upon, but which should be changed whenever the parties should deem expedient, and to divide the net earnings among themselves according to certain fixed proportions; and it was held, in a suit on the agreement against a party who failed to make payment according to its terms, that the agreement was a conspiracy to commit an act injurious to trade, and was illegal and void.

In Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, five coal companies in Pennsylvania entered into an agreement in New York to divide two coal regions of which they had control; to appoint a committee to take charge of their interests, and decide all questions; and appoint a general agent at a certain point in the state of New York, the coal mined to be delivered through him, each company to deliver its propor-

tion at its own cost at the different markets, at such time and to such persons as the committee should direct, the committee to adjust all prices, rates of freight, etc., and settlements to be made between the several companies monthly; and it was held, in a suit brought by one of said companies against another, to enforce a liability arising under said contract, that the contract was in violation of a statute of New York making it a misdemeanor to conspire to commit any act injurious to trade or commerce, and was also against public policy, and therefore illegal and void; the court laying down the rule, among other things, that every association formed to raise or depress prices beyond what they would be, if left without aid or stimulus, was criminal.

In Craft v. McConoughy, 79 Ill. 346, a contract was entered into by all the grain dealers in a certain town which, on its face, indicated that they had formed a partnership for the purpose of dealing in grain, but the true object of which was to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage, and expense of shipment at such town; and it was held, on bill filed for an accounting and distribution of profits, that such contract was in restraint of trade, and consequently void on grounds of public policy. In discussing the principles involved, this court said: "While these parties were in business in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain, as they saw proper, and as they could make contracts for with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, were all the guaranty the public required; but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection."

The doctrine of the foregoing decisions may, in our opinion, be fairly applied to the facts in the present case. While some of the cases cited involve elements not present here, the determining circumstance in all of them seems to have been a combination or conspiracy among a number of persons engaged in

a particular business, to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would have been if left to the influence of unrestricted competition. All such combinations are held to be contrary to public policy, and the courts, therefore, will refuse to lend their aid to the enforcement of the contracts by which such combinations are sought to be effected.

Counsel seek to distinguish this case from those cited by the circumstance, alleged in the second count of the declaration, that but a small portion of the law stenographers of Chicago belong to said association. An analogy is thereby sought to be raised between the contract in this case and those contracts in partial restraint of trade, which the law upholds. We think the analogy thus sought to be raised does not exist. Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its goodwill with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased. But in the present case there is no purchase or sale of any business, nor any other analogous circumstance giving to one party a just right to be protected against competition from the other. All of the members of the association are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists; the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is of precisely the same character, produces the same results, and is subject to the same legal objection.

It may also be observed that, by the constitution of the association, any reputable stenographer, regularly engaged in

law, reporting in Cook county, is eligible to membership, and, if all or a major part of the stenographers in said county engaged in that business are not already members, it is because the association has not yet fully accomplished the purposes of its organization. We can see no legal difference between the restraint upon competition which it now exercises and that which it will exercise when it is in a position to dictate terms to all who are engaged in the business, and to all who may wish to obtain the services of law stenographic reporters.

We are of the opinion that the demurrer to the declaration was properly sustained, and the judgment will therefore be affirmed.[75]

75—See also Texas Standard Oil Co. v. Adoue, 83 Tex. 650 (combination of five cotton seed oil mills in the State of Texas—prices fixed); Nester v. Continental Brewing Co., 161 Pa. St. 473 (combinations of brewers of Philadelphia—prices fixed); DeWitt Wire-Cloth Co. v. New Jersey Wire-Cloth Co., 14 N. Y. Supp. 277 (combination of wire-cloth manufacturers—prices fixed); Urmston v. Whitelegg Bros., 63 L. T. N. S. 455 (combination of mineral water producers—agreement not to sell below a certain price).

But in Jones v. Fell, Ex'r of Clifford, 5 Fla. 510, an agreement by three pilots that each should be on duty one day and off duty two days, and that they would divide the profits equally, was held valid. Baltzell, C. J., said, pp. 514-515: "Associations are so common an element, not only in commerce, but in all the affairs of life, that it would be rather perilous on the part of the Court, to assert that they impair competition, destroy emulation and diminish exertion. There is scarcely an occupation in life, scarcely a branch of trade, from the very largest to the smallest, that does not feel the exciting and invigorating influence of this wonderful instrumentality. It made and conducts our government, constructs our railroads, our steam vessels, our magnificent ships, our temples of worship, structures for public and private use, our manufactories, creates our institutions for learning, builds up our cities and towns.

"Its very office is to do what individual exertion may not accomplish, and in a degree distinguishes civilized from savage life. Why then should this important agency be denied to this meritorious class of our citizens? They are in general men of small means, to whom an association may not only be desirable, but necessary and indispensable. Were our minds less clear on the subject, we are not permitted to assert the invalidity of the act on this account."

BOHN MFG. CO. v. HOLLIS

(Supreme Court of Minnesota, 1893. 54 Minn. 223.)

Appeal from district court, Ramsey county; Cornish, Judge.

Action by the Bohn Manufacturing Company against W. G. Hollis and others for an injunction. From an order denying a motion to dissolve the temporary writ issued, defendants appeal. Reversed.

MITCHELL, J. The pleadings in this case, and the affidavits read on the motion to dissolve the temporary injunction, are so voluminous, and so abound in mere inferences as to motives and consequences, and in adjectives and other qualifying epithets, as to convey the impression, at first sight, that the facts were both complicated and controverted. But a careful analysis of the record proves that there is no real dispute as to the material facts, which are comparatively simple. Stripped of all extraneous matter, the case discloses just this state of facts: The plaintiff is a manufacturer and vendor of lumber and other building material, having a large and profitable trade at wholesale and retail in this and adjoining states, a large and valuable part of this trade being with the retail lumber dealers. The defendant, the Northwestern Lumbermen's Association, is a voluntary association of retail lumber dealers, comprising from 25 to 50 per cent. of the retail dealers doing business in the states referred to, many of whom are, or have been, customers of the plaintiff. A "retailer," as defined in the constitution of the association, is "any person who is engaged in retailing lumber, who carries at all times a stock of lumber adequate to the wants of the community, and who regularly maintains an office as a lumber dealer, and keeps the same open at proper times." Any wholesale dealer or manufacturer of lumber who conforms to the rules of the association may become an honorary member, and attend its meetings, but is not allowed to vote. The object of the association is stated in its constitution to be "the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers." The object is more fully stated, and the means by which it is to be carried into effect are fully set out, in sections 3, 3½, 4, and 6 of the by-laws, which are all that we consider material in this

case. The plaintiff sold two bills of lumber directly to consumers or contractors at points where members of the association were engaged in business as retail dealers. Defendant Hollis, the secretary of the association, having been informed of this fact, notified plaintiff, in pursuance of section 3 of the by-laws, that he had a claim against it for 10 per cent. of the amount of these sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff, from time to time, promised to adjust the matter, but procrastinated and evaded doing so for so long that finally Hollis threatened that unless plaintiff immediately settled the matter he would send to all the members of the association the lists or notices provided for by section 6 of the by-laws, notifying them that plaintiff refused to comply with the rules of the association, and was no longer in sympathy with it. Thereupon, plaintiff commenced this action for a permanent injunction, and obtained, ex parte, a temporary one, enjoining the defendants from issuing these notices, etc. This appeal is from an order refusing to dissolve the temporary injunction. It is alleged, and in view of the facts must be presumed to be true, that if these notices should be issued the members of the association would thereafter refuse to deal with the plaintiff, thereby resulting in loss to it of gains and profits.

The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as "monopolies," "trusts," "boycotts," "strikes," and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of king's bench in Bagg's Case, 11 Coke, 98a, assume that, on general principles, they have authority to correct or

reform everything which they may deem wrong, or, as Lord Ellsmere puts it, "to manage the state." But whatever doubts or difficulties may arise in other cases, presenting other phases of the general subject involved here, it seems to us that there can be none on the facts of the present case. Both the affidavits and brief in behalf of the plaintiff indulge in a great deal of strong, and even exaggerated, assertion, and in many words and expressions of very indefinite and illusive meaning, such as "wreck," "coerce," "extort," "conspiracy," "monopoly," "drive out of business," and the like. This looks very formidable, but in law, as well as in mathematics, it simplifies things very much to reduce them to their lowest terms. It is conceded that retail lumber yards in the various cities, towns, and villages are not only a public convenience, but a public necessity; also, that, to enable the owners to maintain these yards, they must sell their lumber at a reasonable profit. It also goes without saying that to have manufacturers or wholesale dealers sell at retail, directly to consumers, in the territory upon which the retail dealer depends for his customers, injuriously affects and demoralizes his trade. This is so well recognized as a rule of trade, in every department, that generally wholesale dealers refrain from selling at retail within the territory from which their customers obtain their trade. Now, when reduced to its ultimate analysis, all that the retail lumber dealers, in this case, have done, is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other nondealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers, not dealers, at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of defendants' offense. It will be observed that defendants were not proposing to send notices to any one but members of the association. There was no element of fraud, coercion, or intimidation, either towards plaintiff or the members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on plaintiff

for 10 per cent. on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with plaintiff whether it would pay or not. If it valued the trade of the members of the association higher than that of nondealers at the same points, it would probably conclude to pay; otherwise, not. It cannot be claimed that the act of making this demand was actionable; much less, that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Nor was any coercion proposed to be brought to bear on the members of the association, to prevent them from trading with the plaintiff. After they received the notices, they would be at entire liberty to trade with plaintiff, or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be "expelled;" but this simply meant to cease to be members. It was wholly a matter of their own free choice, which they preferred,—to trade with the plaintiff, or to continue members of the association. So much for the facts, and all that remains is to apply to them a few well-settled, elementary principles of law:

1. The mere fact that the proposed acts of the defendants would have resulted in plaintiff's loss of gains and profits does not, of itself, render those acts unlawful or actionable. That depends on whether the acts are, in and of themselves, unlawful. "Injury," in its legal sense, means damage resulting from an unlawful act. Associations may be entered into, the object of which is to adopt measures that may tend to diminish the gains and profits of another, and yet, so far from being unlawful, they may be highly meritorious. Com. v. Hunt, 4 Metc. (Mass.) 111; Steamship Co. v. McGregor, 21 Q. B. Div. 544.

2. If an act be lawful,—one that the party has a legal right to do,—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, "the exercise by one man of a legal right cannot be a legal wrong to another," or, as expressed in another case, "malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful." Heywood v. Tillson, 75 Me. 225; Phelps v. Nowlen, 72 N. Y. 39; Jenkins v. Fowler, 24 Pa. St. 308.

3. To enable the plaintiff to maintain this action, it must

appear that defendants have committed, or are about to commit, some unlawful act, which will interfere with, and injuriously affect, some of its legal rights. We advert to this for the reason that counsel for plaintiff devotes much space to assailing this association as one whose object is unlawful because in restraint of trade. We fail to see wherein it is subject to this charge; but, even if it were, this would not, of itself, give plaintiff a cause of action. No case can be found in which it was ever held that, at common law, a contract or agreement in general restraint of trade was actionable at the instance of third parties, or could constitute the foundation for such an action. The courts sometimes call such contracts "unlawful" or "illegal," but in every instance it will be found that these terms were used in the sense, merely, of "void" or "unenforceable" as between the parties; the law considering the disadvantage so imposed upon the contract a sufficient protection to the public. Steamship Co. v. McGregor, 23 Q. B. Div. 598, [1892] App. Cas. 25.

4. What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act. In a few cases there may be some loose remarks apparently to the contrary, but they evidently have their origin in a confused and inaccurate idea of the law of criminal conspiracy, and in failing to distinguish between an unlawful act and a criminal act. It can never be a crime to combine to commit a lawful act, but it may be a crime for several to conspire to commit an unlawful act, which, if done by one individual alone, although unlawful, would not be criminal. Hence, the fact that the defendants associated themselves together to do the act complained of is wholly immaterial in this case. We have referred to this for the reason that counsel has laid great stress upon the fact of the combination of a large number of persons, as if that, of itself, rendered their conduct actionable. Bowen v. Matheson, 14 Allen, 499; Steamship Co. v. McGregor, 23

Q. B. Div. 598, [1892] App. Cas. 25; Parker v. Huntington, 2 Gray, 124; Wellington v. Small, 3 Cush. 145; Payne v. Railway Co., 13 Lea, 507.

5. With these propositions in mind, which bring the case down to a very small compass, we come to another proposition, which is entirely decisive of the case. It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice. This has been repeatedly held as to associations or unions of workmen, and associations of men in other occupations or lines of business must be governed by the same principles. Summed up, and stripped of all extraneous matter, this is all that defendants have done, or threatened to do, and we fail to see anything unlawful or actionable in it. Com. v. Hunt, *supra;* Carew v. Rutherford, 106 Mass. 1; Steamship Co. v. McGregor, [1892] App. Cas. 25.

Order reversed, and injunction dissolved.

VANDERBURGH, J., absent, took no part.

MARTELL v. WHITE

(Supreme Judicial Court of Massachusetts, 1904. 185 Mass. 255.)

Exceptions from Superior Court, Norfolk County; Robt. R. Bishop, Judge.

Action of tort by one Martell against one White and others for conspiracy to injure plaintiff's business. Verdict was ordered for defendants, and plaintiff excepted. Exceptions sustained.

HAMMOND, J. The evidence warranted the finding of the following facts, many of which were not in dispute: The plaintiff was engaged in a profitable business in quarrying granite and selling the same to granite workers in Quincy and vicinity. About January, 1899, his customers left him, and his business was ruined, through the action of the defendants and their associates.

The defendants were all members of a voluntary association known as the Granite Manufacturers' Association of Quincy, Mass., and some of them were on the executive committee. The association was composed of "such individuals, firms, or corporations as are, or are about to become manufacturers, quarriers, or polishers of granite." There was no constitution, and, while there were by-laws, still, except as hereinafter stated, there was in them no statement of the objects for which the association was formed. The by-laws provided, among other things, for the admission, suspension, and expulsion of members, the election of officers, including an executive committee, and defined the respective powers and duties of the officers. One of the by-laws read as follows: "For the purpose of defraying in part the expense of the maintenance of this organization, any member thereof having business transactions with any party or concern in Quincy or its vicinity, not members hereof, and in any way relating to the cutting, quarrying, polishing, buying or selling of granite (hand polishers excepted) shall for each of said transactions contribute at least $1 and not more than $500. The amount to be fixed by the association upon its determining the amount and nature of said transaction."

Acting under the by-laws, the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and, under the section above quoted, it was voted that the offending parties "should respectively contribute to the funds of the association" the sums named in the votes. These sums ranged from $10 to $100. Only the contribution of $100 has been paid, but it is a fair inference that the proceedings to collect the others have been delayed only by reason of this suit. The party "not a member" was the present plaintiff, and the members of the

association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him. This action on their part was due to the course of the association in compelling them to contribute as above stated, and to their fear that a similar vote for contribution would be passed, should they continue to trade with the plaintiff.

The jury might properly have found, also, that the euphemistic expression, "shall contribute to the funds of the association," contained an idea which could be more tersely and accurately expressed by the phrase "shall pay a fine," or, in other words, that the plain intent of the section was to provide for the imposition upon those who came within its provisions of a penalty in the nature of a substantial fine. The bill of exceptions recites that "there was no evidence of threats or intimidation practiced upon the plaintiff himself, and the acts complained of were confined to the action of the society upon its own members." We understand this statement to mean simply that the acts of the association concerned only such of the plaintiff's customers as were members, and that no pressure was brought to bear upon the plaintiff, except such as fairly resulted from action upon his customers. While it is true that the by-law was not directed expressly against the plaintiff by name, still he belonged to the class whose business it was intended to affect, and the proceedings actually taken were based upon transactions with him alone, and in that way, were directed against his business alone. It was the intention of the defendants to withdraw his customers from him, if possible, by the imposition of fines upon them, with the knowledge that the result would be a great loss to the plaintiff. The defendants must be presumed to have intended the natural result of their acts.

Here, then, is a clear and deliberate interference with the business of a person, with the intention of causing damage to him, and ending in that result. The defendants combined and conspired together to ruin the plaintiff in his business, and they accomplished their purpose. In all this, have they kept within lawful bounds?

It is elemental that the unlawfulness of a conspiracy may be found either in the end sought, or the means to be used. If

either is unlawful, within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as to the object sought and the means used.

The case presents one phase of a general subject, which gravely concerns the interests of the business world, and, indeed, those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things, at least, appear to have been settled; and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that, while a person must submit to competition, he has the right to be protected from malicious interference with his business. The rule is well stated in Walker v. Cronin, 107 Mass. 555, 564, in the following language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria,* unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. BOWEN, L. J., in Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598, 613; Plant v. Woods, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330. The justification must be as broad as the act, and must cover not only the motive and the purpose, or, in other words, the object sought, but also the means used.

The defendants contend that, both as to object and means, they are justified by the law applicable to business competition. In considering this defense, it is to be remembered, as was said

by Bowen, L. J., in Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. D. 598, 611, that there is presented "an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiff to be protected in the legitimate exercise of his trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." Here, as in most cases where there is a conflict between two important principles, either of which is sound, and to be sustained within proper bounds, but each of which must finally yield, to some extent, to the other, it frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which, at least, the line must run, and beyond which the party charged with trespass shall not be allowed to go.

While the purpose to injure the plaintiff appears clearly enough, the object or motive is left somewhat obscure, upon the evidence. The association has no written constitution, and the by-laws do not expressly set forth its objects. It is true that from the by-laws it appears that none but persons engaged in the granite business can be members, and that a member transacting any business of this kind with a person not a member is liable to a fine, from which it may be inferred that it is the idea of the members that, for the protection of their business, it would be well to confine it to transactions among themselves, and that one, at least, of the objects of the association is to advance the interests of the members in that way. The oral testimony tends to show that one object of the association is to see that agreements made between its members and their employés, and between this association and similar associations in the same line of business, be kept and "lived up to." Whether this failure to set out fully in writing the objects, is due to any reluctance to have them clearly appear, or to some other cause, is, of course, not material to this case. The result, however, is that its objects do not so clearly appear as might be desired; but, in view of the conclusion to which we have

come as to the means used, it is not necessary to inquire more closely as to the objects. It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business, and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff, except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then, so far as respects the end sought, the conspiracy does not seem to have been illegal.

The next question is whether there is anything unlawful or wrongful in the means used, as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that, in a more advanced stage of the discussion, the day may come when it will be more clearly seen, and will more distinctly appear in the adjudication of the courts, than as yet has been the case, that the proposition that, what one man lawfully can do, any number of men, acting together by combined agreement, lawfully may do, is to be received with newly disclosed qualifications, arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals, acting each according to his own preference, and that of an organized and extensive combination, may be so great in its effect upon public and private interests as to cease to be simply one of degree, and to reach the dignity of a difference in kind. Indeed, in the language of BOWEN, L. J., in the Mogul Steamship Case, *ubi supra* (page 616): "Of the general proposition that certain kinds of conduct not criminal in one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." See, also, opinion of STIRLING, L. J., in Giblan v. National Amalgamated Labour-

ers' Union [1903] 2 K. B. 600, 621. Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the Mogul Steamship Case, above cited, and in Bowen v. Matheson, 14 Allen, 499. The fact, therefore, that the plaintiff was vanquished, is not enough, provided that the contest was carried on within the rules allowable in such warfare.

It is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. He may fight, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed, in his business, to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or in the words of BOWEN, L. J., in the Mogul Steamship Case, *ubi supra*, may adopt "the expedient of sowing one year a crop of apparently unfruitful prices, in order, by driving competition away, to realize a fuller harvest of profit in the future." In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others; and, so long as he keeps within the operation of the laws of trade, his justification is complete.

But from the very nature of the case, it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction, or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or, in other words, they were coerced by actual or threatened injury to their property. It is true

that one may leave the association if he desires, but, if he stays in it, he is subjected to the coercive effect of a fine, to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but, on the contrary, it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal. Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287.

Nor is the nature of the coercion changed by the fact that the persons fined were members of the association. The words of MUNSON, J., in Boutwell v. Marr, 71 Vt. 1, 9, 609, 43 L. R. A. 803, 76 Am. St. Rep. 746, are applicable here: "The law cannot be compelled, by any initial agreement of an associate member, to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victim of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association."

In view of the considerations upon which the right of competition is based, we are of opinion that, as against the plaintiff, the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference, being injurious and unjustifiable, is unlawful.

We do not mean to be understood as saying that a fine is of itself necessarily, or even generally, an illegal implement. In many cases it is so slight as not to be coercive in its nature; in many, it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation; and, in many, it serves as an extra incentive to the performance of some absolute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature, but conditional, and is inconsistent with those conditions upon which the right rests, then the coercion becomes unjustifiable, and taints with illegality the act.

The defendants strongly rely upon Bowen v. Matheson, 14 Allen 499; Mogul Steamship Co. v. McGregor [1892] A. C. 25; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319; Macauley Bros. v. Tierney, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770; and Cote v. Murphy, 159 Pa. 420, 23 L. R. A. 135, 39 Am. St. Rep. 686. In none of these cases was there any coercion by means of fines upon those who traded with the plaintiff. Inducements were held out, but they were such as are naturally incident to competition—for instance, more advantageous terms in the way of discounts, increased trade and otherwise. In the Minnesota case there was among the rules of the association a clause requiring the plaintiff to pay 10 per cent., but the propriety or the legality of that provision was not involved. In Bowen v. Matheson, it is true that the by-laws provided for a fine, but the declaration did not charge that any coercion by means of a fine had been used. A demurrer to the declaration was sustained upon the ground that there was no sufficient allegation of an illegal act. The only allegation which need be noticed here was that the defendants "did prevent men from shipping with" the plaintiff, and as to this the court said: "This might be done in many ways which are legal and proper, and, as no illegal methods are stated, the allegation is bad." This comes far short of sustaining the defendants in their course of coercion by means of fines. As to the other cases cited by the defendants, it may be said that, while bearing upon the general subject of which the present case presents one phase, they are not inconsistent

with the conclusion to which we have come. Among the authorities bearing upon the general subject, and having some relation to the questions involved in this case, see, in addition to those hereinbefore cited, Slaughter House Cases, 16 Wall. 116, 21 L. Ed. 394; Addyston v. United States, 175 U. S. 211, 44 L. Ed. 136; Doremus v. Hennessy, 176 Ill. 608, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 48 L. R. A. 568, 75 Am. St. Rep. 184; State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710; Olive v. Van Patten, 7 Tex. Civ. App. 630; Barr v. Essex Trades Council, 53 N. J. Eq. 881; Jackson v. Stanfield, 137 Ind. 592, 23 L. R. A. 588; Bailey v. Master Plumbers, 103 Tenn. 99, 46 L. R. A. 561; Brown v. Jacobs Pharmacy Co., 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126; Mogul Steamship Co. v. McGregor, 15 Q. B. D. 476; Id. 21 Q. B. D. 544; Id. 23 Q. B. D. 598; Id. [1892] A. C. 25.

For the reasons above stated, a majority of the court are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

MACAULEY BROS. v. TIERNEY

(Supreme Court of Rhode Island, 1895. 19 R. I. 255.)

Bill by Macauley Bros. against Patrick Tierney and others to enjoin respondents from doing certain acts to the detriment of complainants' business. Bill dismissed.

MATTESON, C. J. The complainants are master plumbers, engaged in the business of plumbing. In the transaction of their business, they have been accustomed, and are obliged, to purchase from time to time materials from wholesale dealers in Rhode Island and other parts of the United States, and, among others, from L. H. Tillinghast & Co., of Providence, who, with the New England Supply Company, are the only wholesale dealers in plumbing materials in this state.

The respondents are also master plumbers, and officers and members of the Providence Master Plumbers' Association, a voluntary association, affiliated with the National Association

of Master Plumbers of the United States of America. The latter association, on June 26, 1894, at Baltimore, in convention assembled, adopted resolutions that they would withdraw their patronage from any firm manufacturing or dealing in plumbing material selling to others than master plumbers; that the masters should demand of manufacturers and wholesale dealers in plumbing material to sell goods to none but master plumbers; that the association should keep a record of all journeymen and plumbers who place in buildings plumbing material bought by consumers of manufacturers or dealers; that a committee be appointed by the association in every state and county for the purpose of reporting to the proper officers, at its head office in the state, any violations of these resolutions; that the convention urge upon the association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction. Subsequently, a resolution of amendment was adopted, at St. Louis, that the interpretation of the resolutions be left in the hands of the executive committee with power. Still later, a resolution was adopted, at Washington, "that it is the sense of this convention that in the future the interpretation of the term of 'master plumber,' as set forth in the above resolutions, to entitle him to purchase plumbing material, be construed to mean master plumbers that have qualified under state or local enactments where such exist."

It is alleged by the complainants that the interpretation put by the executive committee of the National Association on these resolutions is that those only are to be regarded as master plumbers who are members of the National Association, or members of the several local associations affiliated with the National Association; that the complainants have been informed by various wholesale dealers in plumbing materials in the United States outside of this state that they will not sell them supplies unless they shall join the Providence Master Plumbers' Association, and that these dealers are forced to refuse to sell them supplies because of the resolutions referred to and the interpretation put upon them by the executive committee of the National Association, and because of the action of the Providence Master Plumbers' Association in causing such dealers to be notified not to sell to the complainants, under the penalty, in case of their continuing to do so, of not

selling to any member of the association; that the Providence Master Plumbers' Association, acting through the respondents, has issued notice to L. H. Tillinghast & Co. and the New England Supply Company to sell supplies to none but members of the association; and that, in consequence of these notices, these wholesale dealers have notified the complainants and other master plumbers that they will not sell plumbing materials to plumbers not members of the Master Plumbers' Associations in the places in which they do a plumbing business, or members of the National Association; and that, since the date limited in the notices, these dealers have refused to sell to the complainants; and that they have been unable to purchase supplies from them and from other wholesale dealers in the United States, because they are not members of the Providence Master Plumbers' Association.

The bill charges that the Providence Master Plumbers' Association and the National Association have conspired together to prevent the complainants from buying supplies anywhere in the United States, and to utterly ruin their business, unless they will submit to the conditions of membership in and become members of the Providence Master Plumbers' Association; avers that the business of the complainants will be irremediably ruined unless the respondents are enjoined from further action, and are compelled to rescind the action which they have already taken; and prays that the respondents may be directed to rescind the notices given, and all orders and requests, both oral and written, to any and all dealers in plumbers' supplies, not to trade with such dealers, unless they shall refuse to sell supplies to any but members of such associations, and to rescind and withdraw any and all orders and requests to the National Association to prevent wholesale dealers outside of the state of Rhode Island from selling supplies to the complainants; and that the respondents may be enjoined from all further interference with the complainants by notifying such dealers not to sell to them, or by further requests to said National Association to prevent them from buying supplies anywhere in the United States. Testimony has been submitted by the complainants tending to prove the allegations of the bill.

Assuming that the allegations are fully sustained by the

proof, have the complainants made a case entitling them to relief? We think not.

The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty, expressed in some instances and implied in others, of the withdrawal of the patronage of the members of the associations in case of a failure to comply, was unlawful, because it was intended to injuriously affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law, and makes it actionable. If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse, in legal contemplation, for the sending of the notices?

We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival

or his servants or workmen, and the procurement of violation of contractual relations, are instances.

A leading and well-considered case on this subject was Steamship Co. v. McGregor, 23 Q. B. Div. 598 [1892] App Cas. 25. In this case the defendants, who were shipowners, had formed a league for the purpose of keeping in their own hands the control of the tea-carrying trade between London and China, and for the purpose of driving the plaintiff and other competing shipowners from the field. The acts complained of as unlawful by which the defendants sought to accomplish their purpose were: (1) The offer to local shippers and other agents of a benefit by way of rebate if they would not deal with the plaintiff, which was to be lost if this condition was not fulfilled; (2) the sending of special ships to Hankow, in the hope by competition to deprive the plaintiff's vessels of profitable freight; (3) the offer at Hankow of freights at so low a rate as not to repay the shipowner for his adventure, in order to smash freights and frighten the plaintiff from the field; (4) pressure put on their own agents to induce them to ship only by the defendants' vessels, and not by the plaintiff's. The plaintiff alleged that the league was a conspiracy, and claimed damages and an injunction against a continuance of the alleged unlawful acts. It was held that since the acts of the defendants were not in themselves unlawful, and were done by them with the lawful object of protecting and extending their own trade and increasing their profits, and as they had employed no unlawful means, the plaintiff had no cause of action. Bowen, L. J., remarks (page 614): "His [the trader's] right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is intentional procurement of the violation of individual rights, contractual or other, assuming, always, that there is no just cause for it. The intentional driving away of customers by show of violence (Tarleton v. McGawley, Peake, 270); the obstruction of actors on the stage by preconcerted hissing (Clifford v. Brandon, 2 Camp. 358; Gregory v. Brunswick, 6 Man.

& G. 205); the disturbance of wild fowl in decoys by the firing of guns (Carrington v. Taylor, 11 East, 571; Keeble v. Hickeringall, Id. 574, note); the impeding or threatening of servants or workmen (Garret v. Taylor, Cro. Jac. 567); the inducing of persons under personal contracts to break their contracts (Bowen v. Hall, L. R. 6 Q. B. Div. 333; Lumley v. Gye, 2 El. & Bl. 216),—all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that competition so pursued ceases to have a just cause or excuse when there is ill will or personal intention to do harm, it is sufficient to reply * * * that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiff's share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would be but for such motive justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection."

The case at bar contains no element of the character of those enumerated by the lord justice which are forbidden by law, unless the threat of the withdrawal of patronage may be considered as amounting to coercion. We do not think, however, that such a threat can be regarded as coercive within a legal sense; for, though coercion may be exerted by the application of moral as well as physical force, the moral force exerted by the threat was a lawful exercise by the members of the associations of their own rights, and not the exercise of a force violative of the rights of others, as in the cases cited by the lord justice. It was perfectly competent for the members of the association, in the legitimate exercise of their own

business, to bestow their patronage on whomsoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members of the associations more than that of the nonmembers, they would doubtless comply; otherwise, they would not.

Closely analogous to the case at bar was the recent case of Manufacturing Co. v. Hollis, 54 Minn. 223. The plaintiff was a manufacturer and seller of lumber, having a large and profitable trade, both wholesale and retail, in Minnesota and the adjoining states. The defendants, comprising from 25 to 50 per cent. of the retail lumber dealers in the states referred to, many of whom were or had been customers of the plaintiff, formed an association, under the name of the Northwestern Lumbermen's Association, for the protection of its members against sales by wholesale dealers and manufacturers to contractors and consumers, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers at any point where a member of the association was carrying on a retail yard. The by-laws provided that any member of the association doing business in the town to which lumber thus sold by a manufacturer or wholesale dealer had been shipped should notify the secretary of the association, within 30 days after the arrival of the shipment at its destination, who should thereupon notify the manufacturer or wholesale dealer by whom the shipment had been made that he had a claim against him for 10 per cent. of the value of such sale at the point of shipment; that, if the secretary should be unable to obtain payment, he should refer the matter to the directors, who should hear and determine the claim; that, if the manufacturer or dealer refused to abide by the decision of the directors, it should be the duty of the secretary to immediately notify the members of the association of the name of the manufacturer or dealer, and that he refused to comply with the rules of the association; that, if any member continued to deal with such manufacturer or wholesale dealer, he should be expelled from the association; that, whenever the secretary of the association should succeed in collecting any such claim, the sum collected should be paid to the member or members, in equal

shares, doing business at the place of the sale. The plaintiff sold two bills of lumber directed to consumers or contractors at points where members of the association were engaged in business. The secretary of the association, having been informed of the fact, notified the plaintiff, in pursuance of the provision of the by-laws, that he had a claim against him for 10 per cent. of the amount of the sales. Considerable correspondence with reference to the matter ensued, in which the plaintiff from time to time promised to adjust the claim, but procrastinated and avoided doing so until finally the secretary threatened, unless the claim was immediately settled, to send the notice provided by the by-laws to all the members of the association. Thereupon the plaintiff brought its suit for an injunction. An ex parte injunction having been granted, the defendants obtained an order for the complainants to show cause why it should not be dissolved. The court refused to dissolve the injunction, but on appeal the order continuing the injunction was reversed. The court says: "Now, when reduced to its ultimate analysis, all that the retail dealers have done is to form an association to protect themselves from sales, by wholesale dealers or manufacturers, directly to consumers or other nondealers, at points where a member of the association is engaged in the retail business. The means adopted to effect this object are simply these: They agree among themselves that they will not deal with any wholesale dealer or manufacturer who sells directly to customers not dealers at a point where a member of the association is doing business, and provide for notice being given to all their members whenever a wholesale dealer or manufacturer makes any such sale. That is the head and front of the defendants' offense. It will be observed that the defendants are not proposing to send notice to anybody but members of the association. There was no element of fraud, coercion, or intimidation, either towards the plaintiff or members of the association. True, the secretary, in accordance with section 3 of the by-laws, made a demand on the plaintiff for ten per cent. on the amount of the two sales. But this involved no element of coercion or intimidation, in the legal sense of those terms. It was entirely optional with the plaintiff whether it would pay or not. If it valued the trade of the members of the associa-

tion higher than that of the nondealers at the same points, it would probably conclude to pay; otherwise, not. It cannot be claimed that making this demand was actionable; much less that it constituted any ground for an injunction; and hence this matter may be laid entirely out of view. Now, was any coercion proposed to be brought to bear on the members of the association to prevent them from trading with the plaintiff? After they received the notice, they would be at entire liberty to trade with the plaintiff or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be 'expelled'; but this simply meant cease to be members. It was wholly a matter of their own free choice which they preferred,—to trade with the plaintiff, or to continue members of the association." See, also, Payne v. Railroad Co., 81 Tenn. 507, 514-519; Cote v. Murphy, 159 Pa. St. 420, 421; Heywood v. Tillson, 75 Me. 225, 233.

It only remains to notice the charge of conspiracy contained in the bill, upon which considerable stress has been laid, as though the fact that the action of the members of the associations was in pursuance of a combination entitled the complainants to relief. To maintain a bill on the ground of conspiracy, it is necessary that it should appear that the object relied on as the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not members, which, as we have seen, is not unlawful. The means taken to accomplish that object were the agreement among themselves not to deal with wholesale dealers who sold to those not members of the associations, and the sending of notices to that end to the wholesalers. This, as we have also seen, was not unlawful. Hence it follows that, as the object of the combination between the members of the associations was not unlawful, nor the means adopted for its accomplishment unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial. Com. v. Hunt, 4 Metc. (Mass.) 111, 129; Bowen v. Matheson, 14 Allen 499; Wellington v. Small, 3 Cush. 145,

150; Carew v. Rutherford, 106 Mass. 1, 14; Payne v. Railroad Co., 81 Tenn. 507, 521; Hunt v. Simonds, 19 Mo. 583, 588; Robertson v. Parks, 76 Md. 118, 134, 135; Steamship Co. v. McGregor, 23 Q. B. Div. 598 [1892] App. Cas. 25; Manufacturing Co. v. Hollis, 54 Minn. 223, 234; Delz v. Winfree, 80 Tex. 400, 404.

We are of the opinion that the bill should be dismissed.

BROWN & ALLEN v. JACOBS' PHARMACY CO.

(Supreme Court of Georgia, 1902. 115 Ga. 429.)

FISH, J. The record in this case discloses that prior to the institution of the present action, and since then, there existed in the United States three organizations, known, respectively, as the Proprietary Association of America, the National Wholesale Druggists' Association, and the National Association of Retail Druggists. These associations, occupying each toward the others close and intimate relations, had, among other things, the purpose of keeping up the prices of proprietary medicines, drugs, and other articles usually dealt in by those engaged in the drug trade. A local association was formed in Atlanta, known as the Atlanta Retail Druggists' Association. When it was first organized, Joseph Jacobs, secretary and treasurer of the Jacobs Pharmacy Company, the plaintiff in the present case, was a member of it; but at that time it was distinctly understood and agreed among its members that it was to undertake no action with reference to the cutting of prices by dealers in drugs, or to control prices of the same. Afterwards the plaintiff, either by its methods of advertising, or certain things that it did in the conduct of its business, gave offense to the members of this association, and charges were preferred against Jacobs. He then withdrew from the local association. Some of the members of that association were members of one or more of the large associations above referred to. After the retirement of Jacobs, the local concern put in operation a scheme to prevent the pharmacy company from being able to buy goods with which to conduct its business. The main features of that scheme were that the local

concern, by circulars, letters, or otherwise, undertook to notify wholesalers and manufacturers throughout the country that the pharmacy company was an aggressive cutter, and to request the persons or concerns addressed not to sell it any more goods; further, to require all salesmen representing the manufacturers or wholesale houses to procure from the local association a card, in order to procure which such salesmen had to sign an agreement not to sell the pharmacy company any goods; and another part of the scheme was to give the manufacturers and wholesalers to understand that, unless they refused to sell the plaintiff any goods, the members of the local association would not buy any more goods from them. In this condition of affairs, the plaintiff brought its equitable petition against the defendants, alleging, in substance, the facts set forth above, and praying for damages for alleged injuries to its business already done, and for an injunction to prevent the defendants from carrying into effect the scheme above outlined. The petition charged that the scheme was an unlawful conspiracy to destroy the plaintiff's business, and it more fully set out the manner in which this scheme was to be effectuated, by setting forth as exhibits, marked "A," "B," and "C," certain letters, etc., by means of which the defendants were seeking to accomplish the alleged unlawful purpose which the plaintiff was seeking to restrain. These exhibits were as follows:

"Exhibit A. Atlanta, Ga., March 28, 1901. C. L. Stoney, President; W. B. Freeman, Vice President; R. L. Palmer, Treasurer; W. S. Elkin, Jr., Secretary. Atlanta Druggists' Association. Gentlemen: Inclosed please find a copy of a resolution recently adopted by the Atlanta Druggists' Association. There are fifty-eight retail druggists and three wholesale druggists in this city, and among this number only one, a retailer, is designated as an aggressive cutter. Believing that, from a business standpoint, you would prefer the aid and support of fifty-eight (two of the wholesalers are also retailers) legitimate druggists, rather than that of one cutter, we feel sure that it will afford you pleasure to sign the inclosed agreement. Awaiting an early reply, I am yours very truly, [signed] W. S. Elkin, Secretary.

"Exhibit B. We, the undersigned, hereby agree to sell

goods of our manufacture (or manufactured by any other house that we may handle) in the city of Atlanta, Ga., and adjoining districts, only to those druggists who are members of the Atlanta Druggists' Association, and any others who have not been designated as aggressive cutters. We further agree not to sell any goods to department stores in the above-mentioned territory. We reserve the right to cancel this contract by giving notice to the secretary of Atlanta Druggists' Association. Date, ——.

"Exhibit C. A copy of resolution adopted by the Atlanta Druggists' Association, March 22d, 1901: Resolved: (1) That the Atlanta Druggists' Association adopt a card for salesmen reading: 'This is to certify that Mr. ——, representing ——, has qualified, and is hereby recommended to the members of our association. Date, ——. ——, Secretary. (This card is only good for 30 days from date.)'

"(2) That salesmen's cards shall be required of all salesmen representing as follows: Drug jobbers; patent medicine manufacturers; pharmaceutical houses; proprietary medicine manufacturers; druggists' sundry houses who carry patent and proprietary medicines, proprietary articles, and medicated soaps; manufacturers of surgical supplies; and manufacturers of paper boxes and labels.

"(3) That the secretary shall issue cards only to salesmen who sign an agreement not to sell directly or indirectly any aggressive cutter or any department store. This agreement to be binding to house represented by salesmen signing same.

"(4) That where new remedies are being introduced, the salesmen require each purchaser to sign contract to sell such remedy at full printed or implied price.

"(5) That a copy of these resolutions be furnished each manufacturer who is requested to sign agreement."

The case was heard before Hon. J. H. Lumpkin, Judge of the Atlanta circuit, upon the application for an interlocutory injunction. A considerable amount of evidence was introduced, concerning which it is sufficient to say that the plaintiff established, substantially, the material allegations of its petition. It claimed an injunction both upon the general principles of the common law, and also under the terms of what is commonly known as the "Anti-Trust Act" (Acts 1896,

p. 68), passed by the general assembly of this state in 1896. The defendants attacked the constitutionality of that act, alleging that it is in violation of the fourteenth amendment of the constitution of the United States, in that it denies to them the equal protection of the law, and deprives them of liberty and property without due process of law, and also abridges their liberties and immunities as citizens of the United States; that it is class legislation, and violates article 1, § 4, par. 1, of the constitution of Georgia. The judge granted the injunction substantially as prayed. After a careful investigation, we are satisfied that he was right in so doing, except in so far as it was made operative against the Lamar-Rankin Drug Company, one of the defendants which was not a member of the local association mentioned above, and against which, therefore, no injunction should have been granted. This minor error or inadvertency has been corrected by an appropriate direction in the judgment rendered by this court. It would not be profitable to set out, or even summarize, the voluminous evidence which was introduced at the hearing. We have already, in effect, stated that the evidence was sufficient to establish favorably to the plaintiff its contentions of fact. We shall therefore confine our discussion to the questions of law involved in the present writ of error. Their nature will be gathered from what has already been said, and from an examination of the headnotes preceding this opinion. We have been relieved of much labor by reason of the fact that the learned and able judge of the trial court filed in the case an elaborate and carefully prepared opinion. What follows is taken almost literally from the same. We omit, save as to extracts from authorities made by him, the use of quotation marks, for the sake of convenience, as we have seen fit to make some omissions, changes, and additions as to the several propositions stated and discussed by his honor. It is but fair, however, to add that the material which we have rendered available was all supplied by the work done by the judge below.

A conspiracy has been defined as a combination either to accomplish an unlawful end, or to accomplish a lawful end by unlawful means. This form of expression was used by Lord Denman in Rex v. Seward (1834) 1 Adol. & E. 706; Jones'

Case (1832) 4 Barn. & Adol. 345. And though he is reported to have expressed himself somewhat differently in other cases (see passing remark in Reg. v. Peck [1839] 9 Adol. & E. 686), this definition has been very widely accepted and quoted. See Bouv. Law Dict., word, "Conspiracy." Mr. Eddy, in his recent work on Combinations, gives the following definition, as comprehensive in its nature, and including both civil and criminal conspiracies: "Conspiracy is the combination of two or more persons to do (a) something that is unlawful, oppressive, or immoral; or (b) something that is not unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means; (c) something that is unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means." 1 Eddy, Comb'ns, §§ 171, 340. Conspiracies are often spoken of as civil or criminal. The terms "criminal" and "civil" are used, respectively, to designate a conspiracy which is indictable, or a conspiracy which will furnish ground for a civil action. To render a conspiracy indictable at common law, no overt acts in carrying out the design of the conspirators were necessary. The conspiring was sufficient to authorize an indictment. Yet it will be readily perceived that if the conspirators stopped with conspiring, and did nothing further in execution of the design, no injury would have been done which would furnish a basis for a civil action. But if, in carrying out the design of the conspirators, overt acts were done, causing legal damage, the person damaged had a right of action. Savile v. Roberts, 1 Ld. Raym. 378. Hence arose the dictum that the gist of criminal conspiracy is the combination, and the gist of civil conspiracy is the injury or damage. And from this came certain rulings applicable to the two, respectively, which need not be discussed. Mr. Eddy says: "The law of civil conspiracy is a wider development and application of the law of criminal conspiracy. So far as rights and remedies are concerned, all criminal conspiracies are embraced within civil conspiracies. The definition of the latter embraces the former." 1 Eddy, Comb'ns, § 364. That contracts and agreements in general restraint of trade are contrary to public policy and void is a principle so universally recognized that citation of authority is unnecessary to support it. It has been crystallized in section 3668 of the Civil Code of this state, where the expression

is that contracts "in general restraint of trade" are contrary to public policy. Differences of opinion arise only when this general principle is to be applied to a particular case. Thus it is suggested, inasmuch as the evidence shows that not all of the druggists of Atlanta are members of the local association, but only about three-fourths of them, that the combination or agreement was not obnoxious to this rule, or the rule declaring agreements or contracts tending to monopoly against public policy, even if it would have been so, were all members. We do not think this distinction sound. Nothing is more common than for the courts to declare contracts between only two persons, who by no means control a particular kind of business, void, as contrary to public policy. It is the nature or character and tendency of the agreement which renders it objectionable, whether in fact the parties to it succeed in restraining trade generally, or stifling competition, or not. As to the matter of monopoly, it may also be said that if parties make contracts or agreements seeking to establish a monopoly, and do establish it as far as they can, surely they cannot say that the effort is legal if not completely successful.

In More v. Bennett (Ill. 1892) 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216, it was held that an association of stenographers, of which one object was to control the prices to be charged for stenographic work by its members, by restraining all competition between them, was an illegal combination, although only a small portion of the stenographers of the city belonged to it. In the opinion, Bailey, J. (page 891, 29 N. E., page 364, 15 L. R. A., 33 Am. St. Rep. 216), says: "Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its good will with his vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no more than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased." To this have sometimes been added agreements of partnership or employment. Mr. Tiedeman says: "Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of com-

modities or services." Tied. Com. Paper, § 190. In Anderson v. Jett (Ky.; 1889) 12 S. W. 670, 6 L. R. A. 390, 392, it was held: "Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it, all along the line. * * * The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its evil character; but if its object be to prevent or impede free and fair competition in trade, and may in fact have that tendency, it is void, as being against public policy." See, also, Oil Co. v. Adove (1892) 83 Tex. 650, 15 L. R. A. 598, 29 Am. St. Rep. 690; People v. Sheldon, 139 N. Y. 251, 263, 264, 23 L. R. A. 221, 36 Am. St. Rep. 690. Under such circumstances the agreement is void, although the prices fixed at the time may have been reasonable. Association v. Kock, 14 La. Ann. 168.

Judge Taft, in the circuit court of appeals of the Sixth circuit of the United States, in an able decision in the case of U. S. v. Addystone Pipe & Steel Co., 29 C. C. A. 141, 46 L. R. A. 122 et seq., reviews the authorities on this subject. Among other things, he says (29 C. C. A. 152, 46 L. R. A. 131): "Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void, as conditions of civilization and public policy have changed; and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and therefore that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities, when all of them are considered. * * * The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it." After considering a number of authorities, he says (page 160, 29 C. C. A., page 290, 85 Fed., page 136, 46 L. R. A.): "In the foregoing cases the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and

vendee, or of employer and employé. Where such relation exists between the parties, as already stated, restraints are usually enforceable, if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But in recent years even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity, if it could be shown that it was only part of a plan to acquire all the property used in a business by one management, with a view to establishing a monopoly. * * * Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly."

This exactly answers one of the arguments advanced in the present case. It is contended that the members of the Atlanta Druggists' Association were not seeking to restrain trade or create a monopoly, but were only seeking to defend themselves against the cutting of prices by the Jacobs Pharmacy Company, and that really they were fighting an effort at monopoly. That 58 druggists in the city of Atlanta should seriously claim to be in danger of a monopoly from 1, which is not shown to have any more capital than any of them, or any more facilities for trade, or to be making any combination, or in fact doing anything to cause the present action on their part, except selling some articles of merchandise at low rates, is a position which cannot be sustained. This is the argument which is almost universally advanced by every monopoly or combination in restraint of trade. If it is sustained by the courts, then the rules of law as to such contracts and agreements might as well be wiped off the statute books.

The decision just cited was affirmed by the supreme court of the United States in 1899, except as to one mere inadvertence in respect to interstate commerce. In the decision the following is quoted approvingly from the opinion of Judge Taft: "It has been earnestly pressed upon us that the prices at

which the cast iron pipe was sold in 'pay' territory were reasonable. * * * We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so." 175 U. S. 211, 237, 106, 44 L. Ed. 136, 146.

Again, some courts have sought to draw a distinction between what they term "necessaries," or "the necessaries of life," or "prime necessaries," and contracts or agreements with reference to other articles of commerce or merchandise. But this distinction is not well founded. What is at one time a luxury at another is a necessity. The things which were considered sufficient to satisfy the description of necessaries a few years ago, would be considered wholly insufficient now, under present conditions of civilization. How useful must a thing become before it enters the catalogue of necessaries, so that contracts to restrain trade in regard to it, or to foster a monopoly in it, are void? The unsoundness in principle of such a distinction was treated of by Judge Taft in the Case of Addystone Pipe & Steel Co., already referred to. But if it were sound, it may be of interest to consider some of the articles which have been held of such necessity. In a note to be found in 74 Am. St. Rep. 268, 269, to the case of Harding v. Glucose Co. (Ill. Sup.) 55 N. E. 577, the following are set out as having been held of such necessity as to make a combination in regard to them illegal: Beer, alcohol, distilling products, preserves, gas pipes, powder, harrows, capsules, envelopes, wire cloth, bluestone, cigarettes, etc. Now, if these articles are to be ranked as necessaries, within the rule, it might as well be said at once that the rule applies to articles of merchandise generally.

The next position of the defendants, and the one which, on first presentation, seems to be their strongest defense on this part of the case, is that at common law contracts or agreements in general or unreasonable restraint of trade were merely void and unenforceable; that either party could defend against an action based on them, but that they were not illegal, in such sense as to give a right of action to third parties. While there

may be conflict among the authorities, it seems to us that some confusion might have been avoided by bearing in mind the distinction between a contract or agreement merely in restraint of trade as between the parties, and a combination or contract to stifle competition, or a conspiracy to ruin a competitor. Thus, if one of two rival merchants, not purchasing the business of the other, contracted with him that the latter should cease business, and never enter mercantile pursuits at any time or place, the contract would be in general restraint of trade, and void, and could not be enforced. But it alone would not give a right of action to third parties; and although the retiring from business of one of the merchants might lessen facilities for trading, and incidentally cause inconvenience or even put it in the power of the other to raise his prices, the contract, as such, would merely be void. But on the other hand, suppose that two merchants should agree that one should retire from business, and that no other person should open a similar business, and, if he did so, that the two would drive away his customers, or break up his business by violence, threats, or like means; it would get beyond the domain of a mere nonenforceable contract, into the domain of a conspiracy. Or suppose that a number of merchants should agree to fix the price of certain goods, and not to sell below that price; if there were no statute on the subject, and the case rested on the common law, the agreement would simply be nonenforceable; but if they went further, and agreed that, if any other merchant sold at a less price, they would force him to their terms, or drive away those dealing with him, by violence, threats, or boycotting, it would cease to be a mere nonenforceable contract, and if, in its execution, damages proximately resulted to such other merchant, he would have a right of action. For two or more people to make an agreement which neither can enforce at law against the other is one thing; but to further agree, and under that agreement proceed to force another who is no party to it, against his will, to be governed by it, under penalty of financial ruin by driving off his customers, or the like, is, to use a favorite expression of Former Chief Justice Warner, "another and quite a different thing." There is no inherent wrong in the mere act of firing a pistol in a place where not prohibited by law, but it may

become very wrong if it is fired at the person or property of another, and may give a right of action to him for resulting injury. A combination, like a revolver, should not be aimed maliciously or with a reckless disregard of the rights of others.

Doremus v. Hennessy, 176 Ill. 608, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203, was an action on the case for damages on the ground that the members of an organization known as the Chicago Laundrymen's Association had fixed a scale of prices for laundry work, and had conspired to injure the plaintiff in her good name and credit, and to destroy her business, because she would not charge prices in accordance with such scale, and they were proceeding to carry out the conspiracy. It was held actionable. The court said: "A combination by them to induce others not to deal with appellee or enter into contracts with her, or to do any further work for her, was an actionable wrong. Every man has a right, under the law, as between himself and others, to full and free disposition of his own labor and capital according to his own free will, and any one who invades that right without lawful cause of justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. * * * An intent to do a wrongful harm and injury is unlawful, and, if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done with the intent and purpose of injuring another is not lawful competition."

Boutwell v. Marr (Vt.; 1899) 42 Atl. 607, 609, 43 L. R. A. 803, 805, 76 Am. St. Rep. 746, was an action for damages. An association of granite manufacturers prohibited, by resolutions, sales by its members to persons engaged in cutting, quarrying, or polishing granite in the New England states, New York City, and Vermont, who were not members, which enumeration included plaintiffs. There was a by-law which prohibited dealing with members not in good standing, and imposed fines for the violation of its rules. The defense did not concede that such a by-law was more coercive than to attempt to compel, by threats or intimidation, persons not members of the association to withdraw their patronage from plaintiffs, but contended that the by-law was less objection-

able, because applying to members only. The court held both to be alike unlawful. It said (page 609, 42 Atl., page 805, 43 L. R. A., 76 Am. St. Rep. 746): "Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of a majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concert of action, if legal in itself, becomes illegal when the concerted action is procured by coercion. * * * It is clear that if the association had comprised but a small portion of the manufacturers, and had destroyed the plaintiffs' business by compelling the manufacturers to join them in withholding patronage, the members would have been liable." In Inter-Ocean Pub. Co. v. Associated Press (Ill.; 1900) 56 N. E. 822, 826, 48 L. R. A. 568, 75 Am. St. Rep. 184, an injunction was granted. The court said: "Competition can never be held hostile to public interests, and efforts to prevent competition by contract or otherwise can never be looked upon with favor by the courts." In People v. Chicago Live Stock Exchange, 170 Ill. 556, 39 L. R. A. 373, 62 Am. St. Rep. 404, it is said (page 566, 170 Ill., and page 1065, 48 N. E., 39 L. R. A. 373, 62 Am. St. Rep. 404): "Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law." Similar language is used in the case last above cited. 56 N. E. 826, 48 L. R. A. 568, 75 Am. St. Rep. 184. In Beck v. Union (Mich.; 1898) 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421, an application for injunction was sustained. The court said (page 24, 77 N. W., page 418, 42 L. R. A., 74 Am. St. Rep. 421): "The boycott condemned by the law is not alone that accompanied by violence and threats of violence, but that where the means used are threatening in their nature, and intended and naturally tend to overcome, by fear of loss of property, the will of others, and compel them to do things which they would not do otherwise."

State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, arose on a

demurrer to an indictment. In the opinion, POWERS, J. (9 Atl. 567, 59 Am. Rep. 713), said: "The Reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal, whether they promote objects or adopt means that are *per se* indictable, or promote objects or adopt means that are *per se* oppressive, immoral, or wrongfully prejudicial to the rights of others. . . . The anathemas of a secret organization of men, combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body, are quite as dangerous as, and generally altogether more effective than, acts of actual violence." Page 568, 9 Atl., and page 715, 59 Am. Rep. In Carew v. Rutherford, 106 Mass. 1, 10, 8 Am. Rep. 287, Chapman, J., after giving various illustrations of actionable wrongs, says: "But as new methods of doing injury to others are invented in modern times, the same principles must be applied to them, in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges, and existing forms of remedy must be used."

In Gatzow v. Buening (Wis.; 1900) 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 17, it was held that damages were recoverable. It is true that a contract had been made, but the decision was not put upon that ground, but on the broader ground that the conduct of the defendants constituted an actionable conspiracy. MARSHALL, J., said (81 N. W. 1007, 49 L. R. A. 475, 80 Am. St. Rep. 17): "This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and selfish ends of particular classes. There is clamor for laws to prevent combinations, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischief complained of that is actual; yet violations of such law are so

common, and the remedy it furnishes so seldom applied, that its very existence seems in many quarters to be little understood." In Reg. v. Druitt, 10 Cox, Cr. Cas. 593, it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body. A combination to do an act tending necessarily to oppress the public or oppress individuals, by unjustly subjecting them to the power of the confederates, and give effect to the purpose of the latter, whether of extortion or mischief, is unlawful. Bish. Cr. Law, § 177; Destey, Cr. Law, § 2; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159. Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages."

In Olive v. Van Patten (1894) 7 Tex. Civ. App. 630, where a petition alleged that defendants, who were lumber dealers, had formed an association and sought to prevent sales by manufacturers or wholesale dealers to any person not a dealer, except a railroad, at points where there was a dealer; that because of the refusal of the plaintiff, a sawmill owner and dealer, who was not a member, to join such association, and his exercising the right to sell to others than dealers, they had maliciously distributed circulars asking that patronage be withdrawn from the plaintiff until he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury,—it was held to state a good cause of action for damages and injunction. In Barr v. Trades Council (1896) 53 N. J. Eq. 101, an injunction was granted, and an able opinion filed by Green, V. C. In Jackson v. Stanfield (1894) 137 Ind. 592, 23 L. R. A. 588, it was held that a combination of retail lumber dealers to destroy the business of brokers and commission dealers who did not keep a lumber yard with an assorted stock of lumber, by coercing wholesale dealers to refuse to make sales to such brokers, or

lose the business of the members of such combination, was unlawful, and rendered a member who procured action by the association, to the injury of brokers, liable to the latter in damages; also that an injunction might be granted against enforcing an illegal agreement of dealers to injure the business of another person. See, also, Lucke v. Clothing Cutters & Trimmers Assembly (1893) 77 Md. 397, 19 L. R. A. 408, 39 Am. St. Rep. 421; Code, § 3807; Witham v. Cohen, 100 Ga. 670.

Courts and text writers have not infrequently asserted that, as a general rule, a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. But if this be advanced as a rule of universal application, it does not stand unchallenged. In Bailey v. Association (Tenn.; 1899) 52 S. W. 853, 857, 46 L. R. A. 561, it is said: "It is entirely true, as in effect observed in McCauley v. Tierney, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770, and in Manufacturing Co. v. Hollis, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, that, in the first instance, each member of the association had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail. But in our opinion, it does not follow from this undoubted freedom of individual member and individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination had hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference, in legal contemplation, between individual rights and combined action in trade, is seen in numerous cases. Any one of several commercial firms engaged in the sale of India cotton bagging had the right to

suspend its sale for any time it saw fit. Yet an agreement between all of them to make no sales for three months without the consent of the majority 'was palpably and unequivocally a combination in restraint of trade.' Association v. Kock, 14 La. Ann. 168. Any one of several companies had the right to sell the whole or only a part of its output to only such persons, in only such territory, and at only such prices as it pleased, yet it was inimicable [inimical] to the interests of the public, and unlawful for them to combine and agree that those matters should be determined and controlled by an agency jointly created for that purpose. Arnot v. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159. The same was held to be true as to the individual company and the combined company, respectively, in the Sugar Trust Case (Cir. Ct.) 3 N. Y. Supp. 401, and (Sup.). So one railroad company has the unquestioned right to charge reasonable rates for transportation, but it is not lawful for competing companies to mutually bind themselves to maintain those rates. U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed. 259. Individual boat proprietors may establish rules and rates for the conduct of their separate business, but the law does not allow them to form a combination, and by mutual agreement establish joint rules and rates. Hooker v. Vandewater, 4 Denio 349, 47 Am. Dec. 258; Stanton v. Allen, 5 Denio 434, 49 Am. Dec. 282. One grain dealer is perfectly free to decide for himself what price he will offer for grain, but he is not allowed to enter into an agreement with the other grain dealers of his town, and thereby fix the price that all of them shall offer. Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171. A single brewer may fix his own price for the beer he sells. Nevertheless it is unlawful for an association of brewers to regulate the sales of its members. Nester v. Brewing Co., 161 Pa. 473, 24 L. R. A. 247, 41 Am. St. Rep. 894. Many other cases to the same effect in principle might easily be cited, were their citation deemed at all necessary."

Unquestionably, any person who does not occupy a public or quasi public position, like public officials, railroad companies, etc., or whose property has not become impressed

with any public or quasi public use (Munn v. Illinois [1876] 94 U. S. 113, 24 L. Ed. 77), may ordinarily deal with any other person at his option. It may also be conceded, at least for the sake of the argument, that ordinarily a number of persons may, in concert, decline to sell or to buy from another. Yet the facts of the present case go much further than that. Here there was a combination not merely agreeing not to deal with the plaintiff, but undertaking also to drive off and prevent others from dealing with it, and seeking to ruin its business by destroying its power to purchase goods unless it should submit to regulate its business or fix its prices as they desired. If the defendants, as individuals, or in any way, claim to have the right to fix the prices at which they will sell, how can they claim that plaintiff has no such right as to its own business? In Boutwell v. Marr, *supra,* the supreme court of Vermont said that the view above referred to "would preclude a reliance upon an unlawful purpose, and require that the means used should be illegal. The agreeing together to effect an illegal purpose being itself illegal, it might seem that any act done in furtherance of the agreement, and resulting in damage, even though itself not a violation of right, would sustain a recovery. . . . If it be true, as a general proposition, that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means." See, also, Barr v. Trades Council, supra; the strong opinion of Gibson, C. J., in Com. v. Carlisle, Brightly, N. P. 36, 41, quoted at some length in one of the opinions in Knight's Case, 156 U. S. 35, 39 L. Ed. 325; State v. Geidden, 55 Conn. 46, 75, 3 Am. St. Rep. 23; and cases cited in 1 Eddy, Comb'ns, § 360.

Certain portions of the annual address (in 1899) of the president of the National Association of Retail Druggists, as published in the American Druggist and Pharmaceutical Record, were introduced in evidence, from which it appears that, in discussing the power of combination as compared with individual effort, he said: "Nature, too, forgets the individual always. To the species alone is it kind. In the general uplifting alone does it glory. So must it be with man. Man is

of nature, and must follow nature's bent. This tendency to associate, to unite, to combine, everywhere present, strangely active, is as resistless as is yonder great Niagara. Attempt to oppose it, and it spreads far and wide,—spreads with the opposing force, all the while accumulating power, until everything, even the mightiest, is swept before its immensity." And yet, when such mighty power, like a torrent, is turned upon an individual who declines to join or to do the bidding of those who direct the force and sell at prices dictated by them, for the purpose of crushing him and driving off those who would deal with him, under the threat that otherwise they will also be drowned in the resistless Niagara, shall courts of justice find no remedy? To protect the individual against encroachments upon his rights by greater power is one of the most sacred duties of courts. If there is any analogy between a combination of druggists to raise and maintain prices, and a biological species, the Darwinian theory is hardly a rule for a court in administering equity.

In contrast with this idea, the following vigorous language of Mr. Justice Bradley in the Slaughter House Cases, 16 Wall. 116, 21 L. Ed. 394, may be quoted: "For the liberty, preservation, exercise, and enjoyment of these rights [life, liberty, and the pursuit of happiness], the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect, and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed." This occurs in a dissenting opinion, it is true; but there was no difference among the members of the court as to the fact that a man's business is his property, the difference being as to the application of certain amendments of the constitution of the United States.

It is generally held that, if the injury is malicious, the person injured has a right of action. Indeed, it may be said that malicious injury to the business of another has long been held actionable. See Barr v. Trades Council, 53 N. J. Eq. 115, 116, and citations. In the case of Steamship Co. v. McGregor, 23

Q. B. Div. 608,—a case which will be referred to more fully presently,—Lord Justice Bowen said: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade, is actionable, if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a 'malicious wrong.'" The decision in Barr v. Trades Council, *supra*, after citing this and other cases, proceeds: "When we speak in this connection of an act done with a malicious motive, it does not necessarily imply that the defendants were actuated in their proceedings by spite or malice against the complainant, Mr. Barr, in the sense that their motive was to injure him personally, but that they desired to injure him in his business in order to force him not to do what he had a perfect right to do. . . . If the injury which has been sustained or which is threatened is not only the natural but the inevitable consequence of the defendants' acts, it is without effect for them to disclaim the intention to injure. It is folly for a man who deliberately thrusts a firebrand into a rick of hay to declare, after it has been destroyed, that he did not intend to burn it. . . . The law, as a rule, presumes that a person intends the natural result of his acts, and this is true with reference to civil as well as criminal acts." Courts will look at the real substance of things, and do not stop at the mere form of words that may be employed. See More v. Bennett (Ill.) 29 N. E. 88, 15 L. R. A. 361, 33 Am. St. Rep. 216.

We will now refer to some authorities cited by defendants. A leading case, in modern times, is the English case of Steamship Co. v. McGregor, *supra*. It may not be amiss to give briefly its history. It was first heard on application for injunction before Lord Chief Justice Coleridge and Lord Justice Fry in 1885. They held that a confederation or conspiracy by an association of shipowners which was calculated to have, and had, the effect of driving the ships of other merchants or owners, and those of plaintiffs in particular, out of a certain line of trade, even though the immediate and avowed objects were not to injure the plaintiffs, but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports and England, was, or

might be, an indictable offense, and therefore actionable, if private and particular damage could be shown. But under the facts disclosed on that hearing, injunction *ad interim* was denied. 15 Q. B. Div. 476. The case was afterwards heard by Lord Chief Justice Coleridge without a jury, and he rendered judgment for the defendants, holding that the evidence failed to show an actionable conspiracy, as alleged, and that it showed only sharp competition in business, including holding out inducements by rebates, advantages, etc., to those who would deal with defendants exclusively. (1888) 21 Q. B. Div. 544. He stated, however, that he had long doubted and hesitated in reaching this conclusion. In the court of appeal, the case was heard before Lord Esher, master of the rolls, and Bowen and Fry, L. JJ. Lord Esher was of opinion that the appeal should be allowed, but was overruled by the other two justices. (1889) 23 Q. B. Div. 598, 601. In the course of the opinion of Fry, L. J., which has been frequently cited in other cases, he says: "The ancient common law of this country, and the statutes with reference to the acts known as 'badgering,' 'forestalling,' 'regrating,' and 'engrossing,' indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public. They were held criminal accordingly. But early in the reign of George III the mind of the legislature showed symptoms of change in this matter, and the penal statutes were repealed (12 Geo. III, c. 71), and the common law was left to its unaided operations. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the commodities, had a tendency to discourage the growth and enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past; the indication of a new policy for the future. This new policy has been more clearly declared and acted upon in the present reign; for the legislature has, by 7 & 8 Vict. c. 24, altered the common law by utterly abolishing the several offenses of badgering, forestalling, and regrating." He also says a reference to the statutes of 1871 and 1875, en-

larging the power of combination among workmen and masters, is indicative of public policy in England at the time of the decision. We will presently compare this with the public policy of this state. The majority of the court of appeal found, as matter of fact, that the defendants were not engaged in a conspiracy or unlawful combination, and were not actuated by malice or ill will toward plaintiff, and did not aim at any general injury to plaintiff's trade,—the object being simply to divert the trade from plaintiff to defendants,—and that the damage to be inflicted was to be strictly limited by the gain which defendants desired to win for themselves; in other words, that it was a case of competition only. Of course, the loss which a rival may suffer from legitimate competition does not give a right of action. The case was carried to the house of lords, and the judgment of the majority was affirmed. (1892) 61 Law J. Q. B. 295; (1892) App. Cas. 25. Very full extracts from these decisions are made in 1 Eddy, Comb'ns, § 249. A careful consideration of the various decisions in this case will show that, in substance, it only held that where competition was lawful, even if sharp, and the acts complained of were adopted for the advancement of the defendants' own trade, there was no actionable conspiracy, although plaintiff may have sustained loss thereby. If this decision should be deemed adverse to the views here presented, it may be well to contrast the public policy of this state with that mentioned by Fry, L. J. Engrossing, forestalling, and regrating still stand in our Code as criminal offenses, and the presiding judge is required to give the law in reference to these offenses specially in charge to the grand jury at each term of court. See Pen. Code, §§ 662, 846. Our state constitution declares that the legislature "shall have no power to authorize any corporation . . . to make any contract, or agreement whatever, with any such corporation [i. e., other corporations], which may have the effect, or be intended to have the effect to defeat or lessen competition in their respective businesses or to encourage monopoly; and all such contracts and agreements shall be illegal and void." Code, § 5800. See Railroad Co. v. Collins, 40 Ga. 583(6), 629; Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; City of Atlanta v. Stein, 111 Ga. 789, 51 L. R. A. 335. What was

said *arguendo* in State v. Central of Georgia Ry. Co., 109 Ga. 722, 48 L. R. A. 351, to the effect that all combinations are not necessarily illegal, has no application to the facts of the present case. As has been shown above, in the light of the evidence, it is futile for these defendants to claim that they were merely resisting an attack on the part of the plaintiff.

The following are some of the cases relied on by the defendants: Herriman v. Menzies (1896) 115 Cal. 16, 44 Pac. 660, 35 L. R. A. 318, 56 Am. St. Rep. 81, arose on an action to enforce an accounting under an agreement for the formation of an association for doing the business of stevedores. It was held not to be illegal, though one provision included the fixing of prices to be charged by the members. There was no effort to force others to charge such prices; and it was said in the decision that there was nothing to show that the members comprised more than an insignificant part of the trade, in numbers or volume of business, or any such restriction "as to preclude fair competition with others engaged in the business." Bowen v. Matheson, 14 Allen, 499, will be found to have been decided on the idea of competition; but it is not a well-considered case, reviews none of the authorities (but one being cited), and decides only as to certain allegations on demurrer. It has been criticised by Mr. Eddy, whose book shows that he approached the subject without any prejudice against combinations. 1 Eddy, Comb'ns, § 571. Mr. Freeman, in his note to Harding v. Glucose Co. (Ill. Sup.) 74 Am. St. Rep. 244 (s. c), says: "Massachusetts seems also to have gone astray on the question of illegal combinations, . . . having confused the doctrine relating to contracts in restraint of trade and the doctrine against restrictions upon competition." Printing Co. v. Howell (1894), 26 Or. 527, 28 L. R. A. 464, 46 Am. St. Rep. 640, might be quoted as an authority for the plaintiff, except as to the necessity for injunction. The court says (38 Pac. 553, 28 L. R. A. 474): "While conspiracy in itself is not an indictable offense under our law, all these authorities show conclusively that such a combination for the purpose of doing injury to the public or to individuals is *per se* wrongful. Civil consequences are not changed by reason of the fact that the combination is not made a statutory offense." When the court

came to consider the question of the necessity shown for an injunction (there having been a demurrer), it said (page 555, 38 Pac., and page 475, 28 L. R. A.) that, "although it might be inferred that a boycott was pending, they [certain notices] were not so positive nor so persistently and wickedly repeated and maintained as to authorize an injunction;" and again (page 556, 38 Pac., and page 476, 28 L. R. A.), "There is no such persistent, aggressive, and virulent boycott now in progress," etc. It would seem to be rather too stringent to limit equity jurisdiction by so many adjectives. But in the present case the injury is in progress, and is still threatened. McCauley v. Tierney (R. I. 1895) 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770, is another case relied on by defendants. If this decision is sound, it can only be on the idea that the defendants were seeking to obtain trade for themselves by saying, in effect: "If you deal with us, we will deal with you. If you deal with others, we will withdraw our patronage." Whether such an agreement was legally enforceable need not be discussed. There was no effort to compel or coerce others not members to be bound by their prices or views. If the decision in Manufacturing Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, can be sustained, it must be on the same idea. No compulsory measures seem to have been used to enforce obedience on members; nor does there appear to have been any effort to drive away from plaintiff others than those voluntarily acting together in concert, and no pressure on outsiders to maintain prices or incur ruin. In truth, however, some of what was said in that decision is unsound, and not in accord with cases already cited. It has been considerably criticised. See Bailey v. Association (Tenn.; 1899) 52 S. W. 857, 46 L. R. A. 561; 1 Eddy, Comb'ns, § 560, p. 476, note; Jackson v. Stanfield (Ind.; 1894) 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 596. Cote v. Murphy (Pa.; 1894) 28 Atl. 191, 23 L. R. A. 135, 39 Am. St. Rep. 686, and Buchanan v. Kerr, following it (page 195, 28 Atl.), held that where employés had entered into a combination to control by artificial means the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is not unlawful, since it is not made to lower the price of labor as regulated

by supply and demand. Certain Pennsylvania statutes were also considered as indicative of public policy on the line of combining to meet combinations. The strong statement of GIBSON, J., in regard to conspiracies (Com. v. Carlisle, Brightly, N. P. 40), is cited with approval.

In Payne v. Railroad Co. (Tenn.; 1884) 13 Lea, 507, 49 Am. Rep. 666, there was no question of combination or conspiracy at all; and the supreme court of the same state rendered the decision in the later case of Bailey v. Association, already referred to. Park & Sons Co. v. National Wholesale Druggists' Ass'n, *supra* (supreme court of New York, 1900) is cited. We must leave to the honorable courts of that state to reconcile that decision with the principle ruled in Park & Sons Co. v. National Wholesale Druggists' Ass'n (Sup.) 50 N. Y. Supp. 1064, where, as quoted in 1 Eddy, Comb'ns, § 330, p. 213, it was held: "It is in restraint of trade and unlawful for a manufacturer to become a party to a combination which shall prevent any of his customers from obtaining other goods of other manufacturers because those customers violate the agreement with him in respect to the cutting of prices;" and also with People v. Sheldon, *supra.* It seems, too, that in some cases in New York and elsewhere an idea has arisen of determining how much competition is desirable, and apparently of holding that extreme competition is undesirable, and a combination to meet it is not unlawful. The fallacy of such a standard is clearly shown by Judge Taft in U. S. v. Addystone Pipe & Steel Co., *supra,* and by Mr. Freeman in his note to Harding v. Glucose Co., *supra.* Brewster v. Miller (Ky.; 1897) 41 S. W. 301, 38 L. R. A. 505, held that an association of undertakers might lawfully agree to decline to render service in their business to one who had refused to pay a bill to some member of the association for similar services previously rendered. Here, also, there was no effort to compel persons not members to uphold the prices or obey the dictates of the association, or to coerce members or others, but only a voluntary, united refusal to serve a person who would not pay for similar services. Continental Ins. Co. v. Board of Fire Underwriters of the Pacific (C. C.) 67 Fed. 310, sought to follow the decision in the Mogul Steamship Case, and held that the said acts

there complained of were for the purpose of competition, and not maliciously done. Here, again, there was no effort to drive out of business companies not members, further than nonintercourse, and not having the same agents. So far as the enforcing of these provisions by a penalty is concerned, the decision is in conflict with Boutwell v. Marr, *supra.*

Finally, was the plaintiff entitled to an injunction? The usual grounds for the grant of an injunction in such cases are (1) an injury which threatens irreparable damage; or (2) a continuing injury, when the legal remedy therefor may involve a multiplicity of suits. "The difficulty of satisfactorily estimating damages to business is frequently recognized in applying those principles to suits relating to good will, trade-marks, patent rights, and copyrights. 3 Pom. Eq. Jur. §§ 1352, 1354." Barr v. Trades Council, 53 N. J. Eq. 126, et seq., and authorities cited. Mr. Eddy says: "An injury is irreparable when the damage cannot be measured by any known pecuniary standard. The destruction of, or even injury to, a growing business, cannot very well be measured in damages, since it is difficult, if not impossible, to lay down any rule whereby a jury can definitely ascertain the damages inflicted. The owner of the business himself probably could not estimate his loss, and yet the loss would be beyond dispute." Citing authorities. 2 Eddy, Comb'ns, §§ 1014, 1024, 1026, pp. 1161, 1169, 1170; Blindell v. Hagan (C. C.) 54 Fed. 40, affirmed on appeal in 56 Fed. 696. Several of the cases already cited arose upon applications for injunction, and apply to this feature of the case.

It is urged that the plaintiff was not entitled to equitable relief, because it did not come into a court of equity "with clean hands." The specific claim of uncleanness is that on some occasions it sold one drug or mixture instead of, or purporting to be, another. This is denied. If it were true, it would be no defense to this case. If it is undertaken to coerce a dealer not to sell at reduced prices, and is sought unlawfully to destroy its business if it does so, an applicatiion by it for injunction is not successfully met by saying that it sold some spurious goods, or misrepresented some to customers in certain sales. It was money, not morals, that moved the defendants in their conduct toward it for cutting prices. The

doctrine that a suitor must enter a court of equity "with clean hands" has reference to the transaction complained of by him. Ansley v. Wilson, 50 Ga. 425. If plaintiff sells adulterated drugs, it and its officers are liable to punishment under the criminal law. Pen. Code, §§ 483, 484.

The learned judge did not err in holding that the defendants who are members of the Atlanta Druggists' Association, in the name of such association or otherwise, should be enjoined from sending out to wholesale druggists or proprietors of proprietary medicines, through the mails, or delivering them to them otherwise, the letter and agreement set out in Exhibits A and B to plaintiff's petition, or seeking to cause the latter to be signed by means of the letter set out in Exhibit A, or other like means, or sending out any letter, circular, or agreement of similar character, purpose, directly or indirectly, to wholesalers, jobbers, or proprietors; and from issuing to salesmen, and causing to be signed, the card agreement attached to the petition as Exhibit C, or any card or agreement of similar import or purpose; and from in any manner threatening or seeking to intimidate wholesalers or proprietors, and so prevent them from selling to plaintiff, as a cutter or aggressive cutter; and from conspiring and from seeking to prevent wholesale or other druggists from dealing with or selling to plaintiff by direct or indirect threats of cutting off their means of obtaining goods or merchandise, or of causing such means to be cut off, or of causing them injury or loss of custom if they should deal with or supply the plaintiff; and from taking part in or carrying out any conspiracy or combination for that purpose; and from designating or pointing out the plaintiff to other druggists' associations or their representatives as an aggressive cutter; and from writing or sending through the mails any card, circular, letter, or other written or printed communication conveying or intended to convey to proprietors or wholesalers throughout the United States that plaintiff is an aggressive cutter, and under the ban of the local organization, or of similar import.

[The next paragraph of the opinion holding unconstitutional the Georgia anti-trust act (Acts, 1896, p. 68) is omitted.]

3. Certain assignments of error in the bill of exceptions complain, in effect, that the injunction was too broad, because it was operative upon the individual members of the association to which the defendants belonged, and therefore had the effect of cutting them off from the exercise of individual rights which it was their privilege to exercise, provided there was no unlawful conspiracy. The reply to this is that the judge found there was a conspiracy. He could not enjoin the combination in the abstract, but, to render any effective protection to the plaintiff, was obliged to enjoin the individual members of the association from doing the unlawful acts which they had conspired to do, and were actually doing when the petition was filed. It was the only possible way in which to make the writ of injunction of any avail. The defendants could not, fresh from the conspiracy, and inspired by the purposes thereof, fail to injure the plaintiff, if allowed to continue their unlawful acts under the guise of doing so upon their individual responsibility.

Judgment affirmed, with direction. All the justices concurring, except LEWIS, J., *absent.*[76]

NATIONAL FIREPROOFING CO. v. MASON BUILDERS' ASSOCIATION

(United States Circuit Court of Appeals, Second Circuit. 169 Fed. 259.)

This is an appeal from a decree of the Circuit Court for the Southern District of New York dismissing a bill of complaint in a suit in equity.

The complainant is a corporation under the laws of the state of Pennsylvania and is authorized by its charter to manufacture and install fireproofing. Since its organization it has been engaged almost exclusively in the manufacture

76—See also Employing Printers Club v. Blosser Co., 122 Ga. 509 (lockout of labor by printers' association unless labor refused to work for printer who would not become a member of the printers' association and abide by the rules of the association, which eliminated competition and fixed prices).

and installation of what is known as hollow tile fireproofing and produces over 50 per cent. of the entire output of that article in the United States.

The defendant Mason Builders' Association is a corporation under the laws of the state of New York, composed of master mason builders doing business in the city of New York, but comprising less than a majority of the mason builders of that city.

The defendants the various Bricklayers' Unions, with four exceptions which are chartered, are unincorporated associations. Practically every bricklayer in the city of New York and Long Island is a member of one of these unions.

The object of this suit is to restrain the enforcement of, and to have declared void, an agreement entered into between the Mason Builders' Association and the Bricklayers' Unions, upon the ground that it unlawfully interferes with the business and property of the complainant.

The agreement in question between the Mason Builders' Association and the Bricklayers' Unions is a biennial trade agreement covering the years 1906 and 1907 and relating to rates of wages, hours of labor, the settlement of differences by arbitration, and many other matters in the building trade affecting the interests of the parties. The particular clauses to which the complainant objects are the following:

"(5) The members of the Mason Builders' Association must include in their contracts for building all cutting of masonry, interior brickwork, the paving of brick floors, the installing of concrete blocks, the brickwork of the damp-proofing system and all fireproofing-floor arches, slabs, partitions, furring and roof blocks—and they shall not lump or sublet the installation, if the labor in connection therewith is bricklayers' work as recognized by the trade, the men employed upon the construction of the walls to be given the preference."

"(10) No members of these Bricklayers' Unions shall work for any one not complying with all the rules and regulations herein agreed to."

The first agreement between the Builders' Association and the unions was entered into in 1885 and provided only for rates of wages, hours of labor, and arbitration of differences. The agreements since that time have embraced the provisions

of the original agreement and also a gradually increasing number of other important stipulations. Clause 5 in substance was inserted in the agreement of 1893 at the request of the unions and has been retained in subsequent agreements. Clause 10 was inserted in the agreement at the request of the association. The precise time when this was done does not appear, but the clause was in force before the complainant started business in the city of New York.

The work of installing tile fireproofing is considered to be bricklayers' work by the trade, and it would be impracticable for the complainant to undertake such work in the city of New York without employing members of the Bricklayers' Unions. Clause 10, however, provides that members of the unions shall only work for persons complying with all the rules and regulations of the agreement. Among them is clause 5, which provides that the work of installing fireproofing shall not be sublet to a contractor, but must be included in the contract for the building. It follows therefore that these two clauses operate to prevent the complainant from installing its fireproofing in New York City unless it takes the entire contract for erecting a building, which it is not authorized by its charter to do.

In actual operation, too, the clauses in question have prevented the complainant from carrying out contracts for the installation of fireproofing. Thus in 1903 the complainant had a contract with the George A. Fuller Company—a general contractor not a member of the Builders' Association—for installing fireproofing in a building which it was erecting under contract in New York City. The association notified the complainant that its agreement with the unions forbade building contractors subletting the installation of fireproofing, and subsequently all the bricklayers employed upon the building—including those engaged upon the fireproofing—struck. Consequently the complainant was obliged to cancel its contract. Other similar instances are shown in the testimony.

It is evident therefore that these clauses affect owners and general contractors as well as a person who, like the complainant, desires to take separate fireproofing contracts. An owner is practically unable to make a contract for fireproofing alone because if he does the bricklayers will not only refuse

to do that work, but will decline to do the other work upon the building. A general contractor, whether a member of the association or not, practically cannot sublet the fireproofing because if he does he will violate clause 5, and the bricklayers will refuse to work for him.

The defendants claim that the object of clause 5 is to benefit the bricklayers by giving them inside as well as outside work and by preventing specialization in their trade. This subject is fully considered in the opinion.

The object of clause 10 is, obviously, to make the trade agreement effective by extending its operation to third persons requiring the labor of bricklayers. While members of the unions may work for others than members of the association, they can only work for such employers as follow the rules and regulations of the agreement. Should the complainant obtain the power to make general building contracts and enter into such contracts, it could then obtain the services of members of the unions in setting the fireproofing required. The complainant, however, does not wish to do business in this manner. It desires to take separate contracts for fireproofing installation and is prevented from so doing business by the operation of the clauses in question.

The allegations of the amended complaint with respect to a combination to injure the complainant, accompanied by threats and intimidation—except as they relate to the enforcement against it of these clauses—are not supported by the evidence. Whatever the defendants have done has been for the enforcement of such clauses, and if they are valid, and their execution and enforcement in the manner shown lawful, no independent cause of action is established.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). In considering the legal questions arising in this case, it must be borne in mind at the outset that it is not sufficient to show that the agreement in question may create a monopoly, may be in restraint of trade, or may be opposed to public policy. Agreements of that nature are invalid and unenforceable. The law takes them as it finds them, and as it finds them leaves them; but they are not illegal in the sense of giving a

right of action to third persons for injury sustained. Brown v. Jacobs' Pharmacy Co., 115 Ga. 433, 57 L. R. A. 547, 90 Am. St. Rep. 126. And upon similar principles it seems equally clear that they afford such persons no ground for seeking an injunction against injury threatened.

But the complainant asserts that the agreement in this case is positively unlawful and not merely negatively invalid—that it contravenes both national and state statutes against combinations, and thus does give rights of action to injured persons. With respect to the federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the state of New York, can be said to directly affect interstate commerce; but the consideration of this question is not necessary because a person injured by a violation of the federal act cannot sue for an injunction under it. The injunctive remedy is available to the government only. An individual can only sue for threefold damages. Greer v. Stoller (C. C.) 77 Fed. 2; Southern Indiana Exp. Co. v. United States Exp. Co. (C. C.) 88 Fed. 663. See, also, Bement v. National Harrow Co., 186 U. S. 87, 46 L. Ed. 1058; Post v. Southern R. Co., 103 Tenn. 184, 55 L. R. A. 481; Metcalf v. American School-Furniture Co. (C. C.) 108 Fed. 909; Block v. Standard Distilling, etc., Co. (C. C.) 95 Fed. 978; Gulf, etc., R. Co. v. Miami Steamship Co., 30 C. C. A. 142; Pidcock v. Harrington (C. C.) 64 Fed. 821; Hagan v. Blindell, 6 C. C. A. 86, affirming Blindell v. Hagan (C. C.) 54 Fed. 40.

The statute of New York which it is claimed that the defendants violate provides in its first section as follows:

"Every contract, agreement, arrangement or combination, whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby, for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation, is or may be restricted or prevented, is hereby declared

to be against public policy, illegal and void." Laws 1899, p. 1514, c. 690.

The complainant says that the agreement in question violates this statute because it tends to create a monopoly in the hands of members of the association and other general contractors who comply with its provisions. It may well be doubted, however, whether a combination of employers and employés in the building trade could ever be for the purpose of creating a monopoly "in the manufacture, production or sale in this state of any article or commodity of common use." Be that as it may, the thing which is essential to the existence of a monopoly—the concentration of business in the hands of a few—is not present here. The business of installing fireproofing in the city of New York is open to all who choose to engage in it under existing economic conditions. General contractors cannot be said to have a monopoly when any person can be a general contractor. Members of the unions cannot be said to be monopolists when any qualified bricklayer can join a union. Moreover, while it is probable under the New York decisions (Rourke v. Elk Drug Co., 75 App. Div. 145) that a person specially injured by a violation of this anti-monopoly statute would have a right of action for damages, it seems, upon the principle of the cases cited with respect to the federal statute, that only the Attorney General can sue for an injunction; such a suit being authorized by a section of the statute.

The complainant, thus failing to show any right to an injunction upon the ground that the agreement is contrary to public policy or in contravention of any state or national anti-trust statute, can only establish that it is entitled to such relief by showing that the execution of the agreement amounted to a conspiracy, and that its enforcement threatens injury; and to ascertain whether the complainant has established this requires the examination of a most important phase of the law of conspiracies as affecting combinations of labor and combinations between labor and capital.

A "conspiracy" may be broadly defined as a combination to effect an illegal object as an end or means. And a "civil conspiracy," which we are considering, may be defined as a combination of two or more persons to accomplish by con-

certed action an unlawful or oppressive object; or a lawful object by unlawful or oppressive means. To sustain an action, damage must have resulted from the combination; to warrant an injunction, damage must be threatened.

And so the inquiry is: (1) Was the object of the agreement unlawful or oppressive? (2) If the object was lawful and free from oppression, were the means unlawful or oppressive?

The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders a combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may incidentally injure third persons. Conversely, an agreement entered into for the primary purpose of injuring another is not rendered legal by the fact that it may incidentally benefit the parties. As a general rule it may be stated that, when the chief object of a combination is to injure or oppress third persons, it is a conspiracy; but that when such injury or oppression is merely incidental to the carrying out of a lawful purpose, it is not a conspiracy. Stated in another way: A combination entered into for the real malicious purpose of injuring a third person in his business or property may amount to a conspiracy and furnish a ground of action for the damages sustained, or call for an injunction, even though formed for the ostensible purpose of benefiting its members and actually operating to some extent to their advantage; but a combination without such ulterior oppressive object, entered into merely for the purpose of promoting by lawful means the common interests of its members, is not a conspiracy. A laborer, as well as a builder, trader, or manufacturer, has the right to conduct his affairs in any lawful manner, even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful nor oppressive, and the means neither deceitful nor fraudulent, the result is not a conspiracy, although it may necessarily work injury to other persons. The damage to such persons may be serious

—it may even extend to their ruin—but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria*. The damage is present, but the unlawful object is absent. And so the essential question must always be whether the object of a combination is to do harm to others or to exercise the rights of the parties for their own benefit.

These principles are well settled by the leading cases upon conspiracies. Thus in the celebrated case of Mogul Steamship Co. v. McGregor, L. R. 21 Q. B. 552, Lord Chief Justice COLERIDGE said:

"I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who has suffered injury from them. The question comes at last to this: What was the character of those acts, and what was the motive of the defendants in doing them?"

And when the Mogul Steamship Case came to the House of Lords (L. R. [1892] App. Cas. 25, 58), Lord HANNEN said:

"The question, however, raised for our consideration in this case is whether a person who has suffered loss in his business by the joint action of those who have entered into such an agreement can recover damages from them for the injury so sustained. In considering this question, it is necessary to determine upon the evidence what was the object of the agreement between the defendants and what were the means by which they sought to attain that object. It appears to me that their object was to secure to themselves the benefit of the carrying trade from certain points. . . . I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure the plaintiff whether they (the defendants) should be benefited or not."

The cases relating particularly to combinations of labor also state the same doctrine. Thus in National Protective Ass'n v. Cumming, 170 N. Y. 315, 328, 372, 58 L. R. A. 135, 88 Am. St. Rep. 648, Chief Judge PARKER said:

"It is only where the sole purpose is to do injury to another, or the act is promoted by malice, that it is insisted that the

act becomes illegal. No such motive is alleged in that finding. It is not hinted at. On the contrary, the motive which always underlies competition is asserted to have been the animating one."

And in the concurring opinion in the same case, Judge GRAY said:

"The struggle on the part of individuals to prefer themselves, and to prevent the work which they are fitted to do from being given to others, may be keen and may have unhappy results in individual cases; but the law is not concerned with such results, when not caused by illegal means or acts."

In Jacobs v. Cohen, 183 N. Y. 207, 211, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, Judge GRAY also said:

"Nor does the answer aver that it was intended thereby to injure other workmen; or that it was made with a malicious motive to coerce any to their injury, through their threatened deprivation of all opportunity of pursuing their lawful avocation."

In the same case the judge further said regarding the agreement there in question:

"That, incidentally, it might result in the discharge of some of those employed, for failure to come into affiliation with their fellow workmen's organization, or that it might prevent others from being engaged upon the work, is neither something of which the employers may complain, nor something with which public policy is concerned."

In Mills v. United States Printing Co., 99 App. Div. 605, 612, another New York case, the court said:

"There is a manifest distinction, well recognized, between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none other, and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. In the first case, the action of the combination is primarily for the betterment of its fellow members. In the second case, such action is primarily 'to impoverish and to crush another' by making it impossible for him to work there, or, so far as may be possible, anywhere. The difference is between combination for welfare of self and that for the persecution of another. The primary purpose of one may necessarily but incidentally

require the discharge of an outsider; the primary purpose of the other is such discharge and, so far as possible, an exclusion from all labor in his calling. Self-protection may cause incidental injury to another. Self-protection does not aim at malevolent injury to another."

In Vegelahn v. Guntner, 167 Mass. 92, 98, 35 L. R. A. 722, 57 Am. St. Rep. 443, Justice ALLEN said:

"A combination among persons merely to regulate their own conduct is within allowable competition and is lawful, although others may be indirectly affected thereby; but a combination to do injurious acts, expressly directed to another, by way of intimidation or restraint either of himself or of other persons employed or seeking to be employed by him, is outside of allowable competition and is unlawful."

In Allis-Chalmers Co. v. Iron Moulders' Union (C. C.) 150 Fed. 155, Judge SANBORN said:

"The conclusion to be drawn from the cases, as applicable to this controversy, is, I think, that the combination of the defendant unions, their members and the defendant O'Leary, to strike, and further to enforce the strike and if possible to bring the employers to terms by preventing them from obtaining other workmen to replace the strikers, was not unlawful, because grounded on just cause or excuse, being the economic advancement of the union moulders, and the competition of labor against capital."

In Allen v. Flood, L. R. (1898) App. Cas. 1, 164, Lord SHAND said:

"The object was to benefit themselves in their own business as working boiler makers, and to prevent a recurrence in the future of what they considered an improper invasion on their special department of work. How this could possibly be regarded as 'malicious,' even in any secondary sense that can reasonably be attributed to that term, I cannot see."

In Quinn v. Leathem, L. R. (1901) App. Cas. 495, Lord SHAND, in speaking of Allen v. Flood, *supra*, said:

"In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object, but in pursuit merely of a malicious purpose

to injure another, would be clearly unlawful; and having considered the arguments in this case, my opinion has only been confirmed."

The principal case relied upon by the complainant (Curran v. Galen, 152 N. Y. 33, 37 L. R. A. 802, 57 Am. St. Rep. 496), when analyzed will not be found to conflict with the principles just stated. It was held in that case, in substance, that if the prime purpose of a combination of workingmen is to restrict the citizen in pursuing his lawful calling and through contracts with employers to coerce other workingmen to become members of the combination, such purpose is against public policy and renders the combination unlawful, notwithstanding it may possess other features of advantage to its members. As said by the court in its opinion:

"Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict, that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions."

But the court went on to say that if the organization were for the purpose of promoting the general good of its members, it would not be invalid, and quoted with approval the instructions given to a jury in an English case (Regina v. Rowlands, 17 Ad. & Ellis [N. S.] 671):

"A combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured, and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are conceded; but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is, at present, to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property, and

either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their own mutual advantage."

It is evident therefore that the combination in Curran v. Galen was condemned because its primary purpose was to coerce workingmen to join it; any other objects being merely incidental. As said by Judge MARTIN in his dissenting opinion in the later case of Park & Sons Co. v. National Druggists' Ass'n, 175 N. Y. 40, 62 L. R. A. 632, 96 Am. St. Rep. 578:

"As we have already seen, this court in Curran v. Galen unanimously held that a combination or association of workingmen *whose purpose was to hamper or restrict the freedom of the citizen in pursuing his lawful trade or calling,* through contracts or arrangements with employers to coerce workingmen to become members of the organization and to come under its rules and conditions under penalty of loss of their positions and of deprivation of employment, was against public policy and unlawful." (Italics ours.)

And in National Protective Ass'n v. Cumming, 170 N. Y. 334, 58 L. R. A. 135, 88 Am. St. Rep. 648, already referred to, Judge GRAY said:

"The case is not within the principle of Curran v. Galen, 152 N. Y. 33, 37 L. R. A. 802, 57 Am. St. Rep. 496. Upon the facts of that case, as they were admitted by the demurrer to the complaint, the plaintiff was threatened, if he did not join a certain labor organization, and so long as he refused to do so, with such action as would result in his discharge from the employment and in an impossibility for him to obtain other employment anywhere, and, in consequence of continuing his refusal to join the organization, his discharge was procured through false and malicious reports affecting his reputation with members of his trade and with employers. There is no such compulsion, or motive, manifest here. There is no malice found. There is no threat of a resort to illegal methods."

Applying the principles which we have thus far ascertained to the facts of the present case, do we find that the object of the defendants in entering into the agreement embracing the clauses in question was to injure the complainant or to benefit themselves?

The object of clause 10 manifestly was to make the stipula-

tions of the agreement generally effective. The mason builders joining in the agreement being bound by its stipulations, it was necessary for their protection that competing outside builders should only employ bricklayers upon the same conditions. So it was for the advantage of the bricklayers themselves to have means for enforcing uniformity in terms of employment.

It also seems clear from the testimony that the object of clause 5 was to benefit the bricklayers. Certainly from their point of view substantial benefits accrue from preventing the installation of fireproofing by separate contractors. Through the operation of this clause the men who do the exposed work secure the easier and safer inside work and more continuous employment than would otherwise be the case. The specialization of the bricklayers' trade through the growth of a class of workmen, who would devote themselves to setting fire brick and would, in the end, take all that work from the ordinary bricklayer, is prevented.

It is true that the complainant contends that these advantages are fanciful rather than real, and points out that much of the fireproofing is laid before the walls. Still it appears that a very large amount of fireproofing is done after the walls are completed, and the contention of the bricklayers that they obtain advantages through the operation of clause 5 in securing different kinds of work and steady employment seems well founded. The complainant also contends that there would be no danger of specialization in the bricklayers' trade should it take separate contracts for installing fireproofing, but the evidence does not support this contention. On the contrary, it indicates that the apprehensions of the bricklayers, as shown upon the record, are not without foundation.

Considering all the testimony, we are satisfied that the direct object of the adoption of the clauses in question was to benefit the parties and not to injure the complainant or other persons in a similar situation. Any particular or special intention to injure the complainant is, of course, negatived by the fact that the clauses in question were inserted in the trade agreement between the parties long before the complainant undertook to do any business in the city of New York.

The object of the agreement being neither unlawful nor oppressive, the next inquiry is whether the means adopted to make it effective were unlawful or oppressive.

As indicated in the statement of facts, no threats or acts of intimidation except in connection with the enforcement of clause 5 are shown. Instances do appear, however, in which bricklayers struck and ceased to work because they claimed that work was being done in violation of this clause. So, statements were made by members of the Builders' Association and of the unions that the complainant would not be permitted to take separate contracts for the installation of fireproofing. It is unnecessary to review the acts of the defendants in detail. We are not satisfied that if the defendants or their representatives made threats, they threatened to do anything which they had no right to do. The object of the agreement was not unlawful. The defendants had the right to strike to secure its enforcement. They also had the right to notify the complainant and persons with whom it had dealings that it could not take contracts for the installation of fireproofing contrary to the terms of the agreement without incurring its penalties. But a threat to do that which a person has the right to do is not unlawful. In National Protective Ass'n v. Cumming, 170 N. Y. 315, 330, 373, 58 L. R. A. 135, 88 Am. St. Rep. 648, already referred to, the court said:

"They did not threaten to employ any illegal method to accomplish that result. They notified them of the purpose of the defendants to secure this work for themselves and to prevent McQueed and his associates from getting it, and in doing that they but informed them of their intention to do what they had a right to do, and when a man purposes to do something which he has a legal right to do, there is no law which prevents him from telling another who will be affected by his act of his intention."

And in Park & Sons v. National Druggists' Ass'n, 175 N. Y. 1, 20, 143, 62 L. R. A. 632, 96 Am. St. Rep. 578, it was also said:

"There are no threats alleged in this complaint on the part of defendants to do anything except that which they have a right to do, if the views so far expressed be sound, and as we said in that case, and it is proper to repeat here, that a man may threaten to do that which the law says he may do, pro-

vided that, within the rule laid down in certain cases therein cited, his motive is to help himself."

It therefore follows that the defendants have not entered into a combination to accomplish an unlawful or oppressive object, or a lawful object by unlawful or oppressive means, and are not guilty of a common-law conspiracy.

Finally, the complainant contends that the agreement amounts to a conspiracy under the Penal Code of the state of New York (section 168, subds. 5 and 6). But the principles applicable to conspiracies at common law, which we have considered, apply to conspiracies under the statute. The test of the application of the statute is the purpose of the combination, and if the object and means be lawful, there is no conspiracy, even though a third person may be incidentally injured.

And so the conclusion must be that the Circuit Court was right in dismissing the complaint. Nevertheless it cannot be denied that the complainant has ground for complaining. It desires to engage in a lawful and legitimate business in a lawful and legitimate way and is practically prevented from so doing by the acts of the defendants. Its right to do business in the manner it desires is interfered with, and the law affords it no remedy because such interference is only incidental to the exercise by the defendants of their own right to contract for their own benefit. The complainant is injured, but has no remedy. The law could only make it possible for the complainant to do business in the way it chooses by compelling the defendants to do business in the way they do not choose. But, when equal rights clash, the law cannot interfere.

Decree affirmed, with costs.

STATE EX REL DURNER v. HUEGIN

(Supreme Court of Wisconsin, 1901. 110 Wis. 189.)[77]

Writ of error to the circuit court for Milwaukee county to review orders thereof, in habeas corpus proceedings, discharg-

77—Statement abridged and part of opinion omitted.

ing certain persons from custody who were under restraint, according to forms of law, to await trial for the offense of conspiracy to injure. The complaint charging the offense was under oath and as follows:

"Lucius W. Nieman and Lloyd T. Boyd, of the city of Milwaukee, in said county of Milwaukee, being severally first duly sworn, complain to the police court for the city of Milwaukee, Milwaukee county, Wisconsin, that on or about the 5th day of April, A. D. 1900, at the city of Milwaukee, and within said county of Milwaukee, Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, did then and there unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of willfully and maliciously injuring the Journal Company, a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, in its trade and business, and for the purpose and with the intent then and there of willfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade, business and occupation; that the said the Journal Company at all of said times was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as the Milwaukee Journal, published at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee, and throughout the state of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said the Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers, and to solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially at the time of the said combination and conspiracy, and subsequently thereto, the said the Journal Company had a large number of advertisers or patrons who advertised in said newspaper, the Milwaukee Journal, and that a large portion of the revenue of said the Journal Company

was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum were at all of said times and now are, stockholders in said the Journal Company, and financially interested in the business and success of said the Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said the Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said the Journal Company and of the said the Milwaukee Journal; and that at all of said times the business of said John W. Schaum was and is that of treasurer of said the Journal Company.

"That the prices of advertisements and the advertising rates which newspapers such as said the Milwaukee Journal and the other newspapers herein mentioned are entitled to charge, and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900, said the Journal Company in good faith established a new rate for advertising in said the Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said the Milwaukee Journal thereof, which said rate for advertising was an increase of about 25 per cent. above that which was charged by said the Journal Company for like advertising in the year 1899.

"That at all of said times the said Andrew J. Aikens was, and now is, the business manager of the Evening Wisconsin, a daily newspaper published in the city of Milwaukee, and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto said the Milwaukee Journal; that at all of said times said Albert Huegin was, and now is, the business manager of the Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the newspapers aforementioned; that at all of said times said Melvin A. Hoyt was, and now is, the editor of the Milwaukee Daily News, and the president of the News Publishing Company, the corporation owning said the

Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

"That on or about said 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said Andrew J. Aikens, Albert Nuegin and Melvin A. Hoyt, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association, agreement and mutual understanding, for the purpose and with the intent then and there of willfully, maliciously and unlawfully injuring said the Journal Company in its trade and business, and also said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and each of them, in their trade and business, and to that end and with the purpose and intent aforesaid, did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said the Milwaukee Journal, should pay or agree to pay to said the Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to wit: said the Milwaukee Sentinel, the Evening Wisconsin, and the Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to wit: about 25 per cent. in excess of what said last-mentioned three papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said the Journal Company the said increased rate established by it as aforesaid for advertising in said the Milwaukee Journal, then and in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other

persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to wit: the Milwaukee Journal, the Evening Wisconsin, the Milwaukee Sentinel and the Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said the Milwaukee Journal were, pursuant to said combination and conspiracy on the part of said Aikens, Huegin and Hoyt, and in furtherance thereof, notified by them of the said agreement, conspiracy and combination between said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, that many of the patrons and advertisers in said the Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said the Journal Company and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum; that pursuant to said combination, agreement, confederation and conspiracy, and in furtherance thereof, said Andrew J. Aikens, Albert Huegin and Melvin A. Hoyt, did refuse to allow the advertisements of divers merchants and other persons to be inserted in either the Milwaukee Sentinel, the Evening Wisconsin or the Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of said three last-mentioned newspapers because such merchants or other persons so prevented had paid or had agreed to pay to said the Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy and agreement many merchants in the city of Milwaukee and elsewhere, and other persons, were prevented from advertising in said the Milwaukee Journal, greatly to the injury of the business and trade of said the Journal Company, and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and of each of them, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Wisconsin.

"Wherefore, affiants pray that the said Andrew J. Aikens,

Albert Huegin and Melvin A. Hoyt be arrested and dealt with according to law."

The complaint was filed with the police court in the city of Milwaukee and such proceedings were thereupon had, based thereon, that the defendants therein named were arrested and produced before such court for a preliminary examination, whereupon a motion was made for their discharge upon the ground that the allegations of the complaint were not sufficient to show that a criminal offense had been committed. The motion was overruled. Thereupon evidence was taken before the court, tending to establish the allegations of the complaint. At the close of the evidence a motion was made to discharge each of the defendants, which was denied. The court then decided upon the evidence that the offense charged in the complaint had been committed, and that there was probable cause for believing the defendants guilty of such offense. Each defendant refused to give bail for his appearance before the municipal court of Milwaukee county for trial, whereupon he was duly committed to the custody of the sheriff of such county to await such trial. A commitment was delivered to the sheriff, as to each defendant, all being in the same form.

Thereafter each defendant, on a petition stating the proceedings to which reference has been made, sued out of the circuit court for Milwaukee county a writ of habeas corpus to test the legality of his detention. The sheriff of the county made due return to each of such writs, justifying the detention by the commitment placed in his hands as before stated.

[Some of the defendants traversed the return of the sheriff, alleging that the proceedings upon which his detention was based were illegal and void and beyond the jurisdiction of the committing magistrate. Others demurred to the return for insufficiency.]

The court then decided that the proceedings which resulted in the several commitments were illegal, because the facts alleged in the complaint did not constitute a criminal offense; that the statute under which the prosecution was commenced covers only cases where the purpose of the combination is to do such an injury that an action at law can be maintained for damages, against the members of the combination, in case its

purpose is carried out. An order was accordingly entered to discharge each of the defendants from custody. Such orders are presented here for review by writs of error, as before stated.

MARSHALL, J. [after disposing of certain preliminary questions and concluding that the complaint admitted of a construction which would satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure the Journal Company in its business as charged, proceeded as follows]:

We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional.

We have already proceeded beyond some elements of the above somewhat compound proposition, but these parts to which we have already adverted were so exhaustively gone over by the able counsel who argued the case, both in the main argument and on the reargument thereafter accorded for that special purpose, that we will give some further attention in this connection to what has already been referred to incidentally.

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person, acting by himself, or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival even to the extent of impoverishing him and driving him out of the field of industry occupied in common, leaving him remediless for his misfortune, in the absence of a statute to the contrary, must be admitted. National and state legislatures have dealt with that subject in many instances, in recent years, and uniformly with success so far as regards constitutional limitations,—with such success, in fact, that the man

of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds. The time seems past for that, as regards combinations of individual independent interests, designed to remain independent for most purposes, but to act in combination to control trade. By numerous decisions of the highest courts in this country, the police power incident to sovereignty has been held to be broad enough to permit the legislature to deal, by creating civil or criminal liability, or both, with all combinations in restraint of trade which are void by common-law rules on grounds of public policy, and, within reasonable limits to be set by courts in the light of constitutional safeguards, to say that things are contrary to public policy not so before, to legislate against them and to enforce the legislative will by civil or criminal liability, or both:—within the broad field indicated, to regulate or prohibit any combination of the kind we are talking about, formed for the purpose of restraining trade or disturbing those natural business conditions, where every individual is supposed to be free to contend with every other in the regular course of business. We are speaking here of independent interests concerting together for the purpose mentioned. That must be kept in mind. These questions have been so firmly settled that no court will now venture to do more than to follow what has been decided. Contracts that operate merely in restraint of trade, such as it is contended the one in question was, even though unreasonable, were not actionable at all at the common law. They were void, merely. The courts would not enforce or give effect to them. But new conditions have arisen creating new dangers, or intensifying old ones that were once considered so trifling as to pass unnoticed, calling for new restraints and new remedies. Who can say that sovereign power has been so surrendered as to be left incapable of dealing with that subject. Right or wrong, those dangers have been considered so great, and power to deal with them so ample, that legislation has gone to the length we have indicated, making combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally, all upon the broad ground that legislative authority exists in the administration of the police

power, to regulate or prohibit those things which are contrary to public policy by the rules of the common law; and to go further and determine, in the light of new conditions, what is detrimental to the public welfare, and to legislate accordingly.

On what has been said, the following of many authorities that might be cited are in point: U. S. v. Addyston Pipe & Steel Co., 29 C. C. A. 141, 46 L. R. A. 122; U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007; Gibbs v. McNeeley (C. C.) 102 Fed. 594; Nester v. Brewing Co., 161 Pa. 473, 24 L. R. A. 247; People v. Sheldon, 139 N. Y. 251, 23 L. R. A. 221; Jackson v. Stanfield, 137 Ind. 592, 23 L. R. A. 588; People v. Nussbaum (Sup.) 66 N. Y. Supp. 129; Leonard v. Poole, 114 N. Y. 371, 4 L. R. A. 728; People v. Milk Exchange, 145 N. Y. 267, 27 L. R. A. 437; Ford v. Association, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298. The number of cases that could be cited on this subject is so great that no attempt has been made to do more than collect here a few that contain pretty full discussions thereof. A study of them reveals the fact that the power of public opinion in favor of preventing combinations to stifle individual freedom in business and the sacrifice of those benefits that are popularly supposed to flow from free competition, has led to legislation in most of the states of the Union, as well as by the federal congress, and that in but very few instances has such an enactment met the bar of the constitution of state or nation. A late work that treats of police powers, sums up the subject here under discussion thus:

"It is believed that the constitutionality of none of the numerous anti-trust statutes has been successfully questioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law,—so far, at least, as to justify the courts in refusing to enforce them or in any other way to give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such agreements—has been too long the settled rule of law, to admit of any serious question now. And the power of

the state to declare such contracts unlawful being conceded, it is completely within the discretion of the legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the courts or the parties to them be subjected to criminal or civil liabilities." 1 Tied. Cont. of Pers. & Prop. § 112.

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law or as in the line of the numerous state statutes to which we have referred, condemning combinations in restraint of, or injurious to, trade. It has the distinctive element of malice which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect, where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in Martens v. Reilly (decided Jan. 8, 1901) 109 Wis. —. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases, as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be rewritten. The following are the cases referred to: Mogul S. S. Co. v. McGregor, 23 Q. B. Div. 598, decided in house of lords and reported in [1892] App. Cas. 25; and Huttley v. Simmons [1898] 1 Q. B. Div. 181. The first case involved a combination to monopolize trade at the expense of plaintiff, but no element of malice was found. The action was to recover damages.

In that situation it was true that the defendants were not liable in combination if one of them would not have been had he acted alone. The interesting feature of that case is absence of malice. When first decided all the learned judges who wrote upon the question reached the conclusion on which the judgment of the court was entered, upon the theory that no specific intent on the part of the defendants to injure the plaintiff wrongfully, no malice, was disclosed by the testimony. Bowen, L. J., said: "Certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several." "A combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." Fry, L. J., said: "I lay out of consideration, in this case, competition used as a mere engine of malice, even where I do not in terms repeat the exception." Lord Hannen said: "I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure plaintiffs, whether they, the defendants, should be benefited or not." The Mogul S. S. Co. Case, as appears from the opinions rendered in both courts, is full of expressions showing that it was not supposed then that an act, not actionable if perpetrated by one, could not be made so when perpetrated by several in combination, or that liberty to form business combinations to promote the business of the members thereof in the free course of trade, applied to combinations of traders in the same calling to maliciously injure a rival. The free course of trade that one, or a number in combination, may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade. Such is the decision in the Mogul S. S. Co.'s Case on its face. We should say, that must have been the view of the learned men who pronounced the opinions in that case, if it were not for what followed in the subsequent case, because it is in harmony with many decisions cited and approved in the opinions, a good instance being Gregory v. Brunswick, 6 Man.

& G. 205, where it was held that preconcerted hissing of an actor for the purpose of injuring him in his profession, was actionable. That and many other cases decided on the same principle were approved. If we say that such principle had prevailed in the English courts for two centuries prior to the Mogul S. S. Co. Case, we are supported by the lord chancellor in Allen v. Flood [1898] App. Cas. 1. There the element of conspiracy was absent, but the element of malice was present. The majority of the court there, contrary to what was said, inferentially at least, and what all of the judges were so careful to say as to indicate that it was the turning point in their minds, in the Mogul S. S. Co. Case, decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. The reasoning to support that and the decision, at least as applied to a conspiracy with malice, is out of harmony with right and justice, and out of harmony with a multitude of cases that had been theretofore decided by English courts, and the teachings of those who had built and filled the storehouses of learning from which all draw, outside of legal opinions. How can it be harmonized with Gregory v. Brunswick, where the conspirators were held liable because of their malicious purpose; and Clifford v. Brandon, 2 Camp. 358, a similar case; or Garret v. Taylor, Cro. Jac. 567, where malicious impeding of workmen was held actionable,—the authority of which, up to Allen v. Flood, had never been questioned. Those simple cases contain all the principles which govern this case, on the particular question under discussion.

The decision in Allen v. Flood was not reached by any great weight in number. Lord Watson, who delivered the main opinion in favor of it, confessed that the rule established was new in English law. The lord chancellor labored with great vigor to stem the tide of what he considered would amount to a judicial destruction of a system of law, on an important subject, which was as old as the common law. He said that the decision overruled the views of the most distinguished judges of England who had spoken on the subject for 200 years; that it was a departure from the principle that had theretofore guided the courts in the preservation of individual liberty. He cited numerous expressions of the character of

those which we have quoted from the opinions of the judges in the Mogul S. S. Co.'s Case, and said that, "if the elements, which each noble lord in turn pointed out did not exist in that case, had in fact existed, the decision would have been the other way." Lord Morris said that the decision overturned "the overwhelming judicial opinion of England." In that situation one can discover very little in the case to warrant adopting it and extending the principle thereof to a combination to maliciously injure.

After Allen v. Flood, it was but a step to reach Huttley v. Simmons, supra. The conclusion there was in harmony with what Lord Halsbury evidently anticipated would be the final outcome of the rule he so vigorously dissented from. The court held, combining the doctrine of the Mogul S. S. Co. Case and that of Allen v. Flood, that a conspiracy with malice, to do an act, gives a right of action only when the act agreed upon to be done and in fact done, would have been, without pre-concert actionable as a civil injury; because an act lawful without malice is not made unlawful by the addition of the element of malice.

While it is true that the doctrine of the cases referred to, even up to the final conclusion in Huttley v. Simmons, has, to some extent, influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time, been adopted here in any material degree. In courts where it has been partially adopted there has often been most vigorous dissent, as, for example, Passaic Print Works v. Ely & Walker Dry-Goods Co., 44 C. C. A. 426, 105 Fed. 163. Mr. Eddy, in his work on Combinations, published the present year, after a very careful review of all of those cases, said, speaking of Huttley v. Simmons:

"If this decision be sound, there is little indeed to the law of civil conspiracy. The conclusion reached is logically correct if the premises be admitted. If the proposition is sound that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff regardless of any confederation, then the combination is entirely immaterial, and the entire law of civil conspiracy is a superfluous discussion. . . . But, notwithstanding the decision in Huttley

v. Simmons, we believe the law for England, and certainly for the United States, to be well settled to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action." Section 503.

In order to well understand that characterization, one must know that, after a review of numerous cases, the author deduced the conclusion that the element of malice, the intent to injure on the part of several acting in combination, will make that actionable that would not otherwise be so.

This court has often held that an executed conspiracy to inflict a malicious injury is actionable. To hold otherwise now and follow Huttley v. Simmons, would be to overrule these cases. Bratt v. Swift, 99 Wis. 579; Association v. Niezerowski, 95 Wis. 129, 37 L. R. A. 127; Gatzow v. Buening, 106 Wis. 1. The great weight of authority, almost all authority, is to the same effect. We give a few citations. 1 Hawk. P. C. 72, § 2; State v. Stewart, 59 Vt. 273; Carew v. Rutherford, 106 Mass. 14; Ertz v. Exchange Co. (Minn.) 81 N. W. 737; State v. Buchanan, 5 Har. & J. 317; Com. v. Waterman, 122 Mass. 57; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.) 60 Fed. 803; State v. Norton, 23 N. J. Law, 33; State v. Glidden, 55 Conn. 46; Sherry v. Perkins, 147 Mass. 212; Smith v. People, 25 Ill. 17; In re Crump, 84 Va. 927; Doremus v. Hennessy, 176 Ill. 608.

In the last case above cited, PHILLIPS, J., speaking for the court, summed up the subject under discussion thus:

"Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. 'Malice,' as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition."

That expresses the common-law doctrine and the one that prevails here. How contrary it is to Huttley v. Simmons appears without a suggestion.

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade, and render combinations successful by the malicious destruction of the business of competitors, is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. The ideas pressed upon the attention of the court in this case have been pressed upon every court in the land where opportunity therefor has been presented since the decision in the Mogul S. S. Co. Case. So far as then developed they were presented in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., supra, and rejected, the learned circuit judge who wrote the opinion quoting with approval from Com. v. Carlisle, Brightly, N. P. 36, the following:

"It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation of profit to themselves,—to wrongfully harm such competitors merely because they insist upon individual right to conduct individual busi-

ness in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for section 4568, Rev. St. 1898, adding to the common-law essentials of an indictable conspiracy the necessity for an overt act, section 4466a would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of section 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing section 4466a. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that "De minimis non curat lex" applies; but when he unites others with him to maliciously injure the business of another for the mere gratification, in whole or in part, of a desire to inflict such injury, the condition of there being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., supra, the union of individual forces by agreement, to accomplish the injury, gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has and probably never will leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of

them, as it seems, leaves little more that need be said. As indicated at the commencement, a long opinion was unavoidable if reference was to be made even briefly to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle. Our conclusion is this: The term "malicious injury," as used in the statute, is synonymous with that term at the common law; it refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not, in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a single power, of the individual abilities and resources of two or more to wrongfully accomplish harm to another in the line of those things mentioned in the statute. It is in harmony with the doctrine, so definitely stated by Baron Brammel in Reg. v. Druitt, 10 Cox, Cr. Cas. 593, that it has often been quoted by courts and text-writers and nowhere rejected: "The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body;" and "if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they are guilty of a criminal offense."

By the Court.—The orders of the circuit court discharging the defendants in error are severally reversed and the cause is remanded with directions to remand them to the sheriff of Milwaukee county.[78]

Dodge, J., took no part.

78—See Hawarden v. Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 549-551 (Coal wholesalers refused to deal with particular retailers in order to put them out of business).

PARK & SONS CO. v. NATIONAL DRUGGISTS' ASS'N

(Court of Appeals of New York, 1903. 175 N. Y. 1.)

HAIGHT, J. The question presented for review is as to whether the complaint states facts sufficient to constitute a cause of action.

The relief sought by the plaintiff is an adjudication that the resolutions, agreements, plans, and modes for the conducting of the business of the sale of proprietary medicines by the National Wholesale Druggists' Association are illegal, and that an injunction issue, restraining the members of the association from continuing to make efforts to induce any manufacturer or proprietor of what are known as patent or proprietary medicines from adopting the rebate or contract plan for the sale of their goods, or of continuing such plan if they have previously adopted the same.

The complaint is very voluminous, and I have not attempted to give even a fair synopsis, for that would necessarily cover many pages, and I have not deemed it necessary, for it appears to me that the rights of the parties must depend upon a few controlling facts, which may be briefly stated.

It appears from the allegations of the complaint that the matter in controversy has reference to the sale by manufacturers of those particular medicines or remedies covered by trade-marks, copyrights, or patents, which secure to the manufacturer or proprietor the exclusive right to manufacture and sell the same. These medicines are known as "proprietary goods," and their manufacture and sale are confessedly under the control and management of the owner or manufacturer, who may fix his own price, and adopt such plan for the sale thereof as he, in his judgment, may determine. At one time the sale of these goods was largely made through traveling sales agents, who worked upon commissions, and supplied the goods to the consumer or retailer. Later on they were sold largely through the druggists, but many of the manufacturers did not maintain a uniform price. They would supply goods to some of the wholesalers upon more favorable terms than to others; thus permitting large dealers to make a profit, while a great number of the smaller druggists found the handling of proprietary goods unprofitable. This resulted in the

organization of the National Wholesale Druggists' Association, an unincorporated body, which in 1882 and 1883 represented 90 per cent. of the wholesale jobbing trade of the United States. At a meeting of this association a plan was devised and adopted for the conduct of the business of the sale of proprietary goods, which was in the form of a petition addressed to the proprietors, asking them to fix a uniform jobbing price for fixed quantities, and also a selling price by the druggists, which they were to agree to maintain, and that the druggists should be allowed the difference between the jobbing and the selling price as their profit or rebate, which they asked should be not less than 10 per cent.; the proprietors defraying the expenses of boxing and freight to the nearest transportation station of the buyer. It is alleged that a large number of the proprietors consented to this arrangement, and adopted the plan suggested by the wholesale druggists. And this mode of conducting the business appears to have been continued until the December meeting of the association, in 1893, at which time a committee, to whom the Detroit plan, so called, had been referred, reported, among other things, the following: "That in order to strengthen and render this plan more effective, it is respectfully recommended that proprietors accept orders for full quantities with rebate, discounted only from regular houses recognized as belonging to the number who will faithfully observe the prices and conditions established by the manufacturers." This appears to have been adopted and was acquiesced in by the manufacturers, and became the plan under which the business was conducted at the time this action was commenced.

It further appears from the allegations of the complaint that the plaintiff never acquiesced in this plan of conducting the business, but always insisted on its right to sell proprietary goods at such price or prices as it saw fit, in its discretion, and would not be bound by the price established by the manufacturers; that thereupon the manufacturers refused to sell or ship goods to the plaintiff, and it was compelled to procure goods from other druggists; that the National Wholesale Druggists' Association caused the plaintiff's premises to be watched by spies or detectives, and that they made reports to the manufacturers of the druggists who purchased goods of the pro-

prietors and caused them to be delivered at the plaintiff's premises; and that the association also furnished the manufacturers with a list of all of the druggists throughout the United States who were willing to be controlled by the contract plan. The complaint then alleges that the defendants "were combining and conspiring to obtain an exclusive control of the wholesale and jobbing trade, as between the manufacturer and the retailer, in all classes of patent medicines or proprietary goods, and to regulate and control the methods upon which the said trade shall be carried on throughout the entire United States, and to control the prices at which, and the discounts, allowances for freight, and the terms of credit upon which, the said proprietary goods shall be sold to the various retail druggists throughout the United States, and to destroy and prevent any and all competition between the said wholesale and jobbing druggists in the wholesale and jobbing trade in said proprietary goods, and limit and restrict the business of each of the wholesale and jobbing druggists, or such of them as are in one locality, to certain exclusive territory, tributary or proximate to each of them, respectively."

The demurrer is an admission of the facts alleged, but not of the conclusions of law. The allegations just above quoted I understand to be conclusions of law drawn from the allegations of fact alleged in the complaint, and are not therefore admitted by the demurrer. It therefore becomes necessary to determine whether the plan for the conducting of the business of the sale of proprietary goods adopted by the association, and which it requested the proprietors or manufacturers to adopt and carry out, is lawful. The question thus presented is of considerable importance. The plan, as we have seen, in its substantial features, has been in operation nearly 20 years, and in its final, completed form, nearly 10 years. This plan, as I understand, is not one confined to the sale of proprietary medicines, but is one that has been adopted by many manufacturers of merchandise and other goods where manufacturers have established a trade-mark, and have gained a reputation which they wish to maintain throughout the country for character, quality, and durability of the goods which they manufacture. They have consequently established prices at which their goods shall be sold to the consumer, and require all

wholesale and retail dealers to supply the consumer at the price list established. The decision, therefore, reached herein, may largely affect the plan of conducting business in other articles of commerce.

It is said that the National Wholesale Druggists' Association was organized and continued for the purpose of monopolizing and controlling the business of the wholesale druggists and jobbers in the sale of proprietary or patent medicines in the United States. The association doubtless was organized and continued for the purpose of devising and procuring to be carried into effect a plan for the sale of such goods throughout the United States, which would do away with the necessity of maintaining traveling sales agents, and which would secure to the dealers a uniform commission for the handling of the goods; but I do not understand that this was the establishing of a monopoly on the part of the members of the association, for, under the plan adopted, every dealer has the right to purchase goods from the manufacturers upon the same terms as the members of the association, with the right to the same rebate or commissions upon complying with the requirements of the manufacturers with reference to following their price list in making sales of goods. The members of the association clearly had the right to work for their own interests. They had the right to devise and adopt a plan for the conduct of the business in which they could make a commission or a profit, so long as they did not unlawfully interfere with the rights of others. They had the right to petition the manufacturers to adopt the plan devised by them, and to support their petition with all of the arguments and persuasions that they could bring to bear, so long as they did not resort to threats or intimidation. The proprietors, having the exclusive right to manufacture and sell their goods, had the right to adopt such plan with reference to the disposal thereof as they saw fit; and if they became convinced that the contract or rebate plan, so called, was more advantageous to them, and more fair and just to the public, by establishing a uniform price in all sections of the country, they had the right to adopt the same, and no one could complain.

Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers

as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell, or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trade-marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified. The plan does not operate to restrict sales in any localities, but contemplates a ready method of distributing the goods throughout the entire country. It is, in effect, the creating of an agency on the part of the proprietors, by which every druggist throughout the United States may receive the goods and dispose of them as agents of the principal, receiving the commissions agreed upon therefor.

Is this plan against public policy? An active competition and rivalry in business is undoubtedly conducive to the public welfare, but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein, and thus result in a derangement of the business, an inconvenience to consumers, and in public harm. While public policy demands a healthy competition, it abhors favoritism, secret rebates, and unfair dealing, and commends the conduct of business in such a way as to serve all consumers alike. That this is the tendency of modern times is evident from the recent discussions and legislation upon the subject of interstate commerce. One of the cardinal and chief principles of the plan adopted is the establishing of a uniform price by proprietors, which necessitates the service of all persons alike throughout the United States; the proprietors subjecting themselves to the extra expense for freight, etc., in remote sections of the country. I can discover nothing in this which is detrimental to the public policy of the country. The right would certainly not be denied to the manufacturer of a given remedy to adopt the rule that he would only sell it to the jobbers of the country at a certain long price, and would not allow a discount of 10 per cent. where they refused to maintain his price. In other words, the manufacturer says to the jobbers of the country: "I manufacture a medicine that I will sell for one dollar a bottle,

and it is my desire that it shall be sold at that price per bottle throughout the country. If you will take consignments of this medicine from me, billed to you, at that price per bottle, I will allow you a rebate of ten per cent.; and, if I find that you are selling at a lower price than billed to you, I will allow no rebate. If this arrangement is not satisfactory to you, I prefer to keep my manufactured stock on hand. These are the only conditions under which I will ship my manufactured article."

Surely there is nothing in this approaching restraint of trade or the violation of the principle of public policy. It is simply allowing a man to do what he will with his own.

I do not understand that the complaint charges that the manufacturers were compelled to adopt the plan by reason of threats or intimidation on the part of the members of the association. It is true that the complaint contains the allegation, repeated a number of times, to the effect that the proprietors or manufacturers were prevented from selling the plaintiff proprietary goods for the reason that they wished to protect themselves "with the wholesale and jobbing druggists," and also that at one of the meetings of the association the committee on proprietary goods reported that, with a few exceptions, the proprietors of all the prominent proprietary medicines had adopted the contract or rebate plan for the sale of their goods, and then concluded its report with the recommendation "that continued and untiring opposition be shown to the sale of the articles of those proprietors who do not adopt said contract or rebate plan for the sale of their goods, or who withdraw from the plan." There is no allegation, however, that this resolution was served upon the proprietors, or was otherwise presented to them. The first allegation alluded to does not, as I understand it, amount to a threat, when taken in connection with the other allegations of the complaint with reference to the plan devised for the conduct of the business. The proprietors might well deem it to be for their best interests to act in accord with the wishes of the druggists, rather than those of the plaintiff. As to the second allegation, untiring opposition was to be continued against the sale of articles of proprietors who did not accept the contract plan, or, in other words, to the sale of proprietary goods under the old system. I do not understand that by this allegation it

was intended to charge that the plan adopted prohibited druggists from dealing with proprietors or manufacturers who did not adopt the contract plan with reference to the sale of proprietary goods, for, under other allegations of the complaint, it appears that the failure of a manufacturer to adopt the plan simply left his goods upon the unrestricted list, for which druggists could contract in such manner as they saw fit. This is apparent from the resolution adopted by the association at its Washington meeting in 1890.

Is there any boycott of the plaintiff? It is true, many of the proprietors refused to sell to the plaintiff proprietary goods except at the long price, which I understand to be the selling price. They have refused to allow it commissions or a rebate upon the goods purchased, but this refusal is based upon the ground that the plaintiff refused to sell at the prices fixed by the proprietors. The plaintiff can at any time avail itself of the right to purchase upon the contract plan by complying with the requirements of the proprietors. The reply made by one of the proprietors to a letter of John D. Park & Sons under date of January 25, 1889, annexed to and made a part of the complaint, answers this question so completely that I here repeat it: "We think you are in error in calling the action of the association, or the action of any one of its members, 'boycotting.' A boycott means to refuse to sell or do business with a concern, and to prevent anybody else from doing business with a concern on any conditions. This is not the attitude of the association with you. The association has implored you over and over again to abide by your contracts and sell goods as your neighbors do, and you have distinctly defied them and told them that you would do just exactly as you liked. There is no 'boycott' in this, good friends, and nobody knows it better than you do; and you also know that, even if you choose to call it a boycott, you can end the boycott in twenty-four hours by simply agreeing when you sign a document that you will keep it."

Complaint is made with reference to the watching or spying upon plaintiff's business. All there is of this is the watching for the purpose of determining who the druggists were that furnished the plaintiff with proprietary goods in violation of the contract plan under their agreements with the proprietors.

I think there is nothing in this calling for the intervention of a court of equity. The whole success of the plan adopted for conducting the business depended upon the faithful observance of the contract of the druggists with the proprietors, for whom they were acting as agents. If one could be permitted to violate his contract, it would seriously prejudice all the dealers who lived up to the provisions of their contract, and carried it into execution in good faith. As was said in the letter of Parke Davis & Co. to plaintiff's predecessor under date of February 12, 1889: "The contract in force between us and the members of the Wholesale Drug Association during the three years prior to 1887 was objectionable to many because of the opportunities offered to those so disposed for an evasion of its provisions; thus, those who lived up rigidly and honestly to their agreement were made to suffer for the benefit of those disposed to regard their agreement and promises simply as a means for taking advantage of others who fulfilled their agreements."

I am thus brought to a consideration of the reasons for objecting to the plan by the plaintiff. As stated in the allegations of the complaint, they are as follows: "That all of the said manufacturers and proprietors who have adopted the said rebate or contract plan for the sale of their respective proprietary goods were persuaded to adopt it entirely by the representation of the benefit which would accrue to the majority of their distributing agents or vendees, the wholesale and jobbing druggists, who were unable to handle the goods as cheaply as the few who could command large capital." It is also alleged that the firm of John D. Park & Sons, and this plaintiff since its organization, before the happening of the matters alleged in the complaint, had made large purchases, as wholesale and jobbing druggists, of the proprietary goods of all or nearly all of the various manufacturers, and, had it not been for the happening of the matters set forth in the complaint, it would have continued to make large purchases, as wholesale and jobbing druggists, of such goods, and would have been an active and constant competitor of all the other wholesale and jobbing druggists in the United States. The meaning of these allegations is obvious. It is that the plaintiff, or the firm of John D. Park & Sons, of which the plaintiff is

successor, could command large capital, and by reason of this they could purchase proprietary goods in larger quantities and more cheaply than the other wholesale and jobbing druggists, and that by reason of the adoption of the contract plan the plaintiff was unable to so do. Under the contract plan the prices of these goods were made uniform for fixed quantities, and dealers possessing large capital, and thereby enabled to purchase in large quantities, could not purchase for a less sum than the ordinary wholesale and jobbing druggist, and, not being able to purchase for a less sum, could not handle the goods more cheaply. The situation is not new. It is one to which the attention of the public has been frequently drawn in recent years. The great merchants, possessed of large capital, will persuade and induce manufacturers to sell to them more cheaply in consequence of their taking large quantities, and thus they are enabled to undersell and drive out of business the small merchants in their vicinity. I am not here going to question the right of the big fish to eat up the little fish—the big storekeeper to undersell and drive out of business the little storekeeper—but I do believe that the little fellows have the right to protect their lives and their business, and if they can, by force of argument and persuasion, induce manufacturers to establish a uniform price for fixed quantities, so that they can purchase as cheaply as the great merchants, and thus compete with them in the retail trade, they have the right to do so, and that no court of equity ought to interfere and restrain them from the exercise of this privilege.

The authorities have been largely discussed by my associates. I do not understand that we widely differ with reference to the law. Our chief controversy appears to arise out of the different conclusions to which we have arrived with reference to the allegations of facts contained in the complaint.

The judgment should be affirmed, with costs.

PARKER, C. J. It does not seem to me that this case comes within the principle of the Union Bluestone Co. Case, 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655, the Berlin & Jones Envelope Co. Case, 166 N. Y. 292, and kindred cases; and I am not without some acquaintance with those cases, inasmuch as the judgment affirmed in the first case was directed by me

at circuit, and the opinion in the last written by me. Nor is there any case in this court, so far as we have found, precisely analogous; but the principle underlying the decision in National Protective Association v. Cumming, 170 N. Y. 315, 58 L. R. A. 135, 88 Am. St. Rep. 648, is applicable, for reasons which I shall, as briefly as possible, suggest.

It will be observed that this is not a case where the manufacturers have combined for the purpose of raising prices to the consumer of the remedies they manufacture, nor does it appear that it is the object of the wholesale dealers, who form the aggressive part of this association, to increase the price to the consumer. If the object be to raise the price to the consumer, and thus increase the profits of the manufacturer and the agency by which he passes his goods on to his retail dealers, then it may well be that it is void because in restraint of trade, within the principle of the Union Bluestone Co. Case and the Berlin & Jones Envelope Co. Case, supra, notwithstanding the impression that there may be in some judicial minds, and possibly in others, that proprietary remedies are not entitled to be classed among the necessaries of life. The phrase "necessaries of life," as used in connection with the subject of restraint of trade, must certainly be regarded as broad enough to include articles of which the public consume $60,000,000 worth in a year.

The object of this association, however, is not to fix prices at which the manufacturer's goods must be sold. It attempts no restraint whatever upon the manufacturer in making prices. He may lower or increase the price at his pleasure. In that respect he is precisely as free as he was before the association was formed and he became a member of it. He may name the price which the consumer shall pay for his article now, as he could then, which means that he can both make the price, and enforce it by contract. Garst v. Harris, 177 Mass. 72; Fowle v. Park, 131 U. S. 88, 33 L. Ed. 67; Walsh v. Dwight, 40 App. Div. 513, 58 N. Y. Supp. 91.

That being so, the query naturally is, what restraint does the association put upon the manufacturer, and what can be the purpose of this association, which does not seek an increased profit at the expense of the masses?

The answer, as I read the complaint, is that the distributing

agencies—the wholesale dealers—by which the manufacturer's goods are passed on to the retailer, where the public may obtain them, have been taught by experience two things: First. That manufacturers have favorites, to whom they will give a larger rebate than to wholesale dealers as a class; and generally the favorite is the person or corporation buying the greatest amount of goods, as strong firms or corporations like this plaintiff, with a business of such dimensions that it claims damages in this case of one-half million of dollars. Second. That there are wholesale dealers who, for the purpose of getting clients away from their competitors, will give them some part of such extra rebate. To remedy this difficulty was the leading object of the association, and it was sought to be accomplished by placing all the wholesalers upon an equality, so that one should have no advantage over the other in dealing with retail dealers—a result which seems altogether desirable, because it is in the line of fair dealing.

Indeed, the principle which they undertake to secure in this case by contract is like that which the Sherman act attempted to secure in part, namely, equal freight rates to all interstate commerce shippers from common carriers. Before that act was passed, the claim was made (and evidence was adduced in support of it) that rebates of such magnitude were allowed in occasional instances to favorite shippers that it contributed largely, if not entirely, toward driving others out of business, which was deemed so against public policy that Congress set about placing all parties on an equality as to the cost of shipping goods by interstate common carriers. Assuming, as we must, that this legislation was along proper lines, for the purpose of protecting the principle of competition at a point where it seemed to be open to attack, it necessarily follows that it is in accord with public policy that these wholesale dealers may attempt to secure to themselves by contract like fair dealing on the part of the manufacturers, namely, that the rebate from the latter's "long prices," which the manufacturer allows as compensation to the wholesaler for distributing the goods to the retailers, shall be alike to all of them.

Before this association was formed, the complaint alleges, there was no fixed rebate, so that the manufacturer could and did allow to some a greater rebate than he did to others: and

that such a course of dealing might operate to enable one wholesaler to profit greatly at the expense of the others goes without saying. These agencies for distribution between the manufacturer and the retailer, called the "wholesale dealers," set about protecting themselves against what they deemed unfair competition which resulted to them when a manufacturer saw fit to give some one dealer a much larger rebate than allowed to them as a class.

After forming the association, they adopted first what is called in the complaint the "rebate plan." By that plan the proprietor fixes the price of his article, known as the "long price," and agrees to pay expressage and cartage to any point from which it may be ordered. The result is that if the long price is $1, the article is sold to the consumer at exactly that price in all parts of the country, which is very important to the proprietors, as they view it; and it must be borne in mind steadily that it is settled by authority that the proprietor of patent medicines has the right to fix the price at which his article shall go to the consumer, and a druggist who takes his articles for sale under an agreement that he will maintain the price is liable to respond in damages if he violates the contract. Garst Case, and others, supra. This plan was found to be insufficient to accomplish the desired result, because distributors violated their contracts to sell at the "long price."

The Detroit plan was then devised, and all the proprietors were to sell their goods only to wholesale or jobbing druggists, and not to the retail trade; and the committee on proprietary goods, which was composed of wholesale druggists, members of the association, agreed to furnish proprietors lists of wholesalers who could be depended upon to keep their contracts, and cut off lists of dealers who did not keep their contracts, or who bought as a mere cover for dealers who were known not to keep their contracts. Under this plan every wholesaler is at liberty to buy all the goods he chooses of the manufacturers, and can secure the same rebate as any member of the association, but he has to agree to the plan, and he has to keep his agreement. This the plaintiff refuses to do, and, under the agreement which the manufacturers have with this association, they are not at liberty to give plaintiff the benefit of the rebate rate which they give members of the association, so

long as he insists upon it that he will not abide by the rules of the association. He can have all the goods that he wishes, provided he pays "long prices" for them, but he cannot buy goods of the manufacturers who belong to this association at any less than the "long price." In other words, he cannot get the benefit of the rebate unless he will agree to come in and be bound by the rules of the association.

Wholesalers of whom complaint is made are not, therefore, attempting to prevent plaintiff from enjoying all the opportunities for profitable trade which they enjoy, for they have invited him to become a member—indeed, have urged him to do so, and assured him, in common with them, of every advantage which they possess; but they do attempt to prevent him or any other dealer from making uncertain in its rewards, if not wholly unprofitable, the business of distributing proprietary articles among retail dealers.

Plaintiff once attempted to do business in accord with the association, but apparently reached the conclusion that it would be more profitable to him, in the end, to deal independently, and so he refused longer to be bound by the rules of the association; and, hence, the strife between the association and plaintiff, which has culminated in this suit—plaintiff seeking to get the benefit of the same or a larger rebate than the members of the association, without being bound by its rules, and the association doing its utmost to persuade the manufacturers not to give him the benefit of the rebate so long as he continues to oppose the policy of the association.

The position of the respective contestants is not far different, it will be seen, from that of the parties to the action of Nat. Protective Ass'n v. Cumming, supra. Each is striving, as against others, to help itself or himself, and the question is here, as in that case, whether defendants, in taking such action as they did to prevent plaintiff from getting the business they wanted, are violating any rule of law. The wholesale dealers had the right to contract to secure such amount of rebate from the manufacturers as would reasonably compensate them for their services in distribution, together with the money invested. It is not claimed that the rate of compensation agreed upon was unfair, and, if there could be such complaint, it is difficult to see who could make it, except the manufacturers them-

selves, and they do not. It was clearly legal for any one of the wholesale dealers to sign the agreement, and to bind himself to sell at such prices as the manufacturer of the article should see fit to name as the selling price. The right to fix the price belonging to the manufacturer, it was proper for the wholesaler to agree to recognize that right, and govern himself accordingly. He had the right to insist that, in consideration of his performing those conditions in accordance with the wishes of the manufacturer, the latter should not give to other dealers the rebate provided for members of the association, unless such dealer should agree to be bound by the same conditions the members of the association took upon themselves; and he had a right to agree that, in order to secure the due carrying out of the agreement according to the spirit thereof, he would furnish to the manufacturer such evidence as he might secure from time to time, tending to show that members of the association were directly or indirectly violating its rules; and that which he could do alone, he and they could do as members of the association, provided, of course, their coming together did not operate against the rights of the general public; but as against other selling agents like themselves, no other public interest being affected, there could be no doubt of their right to agree with each other to do what any of them could do alone, so long as the motive was proper. The members of the association not only had the right to inform the manufacturers about those members within it, and the dealers without it, who were violating the plans agreed upon; but they also had the right to take such legitimate and honorable means as were within reach to ascertain what persons were violating the rules, and to give notice of it to all of the members of the association. "But that course operated," says the plaintiff, in effect, "to deprive me of the opportunity of buying goods on terms as favorable as the defendant wholesale dealers bought them." True, but it may be answered that "you could buy them on the same terms as the members of the association, which terms contain conditions governing the sale and the conduct of the members. Instead, you prefer to take the business chances to be found outside of the association; and, before the courts will help you, you must show

that the plans of the association, or its conduct under those plans, are unlawful as against you."

The position attempted to be taken at this juncture by the plaintiff is that, granting the plans which the members of the association adopted were legal, nevertheless the wholesale dealers can be proceeded against in this suit, because they compelled some or all of the manufacturers, against their will and inclination, to refuse to sell their goods to plaintiff, by threats, intimidation, blacklisting, and other unlawful acts of the association. This language has a formidable sound, but subjected to the same analysis as was given to the word "threats" in the connection in which it was used in the Nat. Protective Association Case, supra, it will prove to be without force. There are no threats alleged in this complaint on the part of defendants to do anything except that which they have a right to do, if the views so far expressed be sound; and we said in that case, and it is proper to repeat here, that a man may threaten to do that which the law says he may do, provided that, within the rules laid down in certain cases therein cited, his motive is to help himself. If there be any other "intimidation" of manufacturers than that to be found in the agreements and written plans of this association, and the steadfast purpose on the part of its members to carry them out according to their letter, it is not to be found in the complaint. The term "blacklisting" refers to the course of defendants in notifying the trade, in effect, that the plaintiff is outside of the association, and prefers to stay out of it rather than be bound by the rules and regulations which other members of the trade regard as fairest and best to all, and insisting that the penalties of such a course shall be meted out to him, namely, that he shall not be allowed any rebate upon any of the manufacturers' goods so long as he shall retain that position. The facts alleged by them are true. The notification is a part of the plan agreed upon by all, and the plaintiff courted it rather than do business on the same basis as his competitors, who together handled about 90 per cent. of the proprietary articles sold.

The plaintiff's characterization of the acts of the defendants do not establish a cause of action against the defendants if the acts themselves do not, and clearly their acts do not,

inasmuch as they are not aimed at preventing the plaintiff or any one else from participation in the trade to the same extent and on the same basis as themselves, but are intended simply to prevent plaintiff and others from enjoying the same or greater rebates than they get without bearing the burdens which they assume as a condition of receiving them, unless it may be said that the fact that they have agreed upon a basis of transferring the goods from the manufacturer that insures only reasonable profit and security to them as distributing agents is illegal and void. And this would seem to be impossible, in view of the fact that the wholesale dealers have not secured the authority to, nor attempted to, restrict either the price or the quantity sold of the goods dealt in. One of these elements has always been present in the cases of the past in this state, in which it has been held that there existed a combination in restraint of trade, which was against public policy and void.

It will be seen, therefore, that this is a controversy between opponents in business, neither side trying to help the public. Nor will the public be the gainer by the success of either. The motive behind the action of each party is self-help. It is the usual motive that inspires men to endure great hardships and take enormous risks that fortune may come. In the struggle which acquisitiveness prompts, but little consideration is given to those who may be affected adversely. Am I within my legal rights? is as near to the equitable view as competitors in business usually come. When one party finds himself overmatched by the strength of the position of the other, he looks about for aid. And quite often he turns to the courts, even when he has no merit of his own, and makes himself for the time being the pretended champion of the public welfare, in the hope that the courts may be deceived into an adjudication that will prove helpful to him. Now, while the courts will not hesitate to enforce the law intended for the protection of the public because the party invoking such protection is unworthy, or seeks the adjudication for selfish reasons only, they will be careful not to allow the process of the courts to be made use of under a false cry that the interests of the public are men-

aced, when its real purpose is to strengthen the strategic position of one competitor in business as against another.

I concur with Judge HAIGHT.

The judgment should be affirmed, with costs.

MARTIN, J. (dissenting). I am unable to concur in the opinion of the learned Appellate Division, or in the conclusion reached by a majority of this court. The demurrers to the amended complaint were sustained, both at the Special Term and in the Appellate Division, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, although apparently for different reasons. Several of the defendants stated, as additional grounds of demurrer, that the court had no jurisdiction over them, and that it had no jurisdiction of the subject of the action. The latter grounds were not considered or passed upon by either court, and obviously cannot be sustained.

The amended complaint was served in September, 1898. The defendants demurred, and the issue arising upon such demurrers was decided by the Special Term in May, 1900, and subsequently the final judgment was entered. The complaint is exceedingly lengthy, containing about 150 pages and about 600 folios. The labor necessary to a careful analysis of the multifarious allegations in this lengthy complaint is well-nigh appalling, and would naturally provoke a desire to avoid it if possible. But as the case is important, affecting not only the parties to this particular litigation, but involving a principle which affects the general public, its dealings in a large class of merchandise, the legality of monopolies organized to prevent competition in articles in common use, and the right to employ as a means to secure that end the boycotting or intimidation of persons engaged in the same general business, our duty demands the performance of that labor, however burdensome. Therefore, although it is impossible within the limits of this opinion to state all the material allegations of the complaint, yet a brief statement of the general and most material, including a general outline or history of the transactions upon which it is based, is quite essential to an understanding of the case.

The plaintiff is a Kentucky corporation, and its principal

place of business is in Cincinnati. Its business consists of the manufacture of proprietary articles or patent medicines, the purchase of the same class of articles from other manufacturers, and in selling such goods to retail dealers. Before the acts complained of, its trade was large and profitable. The defendant association was organized in 1876 under the name of the Western Wholesale Drug Association. Its name was changed in 1882, and it is an unincorporated association. It consists of active and associate members. The former are wholesale and jobbing druggists, and druggists who also own and manufacture certain proprietary goods, who alone comprise the active members of the association. Proprietors of proprietary articles, who only manufacture and sell their own goods, and manufacturers of chemical or pharmaceutical preparations, not interested in proprietary goods, constitute the associate members, but have no control or voice in the business or affairs of the association. The active membership includes at least two-thirds of the wholesale dealers in the United States, who control more than 90 per cent. of the wholesale and jobbing trade. Formerly patent medicines and proprietary articles were sold by the manufacturers through agents, who received a commission for their compensation. The trade, however, is now almost exclusively carried on through wholesale dealers and jobbers. The rebate or discount allowed to the wholesale dealers constitutes their profit. Before the acts complained of, the discounts or commission allowed by manufacturers were not fixed or uniform, nor was the custom as to delivery and charges allowed, in all instances, the same, and there was then an active competition between the various wholesale dealers. With this situation and method of transacting the business the manufacturers were content, but the wholesale dealers and jobbers were dissatisfied. In March, 1876, the association adopted a schedule of prices at which proprietary goods should be sold by each wholesale and jobbing druggist, and they were to be sold at the prices thus established without competition. Afterwards, and in 1882, the association adopted a plan under which the manufacturers were to be required to sell their goods. By it there was to be a contract between the manufacturer and buyer, in accordance with which the latter was to maintain certain prices, fixed

by the proprietor; the articles to be charged and invoiced at the full jobbing prices; the difference between the proprietor's price and the jobber's to be allowed to the buyer, provided he entered into a contract to maintain prices; the rebate to be not less than 10 per cent; and, wherever sent, the manufacturers to pay freight on all the goods sold.

In October, 1883, the association, by its active members, declared its purpose to pursue a continued and untiring opposition to the sale by its members of articles of such manufacturers as should not adopt its plan, or, having adopted it, should withdraw therefrom. Thereupon many of the manufacturers, at the solicitation of the officers, active members, and agents of the association, adopted its plan, until nearly all the manufacturers in the United States were induced by the association to do so. This was procured entirely by the representation of the association as to the benefit which would accrue to the majority of their distributing agents or vendees, who were unable to handle the goods as cheaply as the few who could command large capital; and the manufacturers were compelled to adopt it to protect themselves against the association and its active members, who constituted a great majority of their customers. All the active members of the association agreed and bound themselves to buy goods only of manufacturers who adopted the rebate plan, and not to cut or vary prices, save by the discounts and terms of credit mentioned in the contract. The manufacturers who adopted this plan have adopted substantially the form of contract required by the association, except in states having anti-trust laws, where written contracts are not required, but the purchaser is required to make a verbal agreement to the same effect, or to send letters agreeing thereto. The manufacturers who adopted that plan were compelled to do so to protect themselves with the wholesale dealers. The latter have bound themselves to give to retailers who are their customers only the terms of credit and discounts fixed by the contract, and not to pay freight, or to deliver the goods. The active members of the association are combining and conspiring to obtain an exclusive control of the wholesale and jobbing trade, as between the manufacturer and the retailer, in all classes of patent medicines or proprietary goods; to regulate and con-

trol the methods upon which such trade shall be carried on; to control the prices, discounts, allowances for freight, and terms of credit upon which such goods shall be sold to the various retail druggists throughout the United States; and also to destroy and prevent competition between the wholesale and jobbing druggists in the sale of such medicines or goods, and to limit and restrict the business of each of the wholesale dealers, or such of them as are in one locality, to certain exclusive territory, tributary or proximate to each.

Prior to the matters set forth, many of the wholesale dealers were purchasers of goods of the plaintiff, and, but for the action of the association, would now be. Before its action, the plaintiff was a large purchaser, as a wholesale dealer, of nearly all the manufacturers of such goods, especially of those who have adopted the plan of the association, and would have continued, but for the matters stated in the complaint. The plaintiff, so far as able, always has been an active competitor in the wholesale and jobbing drug trade, and has refused to combine and conspire with the defendants for the control of the trade and the destruction of competition therein, or to restrict its business to a limited territory. It has sold the goods of all the manufacturers at such prices and upon such terms as to credits, discounts, allowances for boxing, cartage, and for freight as it deemed advisable. The active members of the association now claim that the manufacturers are bound not to sell to any wholesale dealer except upon the terms and conditions imposed by the association, nor unless he signs such contract. They also claim that any person who purchases of a rebate manufacturer, unless he complies with the terms of the contract, is not to be trusted or allowed to handle the goods of such manufacturer.

In 1885 a committee of the association was authorized to and called upon rebate manufacturers to decline all the plaintiff's orders until it was reinstated by that committee. Thereupon many of them, to protect themselves against the action of the association, declined to sell goods to the plaintiff. In September, 1886, the association resolved that no agreement, unaccompanied by the rebate contract, should be considered on the rebate plan, and that where a firm had, by the committee, been found guilty of violating it, the manufacturers should

withhold supplies. Thereafter the committee, charging the plaintiff with a violation of the plan, sent circulars to that effect to the manufacturers, urging them to carry out the wishes of the association, and sent various letters to the same effect to rebate manufacturers, and to others who had not adopted the plan, and the association, by resolution, also declared that any member who should sell to a dealer whose orders had been declined at the request of the committee should be expelled; and thereupon every effort was made to induce all the members of the association and all the manufacturers to refuse to sell goods to the plaintiff, or to any person who would sell it goods. In 1887 it sent out another circular to the effect that any member who supplied goods to a dealer whose orders had been declined at the request of the committee was guilty of violating the spirit of his contract, and should be expelled, and advised the manufacturers to scrutinize orders coming from unusual quarters, and predicted that the firm now in warfare against the rebate plan could not long continue its methods. After receiving these various notices and resolutions, many of the defendants, both wholesale dealers and manufacturers, refused to sell to the plaintiff, or to any person who had supplied it with goods, and many of them demanded from each customer a contract by which he agreed not to sell to the plaintiff until it should be reinstated.

In 1888 a subcommittee of three was appointed by the association, with power to order all supplies withheld from any firm or individual whom it found guilty of violating its contracts, until the committee should become satisfied that such practices would be discontinued, and to request manufacturers to refuse supplies to any person thus found guilty. The association also authorized the omission from future official lists of rebate articles the goods of such proprietors as should continue selling to violators of the agreement, and gave a committee power to employ persons to investigate charges against any dealer. Such committee ordered all supplies of rebate goods to be withheld from the plaintiff, sent a circular to each manufacturer calling upon him to comply with such order, and many of such manufacturers thereafter refused to sell to the plaintiff, being compelled thereto to

protect themselves against the wholesale dealers' association and its active members. The committee also made efforts to ascertain from whom the plaintiff purchased supplies, and employed detectives for that purpose, who spied upon the plaintiff's business, and reported to the committee the names and places of business of persons shipping it goods. It thereupon sent, and is about to continue sending, circulars to manufacturers and wholesale dealers, known as "cut-off lists," containing the names of persons reported as selling to the plaintiff, and it thereupon made efforts, and is about to continue its efforts, to induce manufacturers not to sell to persons on such cut-off lists, and by reason thereof many manufacturers have refused to sell to persons thereon.

In 1893 the association adopted the Detroit plan, by which it required the manufacturers to compel the purchasers of their goods to accept a contract to become selling agents, to take the goods in fixed quantities, and in consideration of their maintaining fixed selling prices and complying with all the regulations of the association they were to receive a fixed per cent. for selling and a fixed discount for cash; the manufacturer to pay the freight; the prices not to be cut, and, if cut, the agency to be withdrawn, and all other agents notified not to sell them; and the manufacturers to sell only through selling agents. It then provided for the organization of a similar association in each town, which was to be given a list of all rebate goods. Thereafter the manufacturers were, in effect, required to submit full lists of all their customers to the association.

In December, 1893, the committee sent a circular to manufacturers and wholesale dealers, asking the former to furnish it a list of all their customers, and with this circular was a list of all persons who were entitled to purchase rebate goods, which did not include the plaintiff or persons selling to it. Thereupon many rebate proprietors, at the instance of the committee, agreed to confine their sales to the persons named on the lists, refused to allow to others any rebate, allowances, or discounts, and furnished the committee with full lists of their customers not named on the list from whom they received orders for any of their goods. The committee is making every effort to ascertain what manufacturers are still selling

to the plaintiff, and is employing detectives for that purpose, who watch and spy upon shipments made to the plaintiff and report the names of rebate manufacturers who are selling it goods. Similar action on the part of the committee was continued through 1894, which directly pointed to the business of the plaintiff, and the committee was authorized to continue its aggressive work against those who should not comply with the rules of the association, and funds were provided for that purpose.

In October of that year circulars were sent by the association to all manufacturers and wholesale dealers, whether members of the association or not, embodying the substance of its resolutions, which, in effect, were a reaffirmance of its intention to uphold its plan; that its committee should notify its members of the action of manufacturers who, having had their attention called to the matter, continued shipping their goods to the "Cincinnati cutter" (meaning the plaintiff), or to those who supply him, and notify such manufacturers that their articles would be taken from the rebate list, and in publishing the official list of rebate articles issued by it such names would be omitted therefrom; that the committee on proprietary goods be authorized to continue the aggressive work against cutters inaugurated during last year, and, to enable them to do this most effectually, means fully adequate to provide assistance be placed at their disposal. With such circulars, letters were sent for those receiving them to sign, by which they should agree not to ship goods to violators of the contract until they received assurances that such violations were discontinued, and, further, to furnish the committee with lists of their quantity buyers. Nearly all the wholesale dealers and manufacturers signed and returned such letters to the committee, being compelled to do this in order to protect their own business. Nearly all the wholesale and jobbing druggists are making and will continue to make every effort to induce manufacturers to confine the sale of their goods to the persons named in the list containing the names of persons claimed to be entitled to rebate goods, and all or nearly all the rebate manufacturers have refused to sell goods to the plaintiff, some of them stating that they would like to fill its orders, but that their relations with the asso-

ciation prevented, and that it would not pay them to antagonize the trade by selling to the plaintiff. The correspondence alleged in or annexed to the complaint shows clearly that many of the manufacturers who formerly sold to the plaintiff were compelled by the association to forego their own desires and disposition in that respect, and to refuse the plaintiff's orders by reason of the pressure to which they were subjected by the association and its active members.

The various resolutions, contracts, and agreements adopted by such association to prevent the plaintiff from conducting a wholesale and jobbing business in proprietary goods tended to injure and destroy its business, and the plaintiff's business is being injured and destroyed by the unlawful acts of the defendants. Nearly all the rebate manufacturers who have been willing to sell to the plaintiff or to persons who would supply it are refusing to do so, and will refuse unless the acts of the association and its active members are restrained; and that their acts are such as to irreparably damage the plaintiff's business, and it cannot obtain adequate relief at law without a multiplicity of suits.

With other relief demanded, the plaintiff seeks by this action to restrain the association, its active members, committees, and agents, from making and continuing its and their efforts to prevent the plaintiff from purchasing, and the manufacturers from selling their goods to the plaintiff, by threats, intimidation, or other improper means, from continuing a monopoly of such business, and from performing any act or acts that will impair or destroy competition in the sale thereof.

While this is a meager and brief synopsis of the complaint, and falls far short of containing all the material allegations therein, yet, as it gives a general outline thereof, it is perhaps ample to enable us to consider the question of its sufficiency. As all the allegations of the amended complaint, as well as all that can by reasonable and fair intendment be implied therefrom, are admitted by the defendant's demurrer, we are presented with the question whether they constitute a cause of action entitling the plaintiff to any relief whatever. Marie v. Garrison, 83 N. Y. 14; Sanders v. Soutter, 126 N. Y. 193; Coatsworth v. Lehigh Valley R. R. Co., 156 N. Y. 451; Stand-

ard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, 43 L. R. A. 854, 68 Am. St. Rep. 749; Ahrens v. Jones, 169 N. Y. 555, 559, 88 Am. St. Rep. 620. Under the recent authorities, pleadings are not to be strictly construed against the pleader, but averments which sufficiently point out the nature of the plaintiff's claim are sufficient if, under them, he would be entitled to give the necessary evidence to establish a cause of action. Rochester Ry. Co. v. Robinson, 133 N. Y. 242, 246; Coatsworth v. Lehigh Valley R. R. Co., 156 N. Y. 451, 457.

In determining that question we must assume that the association was organized and continued for the purpose of monopolizing and controlling the business of wholesale druggists and jobbers in the sale of proprietary articles or patent medicines in the entire United States, to prevent competition therein, and to compel the payment of greater and uniform commissions for the sale thereof. This was accomplished by forming a combination of two-thirds in number of all the wholesale druggists and jobbers in the United States, transacting more than 90 per cent. of all that business, and then by requiring them to refrain from selling such goods for a less commission or a lower compensation than was established by the association, and to decline to purchase goods of any manufacturer who should refuse to comply with its demands, or who refused to transact his own business in accordance with such rules and regulations as the association had, or from time to time might adopt. Thus, as is usual in the creation of such trusts or monopolies, the purpose of the association was to be accomplished by a combination to ruin and destroy the business of any manufacturer or wholesale dealer who should refuse to be controlled by the association in the transaction of his own business.

It is a plain perversion of the complaint to say that it states a claim or cause of action involving merely the right of a manufacturer to sell his goods to whom he will. The question presented by the complaint is whether individuals, firms, or corporations have a right to enter into a combination or conspiracy to prevent manufacturers of patent medicines from maintaining competition with others in the sale of their goods, or from selling them in such manner and upon such terms as they shall desire or agree upon with their customers, and, in

case they do, whether the members of the combination have a right to boycott such articles and the manufacturer as well. That such was the purpose of the association, and that it and its active members have carried that purpose into effect, is plainly alleged and not denied. It is also alleged that any person engaged in the manufacture of such commodities, who does not agree to enter into the arrangement required by that combination, or does not fulfill such agreement, is to be blacklisted by them, and they are to make every effort in their power to destroy his business.

Moreover, the association maintains a committee to spy out the business transactions of manufacturers, to ascertain if they sell to the plaintiff or to persons not members of the association or to persons who sell to others not such members, and, if it decides such to be the case, to send to practically all the wholesale dealers in the United States a notice in effect requiring them to refuse to deal with such manufacturers, and the penalty to such dealers for refusal is that all the members of the association will decline to purchase any of their goods.

It is to be observed that the claim of the plaintiff is, not that the manufacturers have voluntarily committed any wrongful acts of which it complains, as it is plainly alleged that they desire to sell it goods, and would do so but for the wrongful acts of the association and its active members. Its claim is that the National Wholesale Druggists' Association and such members have committed the wrong from which it has suffered by unlawfully combining together for the purpose, and by requiring manufacturers to refuse to sell goods to the plaintiff, and by enforcing that requirement by requiring a refusal by all its members to deal in such manufacturers' goods, to procure others to refuse to deal in them, and to publicly advertise such manufacturers as unworthy dealers, and thus injure or destroy their business. It is alleged and admitted that many, if not most, of the manufacturers, have been compelled against their will or inclination to refuse to sell their goods to the plaintiff by threats, intimidation, blacklisting, and other unlawful acts of the association and its active members. From the outset the action of the association and of its active members has been aggressive, persistent, and

continuous to ruin or exclude from business any manufacturer or dealer who should sell any of this class of goods to the plaintiff or others similarly situated. This scheme was planned, originated, and forced upon the manufacturers by the association and its active members. The manufacturers did not seek or inaugurate this plan, and adopted it only because they were compelled to do so to protect their business against the acts and threats of such active members, who alone desired its adoption and enforcement to obtain increased compensation, and to maintain prices without regard to the expense of conducting business. Under it the business of the manufacturers was to be and has been controlled by a combination of their customers. It is true that there was reserved to the manufacturers the right to establish a single price at which their goods might be sold, but it must be uniform and fixed, without regard to the expense of delivery or the amount of the sale. The rights to establish the amount of commissions to be paid, and to determine to whom their goods should be sold, were withdrawn, and no right was left them to make any agreement on the subject of their own property, or to make any agreement in regard to selling it, with any person other than those that were selected by the combination. In other words, the manufacturers were compelled by their customers to surrender to the latter practically all authority as to the manner of the sale of their own property and the selection of their customers, and, unless they did, their business was to be destroyed.

The foregoing facts are, in substance, alleged and admitted, and hence the question arises whether the association and its officers, agents, employes, and active members, by thus interfering with the plaintiff's business, have pursued a course of action that constitutes an invasion of or trespass upon its rights which renders them liable therefor. If this combination was formed to accomplish an unlawful purpose, or if its purpose has been accomplished by unlawful means, the plaintiff, who has alleged special damage, can maintain an action to recover by reason thereof.

Therefore in the further discussion of this case we are led to consider: First, whether the purpose for which the com-

bination was formed was lawful; and, second, whether it was to be accomplished by lawful means.

As to the purpose, it is obvious from the facts alleged that the conspiracy or combination was formed to restrain trade or commerce, to monopolize the sale of goods in common use, and to prevent competition therein. Such being its plain purpose, it is equally clear that it was unlawful. From a very early day it has been the policy of this state and most other jurisdictions that free and unrestricted competition in all business pursuits must be maintained, and the business maxim that "competition is the life of trade" has been established and sustained by their courts and legislation. While this principle has not been thus firmly and universally settled without discussion as to whether it does not work a greater hardship than advantage by crushing out weaker competitors and causing disaster to others by reduction of prices, yet, notwithstanding these arguments, the consideration which the question has received has led to the conclusion that public policy requires the continuance and enforcement of the rule of competition as a principle controlling business affairs in the various commonwealths. This principle of political economy is not based alone upon the theory that combinations to prevent competition will, of necessity, enhance the price, as there are notable instances where such combinations have, even permanently, reduced the price of articles thus traded in or manufactured; but it is founded upon the theory that such combinations may, as they usually will, enhance the price, and also drive small and worthy dealers out of business. In People v. Sheldon, 139 N. Y. 251, 263, 23 L. R. A. 221, 36 Am. St. Rep. 690, ANDREWS, C. J., said: "The question is, was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition, . . . one upon which the law affixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. . . . The gravamen of the offense of conspiracy is the combination. Agreements to pre-

vent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used." The right of the plaintiff to recover in this action does not rest upon the common law alone, as the Revised Statutes provided: "If two or more persons shall conspire to commit any act injurious . . . to trade or commerce, . . . they shall be deemed guilty of a misdemeanor" (2 Rev. St. [1st Ed.] pt. 4, c. 1, tit. 6, § 8, subd. 6), and this was re-enacted in subdivision 6 of section 168 of the Penal Code; while subdivision 5 provided: "If two or more persons conspire . . . to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats (or) intimidation, . . . each of them is guilty of a misdemeanor." In 1897 the Legislature passed an act which provided: "Every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restrained or prevented, is hereby declared to be against public policy, illegal and void." Laws 1897, p. 310, c. 383, § 1. That the acts alleged to have been committed by the defendants were injurious to trade and commerce, created a combination to monopolize the sale of articles in common use, restrained competition in the supply of articles or commodities, and established and maintained a monopoly restricting or preventing trade, is manifest, and therefore the combination or conspiracy of the defendants was for an illegal purpose, and the acts performed by them under it were also illegal. Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 258; Clancey v. Onondaga Fine Salt Mfg. Co., 62 Barb. 395; Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282; Leonard v. Poole, 114 N. Y. 371, 4 L. R. A. 728, 11 Am. St. Rep. 667; People v. Fisher, 14 Wend. 9, 14, 28 Am. Dec. 501; People v. Sheldon, 139 N. Y. 251, 261, 23 L. R. A. 221, 36 Am.

St. Rep. 690; Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Curran v. Galen, 152 N. Y. 33, 37, 37 L. R. A. 802, 57 Am. St. Rep. 496; People v. Milk Exchange, 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609; Pittsburg Carbon Co. v. McMillin, 119 N. Y. 46, 7 L. R. A. 46; Judd v. Harrington, 139 N. Y. 105; Cummings v. Union Blue Stone Co., 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655; Cohen v. Berlin & Jones Envelope Co., 166 N. Y. 292; Matter of Davies, 168 N. Y. 89, 101, 56 L. R. A. 855; United States v. Freight Ass'n, 166 U. S. 290, 322, 41 L. Ed. 1007; United States v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed. 259; Addystone Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. Ed. 136; Beach on Modern Contracts, § 1582; Richardson v. Buhl, 77 Mich. 632, 658, 6 L. R. A. 457; State v. Nebraska Distilling Co., 29 Neb. 700, 715; Craft v. McConoughy, 79 Ill. 346, 350, 22 Am. Rep. 171; People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 298, 8 L. R. A. 497, 17 Am. St. Rep. 319; Hawarden v. Y. & L. C. Co., 111 Wis. 545, 55 L. R. A. 828; U. S. v. C. & C. Co. (C. C.) 46 Fed. 432. In People ex rel Tyroler v. Warden, etc., 157 N. Y. 116, 132, 43 L. R. A. 264, 68 Am. St. Rep. 763, PARKER, C. J., very properly said, "In this one [jurisdiction] it is well established that the public welfare is best subserved by the encouragement of competition."

It was held in the Arnot Case that a contract by one producer with another to withhold his supply from the market was against public policy, and void; in the Curran Case, that contracts or arrangements with employers to coerce other men to join an organization under the penalty of the loss of their positions were against public policy, unlawful, and in conflict with the principle of public policy which prohibits monopolies and exclusive privileges; and in the Milk Exchange Case that a corporation to fix the price of milk justified a finding that the corporation was a combination, the purpose of which was inimical to trade, and therefore unlawful. In the McMillin Case a combination was entered into for the management and control of the business of manufacturing carbon, by which several corporations combined, the proceeds to be divided in accordance with the contract, and it was held illegal and void. In the Judd Case an agreement was made for the purpose of suppressing competition in the sale of sheep

and lambs, and it was held contrary to public policy, and void, and also that the fact that it was entered into for the purpose of protecting those interested from loss by unreasonable competition made no difference; that, the agreement being intended to control the markets, it was invalid, as the public might be prejudiced thereby, and whether they were in fact was immaterial. The Blue Stone Case involved a contract by which nearly all that kind of stone was to be sold at prices to be fixed and uniform, and sales to be apportioned between the producers, and it was held that it was void, in that it threatened a monopoly whereby trade in a useful article might be restrained, and its price unreasonably enhanced. In the Cohen Case there was an agreement between the manufacturers of 85 per cent. of the envelopes manufactured in the country and an outside manufacturer, which provided that the selling price of all envelopes manufactured by them should be fixed by a corporate agent, and it was held that the combination threatened a monopoly, whereby trade in a useful article might be restrained, and hence it was invalid. In the Freight Association Case there was a contract between common carriers, which resulted in increasing fare or freight beyond that which would exist if competition was free, and it was held invalid. In Beach on Modern Contracts it is said: "Combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable, and ought to receive the condemnation of the courts. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise or public work under governmental control in the interest of the public. But its tendency is destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the federal Constitution." Thus we see that agreements and acts injurious to trade or commerce, combinations to restrain competition in articles or commodities in common use, and monopolies restraining or preventing trade have, by a long line of authorities, been held to be illegal.

This brings us to consider whether the means the association and its active members employed to accomplish their

purpose were lawful. It will be remembered that the means adopted by them were that, if any dealer or manufacturer sold goods to the plaintiff or any other person not conforming to the requirements of the association, all its active members were required to and refused to sell the goods of such manufacturer, procured others to refuse to deal in his goods, publicly advertised him as an unworthy dealer, and thus sought to injure and ruin his business. Thus it was that the members of the association accomplished their purpose of preventing other manufacturers from selling goods to the plaintiff. Such means were clearly unlawful. Temperton v. Russell [1893] 1 Q. B. 715; Rourke v. Elk Drug Co., 75 App. Div. 145; People v. Fisher, 14 Wend. 9, 14; People v. N. R. S. R. Co., 54 Hun. 354, 2 L. R. A. 33, 5 L. R. A. 386, affirmed 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843; Steamship Co. v. McKenna (C. C.) 30 Fed. 48; Casey v. Cincinnati Typographical Union (C. C.) 45 Fed. 135, 146, 12 L. R. A. 193; Boutwell v. Marr, 71 Vt. 1, 7, 43 L. R. A. 803, 76 Am. St. Rep. 746; Doremus v. Hennessy, 176 Ill. 608, 614, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; Brown v. Jacobs Pharmacy Co. (Ga.) 41 S. E. 553, 57 L. R. A. 547.

In Temperton v. Russell a firm of builders refused to obey certain rules of the trade unions with regard to building operations, and the unions sought to compel them to do so by preventing the supply to them of building materials. In furtherance of this purpose, they requested the plaintiff, who supplied building materials to the firm, to cease supplying them, which he refused to do. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with such request, the defendants induced persons who had entered into contracts with him for the supply of materials to break their contracts, and not to enter into further contracts with the plaintiff, by threatening that the workmen would be withdrawn from their employ. The plaintiff sustained damage by reason thereof, and the court held that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contract, and for maliciously conspiring together to injure him by preventing persons from entering into contracts with him. In the Fisher Case, SAVAGE, C. J., in effect said that the owner of an article was not required to sell it for any particular

price, or for less than a stated price, but he had no right to state the price at which others should sell their goods, and that all combinations to effect such a purpose were illegal. In the McKenna and Casey Cases it was held that all associations designed to interfere with the management and control of lawful business, or in dictating the particular terms upon which its owners should conduct it, by means of threats of injury or loss, by interfering with their property or traffic, or with their lawful employment of other persons, are pro tanto illegal combinations or associations. The same principle was involved in the case of Curran v. Galen, supra.

In the Boutwell case it was said: "Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of the majority of an organized body in matters involving the rights of outside parties is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concerted action, if legal in itself, becomes illegal when the concert of action is procured by coercion."

In Doremus v. Hennessy it was said: "No persons, individually or by combinations, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. Losses willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit, will sustain an action. . . . 'Malice,' as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and, if a wrongful act is done to the detriment of the right of another, it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition."

In Brown v. Jacobs Pharmacy Co. it was said: "Suppose that a number of merchants should agree to fix the price of certain goods, and not to sell below that price. If there were no statute on the subject, and the case rested on the common

law, the agreement would simply be nonenforceable; but if they went further, and agreed that, if any other merchant sold at a less price they would force him to their terms, or drive away those dealing with him by violence, threats, or boycotting, it would cease to be a mere nonenforceable contract, and if, in its execution, damages proximately resulted to such other merchant, he would have a right of action."

Before concluding this discussion, there is another aspect of the situation which seems worthy of consideration, or of mention, at least. If the decision of the court below shall be affirmed, it obviously results in an unfair and unjust discrimination by this court in favor of capital or business and against labor by enforcing the law as to one and refusing as to the other. As we have already seen, this court, in Curran v. Galen, unanimously held that a combination or association of workingmen, whose purpose was to hamper or restrict the freedom of the citizen in pursuing his lawful trade or calling, through contracts or arrangements with employers to coerce workingmen to become members of the organization and to come under its rules and conditions under penalty of loss of their positions and of deprivation of employment, was against public policy, and unlawful; while in this case it is held that a combination or association of wholesale dealers in useful articles, whose purpose is to hamper and destroy the freedom of the plaintiff and others to pursue their lawful business by contracts or arrangements with manufacturers to coerce them to become members of their organization and to come under its rules and conditions under penalty of the destruction of their business, was not against public policy nor unlawful. As these decisions could not be harmonized, they would result in a discrimination in favor of capital or business which could not be sustained upon any just or legal principle known to or established by statute or common law. With the existing conflict between capital and labor, such a distinction would not only be unjust, but extremely unfortunate, especially as it can be justified upon no principle of ethics, law, or equity.

Thus far we have discussed the illegality of contracts involving the creation of monopolies, agreements that prevent competition, and the right of individuals or corporations by threats, intimidation, or interfering with the business or traf-

fic of others to enforce or compel parties to enter into contracts in restraint of trade, under the general principles of the common law and the statutes, and upon the broad ground that they apply to all lawful contracts or business, subject to very slight limitations. We have regarded the principle of the cases cited and the provisions of the statute as sufficiently broad to apply to all transactions relating to trade and commerce, to the free pursuit of any lawful business, trade, or occupation, and to the sale of any article or commodity in common use. The learned court at Special Term, however, seems to have emphasized and placed great reliance upon the fact that the articles to which this controversy relates were not the prime necessaries of life, or articles which were necessary to the existence of man, and also upon the ground that, as they were patent medicines, each owner possessed a greater right as to their disposition than he otherwise would, including their sale free from competition among dealers to whom they were sold; while the learned Appellate Division seems to have based its decision upon the ground that patent medicines are not necessaries of life as to which public policy might restrain a combination to fix an exorbitant price.

Obviously the provisions of the statutes and the principles of the decisions to which we have referred are not limited in their application to the necessaries of life, but, as we have already seen, they have a much broader application, and include all articles and commodities in common use, or that are the subject of lawful trade or commerce. In determining whether there has been a conspiracy in restraint of trade, the character of the trade sought to be monopolized is immaterial, so long as it is a lawful one. People v. Duke, 19 Misc. Rep. 292, 296. Nor is the operation of the rule forbidding contracts restraining competition limited to trade in necessaries of life, but it extends equally and alike to all commodities of commerce. Wire Cloth Case (Sup.) 19 N. Y. Supp. 413, note. It is apparent from the character of this litigation that the articles and commodities to which it relates are both articles of trade and commerce, and such as are in common use. This is obvious when we consider the fact that they amount annually to about $60,000,000, and constitute more than two-thirds of all the drugs and medicines sold in the United States.

Therefore the fact that they may not be necessaries of life in the strictest sense is not controlling, and the decision of the courts below cannot be sustained upon that ground.

Moreover, the fact that the medicines may have been patented or copyrighted, so as to give the owners the exclusive right of sale, can make no difference. It must be constantly borne in mind that the purpose of this action is not to compel the manufacturers, against their will or disposition, to sell their goods to the plaintiff, but its purpose is to enjoin the association, its active members, committees, and agents, from compelling manufacturers or dealers, against their will, to refuse to sell their property to the plaintiff, by a system of intimidation and boycotting. It is not and cannot be properly claimed that the plaintiff can compel the manufacturers to sell it their merchandise without their consent or against their will, and the fact that it consists of proprietary articles or patent medicines can make no difference whatever. With few exceptions, which have no application here, courts can compel no owner of property to sell or part with his title to it without his consent, or to sell or deliver it to any particular person. So that the rule is the same where a party is the exclusive owner of the property, whether it is patented or not, at least so far as the question here involved is concerned. Besides, there are authorities which hold that patentees or owners of patents cannot legally enter into a combination in restraint of trade, or for the creation of monopolies in the sale of their goods, and that such contracts are unlawful. It is said: "Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other." National Harrow Co. v. Hench, 27 C. C. A. 349, 39 L. R. A. 299; Parke & Co. v. Druggists' Ass'n, 84 N. Y. St. Rep. 1064; Vulcan Powder Co. v. Powder Co., 96 Cal. 510, 515, 31 Am. St. Rep. 242; National Harrow Co. v. Bement & Sons, 21 App. Div. 290, 47 N. Y. Supp. 462; Beach on Monopolies & Industrial Trusts, § 175; Tiedeman on State & Federal Control of Persons & Property, vol. 1, p. 412.

If, however, it was conceded that the possession of their patents authorized the manufacturers to enter into combina-

tions which otherwise would be illegal, still that principle would have no application whatever to this case. Here it is not the manufacturers or the patentees who have organized the combination complained of, or who have sought to create a monopoly and prevent competition. The patentees have not forced or attempted to force the wholesale druggists to transact their business in any particular manner. But it is the wholesale druggists' association, organized and controlled by the druggists, who have no special property or interest under the manufacturers' patents, who seek to and have enthralled the patentees themselves and such of their customers as will not bow in subjection to a method of transacting their own business, inaugurated and enforced by the association. In other words, the plaintiff desires relief, not from the voluntary act of the patentees, or from any combination into which they have voluntarily entered or which they control, but asks to be relieved from a combination of their customers who have by threats and intimidation compelled them, notwithstanding their desire to do so, to refrain from selling their property to the plaintiff or other customers without the consent of the association.

Hence, by the allegations of the complaint, it is made apparent not only that the defendants entered into and formed an illegal combination or conspiracy to interfere with the plaintiff's trade by preventing the various manufacturers of these goods from selling them to it, and thereby seriously interfered with and injured its business, but it is equally clear that the means employed by them to accomplish that purpose, by threats, intimidation, boycotting, and continued and persistent efforts to injure any manufacturer who should continue to deal with it, were also illegal. Therefore the defendants were not only guilty of an illegal act in combining to injure the plaintiff's business, but were likewise guilty of an illegal combination to accomplish the plaintiff's ruin by illegal and improper means. The purpose being illegal, and the means by which it was accomplished being also illegal, it follows that the action of the defendants was illegal, and, as against the plaintiff, should be restrained. These considerations lead to the conclusion that the facts alleged in the amended complaint and admitted by the demurrer were suf-

ficient to constitute a cause of action, and that the courts below erred in holding to the contrary and in dismissing the complaint.

It follows that the final and interlocutory judgments herein, and the order dissolving the preliminary injunction, should be reversed, and the demurrer to the complaint overruled, with costs in all the courts, but with leave to the defendants, upon the payment of one bill of costs, within 20 days, to file and serve an answer to the amended complaint herein.

CULLEN, J. (dissenting). I concur in the opinion of MARTIN, J., for reversal, but I wish to add a word as to my position on a question discussed in the opinion of Judge HAIGHT. I agree with him that the combination between the jobbers to force the manufacturers to sell to each of their number at exactly the same price and upon the same terms, and to sell to no one else on any better terms, was entirely legal, and that it was within their rights to accomplish this result by refusing to deal with or handle the goods of any manufacturer who would not comply with their demand. If the object of the combination ceased here, it would not be subject to criticism. But the scheme adopted goes further. It requires not only the manufacturer to sell at the same price to each jobber, but to compel each jobber to sell to the consumer at the same price, by refusing to sell goods to any one who would not comply with these requirements. It is in this respect that the agreement is vicious and operates in restraint of trade, for it destroys competition among the jobbers.

O'BRIEN and BARTLETT, JJ., concur with HAIGHT, J., and PARKER, C. J. VANN, J., concurs with MARTIN and CULLEN, JJ.

Judgment affirmed.

KLINGEL'S PHARMACY v. SHARP & DOHME

(Court of Appeals of Maryland, 1906. 104 Md. 218.)

McSHERRY, C. J. The question now before us is merely one of pleading and involves only the sufficiency of the aver-

ments of the declaration. To the declaration the defendants demurred, and the superior court of Baltimore City sustained the demurrer and entered judgment for the defendants for costs, and from that judgment this appeal was taken.

In order to determine whether the ruling of the superior court was eorrect, it will be necessary to set forth with some fullness the allegations of the declaration, and the objections which have been urged against its legal sufficiency will then be stated and considered.

The declaration avers that Klingel's Pharmacy of Baltimore City, the plaintiff, is a duly-licensed, incorporated retail vendor of drugs and druggists' supplies; that it was and still is able, ready, and willing to pay cash for all kinds of drugs and druggists' supplies needed by it and suitable for the proper conducting of its said business; that the defendants the Calvert Drug Company and Sharp & Dohme are corporations which have been for some time and still are engaged in the business of selling drugs and druggists' supplies; that the other defendant, the Baltimore Retail Drug Association, is a corporation formed and organized for the purpose, amongst other things, of unlawfully maintaining amongst dealers in drugs and druggists' supplies the maximum rate schedule of prices and of preventing, in restraint of trade, all vendors of drugs and druggists' supplies, who are unwilling to acquiesce in and submit to the prices so fixed by it, from buying at any price the drugs and druggists' supplies needed and desired by them in their business, by the unlawful coercion of threats that any and all vendors of drugs and druggists' supplies who shall sell for less than the schedule prices shall be themselves blacklisted, and all sales of drugs and druggists' supplies be refused them; that all the members of said retail drug association are bound by an agreement not to sell such supplies to any person or corporation who will not agree to maintain its maximum schedule of prices; that the plaintiff has steadily refused to beeome a member of said Baltimore Retail Drug Association, or to unite with it and with its members and with the other named defendants in said combination and conspiracy to coerce the dealers in drugs and druggists' supplies to maintain said established prices by refusing to sell to them and by threats that, unless they shall so maintain the same,

they shall be boycotted and placed on the blacklist and be disabled from buying any drugs and druggists' supplies whatever; that though the plaintiff has repeatedly applied to the Calvert Drug Company and to Sharp & Dohme and to sundry other druggists to sell to it drugs and druggists' supplies, tendering itself ready, able, and willing to pay cash, yet the said defendants and said other druggists have refused to sell it drugs or druggists' supplies at any price whatsoever, because of said unlawful conspiracy and combination, coupled with the threat that for any violation of such unlawful combination and conspiracy the parties violating it should themselves be blacklisted and all sales be refused to them; that the avowed object of the conspiracy was and is to maintain in restraint of trade a maximum price of drugs and druggists' supplies, and to compel the plaintiff to become a member of said combination and to agree to charge all its customers such maximum price or to be driven out of business; that the retail drug association is wholly composed in its membership of such vendors, and that the entire power of the association and of its members is unlawfully exerted to coerce, by blacklisting and by potent and effective threats of boycotting, the illegal purposes and acts aforesaid; that the wrongful refusal of the Calvert Drug Company and of Sharp & Dohme and of other parties to sell to the plaintiff was and is the direct result exclusively of said unlawful combination and conspiracy and of the wrongful actings and doings of said retail drug association in carrying out the unlawful object and purpose of said conspiracy; that the action of the defendants is not an action taken by them in the bona fide exercise of their supposed right to sell or to refuse to sell to whomsoever they please, nor in the bona fide exercise of their supposed right to advise other vendors as to selling or not selling their drugs and druggists' supplies, but, on the contrary, that by the said combination and conspiracy the defendants did wrongfully and maliciously intend to injure and destroy the plaintiff's business, which they have succeeded in doing; and that such injury to the business of the plaintiff is the direct result of said illegal, malicious, and wrongful conspiracy and of the acts done in furtherance thereof.

Here, then, it is distinctly charged that there is an unlawful

conspiracy to exact and to maintain a maximum schedule of prices for drugs and druggists' supplies in restraint of trade; and it is with equal directness alleged that, because the plaintiff will not enter into that combination and conspiracy, no drugs or supplies have been or will be sold to it by the defendants, and that no other dealer in those articles is or will be allowed to sell to it without incurring the penalty of being blacklisted and boycotted as threatened by the defendants, which action of the defendants was not taken in the bona fide exercise of their right to sell or to refuse to sell to whom they pleased, but was taken with a malicious intent to injure and destroy the business of the plaintiff, whereby the plaintiff has been wholly deprived of the ability to purchase supplies and has as a result been prevented from pursuing its lawful avocation. By sustaining the demurrer, the superior court held that these facts, if true, did not constitute a valid cause of action. We are not apprised by the record as to the ground upon which the trial judge based his decision. But the reasons assigned in the brief of the appellees to sustain that ruling are, first, because (a) an agreement or conspiracy not to sell to the plaintiff is not actionable, and because (b) no facts are alleged that amount to unlawful coercion by the defendants to the damage of the plaintiff; secondly, because the declaration is bad for misjoinder. These grounds are not tenable, as we shall see in a moment. They have been assumed obviously in consequence of a misinterpretation of the averments of the narr.

In the last analysis it will be seen that there are three salient facts averred in the declaration. First. A combination to exact and maintain a maximum schedule of prices for drugs and druggists' supplies is asserted to exist between the defendants and others in restraint of trade. That combination, if it does exist, and we are bound to assume that it does when dealing with the issue raised by the demurrer, is a criminal conspiracy at the common law and is punishable by fine and imprisonment after indictment and conviction. It is the offense of forestalling the market, and is defined to be every practice or device by act, conspiracy, words, or news to enhance the price of victuals or other merchandise. Roscoe, Ev. 437; 3 Inst. 196; 3 Bac. Ab. 261; 1 Russ. 169. As it creates a

monopoly it was held to be unlawful at the common law as being in restraint of trade and against public policy. Mitchel v. Reynolds, 1 P. Wms. 181. The English statutes on this subject which were merely declaratory of the common law were repealed by 7 & 8 Vict. c. 24. In the United States, whilst we hear little now about forestalling, engrossing, or regrating, we hear much of "corners" and "trusts" which are, in many instances, the old offenses under new names, since they are frequently attempts by a combination or conspiracy of persons to monopolize an article of trade or commerce and so to enhance its price. Where the direct and immediate effects of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are constantly being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. Addystone Pipe & Steel Co. v. U. S., 175 U. S. 244, 44 L. Ed. 136. Though this was said by the Supreme Court in a case which arose under the anti-trust act of Congress of July 2, 1890, it equally applies to combinations and conspiracies of the character described in the declaration set forth in the record now before us. A combination is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice the public, or oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief; and the same proposition in one form of expression or another is laid down in all the criminal law. Bish. Cr. L. § 172; Desty, Cr. L. § 2; 3 Chitty, Cr. L. § 1138; Arch. Cr. Pr. 1830. A "corner," when accomplished by confederation to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, 8 Am. Rep. 159; People v. Melvin, 2 Wheeler, Cr. Cas. (N. Y.) 262; People v. North River Sugar Refining Co. (Sup.) 3 N. Y. Supp. 407, 2 L. R. A. 33 and notes. In Van Horn v. Van Horn, 52 N. J. Law, 284, 10

L. R. A. 184, it was ruled that an action will lie for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business, resulting in damage. S. C., 10 L. R. A. 184.

The cases of Kimball v. Harman & Burch, 34 Md. 407, 6 Am. Rep. 340, and Robertson v. Parks et al., 76 Md. 118, decide nothing at variance with the principles just stated. They hold that an act which does not constitute a cause of action when done by one person does not become actionable merely because it has been done by conspirators; that an unlawful combination to do an act, which, if done, would injure another, does not of itself and without more furnish a ground for a civil suit; and finally, as a corollary to the previous proposition, that though a conspiracy to do an injury exists, a plaintiff cannot recover against the conspirators unless some act has been done in furtherance of the conspiracy which has resulted in damage to him. "The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie." Kimball v. Harman, supra. Having described a combination which at the common law is a criminal conspiracy, the declaration proceeds to set forth the acts done in execution of the unlawful conspiracy, and to aver that they were maliciously done, and then to allege the injury resulting therefrom.

The second salient fact averred in the narr. consists of a statement of the acts done in furtherance of the conspiracy. Those acts are twofold: First, a refusal by the defendants to sell to the plaintiff, an act they would have the legal right to do, if when done it were not done in the execution of and to carry into effect a criminal conspiracy in restraint of trade; and, secondly, coercion and intimidation practiced by the defendants upon other vendors of like commodities, by means of threats to blacklist and to boycott such vendors, if they sold to the plaintiff any drugs or druggists' supplies, whereby they were deterred from selling those articles to the plaintiff, unless it joined the association.

"It is a part of every man's legal rights," said Judge Cooley, "that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."

Cooley, Torts, 278. Again: "The exercise by one man of his legal right cannot be a legal wrong to another. . . . Whatever one has a legal right to do another can have no right to complain of." Id. 688. It was upon this principle that the decision in Bohn Manf. Co. v. N. W. Lumbermen Ass'n, 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, was placed. In that case a large number of retail lumber dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and they provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, the secretary of the association should notify all the members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact to all the members of the association, and it was held that no action would lie, and that there was no ground for an injunction. There was nothing unlawful in this. Each member of the association had the legal right to refuse to sell the lumber which he owned, if he saw fit to refuse, and the collective refusal of all the members was equally lawful. So, too, the defendants in this case had a perfect legal right to refuse to sell to the plaintiff any drugs and druggists' supplies owned by them, and it would have been wholly immaterial whether that refusal was the result of whim, caprice, prejudice, or malice, if the bare refusal to sell had been the head and front of their offending. But the refusal to sell was not the exercise of a legal right, if that refusal were a mere step in the development and enforcement of a scheme to forestall the market in restraint of trade, or to drive the plaintiff into becoming a member of an organization which would control the prices he could charge for his wares and which would thereby deprive him of the liberty to contract for the sale of his goods according to his own judgment of their value. Whilst an act which is in itself lawful can never become unlawful simply because it may be done by several persons instead of by only one, yet the same act may be unlawful when it is a means of accomplishing an unlawful end. An act performed in furthering an unlawful enterprise cannot be

a lawful act, though the same act would be free from censure if done with some other view. If it be conceded that a person has the lawful right to do a thing irrespective of his motive for doing it, the proposition that an act lawful in itself is not converted by a bad motive into an unlawful act is a mere abstract truism. But if the meaning of the proposition is that when a person or an aggregation of persons, if influenced by one kind of motive, has a lawful right to do a thing, the act is still lawful when done with any motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, then the proposition is neither logically nor legally accurate. In so far as a right is absolutely and unqualifiedly lawful, it is lawful whatever may be the motive of the actor; but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause, and this justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and the motive combined. Plant v. Woods, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 302. The intent or knowledge with which an act is done may make a lawful act unlawful. It is no offense to receive stolen goods; it is an offense to receive them knowing them to be stolen. The act of receiving the goods is identically the same in each instance. In the one case it is lawful, in the other the same act is unlawful because the scienter makes it so. To utter forged paper is no offense, but to utter it knowing it to be forged is criminal. It is the same act in each instance, but it is lawful or unlawful according to the absence or presence of a guilty knowledge. Hence it is fallacious to say that an act which is lawful can never become unlawful, and equally fallacious to say that, though it is lawful for a person to refuse to sell to another, it is also lawful for the same person in combination with others to likewise refuse to sell when such refusal forms part of a scheme to raise and maintain the price of commodities in restraint of trade, and is not the bona fide exercise of their right to refuse to sell.

The declaration goes a step farther and charges that the defendants coerced other vendors of drugs and druggists'

supplies to abstain from selling those articles to the plaintiff, and that they did this by means of threats of blacklisting and boycotting such vendors if they should sell to the plaintiff whilst it was not a member of that combination, by reason of which threats those vendors were intimidated and were deterred from selling to the plaintiff. The plain meaning of all this is: The defendants notified the plaintiff that, unless it entered into the union or combination, and charged the same prices which other members thereof were required to charge, the defendants would by threats of coercion, by blacklisting, and by boycotting other dealers, deprive the plaintiff of the ability to carry on its lawful business. Is such an interference with the legal right of an individual to conduct a lawful business in a lawful way tolerated by the law? And can it be permitted to flourish unscathed because no open deeds of violence or breaches of the peace have been committed? It would be a reproach to the law if such were the case. A boycott means the confederation, generally secret, by many persons whose intent is to injure another by preventing all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators. 8 Cyc. 639. The courts have generally condemned those combinations which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them by means of threats and intimidations of the right to conduct the business in which they are engaged according to the dictates of their own judgment. My Md. Lodge v. Adt., 100 Md. 248, 68 L. R. A. 752. Whilst an owner of property has the legal right to refuse to sell it to another, and whilst, as in the case of Bohn Manf. Co. v. N. W. Lumbermen Ass'n, supra, several owners may unite to do the same thing, just as laborers may organize to improve their condition and to secure better wages, and in fact may refuse to work unless such better wages are obtained, still "the law does not permit either an employer or employé to use force, violence, threats of force or threats of violence, intimidation, or coercion to secure these ends (My Md. Lodge v. Adt., supra); nor does it permit vendors to resort, with impunity, to the like means to force or compel others engaged in the same business to abandon their

own method of conducting a lawful business in a lawful way. In Erdman et al. v. Mitchell et al., 207 Pa. 79, 63 L. R. A. 534, 99 Am. St. Rep. 783, it was held that a conspiracy by a number of persons that they will, by threats and strikes, deprive a mechanic of the right to work for others because he does not join a particular union, would be restrained.

The case at bar involves no right of labor, but the principles which have upheld the jurisdiction of courts to intervene to prevent injury and loss that would result to both employer and employé, if a threatened strike or boycott were not prevented, are broad enough to include the situation presented by the declaration now before us. In the case of Plant v. Woods, supra, it was held that members of a labor union were entitled to an injunction restraining the members of another union, from which they had withdrawn, from doing acts in pursuance of a conspiracy to compel their reinstatement, by appeals to their employers to induce them to rejoin and to discharge them in case of refusal, accompanied by threats intimating results detrimental to the employer's business and property in case of a failure to comply, coercive in effect upon the will, although they committed no acts of personal violence or physical injury to property, where complainants have been injured by such acts, and there is reason to believe that further proceedings of the same kind are contemplated which will result in still more injury to them. In the course of the judgment it was said: "It is true they committed no acts of personal violence, or of physical injury to the property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this." If these facts warrant a court of equity in restraining anticipated injury, why do they not furnish a sufficient ground to enable a court of law to award damages for the injury which they have actually caused? The coercive threats of blacklisting and boycotting have been as efficacious in restraining the minds of the persons upon whom they operated according to the averments of the narr.

as would have been the consummated boycott itself; and the result to the plaintiff's business has been just as disastrous as though the persons who have been deterred or terrorized by these threats from selling to it had been in fact blacklisted by the defendants. The threat to boycott produced the consequences intended by the defendants as completely as an actual boycott would have done, and it is no answer for them to say that no other overt act, or no act involving a breach of the peace, was done to make effective their unlawful combination. The threatened boycott was successful. It deterred persons from selling to the plaintiff, and as a direct result ruined the plaintiff's business. These are the allegations of the narr., and, if proved to be true, they show an injury to the plaintiff as the direct consequence of the lawless acts of an unlawful confederation, and entitle the plaintiff to recover.

The threat to injure the business of the persons who might sell to the plaintiff was just as efficacious in preventing them from doing the thing they were warned not to do, and therefore just as potent in causing damage to the plaintiff, as an actual boycott would have been. A threat is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent. And. Law Dic. That such a threat, coupled with the damage necessarily flowing from it in the prosecution of a conspiracy to do an unlawful thing, is sufficient to constitute a good cause of action, has repeatedly been decided. The principle is stated by Mr. Addison in these words: "Injuries to property indirectly brought about by menaces, false representations or fraud create as valid a cause of action as any direct injury from force or trespass. Thus, if the plaintiff's tenants have been driven away from their holdings by the menaces of the defendant, damages are recoverable for the wrong done." Addison, Torts, 20. The threats were overt acts in the scheme of the conspiracy, and were as effective in accomplishing the result intended to be attained as would have been an agency or instrument of physical force had it been resorted to.

The damages alleged to have followed the acts and conduct of the defendants are charged to be the direct and necessary results of those acts and that conduct. Every element, there-

fore, which is required to make out a valid cause of action is distinctly set forth in the narr., and the demurrer should have been overruled, unless there has been a misjoinder of defendants. It is insisted that the retail drug association should not have been made a party, but the answer to this objection is found in the narr. itself, since by appropriate averments it charges that defendant with a complicity in and as being the medium to execute the various illegal acts which go to make up the cause of action.

Of course, what has been said must be understood as applying to the case as made by the pleadings. We know nothing of or concerning the facts which a trial of the issues may elicit.

For the error committed in sustaining the demurrer, the judgment will be reversed, with costs.

Judgment reversed, with costs above and below, and new trial awarded.

CENTRAL SHADE ROLLER CO. v. CUSHMAN

(Supreme Judicial Court of Mass., 1887. 143 Mass. 353.)

Bill in equity for an account, and for an injunction to restrain the defendant from violating an agreement made by him with the plaintiff. Hearing in the supreme court on the demurrer of the defendant, before Devens, J., who sustained the demurrer, and the plaintiff appealed. The facts are stated in the opinion.

J. B. Warner, for plaintiff.

The attempt to apply to this subject the rules which forbid a restraint of trade is without precedent. Morse Twist-drill Co. v. Morse, 103 Mass. 73; Taylor v. Blanchard, 13 Allen, 370, 373; Vickery v. Welch, 19 Pick. 523; Leather Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Printing, etc., Co. v. Sampson, L. R. 19 Eq. 462; Peabody v. Norfolk, 98 Mass. 452. The burden is upon the defendant to make it "plainly and obviously clear that the contract is against public policy; such being the burden upon a party who seeks to put a restraint upon the freedom of contract." Rousillon v. Rousillon, 14

Ch. Div. 351, 365; Phippen v. Stickney, 3 Metc. 384; Marsh v. Russell, 66 N. Y. 288; Stearns v. Barrett, 1 Pick. 443, 450; Morris v. Colman, 18 Ves. 437; Wallis v. Day, 2 Mees. & W. 273. See Mitchel v. Reynolds, 1 P. Wms. 181; S. C. 1 Smith, Lead. Cas. 756; Gale v. Reed, 8 East, 80. An agreement to sell the entire product of the business to one party, who agrees to buy it, cannot possibly be a restraint. Schwalm v. Holmes, 49 Cal. 665; Long v. Towl, 42 Mo. 545; Wiggins Ferry Co. v. Chicago & A. R. Co., 73 Mo. 389; Ainsworth v. Bentley, 14 Wkly. Rep. 630; Perkins v. Lyman, 9 Mass. 521; Barfield v. Nicholson, 2 Sim. & S. 1; Stiff v. Cassell, 2 Jur. (N. S.) 348; Ingram v. Stiff, 5 Jur. (N. S.) 947.

The cases in which agreements to prevent competition have been adjudged illegal are usually those where the end is accomplished by a wholesale restraint of trade, as in contracts not to manufacture, or not to sell at all, or except by permission of an association. Hilton v. Eckersley, 6 El. & Bl. 47; Hornby v. Close, L. R. 2 Q. B. 153; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; India Bagging Ass'n v. Kock, 14 La. Ann. 168; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558; Raymond v. Leavitt, 46 Mich. 447; Craft v. McConoughy, 79 Ill. 346; Stanton v. Allen, 5 Denio, 434. See Phippen v. Stickney, 3 Metc. 384; Gibbs v. Smith, 115 Mass. 592. It is not a principle of law that competition is to be guarded to the extent of prohibiting an honest combination of persons having similar interests. Collins v. Locke, 4 App. Cas. 674; Wickens v. Evans, 3 Younge & J. 318; Skrainka v. Scharringhausen, 8 Mo. App. 522; 1 Wood, Ry. Law, 600; Central Trust Co. v. Ohio Cent. Ry., 23 Fed. Rep. 306; Hare v. London & N. W. Ry. Co., 2 Johns. & H. 80; Mallan v. May, 11 Mees. & W. 653, 665; Griffiths v. Earl of Dudley, 9 Q. B. Div. 357, 364; Perkins v. Lyman, 9 Mass. 521; Palmer v. Stebbins, 3 Pick. 188; Com. v. Hunt, 4 Metc. 111, 130; Carew v. Rutherford, 106 Mass. 1; Bowen v. Matheson, 14 Allen, 499; Snow v. Wheeler, 113 Mass. 179; Long v. Towl, 42 Mo. 545, 549. If any danger is apprehended from the possible abuse of powers of combination, we submit that the court should wait until it has a clear case of illegal action within the limits already recognized by the law. It cannot be well to meet the possible evil, which may never

arise, by selecting an inoffensive case as the occasion for an interference which may be itself the greater evil. Master Stevedores' Ass'n v. Walsh, 2 Daly, 1.

Moorfield Storey, for respondent.

The contract is clearly in restraint of trade, and therefore void. Certainly a court of equity will not enforce it. Craft v. McConoughy, 79 Ill. 346; Raymond v. Leavitt, 46 Mich. 447; India Bagging Ass'n v. Kock, 14 La. Ann. 168; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Stanton v. Allen, 5 Denio 434; Arnot v. Pittston & Elmira Coal Co., 68 N. Y. 558; Keeler v. Taylor, 53 Pa. St. 467; Story, Eq. § 292 *et seq.*: California & Hecla Min. Co. v. Quincy Min. Co., (N. Y. Sup. Court) ——; Saratoga Co. Bank v. King, 44 N. Y. 87; Hartford & N. H. R. R. v. New York & N. H. R. Co., 3 Rob. (N. Y.) 411.

The court will look through the form to the substance. Craft v. McConoughy, *ubi supra;* Central Ohio Salt Co. v. Guthrie, *ubi supra.*

The fact that in this case the combination relates to articles protected by patents is immaterial.

The general rule is modified where an article is patented only so far as is necessary to secure the patentee the fruits of his patent. Mitchel v. Reynolds, 1 P. Wms. 181; S. C. 1 Smith, Lead. Cas. 756; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64.

W. ALLEN, J. The contract which is sought to be enforced by this bill (and the validity of which is the only question presented by the demurrer and argued by the parties) was made between the plaintiff, of the first part, and three manufacturers, under several patents of certain curtain fixtures known as "Wood Balance Shade-rollers," of the second part, in pursuance of an arrangement between the persons forming the party of the second part that the plaintiff corporation should be created for the purpose of becoming a party to the combination, was to prevent, or rather to regulate, competition between the parties to it in the sale of the particular commodity which they made.

This is a lawful purpose, but it is argued that the means employed to carry it out—the creation of the plaintiff cor-

poration and the terms of the contract with it—are against public policy and invalid.

The fact that the parties to the combination formed themselves into a corporation of which they were the stockholders, that they might contract with it, instead of with each other, and carry out their scheme through its agency, instead of that of a pre-existing person, is obviously immaterial, and the only ground upon which it can be argued that the contract is invalid is the restraint it puts upon the parties to it.

Does the contract impose a restraint as to the manufacture on the sale of balance and shade-rollers which is void as against public policy? The contract certainly puts no restraint upon the production of the commodity to which it relates. It puts no obligation upon and offers no inducement to any person to produce less than to the full extent of his capacity. On the contrary, its apparent purpose is, by making prices more uniform and regular, to stimulate and increase production.

The contract does not restrict the sale of the commodity. It does not look towards withholding a supply from the market in order to enhance the price, as in Craft v. McConoughy, 79 Ill. 346, and other cases cited by the defendant. On the contrary, the contract intends that the parties shall make sales, and gives them full power to do so; the only restrictions being that sales not at retail or for export shall be in the name of the plaintiff, and reported to it, and the accounts of them kept by it; and the provision that, when any party shall establish an agency in any city or town for the sale of a roller made exclusively for that purpose, no other party shall take orders for the same roller in the same place. To these restrictions, clearly valid, there is added the one which affords an argument for the invalidity of the contract,—the restriction as to price. That restriction is, in substance, that the prices for rollers of the same grade, made by different parties, shall be the same, and shall be, according to a schedule contained in the contract, subject to changes which may be made by the plaintiff upon recommendation of three-fourths of its stockholders. In effect, it is an agreement between three makers of a commodity that for three years they will sell it at a uniform price fixed at the outset, and to be changed only by consent of a majority of them. The agreement does not refer to

an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture. It does not look to affecting competition from outside,—the parties have a monopoly by their patents,—but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts, and to put a price on the products of their own industry.

But we cannot assume that the purpose and effect of the combination is to unduly raise the price of the commodity. A natural purpose and a natural effect is to maintain a fair and uniform price, and to prevent the injurious effects, both to producers and consumers, of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason for holding it to be invalid as in restraint of trade or against public policy.

We have not overlooked other provisions of the contract, which were adverted to in the argument, but we do not find anything which renders it invalid, or calls for special consideration.

In the opinion of a majority of the court, the entry must be, demurrer overruled.[79]

QUEEN INSURANCE CO. v. STATE OF TEXAS

(Supreme Court of Texas, 1893. 86 Texas, 250.)[80]

GAINES, ASSOCIATE JUSTICE. This action was brought in the name of the state of Texas, by its attorney general,

79—See Skrainka v. Scharringhausen, 8 Mo. App. 522 (twenty-four competitors agreed to eliminate competition by selling through a common agent for six months, held valid).

80—Only the opinion of the court is given, with the portions omitted, as noted.

against the Texas Insurance Club, an association of insurance agents, and against 57 foreign insurance corporations doing business in this state under permits granted in pursuance of the statutes of the state. It is alleged in the petition that the Texas Insurance Club was created with the consent and by the procurement of the other defendants, with the object of organizing a combination for the purpose of fixing a uniform rate of insurance throughout the state upon a graduated scale, and of thereby preventing competition among each other, and at the same time of establishing a fixed rate of commission to be paid to the agents of such companies. It is claimed in the petition that the acts charged against the defendants show an illegal combination, as defined and denounced in the act of March 30, 1889, entitled "An act to define trusts and to provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and to promote free competition in the state of Texas." Laws 1889, p. 141. It is also claimed in the petition that the combination, purposes, and acts of the defendants are in restraint of trade and contrary to public policy, and therefore illegal at common law. The prayer was that the Texas Insurance Club be dissolved, and that the permits of the other defendants be canceled, or that the defendants be enjoined from carrying out the objects of the combination as alleged in the petition.

The trial court held that the act of March 30, 1889, did not apply to a combination to fix rates of insurance or the commissions of the agents of insurance companies, and also that the act was unconstitutional and void, by reason of the thirteenth section, which excepted from its operation "agricultural products and live stock while in the hands of the producer or raiser;" and sustained a demurrer to so much of the petition as charged a violation of that statute. However, the demurrer to that part of the petition which charged a combination alleged to be illegal at common law was overruled; and after hearing the evidence the court held that the effective allegations of the bill were sustained by the proof, and entered a decree enjoining the defendants from making or carrying out any agreements between them establishing fixed rates of insurance, or fixing the percentage of commissions to be paid to their agents.

The defendants appealed, and the attorney general filed cross assignments of error. The court of civil appeals affirmed the judgment of the district court in every particular, but held that the statute of March 21, 1889, was invalid, because it nowhere in terms declared that "trusts" such as are defined in the first section are illegal.

Assuming that the whole case is before us upon the pleadings and facts as determined by the court of civil appeals, we will proceed to dispose of the questions involved in it, so far as may be necessary for its disposition. [The court then proceeded to consider certain questions relating to the Act of March 21, 1889, and found that the acts charged against the defendants were not embraced within the provisions of the statute. The opinion of the court then proceeded as follows:]

Having determined that the acts charged against the defendants are not embraced within the provisions of the statute, it becomes necessary to decide whether or not they are unlawful at common law. We have found no direct decision in any court of last resort upon the point. The decisions upon cases involving similar questions are not altogether harmonious.

We have seen that contracts in unreasonable "restraint of trade" are illegal in the sense that they are not enforceable. Of these, there is a well-defined class,—those in which the parties seek to bind themselves by an agreement that one of them shall cease to pursue his vocation. The terms are usually employed by the courts in this sense. It is clear that the combination in question is not of this class. But, employing the terms in a looser sense, it is frequently said that agreements to raise or depress prices between persons engaged in the same business is a combination in restraint of trade. That such contracts, as applied to certain kinds of business, are unlawful, in the sense that they are not valid, there is no doubt; but whether the rule extends to every class of business is a different question. It extends to a business in which the public have a right, as distinguished from a business which may be merely beneficial to the public. Such is the carrying trade, and especially the business of transportation by railroad and communication by telegraph. Railroad and telegraph companies derive their right to condemn property from the fact that their business is established for a public use. So, the

business of gas companies, who have acquired a right to lay their pipes in the public streets, in analogy to that of railroad companies, is treated as public. People v. Chicago Gas Trust Co. (Ill. Sup.), 22 N. E. 798.

Thus far we may clearly see our way; but when we come to a business not public in its character, in the sense previously indicated, difficulties arise. We take it as being well settled that all the combinations among dealers in provisions or other articles of prime necessity are deemed in law contrary to public policy, and contracts to effect or carry out such combinations are held void. Bagging Ass'n v. Kock, 8 La. Ann. 168; Lumber Co. v. Hayes, 76 Cal. 387; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

Combinations of this character are commonly called "monopolies," but they are not the technical monopolies known to the common law. 4 Bl. Comm. c. 12, § 9. The doctrine that they are illegal probably had its origin in the laws against forestalling, regrating, and engrossing,—offenses which, at a very early day in England, were made punishable by statutes which have since been repealed. They were probably offenses at common law, though their precise nature, as defined in that system, seems to be obscure. 1 Bish. Crim. Law, (8th Ed.) § 525. According to Blackstone, "forestalling" was defined by the statute "to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there; or of any practices to make the market dearer to the fair trader;" and "regrating" "to be the buying of corn or other dead victual in any market and selling it again in the same market or within four miles of the place." "Engrossing" is "the buying up large quantities of corn or other dead victual with intent to sell them again." As we have said, these statutes have been repealed in England. They were applicable to a condition of society which no longer exists. But it is to be presumed that the common-law principle which underlies them is the origin of the modern doctrine on the subject.

We find that most of the cases in which agreements among manufacturers and dealers to increase the price of their wares and commodities related to some merchantable article of

necessity or of great utility. In the case of Bagging Ass'n v. Kock, supra, it is said in the opinion that bagging is an article "of prime necessity" to cotton planters. In the elaborate opinion delivered in the trial court in the Sugar Refining Case, Judge Barrett lays stress upon the fact that sugar is "a necessary article of commerce." People v. North River Sugar Refining Co., (Cir. Ct.) 3 N. Y. Supp. 401. So, also, in the opinion in the same case in the supreme court. 7 N. Y. Supp. 406. In the opinion in the same case in the court of appeals the question was not discussed, it not being deemed necessary to a decision of the case. 121 N. Y. 582. In Richardson v. Buhl, (Mich.) 43 N. W. 1102, the court also say: "The article" in controversy "has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country." Similar expressions may be found in other cases.

On the other hand, in Roller Co. v. Cushman, 143 Mass. 353, an agreement between three manufacturers of shade rollers to control the manufacture and sale of their products was held not unlawful, distinctly upon the ground that their wares were not articles of "prime necessity." The doctrine was adhered to and reaffirmed by the same court in the subsequent case of Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92. In the latter case the court say: "Their contract had no relation to an article of prime necessity, or to staple commodities ordinarily bought and sold in market." In most of the cases in which agreements between persons doing a business not of a public character have been held contrary to public policy and void, the contracts related not only to articles of commerce, but to staple commodities.

Insurance is a mere contract of indemnity against a contingent loss. Though it is an important aid to commerce, it is not a business of commerce, or one in which the public have any direct right. No franchise is necessary for its prosecution, and no one has a right to demand of an underwriter that his property shall be insured at any rate. Any individual may execute a policy, and so any company incorporated for the purpose of insuring property may refuse to execute one, unless it be so bound by its charter. Forced insurance, for obvious reasons, is detrimental to the public interest, and it

is therefore not probable that such restriction will be found in any charter.

Labor is necessary to production and transportation, and therefore it is not merely an aid, but a necessity, of commerce. It is advantageous to the public, and in that sense they have an interest in it. The services of professional men are likewise indispensable in most civilized communities, and are presumably likewise advantageous to the public. The public have an interest in them in the same sense in which they have an interest in the business of insurance.

It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render their services below a stipulated rate should be held contrary to public policy and void upon the same ground.

Combinations among workingmen to increase or maintain their wages by unlawful means are unlawful. But are such combinations unlawful when the only means resorted to to accomplish their objects is a refusal on part of the parties to the agreement to accept employment at a lower rate of wages than that designated in the contract? This is the next question for determination, and it is not without difficulty.

In treating of criminal conspiracies, Mr. Bishop says: "Whatever the language of some of the old cases, no lawyer of the present day would hold it indictable for men simply to associate to promote their own interests, or specifically to raise their wages. If the means adopted were mutual improvement of their mental or physical powers, mutual instruction in their methods of doing their work, mutual inquiring and imparting information as to the wages paid in other localities, or anything else of a like helpful nature, severally enabling the members to obtain higher wages, nothing could be more commendable, and nothing further from the inhibition of the law; or, if employers should combine simply to reduce wages, not proposing any unlawful means, perhaps we might not so much commend them, yet still they would stand under no disfavor from the law,—the result of which is that a conspiracy to enhance or reduce wages is not indictable per se, while yet

it may be so by reason of proposed unlawful means." 2 Bish. Crim. Law, § 233, subd. 2. The author then proceeds to consider certain means which have been determined to be unlawful, in which a mere agreement by men not already under contract not to work unless for a certain rate of wages does not seem to be included.

But the matter seems to be involved in some obscurity. In a previous section the author cites the remarks of distinguished English judges, including Lord MANSFIELD, to the effect that such agreements are unlawful in themselves, but adds: "In a later case, EARLE, J., perhaps with a view to conforming to the statute of 6 Geo. IV, c. 129, § 4, yet distinctly qualifying the words of Lord MANSFIELD, stated it as settled that workmen are at liberty, while they are perfectly free from engagements, and have the option of entering into employment or not, to agree among themselves to say, 'We will not go into any employ unless we can get a certain rate of wages.'"

Mr. Freeman, in his note to the case of People v. Fisher, says: "Recent decisions in England, and the spirit now prevailing there and in this country, of giving encouragement to workmen in their endeavors to associate themselves into organizations for their mutual benefit, have settled beyond question that unemployed workmen may unite, and agree not to work unless for a certain price. This is a plain right, upon which no doubt ought ever to have existed." 28 Amer. Dec. 508. The learned annotator then quotes: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they may choose to agree to demand;" citing Reg. v. Rowlands, 5 Cox Crim. Cas. 436, 460.

In Com. v. Hunt, 4 Metc. (Mass.) 111, it was held by the supreme court of Massachusetts that an association among journeymen bootmakers, in which they bound themselves not to work for any person who employed one not a member of the association, was not indictable at common law. Following that decision, that court also held, in Bowen v. Matheson, 14 Allen 499, that an agreement among certain defendants by which they sought to compel the plaintiff, a shipping master, among other things, to ship men from them at an established rate of wages, was not illegal, and did not give a ground of action, although the plaintiff's business had been damaged by

the conspiracy. So, also, in Carew v. Rutherford, 106 Mass. 10, they say that "it is no crime for any number of workmen to associate themselves, and agree not to work for or deal with certain men or certain classes of men, or work under certain wages or without certain conditions."

We take it, therefore, that the weight of authority is against the proposition that such a combination among workmen was indictable at common law. It does not follow, however, that any agreement of that character is not against public policy, and therefore void; but it is proper to show that it was not an indictable offense at common law, for, if so, any contract in pursuance of such an agreement would have been illegal, in the sense that it would not be enforceable in the courts.

Upon the question whether an agreement among workmen to raise their wages is contrary to public policy, as being in restraint of trade, there is some conflict in the authorities. In Collins v. Locke, 4 App. Cas. 674, the judicial committee of the privy council held that a contract between stevedores in a certain port, by which they agreed to parcel out the stevedoring business, was not void, as a contract in restraint of trade, at common law. The court say: "The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it, and to prevent competition at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means,—that is, by provisions reasonably necessary for the purpose,—though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade."

In Association v. Walsh, 2 Daly, 1, which was a civil action, it was held that it was not unlawful for workmen to agree that they would not work below certain rates, and that a by-law of an association which provided a pecuniary penalty for the violation by way of a fine could be recovered. The decision was not by a court of last resort, but the opinion is able, learned, and exhaustive, and, as it seems to us, convincing. See, also, Sayre v. Association, 1 Duv. 143.

In Ladd v. Manufacturing Co., 53 Tex. 172, it was also decided, in effect, that a combination among the compressing

companies in the city of Galveston, by which they increased the prices for compressing cotton, was not unlawful. This proposition is based distinctly upon the ground that compressing cotton is not a public business.

On the other hand, it is held by the supreme court of Illinois, in More v. Bennett, 29 N. E. 888, that an association of stenographers, one of the objects of which was to control prices to be charged for work by its members, is an illegal combination, and that its rules would not be enforced so as to sustain an action of one member against another. The cases cited all relate to combinations between carriers or dealers in, or producers of, staple articles of commerce, as the opinion itself shows. The court also quote from Tiedeman on Commercial Paper (section 190), as follows: "All combinations of capitalists or of workingmen for the purpose of influencing trade in their especial favor by raising or reducing prices are so far illegal that agreements to combine cannot be enforced." The cases cited by this author do not sustain the proposition. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, was a combination to affect the price of coal. Stanton v. Allen, 5 Denio, 434, was an association composed of the proprietors of canal boats to regulate the rate of transportation. In the other cases cited—Brisbane v. Adams, 3 N. Y. 129; Noyes v. Day, 14 Vt. 384; Doolin v. Ward, 6 Johns. 194; and Thompson v. Davies, 13 Johns. 112—it is simply held that agreements to prevent competition in bidding at auction sales are contrary to public policy, and therefore void. Combinations of that character tend to affect the price of the thing to be sold, and directly to defraud the owner. In his work on Sales, the same author lays down the same proposition, and attempts to sustain it by the same authorities. Tied., Sales, § 303. Notwithstanding our great respect for the court which made the decision, we cannot concur in the doctrine announced in the case of More v. Bennett. It is opposed to the well-considered cases on the same point which we have previously cited, and which as we think, lay down the correct rule.

Now, the business of stevedores is essential to maritime commerce, and that of compressing cotton is an important aid to traffic in that staple. In that particular, neither are secondary to the business of insurance. The public has an interest

in the one, just as it has in the others; and, if it be law that those engaged in lading ships and in compressing cotton may combine to regulate their charges, we see no good reason why insurance companies may not combine for a similar purpose. The same may be said of lawyers, physicians, dentists, and others pursuing like occupations, in which many persons may have an interest in the services to be performed.

But there is a stronger reason for holding illegal combinations to enhance prices among those engaged in occupations which are licensed, and are protected from unlicensed competition, than among those of whom no such license is required. In Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, Judge AGNEW, who delivered the opinion, puts the case very strongly against a combination among coal companies to control the market, and yet says: "To fix a standard of prices among men in the same employment, as a fee bill, is not in itself criminal, but may become so when the parties resort to coercive restraint or penalties upon the employe or employers, or, what is worse, to force of arms." For these reasons, we conclude that the combination in this case is not illegal at common law.

But, if it should be determined that the combination charged in the petition is so far illegal as to make any contract growing out of it void at common law, we are not prepared to say that it would either subject the corporations engaged in it to a forfeiture of their franchises, or to be enjoined at the suit of the state. The application of either rule would result in grave consequences. A corporation which exceeds its powers in an important particular commits a breach of an implied condition of its contract, and may be properly held subject to the penalty of a forfeiture.

But the sanction of a rule of law which holds a contract not made punishable merely void as against public policy is ordinarily simply to refuse the parties any remedy for its enforcement, and it may be doubted whether the courts would interfere to enjoin their performance. The courts may command parties to a legal contract in restraint of trade to refrain from violating its provisions, but can they enjoin a party to a contract merely void to refrain from its performance? The rule is to leave the parties as they have left themselves. If

the contract be executory, a court will not enforce it in favor of one claiming under it; if executed, it will not rescind it at the suit of a party claiming against it. The public policy which creates the rule in these cases, it seems to us, has gone no further in providing a sanction for its enforcement than to refuse a remedy in the courts to either party to the agreement.

The North River Sugar Refining Case was tried, and appealed to the supreme court in banc, and thence an appeal was again taken to the court of appeals. It was stubbornly contested and argued with distinguished ability on both sides at every stage of its progress. In the opinion of the trial judge, stress is laid upon the fact that the tendency of the combination was to create a monopoly in restraint of trade. 3 N. Y. Supp. 401. In the supreme court this is made a principal ground upon which the opinion of the court is based. The opinion recognizes that it was a conspiracy in restraint of trade under the statute of New York, and an indictable offense. 7 N. Y. Supp. 406. But it is notable that the court of appeals expressly waive any consideration of that question, and hold that the defendant corporation had subjected its charter to forfeiture, by reason of its having exceeded its powers in forming with other corporations a trust in the nature of a partnership. It may be that to restrain a party from performing a contract merely void at common law, as being contrary to public policy, would be to violate the rule which leaves all the parties to suffer the consequence of their improvident engagements of such a character, and gives relief to none; but this would not apply if the interest of a third person was to be affected. The question is not without difficulty, and, since its determination is not necessary to this case, we do not decide it. It may be that a thorough examination of the authorities would show that it is settled.

We would not be understood as holding that the combination declared in this case is not detrimental to the public, and that sound policy does not demand the suppression of that and all like organizations of a similar magnitude. There are certain contracts, and perhaps combinations, which the law regards as being against public policy. The courts cannot extend the rule merely by reason of their opinion as to what the law ought to be. What other combinations or contracts should

be held illegal on the ground of public policy is a political question,—that is to say, one which it is the province of the legislative department of the government to determine. The legislature has power to weigh the public interest even "in golden scales," and, if such combinations be found detrimental, they can denounce the evil, and provide the remedy.

It follows that we are of opinion that this action cannot be maintained, and therefore the judgments both of the court of civil appeals and of the district court are reversed, and judgment is here rendered for the defendants in the latter court, the plaintiffs in error in this court.

Reversed and rendered.[81]

ONTARIO SALT CO. v. MERCHANTS SALT CO.

(Court of Chancery of Ontario, 1871. 18 Grant (U. C.) 540.)

STRONG, V. C. The bill in this case is filed by the Ontario Salt Company and five other companies, all incorporated under the provisions of the general Acts of the Legislature relating to joint stock companies, and several individuals as plaintiffs, against the Merchants Salt Company, a corporation also constituted under the general Acts referred to; and it seeks to have the defendants restrained from doing certain acts in contravention of covenants contained in an indenture made between the plaintiffs and defendants. This indenture the bill alleges to have been entered into "with the view of successfully working the business of salt manufacturing, and to further develop and extend the same, and for the purpose of procuring and assuring combined action and mutual protection in their said business." By the indenture the plaintiffs and defendants agreed "to combine and amalgamate and unite under the name of the Canadian Salt Association for the purposes stated in the recital of the said agreement of mutual protection in the general management of salt operations, for

81—See Aetna Ins. Co. v. Commonwealth, 106 Ky. 864 (where it was held that the members of the insurance association were not subject to indictment for conspiracy, but the court *arguendo*, assumed that the association was illegal, p. 880).

the purpose of selling on such terms as to secure as far as possible a fair share for their capital invested in such operations, and generally for the purposes of combined action and mutual protection in all matters relating to the manufacture and sale of salt in Canada and elsewhere." The bill further states as follows: "The said agreement provided for the appointment of trustees from among and by whom a president and vice-president were to be appointed; and the said trustees were also to appoint and provide for the payment of such other officers or agents as they might deem necessary for fully and effectually carrying out the agreement," and that in pursuance of the agreement trustees and officers were appointed. It is also alleged by the bill that "the agreement provides that all the parties to it should sell all salt manufactured by them through the trustees of the association, and should sell none except through the said trustees;" and that no party should be permitted to withdraw from the agreement until six months after its date, and then not until after three months' notice.

This bill was demurred to for want of equity. Upon the argument of the demurrer, the learned counsel for the defendants insisted upon the following points: *First,* that the agreement set forth in the bill was contrary to public policy as tending to a monopoly. *Secondly,* that it was void as being in undue restraint of trade. *Thirdly,* that it was a contract *ultra vires* of the defendants and such of the plaintiffs as are incorporated companies. *Fourthly,* that it was an agreement of such a peculiar nature that, even though binding at law, this Court would not enforce it; and lastly, that the Court ought to decline to interfere on the ground of hardship.

I am of opinion that on none of these grounds ought this demurrer to be allowed.

It is out of the question to say that the agreement which is the subject of this bill had for its object the creation of a monopoly, inasmuch as it appears from the bill that the plaintiffs and defendants are not the only persons engaged in the production of salt in this province, and therefore the trade in salt produced here by other persons, and in salt imported from abroad, will remain unaffected by the agreement, except in so far as prices may possibly be influenced by it. The objection on this head is rather that the agreement has for its object

the raising the price of salt, and for that reason is illegal, as constituting the old common law offence of "engrossing," or at least is void as being against public policy.

Engrossing is defined to be "the getting into one's possession or buying up large quantities of corn or other dead victuals with intent to sell them again." [Benjamin on Sales, p. 386.] In the case of the King v. Waddington, [1 East. 143.], the defendant was convicted of the offence of trying to raise the price of hops in the market, by telling sellers that hops were too cheap, and planters that they had not a fair price for their crops, and for contracting for one-fifth of the produce of two counties, when he had a stock on hand and did not want to buy, but merely to speculate how he could enhance the price. And Waddington was imprisoned for four months and fined £500. Mr. Justice Grose, in pronouncing sentence, saying, that "It would be a precedent of *most awful moment* for this Court to declare that hops, which are an article of merchandise, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article the price of which it is a crime by undue means to advance." The common law which was so severely applied in this case has since been abolished in England by the statute 7 and 8 Vic. cap. 24; and although I have been unable to discover that any similar legislation has taken place in this country, I cannot suppose that a law which would strike at a vast number of transactions which, with manifest benefit and profit to the community, are daily being entered into without the least suspicion on the part of those engaged in them that they are doing wrong, would now be applied as part of our common law. As regards the United States, Mr. W. Story, in his Treatise on Sales, at p. 647, says: "These three prohibited acts" (referring to engrossing and the kindred offences of forestalling and regrating) "are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy." I must therefore conclude that long usage has brought about such a change in the common law since the decision in the King v. Waddington, that even if it could be said that the object of the parties to the agreement

in question here was to enhance the price of salt, the contract would be neither illegal nor against public policy.

Were I to hold this agreement void on any such ground, I should be laying down a rule, which if applied, would cause great inconvenience in trade, and one, the necessity for which would at this day be discountenanced by all public and scientific opinion.

I am far, however, from saying that if this doctrine of the King v. Waddington is still to be considered as law, it would reach such an agreement as this. I think a distinction would be found in the consideration that here the article, the price of which was to be regulated, was not to be purchased in the market, but was actually to be produced by the parties themselves, and this product they could not be compelled to part with except on their own terms. Then the object of the agreement was not unduly to enhance the price, but as it is expressly alleged in the bill, to enable the parties by concerted action to combat an attempt on the part of foreign producers and manufacturers unduly to depreciate it. I know of no rule of law *ever* having existed which prohibited a certain number (not all) of the producers of a staple commodity agreeing not to sell below a certain price—and nothing more than this has been agreed to by the parties here.

Further, it is expressly alleged in the bill that the effect of the deed was to constitute a partnership; and if this is so, there can be nothing objectionable in the stipulation that all the salt produced—which is to form the partnership stock—should be sold through the agency of the trustees. The first objection therefore fails.

I cannot either agree that this contract is void on grounds of public policy, as being in undue restraint of trade. The law on this subject is now well settled, though there is sometimes much difficulty in applying it. *Prima facie* every contract in restraint of trade is void; but if an agreement appears to be for a partial restraint only, for valuable consideration and reasonable, the law sanctions it.

Here there is certainly some restraint imposed by the parties upon themselves, for they agree not to sell except through the intervention of the common agents, such salt as they may produce. But this is a partial restraint only; they put no restric-

tion on their right to continue the manufacture, neither do they stipulate not to sell at all, but merely not to sell except through the medium of particular persons. Then the mutual obligations imposed by the contract constitute a sufficient consideration.

The remaining question, as to how far the restraint is reasonable, introduces the only difficulty to be found in the case. In Horner v. Graves, [7 Bing. at 743], TINDAL, C. J., explains the sense in which the expression *reasonable* is to be used in this connection, as follows:—"We do not see how a better test can be applied to the question, whether 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."

The question then here is, whether or not this agreement does do hurt to the public interest? The authority principally relied on by Mr. Crooks was the case of Hilton v. Eckersley, [6 E. & B. 47.]. There a bond entered into by the millowners of a certain district in Lancashire, conditioned to carry on their works in regard to wages, and the engaging of labourers and time of work, according to the resolutions of a majority for a period of twelve months, was held void as being in undue restraint of trade, and so contrary to public policy. It is to be observed that in Hilton v. Eckersley each millowner completely surrendered his right of carrying on trade without restraint to the majority of the associates, who could at any moment they thought fit close the mills altogether. Before, however, pointing out how far short of the restraint imposed in Hilton v. Eckersley the present agreement falls, I will refer to some general observations of Judges of high authority, which shew how carefully courts of justice ought to proceed in determining what is and what is not against public policy. In this same case of Hilton v. Eckersley, we find Lord CAMPBELL using this language: "I enter upon such considerations with much reluctance and with great apprehension when I think how different generations of Judges and different Judges of the same generation have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases; and I cannot help thinking that where

there is no illegality in bonds and other instruments at common law, it would have been better that our Courts of justice had been required to give effect to them, unless where they are avoided by Act of Parliament."

When one finds that Lord CAMPBELL, notwithstanding these striking observations, decided that the obligors were not bound by their bond, it is impossible not to feel the force of the somewhat quaint illustration of BURROUGH, J., in Richardson v. Mellish, [2 Bing. at 252], where he says: "Public policy is an unruly horse, and when once you get astride it, you never know where it will carry you."

Again, commenting on Hilton v. Eckersley, the editors of Smith's Leading Cases, MR. JUSTICE WILLES and MR. JUSTICE KEATING say, [4 edit. vol. 1, p. 286]: "The law upon this subject is, it must be confessed, in an unsatisfactory state, and there seems but too much ground to fear that, unless checked by a firm determination to uphold men's acts when not in violation of some known rule of law, and to treat decided cases having a contrary tendency as exceptional, it may degenerate into the mere private discretion of the majority of the Court as to a subject of all others most open to difference of opinion and most liable to be affected by changing circumstances." And in Richardson v. Mellish, already cited, BEST, C. J., says: "I am not much disposed to yield to arguments of public policy. I think the Courts of Westminister Hall have gone much further than they were warranted in doing on questions of policy. They have taken on themselves sometimes to decide doubtful questions of policy, and they are always in danger in so doing, because Courts of law look only at the particular case, and have not the means of bringing before them all those considerations which enter into the judgments of those who decide on questions of policy. I admit that if it can be clearly put upon the contravention of public policy, the plaintiff cannot succeed; but it must be unquestionable—there must be no doubt."

After reading the extracts which I have just quoted, it requires no argument to demonstrate that decided cases, unless the facts exactly resemble those of the case for determination, are of but little assistance in questions of this kind. I think, therefore, that Hilton v. Eckersley may be disposed of

by saying that the only proposition of law which it affirms is the familiar one that contracts in restraint of trade, though partial, are nevertheless void if unreasonable—that is against public policy. That the particular contract there in question was void on that ground, in no way assists to prove that the totally dissimilar contract in question here is also to be held bad. The rule of law is plain—the difficulty is in applying it.

I must therefore inquire whether in the present case there is "without doubt" an "unquestionable" interference with the public interests by reason of the execution of this deed.

In the first place, it must be remembered, that there is here no submission to the will of a majority, but that all are placed on an equal footing. Then there is no restriction on the sale of the salt, but it is all to be placed in the hands of the trustees, whose duty it is to sell to the best advantage, the interest of all being alike. What is this more than two persons carrying on the same trade binding themselves not to undersell each other? And can it be said that such an agreement would be in restraint of trade? The only distinction between such a case and this is, that in the case put the parties would be subject to the inconvenience of having constantly to adjust the prices with the risk of frequent disagreements, whilst in the present case that is obviated by leaving it to the judgment of a common agent. Suppose two producers of any article agree to consign all their produce to the same agent and to leave that agent to sell for the same price. How would public policy be infringed by such an arrangement? The argument on the part of the defendants might be pushed so far as to make a partnership between two persons carrying on the same trade illegal as tending to lessen competition. That a contract to charge the same prices is not an improper restraint of trade, was determined by high authority in the case of Hearne v. Griffin, [2 Chitty's Repts. 407]. That was the case of an agreement between two coach masters not to oppose each other and to charge the same prices, and it was contended that it was an undue restraint. But Lord Ellenborough held the contract to be valid, saying: "How can you contend that it is in restraint of trade; they are left to charge what they like, though not more than each other. This is merely a convenient mode of arranging two concerns which

might otherwise ruin each other." I see no difference in principle between that case and the present. Here, it is true, as I have already remarked, that the regulation of price is left to third parties, the trustees, whose obligations are alike to all the constituents. If authority is to be referred to, the case of Wickens v. Evans, [3 Y. & J. 318], cited by Mr. Blake, is strongly in favor of the plaintiffs resembling this case as it does in many of the essential facts.

I do not follow Mr. Crooks in his argument that the number of persons associated in this arrangement made a difference. It appears on the face of the bill that they are not all the salt producers in the Province, and it also appears that salt, other than the produce of the wells of the plaintiffs and defendants, can be, and is supplied to the public. This being so, I think it makes no difference that this agreement was entered into by twenty persons engaged in the trade instead of only two.

Did I even think otherwise than I do, that this arrangement was injurious to the public interests, I should hesitate much before I acted on such an opinion, for I should feel that I was called on to relieve parties from a solemn contract, not by the mere application of some well established rule of law, but upon my own notions of what the public good required—in effect to arbitrarily make the law for the occasion. I can conceive no more objectionable instance of what is called Judge-made law, than a decision by a single Judge in a new and doubtful case that a contract is not to bind on the ground of public policy.

Mr. Crooks further argued that the deed was not binding as being *ultra vires* of the several parties who are companies incorporated under the Provincial Acts relating to joint stock companies. Upon the allegations of the bill, I must assume that so far as the individual members of these companies are concerned, they assented to the arrangement and to the execution of the deed. Then I take the rule to be that these companies, like all corporations, are regulated as to their powers by the instrument of their creation; and that if not expressed in the statute, it is to be implied that they are to engage in no undertaking foreign to the object for which they are created. So far I go with the learned counsel for the defendants. But I cannot agree that this arrangement is

foreign to the purpose of companies incorporated for the purpose of producing, manufacturing, and selling salt. I regard the agreement as one providing for a particular mode of selling salt, and therefore as being quite consistent with the objects of the company, and in fact tending to the better accomplishment of those objects. I do not think the companies have surrendered their rights in any respect. Their internal affairs will still be managed as usual, and their business will not, under the agreement, be interfered with, save in the single matter of selling. The cases determining the validity of traffic agreements, as they are called, between competing railway companies, providing that the gross earnings shall go into a common purse and be divided in certain agreed proportions, are in point to shew that this deed is not *ultra vires.*

It was argued by Mr. Maclennan that, even assuming the agreement to be legal and binding, the case was not a proper one for the interference of a Court of equity. I must decide against this objection also. The breach of the agreement complained of by the bill is, the sale of salt in contravention of the covenant not to sell except through the trustees. The right to an injunction to restrain a breach of a negative covenant stands on a different footing from a right to specific performance, and ever since 1852, when Lord St. Leonards decided, Lumley v. Wagner, [1 Deg. M. & G. 604], I believe there has been no doubt but that the breach of such a covenant as this would be enjoined.

It was lastly urged that the hardship of the agreement on the defendants constituted a defence. I cannot see the slightest foundation for such an objection. All parties under this deed have equal rights and equal liabilities. *The demurrer must be overruled with costs.*[82]

82—United States v. Nelson, 52 Fed. 646, Nelson, D. J., said, p. 647: "An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion. Competition is not stifled by such an agreement, and other dealers would soon force the parties to the agreement to sell at the market price, or a reasonable price, at least."

UNITED STATES v. ADDYSTONE PIPE & STEEL CO. et al.

(United States Circuit Court of Appeals, Sixth Circuit, 1898. 85 Fed. 271.)[83]

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, C. J., delivered the opinion of the court.

The first section of the act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," passed July 2, 1890 (26 Stat. 209), declares illegal "every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states or with foreign nations." The second section makes it a misdemeanor for any person to monopolize, or attempt to monopolize, or combine or conspire with others to monopolize, any part of the trade or commerce among the several states. The fourth section of the act gives the circuit courts of the United States jurisdiction to hear and determine proceedings in equity brought by the district attorneys of the United States under the direction of the attorney general to restrain violations of the act.

Two questions are presented in this case for our decision: First. Was the association of the defendants a contract, combination, or conspiracy in restraint of trade, as the terms are to be understood in the act? Second. Was the trade thus restrained trade between the states?

The contention on behalf of defendants is that the association would have been valid at common law, and that the federal anti-trust law was not intended to reach any agreements that were not void and unenforceable at common law. It might be a sufficient answer to this contention to point to the decision of the supreme court of the United States in U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, in which it was held that contracts in restraint of interstate transportation were within the statute, whether the restraints would be regarded as reasonable at common law or not. It is suggested, however, that that case related to a quasi public employment

83—Statement of facts omitted and part of the opinion only given.

necessarily under public control, and affecting public interests, and that a less stringent rule of construction applies to contracts restricting parties in sales of merchandise, which is purely a private business, having in it no element of a public or quasi public character. Whether or not there is substance in such a distinction,—a question we do not decide,—it is certain that, if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of trade, it is within the inhibition of the statute if the trade it restrained was interstate. Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. Mogul Steamship Co. v. McGregor, Gow & Co., [1892] App. Cas. 25; Hornby v. Close, L. R. 2 Q. B. 153; Lord Campbell, C. J., in Hilton v. Eckersley, 6 El. & Bl. 47, 66; Hannen, J., in Farrer v. Close, L. R. 4 Q. B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints.

The argument for defendants is that their contract of association was not, and could not be, a monopoly, because their aggregate tonnage capacity did not exceed 30 per cent. of the total tonnage capacity of the country; that the restraints upon the members of the association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable, because without them each member would be subjected to ruinous competition by the other, and did not exceed in degree of stringency or scope what was necessary to protect the parties in securing prices for their product that were fair and reasonable to themselves and the public; that competition was not stifled by the asso-

ciation because the prices fixed by it had to be fixed with reference to the very active competition of pipe companies which were not members of the association, and which had more than double the defendants' capacity; that in this way the association only modified and restrained the evils of ruinous competition, while the public had all the benefit from competition which public policy demanded.

From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others.

Chief Justice Parker, in 1711, in the leading case of Mitchel v. Reynolds, 1 P. Wms. 181, 190, stated these objections as follows:

"First. The mischief which may arise from them (1) to the party by the loss of his livelihood and the subsistence of his family; (2) to the public by depriving it of an 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."

The reasons were stated somewhat more at length in Alger v. Thatcher, 19 Pick. 51, 54, in which the supreme judicial court of Massachusetts said:

"The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (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 in 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; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void."

The changed conditions under which men have ceased to be so entirely dependent for a livelihood on pursuing one trade, have rendered the first and second considerations stated above less important to the community than they were in the seventeenth and eighteenth centuries, but the disposition to use every means to reduce competition and create monopolies has grown so much of late that the fourth and fifth considerations mentioned in Alger v. Thatcher have certainly lost nothing in weight in the present day, if we may judge from the statute here under consideration and similar legislation by the states.

The inhibition against restraints of trade at common law seems at first to have had no exception. See language of Justice Hull, Year Book, 2 Hen. V, folio 5, pl. 26. After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. It was equally for the good of the public and trade, when partners dissolved, and one took the business, or they divided the business, that each partner might bind himself not to do anything in trade thereafter which would derogate from his grant of the interest conveyed to his former partner. Again, when two men became partners in a busi-

ness, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were of course, only ancillary to the main end of the union, and were to be encouraged. Again, when one in business sold property with which the buyer might set up a rival business, it was certainly reasonable that the seller should be able to restrain the buyer from doing him an injury which, but for the sale, the buyer would be unable to inflict. This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property. Again, it was of importance that business men and professional men should have every motive to employ the ablest assistants, and to instruct them thoroughly; but they would naturally be reluctant to do so unless such assistants were able to bind themselves not to set up a rival business in the vicinity after learning the details and secrets of the business of their employers.

In a case of this last kind, Mallan v. May, 11 Mees. & W. 652, Baron PARKE said:

"Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is, in effect, the sale of a good will, and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry. * * * And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same

trade or profession within certain limits. * * * In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business."

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employé of the confidential knowledge acquired in such business. Under the first class come the cases of Mitchel v. Reynolds, 1 P. Wms. 181; Fowle v. Parke, 131 U. S. 88; Nordenfeldt v. Maxim Nordenfeldt Co., [1894] App. Cas. 534; Rousillon v. Rousillon, 14 Ch. Div. 351; Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Whittaker v. Howe, 3 Beav. 383; Match Co. v. Roeber, 106 N. Y. 473; Tode v. Gross, 127 N. Y. 480; Beal v. Chase, 31 Mich. 490; Hubbard v. Miller, 27 Mich. 15; National Ben. Co. v. Union Hospital Co., 45 Minn. 272; Whitney v. Slayton, 40 Me. 224; Pierce v. Fuller, 8 Mass. 222; Richards v. Seating Co., 87 Wis. 503. In the second class are Tallis v. Tallis, 1 El. & Bl. 391, and Lange v. Werk, 2 Ohio St.

520. In the third class are Machinery Co. v. Dolph, 138 U. S. 617, and Matthews v. Associated Press, 136 N. Y. 333. In the fourth class are American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, and Hitchcock v. Anthony, Id. 779, both decisions of this court; Navigation Co. v. Winsor, 20 Wall. 64; Dunlop v. Gregory, 10 N. Y. 241; Hodge v. Sloan, 107 N. Y. 244. While in the fifth class are the cases of Homer v. Ashford, 3 Bing. 322; Horner v. Graves, 7 Bing. 735; Hitchcock v. Coker, 6 Adol. & E. 454; Ward v. Byrne, 5 Mees. & W. 547; Dubowski v. Goldstein, [1896] 1 Q. B. 478; Peels v. Saalfeld, [1892] 2 Ch. 149; Taylor v. Blanchard, 13 Allen, 370; Keeler v. Taylor, 53 Pa. St. 467; Herreshoff v. Boutineau, 17 R. I. 3, 19 Atl. 712.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In Horner v. Graves, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaughten's judgment in Nordenfelt v. Maxim Nordenfelt Co., [1894] App. Cas. 535, 567), used the following language:

"We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the

covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.

Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and, therefore, that contracts made with a view to check such ruinous competition and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities when all of them are considered. It is true that certain rules for determining whether a covenant in restraint of trade ancillary to the main purpose of a contract was reasonably adapted and limited to the necessary protection of a party in the carrying out of such purpose

have been somewhat modified by modern authorities. In Mitchel v. Reynolds, 1 P. Wms. 181, the leading early case on the subject, in which the main object of the contract was the sale of a bake house, and there was a covenant to protect the purchaser against competition by the seller in the bakery business, Chief Justice PARKER laid down the rule that it must appear before such a covenant could be enforced that the restraint was not general, but particular or partial, as to places or persons, and was upon a good and adequate consideration, so as to make it a proper and useful contract. Subsequently, it was decided in Hitchcock v. Coker, 6 Adol. & E. 454, that the adequacy of the consideration was not to be inquired into by the court if it was a legal one, and that the operation of the covenant need not be limited in time. More recently the limitation that the restraint could not be general or unlimited as to space has been modified in some cases by holding that, if the protection necessary to the covenantee reasonably requires a covenant unrestricted as to space, it will be upheld as valid. Whittaker v. Howe, 3 Beav. 383; Cloth Co. v. Lorsont, L. R. 9 Eq. 345; Rousillon v. Rousillon, 14 Ch. Div. 351; Nordenfeldt v. Maxim Nordenfeldt Co., [1894] App. Cas. 535. See, also, Fowle v. Park, 131 U. S 88; Match Co. v. Roeber, 106 N. Y. 473. But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having for their sole object the restraint of trade than did the courts of an earlier time. It is true there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would

seem to be a strong reason against adopting it. The cases assuming such a power in the courts are Wickens v. Evans, 3 Younge & J. 318; Collins v. Locke, 4 App. Cas. 674; Ontario Salt Co. v. Merchants' Salt Co., 18 Grant (U. C.) 540; Kellogg v. Larkin, 3 Pin. 123; Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363.

In Wickens v. Evans, three trunk manufacturers of England, who had competed with each other throughout the realm to their loss, agreed to divide England into three districts, each party to have one district exclusively for his trade, and, if any stranger should invade the district of either as a competitor, they agreed "to meet to devise means to promote their own views." The restraint was held partial and reasonable, because it left the trade open to any third party in either district. In answer to the suggestion that such an agreement to divide up the beer business of London among the London brewers would lead to the abuses of monopoly, it was replied that outside competition would soon cure such abuses,—an answer that would validate the most complete local monopoly of the present day. It may be, as suggested by the court, that local monopolies cannot endure long, because their very existence tempts outside capital into competition; but the public policy embodied in the common law requires the discouragement of monopolies, however temporary their existence may be. The public interest may suffer severely while new competition is slowly developing. The case can hardly be reconciled with later cases, hereafter to be referred to, in England and America. It is true that there was in this case no direct evidence of a desire by the parties to regulate prices, and it has been sometimes explained on the theory that the agreement was solely to reduce the expenses incident to a business covering the realm by restricting its territorial extent; but it is difficult to escape the conclusion that the restraint upon each two of the three parties was imposed to secure to the other a monopoly and power to control prices in the territory assigned to him, because the final clause in the contract implies that, when it was executed, there were no other competitors except the parties in the territory divided.

Collins v. Locke was a case in the privy council. The action

was brought to enforce certain articles of agreement by and between four of the leading master stevedore contracting firms in Melbourne, Australia, who did practically all the business at that port. The court (composed of Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier) describes the scope and purposes of the agreement and the view of the court as follows:

"The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it, and so to prevent competition, at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means,—that is, by provisions reasonably necessary for the purpose,—though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade."

No attempt is made to justify the view thus comprehensively stated, or to support it by authority, or to reconcile it with the general doctrine of the common law that contracts restraining competition, raising prices, and tending to a monopoly, as this is conceded by the court to have been, are void. The court ignores the public interest that prices shall be regulated by competition, and assumes the power in the court to uphold and enforce a contract securing a monopoly if it affect only one port, so as to be but a partial restraint of trade. The case is directly at variance with the decision of the supreme court of Illinois in More v. Bennett, 140 Ill. 69, hereafter discussed, and cannot be reconciled in principle with many of the other cases cited.

The Canadian case of Ontario Salt Co. v. Merchants' Salt Co. is another one upon which counsel for the defendants rely. That was the decision of a vice chancellor. Six salt companies, in order to maintain prices, combined, and put their business under the control of a committee, and agreed not to sell except through the committee. It was held that because it appeared that there were other salt companies in the province, and because the combiners denied that they intended to raise prices, but only to maintain them, the contract of union was not in unlawful restraint of trade. The

conclusion and argument of the court in Salt Co. v. Guthrie, 35 Ohio St. 666, hereafter stated, would seem to be a sufficient answer to this case.

Kellogg v. Larkin, 3 Pin. 123, was an early case in Wisconsin, in which the action was on the covenant of a warehouseman in a lease of his warehouse, by which he agreed to devote his services to the lessee at certain compensation, and not to purchase or store wheat in the Milwaukee market. The covenant was held valid. Had nothing else appeared in the case, the conclusion would have been clearly right, because such a covenant might well have been reasonably necessary to the protection of the lessee in his enjoyment of the warehouse and the good will of the lessor. But it further appeared that this lease, with the covenant, was only one of many such executed by the warehousemen of Milwaukee to the united grain dealers of that city, to enable the latter to obtain absolute control of the wheat market in Milwaukee. The court held the latter combination valid also. The decision cannot be upheld, in view of the more modern authorities hereafter referred to.

The case of Leslie v. Lorillard, 110 N. Y. 519, would seem to be an authority against our view. In that case a stockholder sought to restrain the payment of an annual payment about to be made by the Old Dominion Steamship Company under a contract by which it bought off the Lorillard Steamship Company from continuing in competition with it in carrying passengers and freight between New York and Norfolk. The contract was held valid, although it had no purpose except the restraining of competition, and, so far as appears, the obtaining of the complete control of the business. The case is rested on Match Co. v. Roeber, 106 N. Y. 473, which was a case of the purchase of property and good will. It proceeds on the general proposition "that competition is not invariably a public benefaction; for it may be carried on to such a degree as to become a general evil," and thus leaves it to the discretion of the court to say how much competition is desirable, and how much is mischievous and accordingly to determine whether a contract is bad or not. The case is directly opposed to Anderson v. Jett, 89 Ky. 375, hereafter cited. It should be said that nothing appears in the

report of the case to show directly that the purpose of the contract was to reserve the entire business to the Dominion Company, or to secure to it the power of regulating prices, but this natural inference from the terms of the contract is not negatived.

The case of Mogul Steamship Co. v. McGregor, Gow & Co., [1892] App. Cas. 25, has been cited to sustain the position of the defendants. It does not do so. It was a suit for damages, brought by a company engaged in the tea-carrying trade at Hankow, China, against six other companies engaged in the same trade, for loss inflicted by an alleged unlawful conspiracy entered into by them to drive the plaintiff out of the trade, and to obtain control of the trade themselves. It appeared that the defendants agreed to conform to a plan of association, by which they should constantly underbid the plaintiff, and take away his trade by offering exceptional and very favorable terms to customers dealing exclusively with the members of the association, and that they did this to control the business the next season after he had been thus driven out of competition. It was held by the house of lords that this was not an unlawful and indictable conspiracy, giving rise to a cause of action by the person injured thereby; but it was not held that the contract of association entered into by the defendants was not void and unenforceable at common law. On the contrary, Lord Bramwell, in his judgment (at page 46), and Lord Hannen, in his (at page 58), distinctly say that the contract of association was void as in restraint of trade; but all the law lords were of opinion that contracts void as in restraint of trade were not unlawful in a criminal sense, and gave no right of action for damages to one injured thereby. The statute we are considering expressly gives such contracts a criminal and unlawful character. It is manifest, therefore, that whatever of relevancy the Mogul Steamship Co. Case has in this discussion makes for, rather than against, our conclusion.

Two other cases deserve mention here. They are Roller Co. v. Cushman, 143 Mass. 353, and Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92. In these cases it was held that contracts in restraint of trade are not invalid if they affect trade in articles which, though useful and convenient,

are not articles of prime or public necessity, and therefore contracts between dealers made to secure complete control of the manufacture and sale of such articles were supported. In the first case the article involved was a fastening of a certain shade roller, and in the other was glue made from fish skins. We think the cases hereafter cited show that the common law rule against restraint of trade extends to all articles of merchandise, and that the introduction of such a distinction only furnishes another opportunity for courts to give effect to the varying economical opinions of its individual members. It might be difficult to say why it was any more important to prevent restraints of trade in beer, mineral water, leather cloth, and wire cloth than of trade in curtain shades or glue. However this may be, the cases do not touch the case at bar, because the same court, in Telegraph Co. v. Crane, 160 Mass. 50, held that fire-alarm telegraph instruments were articles of sufficient public necessity to render unreasonable restraints of trade in them void, and certainly such articles are not more necessary for public use than water, gas, and sewer pipe.

There are other cases upon which counsel of defendants rely, which, in our judgment, have no bearing on the issue, or, if they have, are clearly within the rules we have already stated. One is a case in which a railroad company made a contract with a sleeping-car company by which the latter agreed to do the sleeping-car business of the railway company on a number of conditions, one of which was that no other company should be allowed to engage in the sleeping-car business on the same line. Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co., 139 U. S. 79. The main purpose of such a contract is to furnish sleeping-car facilities to the public. The railroad company may discharge this duty itself to the public, and allow no one else to do it, or it may hire some one to do it, and, to secure the necessary investment of capital in the discharge of the duty, may secure to the sleeping-car company the same freedom from competition that it would have itself in discharging the duty. The restraint upon itself is properly proportioned to and is only ancillary to, the main purpose of the contract, which is to secure proper facilities to the public. Exactly the same principle applies to similarly exclusive contracts with express companies and stock-yard delivery companies. Ex-

press Cases, 117 N. S. 1, 628; Stock-Yards Co. v. Keith, 139 U. S. 128; Butchers' & Drovers' Stock-Yards Co. v. Louisville & N. R. Co., 31 U. S. App. 252, 14 C. C. A. 290. The fact is that it is quite difficult to conceive how competition would be possible upon the same line of railway between sleeping-car companies or express companies. Such contracts involve the hauling of sleeping cars or express cars on each express train, the assignment of offices in each station, and various running arrangements, which it would be an intolerable burden upon the railroad company to make and execute for two companies at the same time. And the same is true of contracts with a stock delivery company. The railway company could not ordinarily be expected to have more than one general station for the delivery of cattle in any one town. It would only be required by the nature of its employment to furnish such facilities as were reasonably sufficient for the business at that place. There is hardly more objection on the ground of public policy to such a restriction upon a railway company in cases like these than there would be to a restriction upon a lessor not to allow the subject-matter of the lease to be enjoyed by any one but the lessee during the lease. The privilege, when granted, is hardly capable of other than exclusive enjoyment. The public interest is satisfactorily secured by the requirement, which may be enforced by any member of the public, to wit, that the charges allowed shall not be unreasonable, and the business is of such a public character that it is entirely subject to legislative regulation in the same interest.

Having considered the cases upon which the counsel for the defendants have relied to maintain the proposition that contracts having no purpose but to restrain competition and maintain prices, if reasonable, will be held valid, we must now pass in rapid review the cases that make for an opposite view.

In People v. Sheldon, 139 N. Y. 251, all the coal dealers in the city of Lockport, N. Y., entered into a contract of association, forming a coal exchange to prevent competition by constituting the exchange the sole authority to fix the price to be charged by members for coal sold by them, and the price was thus fixed. The court approved a charge to the jury that even if this was merely a combination between independent coal dealers to prevent competition between themselves for the due

protection of the parties to it against ruinous rivalry, and although no attempt was made to charge unreasonable or excessive prices, it was inimical in trade and commerce, whatever might be done under it, and was within the state statute making a conspiracy injurious to trade indictable. Said ANDREWS, C. J. (page 264, 139 N. Y., and page 789, 34 N. E.):

"If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

See, to the same effect, Judd v. Harrington, 139 N. Y. 105; Leonard v. Poole, 114 N. Y. 371; De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co. (Com. Pl.) 14 N. Y. Supp. 277.

In Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173, five coal companies controlling the bituminous coal trade in Northern Pennsylvania agreed to allow a committee to fix prices and rates of freight, and to fix proportion of sales by each. Competition was not destroyed, because the anthracite coal and Cumberland bituminous coal were sold in competition with this coal. The association was, nevertheless, held void, as in illegal restraint of trade and competition, and tending to injure the public. In Nester v. Brewing Co., 161 Pa. St. 473, 45 brewers in Philadelphia made an agreement to sell beer in Philadelphia and Camden at a certain price to be fixed by a committee of their number. Though beer could hardly be said to be an article of prime necessity like coal, yet, as it was an article of merchandise, the contract was held void, as in restraint of trade, and tending to a monopoly.

In Salt Co. v. Guthrie, 35 Ohio St. 666, the salt manufacturers of a salt producing territory in Ohio, with some exceptions, combined to regulate the price of salt by preventing ruinous competition between themselves, and agreed to sell only at prices fixed by a committee of their number. The supreme court of Ohio held the contract void. Judge McIlvaine, who delivered the opinion of the court, said:

"The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that

reason, on the ground of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public."

Other Ohio cases which presented similar facts, and in which the same rule was enforced, are Emery v. Candle Co., 47 Ohio St. 320, and Hoffman v. Brooks, 11 Wkly. Law Bul. 258.

In Anderson v. Jett, 89 Ky. 375, two owners of steamboats running on the Kentucky river made an agreement to keep up rates, and divide net profits, to prevent ruinous competition and reduced rates. The contract was held void.

In Chapin v. Brown, 83 Iowa 156, the grocerymen in a town, in order to avoid a trade in butter which was burdensome, agreed not to buy any butter or to take it in trade except for use in their own families, so as to throw the business into the hands of one man who dealt in butter exclusively. The agreement was held invalid, because in restraint of trade, and tending to create a monopoly.

In Craft v. McConoughy, 79 Ill. 346, five grain dealers in Rochelle, Ill., agreed to conduct their business as if independent of each other, but secretly to fix prices at which they would sell grain, and to divide profits in a certain proportion. This was held void, as in restaint of trade, and tending to create a monopoly. In More v. Bennett, 140 Ill. 69, articles of association entered into by only a part of the stenographers of Chicago to fix a schedule of prices, and prevent competition among their members and a consequent reduction of prices, was held void. The court said:

"A combination among a number of persons engaged in a particular business to stifle or prevent competition, and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition, is contrary to public policy. Contracts in partial restraint of trade which the law sustains are those entered into by a vendor of a business and its good will with its vendee, by which the vendor agrees not to engage in the same business within a limited territory; and the restraint, to be valid, must be no

more extensive than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased."

As already said, this case is in direct conflict with Collins v. Locke, 4 App. Cas. 674, discussed above. To the same effect as More v. Bennett are Ford v. Association, 155 Ill. 166, and Bishop v. Preservers Co., 157 Ill. 284.

In Association v. Niezerowski, 95 Wis. 129, the suit was on a note given in pursuance of the secret rules of an association of 60 out of the 75 master masons in Milwaukee, by which all bids for work about to be let were first made to the association, and the lowest bidder was then required to add 6 per cent. to his bid, and, if the bid was more than 8 per cent. below the next lowest bidder, more than 6 per cent. might be added. Each member was required to pay to the association 6 per cent. of his estimates when due, for subsequent distribution. In declaring the contract void, the court said:

"The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exist no contract relations."

In Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, four powder companies of California agreed that each should sell at a price to be fixed by a committee of their representatives, and should pay over to the others the profits on any excess of sales over a fixed proportion of the total sales. The contract was held void.

In Oil Co. v. Adoue, 83 Tex. 650, five owners of cottonseed oil mills in Texas made an agreement not to sell at less than certain agreed prices. One guaranteed profits to the four others, and suit was brought on the guaranty. It was held void, as restraining trade, and tending to a monopoly, even though the evidence failed to establish that it effected a monopoly.

In Association v. Kock, 14 La. Ann. 168, eight commercial firms in New Orleans holding a large quantity of cotton bagging entered into an agreement by which they stipulated that for three months no member should sell a bale except by a vote of the majority. It was held that the contract was "palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary

to public order, and cannot be enforced in a court of justice."

In Hilton v. Eckersley, 6 El. & Bl. 47, it was held that an agreement between 18 cotton manufacturers to submit to the control of a committee of their number for 12 months the question as to prices to be paid for labor and the terms of employment, in order to resist the aggressions of an association of workingmen, was void and unenforceable, because in restraint of trade.

In Urmston v. Whitelegg, 63 L. T. (N. S.) 455, a case in the queen's bench division, before DAY and LAWRENCE, JJ., the action was brought to enforce a penalty under the rules of the Bolton Mineral Water Manufacturers' Association, which recited that the object of the association was to maintain the price of mineral water, and bound the members for 10 years not to sell at less than 9d. a dozen bottles, or at least not less than any higher price fixed by the committee, on penalty of £10 for each violation. DAY, J., said:

"If a contract for raising prices against the public interest is a contract in restraint of trade, this is undoubtedly such a contract. During the last hundred years great changes have taken place in the views of the public, of the legislature, and therefore of the judges, on the matter, and many old-fashioned offenses have disappeared; but the rule still obtains that combination for the mere purpose of raising prices is not enforceable in a court of law. This contract is illegal in the sense of not being enforceable. It is not necessary that it should be such as to form the ground of criminal proceedings."

In the foregoing cases the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employé. Where such relation exists between the parties, as already stated, restraints are usually enforceable if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But, in recent years, even the fact that the contract is one for the sale of property or of business and good will, or for the making of a partnership or a corporation, has not saved it from invalidity if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a

view to establishing a monopoly. Such cases go a step further than those already considered. In them the actual intent to monopolize must appear. It is not deemed enough that the mere tendency of the provisions of the contract should be to restrain competition. In such cases the restraint of competition ceases to be ancillary, and becomes the main purpose of the contract, and the transfer of property and good will, or the partnership agreement, is merely ancillary and subordinate to that purpose. The principal cases of this class are Richardson v. Buhl, 77 Mich. 632; Arnot v. Coal Co., 68 N. Y. 558; People v. Milk Exchange, 145 N. Y. 267; People v. Refining Co., 54 Hun. 366; State v. Nebraska Distilling Co., 29 Neb. 700; State v. Standard Oil Co., 49 Ohio St. 137; Manufacturing Co. v. Klotz, 44 Fed. 721; Distilling & Cattle Feeding Co. v. People, 156 Ill. 448; Carbon Co. v. McMillin, 119 N. Y. 46; Harrow Co. v. Hench, 83 Fed. 36; Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36; Lumber Co. v. Hayes, 76 Cal. 387.

In addition to the cases cited, there are others which sustain the general principle, but in them there exists the additional reason for holding the contracts invalid that the parties were engaged in a quasi public employment. They are Gibbs v. Gas Co., 130 U. S. 396; People v. Chicago Gas Trust Co., 130 Ill. 268; Stockton v. Railroad Co., 50 N. J. Eq. 52; West Va. Transp. Co. v. Ohio River Pipe-Line Co., 22 W. Va. 600; Hooker v. Vandewater, 4 Denio, 349; Stanton v. Allen, 5 Denio, 434; Railroad Co. v. Collins, 40 Ga. 582; Hazlehurst v. Railroad Co., 43 Ga. 13.

Upon this view of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. But the facts of the case do not require us to go so far as this, for they show that the attempted justification of this association on the grounds stated is without foundation.

The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York, Pennsyl-

vania, and Virginia, constituting considerably more than three-quarters of the territory of the United States, and significantly called by the associates "pay territory." Their joint annual output was 220,000 tons. The total capacity of all the other cast-iron pipe manufacturers in the pay territory was 170,500 tons. Of this, 45,000 tons was the capacity of mills in Texas, Colorado, and Oregon, so far removed from that part of the pay territory where the demand was considerable that necessary freight rates excluded them from the possibility of competing, and 12,000 tons was the possible annual capacity of a mill at St. Louis, which was practically under the same management as that of one of the defendants' mills. Of the remainder of the mills in pay territory and outside of the combination, one was at Columbus, Ohio, two in northern Ohio, and one in Michigan. Their aggregate possible annual capacity was about one-half the usual annual output of the defendants' mills. They were, it will be observed, at the extreme northern end of the pay territory, while the defendants' mills at Cincinnati, Louisville, Chattanooga, and South Pittsburg, and Anniston, and Bessemer, were grouped much nearer to the center of the pay territory. The freight upon cast-iron pipe amounts to a considerable percentage of the price at which manufacturers can deliver it at any great distance from the place of manufacture. Within the margin of the freight per ton which Eastern manufacturers would have to pay to deliver pipe in pay territory, the defendants, by controlling two-thirds of the output in pay territory, were practically able to fix prices. The competition of the Ohio and Michigan mills, of course, somewhat affected their power in this respect in the northern part of the pay territory; but, the further south the place of delivery was to be, the more complete the monopoly over the trade which the defendants were able to exercise, within the limit already described. Much evidence is adduced upon affidavit to prove that defendants had no power arbitrarily to fix prices, and that they were always obliged to meet competition. To the extent that they could not impose prices on the public in excess of the cost price of pipe with freight from the Atlantic seaboard added, this is true; but, within that limit, they could fix prices as they chose. The most cogent evidence that they had this power is the fact, everywhere ap-

parent in the record, that they exercised it. The details of the way in which it was maintained are somewhat obscured by the manner in which the proof was adduced in the court below, upon affidavits solely, and without the clarifying effect of cross-examination, but quite enough appears to leave no doubt of the ultimate fact. The defendants were, by their combination, therefore able to deprive the public in a large territory of the advantages otherwise accruing to them from the proximity of defendants' pipe factories, and, by keeping prices just low enough to prevent competition by Eastern manufacturers, to compel the public to pay an increase over what the price would have been, if fixed by competition between defendants, nearly equal to the advantage in freight rates enjoyed by defendants over Eastern competitors. The defendants acquired this power by voluntarily agreeing to sell only at prices fixed by their committee, and by allowing the highest bidder at the secret "auction pool" to become the lowest bidder of them at the public letting. Now, the restraint thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies. In U. S. v. E. C. Knight Co., 156 U. S. 1, 16, Chief Justice Fuller, in speaking for the court, said:

"Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition."

It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give

defendants the power to charge unreasonable prices, had they chosen to do so. But, if it were important, we should unhesitatingly find that the prices charged in the instances which were in evidence were unreasonable. The letters from the manager of the Chattanooga foundry written to the other defendants, and discussing the prices fixed by the association, do not leave the slightest doubt upon this point, and outweigh the perfunctory affidavits produced by the defendants. The cost of producing pipe at Chattanooga, together with a reasonable profit, did not exceed $15 a ton. It could have been delivered at Atlanta at $17 to $18 a ton, and yet the lowest price which that foundry was permitted by the rules of the association to bid was $24.25. The same thing was true all through pay territory to a greater or less degree, and especially at "reserved cities."

Another aspect of this contract of association brings it within the term used in the statute, "a conspiracy in restraint of trade." A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means. In the answer of the defendants, it is averred that the chief way in which cast-iron pipe is sold is by contracts let after competitive bidding invited by the intending purchaser. It would have much interfered with the smooth working of defendants' association had its existence and purposes become known to the public. A part of the plan was a deliberate attempt to create in the minds of the members of the public inviting bids the belief that competition existed between the defendants. Several of the defendants were required to bid at every letting, and to make their bids at such prices that the one already selected to obtain the contract should have the lowest bid. It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside. Breslin v. Brown, 24 Ohio St. 565; Atcheson v. Mallon, 43 N. Y. 147; Loyd v. Malone, 23 Ill. 41; Wooton v. Hinkle, 20 Mo. 290; Phippen v. Stickney, 3 Metc. (Mass.) 384; Kearney v. Taylor, 15 How. 494, 519; Wilbur v. How, 8 Johns. 444; Hannah v. Fife, 27 Mich. 172; Gibbs v. Smith, 115 Mass. 592; Swan v.

Chorpenning, 20 Cal. 182; Gardiner v. Morse, 25 Me. 140; Ingram v. Ingram, 49 N. C. 188; Brisbane v. Adams, 3 N. Y. 129; Woodruff v. Berry, 40 Ark. 251; Wald, Pol. Cont. 310, note by Mr. Wald, and cases cited. The case of Jones v. North, L. R. 19 Eq. 426, to the contrary, cannot be supported. The largest purchasers of pipe are municipal corporations, and they are by law required to solicit bids for the sale of pipe in order that the public may get the benefit of competition. One of the means adopted by the defendants in their plan of combination was this illegal and fraudulent effort to evade such laws, and to deceive intending purchasers. No matter what the excuse for the combination by defendants in restraint of trade, the illegality of the means stamps it as a conspiracy, and so brings it within that term of the federal statute.

The second question is whether the trade restrained by the combination of the defendants was interstate trade. [Balance of opinion relating to this point is omitted.]

For the reasons given, the decree of the circuit court dismissing the bill must be reversed, with instructions to enter a decree for the United States perpetually enjoining the defendants from maintaining the combination in cast-iron pipe described in the bill, and substantially admitted in the answer, and from doing any business thereunder.[84]

DUNBAR v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY

(Supreme Court of Illinois, 1909. 238 Ill. 456.)

(See ante p. 105, where case is given in full.)

84—This judgment, slightly modified so as not to affect intra-state trade, was affirmed in Addystone Pipe & Steel Co. v. U. S., 175 U. S. 211, given *post* p. 772.

LEADING LAW SCHOOL BOOKS

ADMINISTRATION AND GOVERNMENT—GOODNOW'S CASES ON GOVERNMENT AND ADMINISTRATION, by Frank J. Goodnow, President of Johns Hopkins University. $2.50.

AGENCY—MECHEM'S OUTLINES OF AGENCY, by Floyd R. Mechem, author of "Mechem on Agency," "Mechem on Sales," "Mechem Public Officers," etc., Professor of Law in the University of Chicago. Second Edition. $2.00.

AGENCY—BAYS. A HANDBOOK ON THE LAW OF AGENCY AND THE LAW OF PARTNERSHIP, with Questions, Problems and Forms, by Alfred W. Bays, Member of the Chicago Bar and Professor of Commercial Law, Northwestern University School of Commerce. $1.50.

AGENCY—MECHEM ON AGENCY. A TREATISE ON THE LAW OF AGENCY, including not only a discussion of the general subject, but also Special Chapters on Attorneys, Auctioneers, Brokers and Factors, by Floyd R. Mechem, of the Chicago Bar, and author of "Mechem on Sales," "Mechem Public Officers," "Outlines of Agency," etc., Professor of Law in the University of Chicago. $4.00.

AGENCY—MECHEM'S CASES ON THE LAW OF AGENCY, by Floyd R. Mechem, author of "Sales," "Agency," "Public Officers," etc., Professor of Law in the University of Chicago. $3.00.

AMERICAN ADMINISTRATIVE LAW—GOODNOW'S SELECTED CASES ON AMERICAN ADMINISTRATIVE LAW, with particular reference to the Law of Officers and Extraordinary Legal Remedies. By Frank J. Goodnow, President of Johns Hopkins University. $6.00.

APPELLATE PRACTICE—SUNDERLAND'S CASES ON APPELLATE PRACTICE, by Edson R. Sunderland, Professor in the University of Michigan Law School. $4.00.

BAILMENTS & CARRIERS—GODDARD'S OUTLINES OF THE LAW OF BAILMENTS AND CARRIERS, by Edwin C. Goddard, Professor of Law in the University of Michigan. $2.50.

BAILMENTS & CARRIERS—GODDARD'S SELECTED CASES ON THE LAW OF BAILMENTS AND CARRIERS, including the Quasi-Bailment Relations of Carriers of Passengers, of Telegraph and Telephone Companies as Carriers, by Edwin C. Goddard, Professor of Law in the University of Michigan. $3.75.

BAILMENTS & CARRIERS—VAN ZILE. ELEMENTS OF THE LAW OF BAILMENTS AND CARRIERS, including Pledge and Pawn, and Inn Keepers, by Hon. Phillip T. Van Zile, of the Detroit Bar, author of "Equity Pleading and Practice," Dean of the Detroit College of Law. Second Edition. $5.00.

BANKRUPTCY—BAYS. A HANDBOOK ON DEBTOR AND CREDITOR, INCLUDING BANKRUPTCY, containing the text of the Federal Bankruptcy Law, with Questions, Problems and Forms, by Alfred W. Bays, Professor of Commercial Law in Northwestern University School of Commerce. $1.50.

BANKRUPTCY—HOLBROOK AND AIGLER'S CASES ON THE LAW OF BANKRUPTCY, including the Law of Fraudulent Conveyances, selected and arranged by Evans Holbrook and Ralph W. Aigler, Professors of Law, University of Michigan. $4.00.

LEADING LAW SCHOOL BOOKS

BANKS AND BANKING—BAYS. A HANDBOOK ON BANKS AND BANKING, containing the text of the National Bank Act, with Questions, Problems and Forms, by Alfred W. Bays, Member of the Chicago Bar, and Professor of Commercial Law in Northwestern University School of Commerce. $1.50.

BLACKSTONE'S COMMENTARIES—COOLEY. Fourth Edition. Commentaries on the laws of England, by Sir William Blackstone, one of the Justices of His Majesty's Court of Common Pleas, together with copious analysis of the contents, and notes with reference to English and American Decisions, and Statutes which illustrate or change the law of the text; also full Table of Abbreviations and some considerations regarding the study of the law, by Hon. Thomas M. Cooley. Fourth Edition, by J. D. Andrews. Two volumes, $9.00. Same, Third Edition, $6.00.

BLACKSTONE—SPRAGUE'S ABRIDGMENT OF BLACKSTONE'S COMMENTARIES, by William S. Sprague. One volume $3.00.

BUSINESS METHODS AND FINANCE—By George L. Corlis, Dean of the Benton College of Law.

CARRIERS—HUTCHINSON. A TREATISE ON THE LAW OF CARRIERS, as administered in the Courts of the United States and England. Second Edition by Floyd R. Mechem, author of "Mechem on Agency," "Mechem Public Officers," "Mechem on Sales," etc., and Professor of Law in the University of Chicago. $4.00.

CODE PLEADING—HINTON'S CASES ON CODE PLEADING, under modern codes, by Edwin W. Hinton, Professor of Law in the University of Chicago. $4.00.

CODE PLEADING—PHILLIPS. An exposition of the Principles of Pleading under the Codes of Civil Procedure, by Hon. George L. Phillips. $4.00.

CODE PLEADING—SUNDERLAND'S CASES ON CODE PLEADING, by Edson R. Sunderland, Professor of Law in the University of Michigan. $4.00.

COMMERCIAL LAW—BAYS. Commercial Law Library. A series of small text books on Business Law, with Questions, Problems, and Forms, by Alfred W. Bays, of the Chicago Bar, and Professor of Law in Northwestern University School of Commerce. Nine small volumes. Complete set, $12.00; single volumes, $1.50.

COMMERCIAL LAW—BAYS' CASES ON COMMERCIAL LAW, including Contracts, Agency, Sales, Negotiable Paper, Partnerships, Corporations, by Alfred W. Bays, author of "Commercial Law Series," member of the Chicago Bar, and Professor of Commercial Law in Northwestern University School of Commerce. $4.00.

COMMERCIAL LAW—CORLIS. By George L. Corlis, Dean Benton College of Law.

COMMON LAW PLEADING—Andrews' Stephens' Pleadings, in Civil Actions under the Common Law System, and as modified and applied to modern Codes and Practice Acts, and introduced by a summary view of the proceedings in legal actions, by Henry John Stephen. Second Edition by J. D. Andrews, author of "Andrews' American Law," Edition of Cooley's Blackstone and Wilson's Works, etc., $3.50.

COMMON LAW PLEADING—SHIPP & DAISH'S CASES ON COMMON LAW PLEADING, with Definitions and Rules relating thereto, by E. Richard Shipp and John B. Daish. $2.50.

COMMON LAW PLEADING—SUNDERLAND'S CASES ON COMMON LAW PLEADING, by Edson R. Sunderland, Professor in the University of Michigan Law School. $4.00.

LEADING LAW SCHOOL BOOKS

CONFLICT OF LAWS—CASES.—See International Law.

CONSTITUTIONAL LAW—BOYD'S CASES ON AMERICAN CONSTITUTIONAL LAW, by Carl Evans Boyd. Second Edition, $3.00.

CONSTITUTIONAL LAW—EVANS' LEADING CASES ON AMERICAN CONSTITUTIONAL LAW, by L. B. Evans. $2.75.

CONTRACTS—ANSON. PRINCIPLES OF THE LAW OF CONTRACTS, and of Agency In its relation to Contracts, by Sir William L. Anson. Second American Edition, by Jerome C. Knowlton, Professor of Law in the University of Michigan. $3.50.

CONTRACTS—KALES' CASES ON CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE, by Albert M. Kales, of the Chicago Bar, author of "Kales Future Interests" and Professor of Law in Harvard University. Two volumes, $7.50.

CONTRACTS—WILLIS. PRINCIPLES OF THE LAW OF CONTRACTS, by Hugh E. Willis, Dean of the Law School of Southwestern University. $2.00.

CORPORATIONS—ABBOTT. (PUBLIC.) A SUMMARY OF THE LAW OF PUBLIC CORPORATIONS, by Hon. Howard S. Abbott, of the Minneapolis Bar, lecturer on Public and Private Corporations and Civil Law, University of Minnesota, and author of "Abbott's Municipal Corporations." $4.00.

CORPORATIONS—BAYS. A HANDBOOK ON THE LAW OF PRIVATE BUSINESS CORPORATIONS, with Questions, Problems and Forms, by Alfred W. Bays, member of the Chicago Bar, and Professor of Commercial Law, Northwestern University School of Commerce. $1.50.

CORPORATIONS—(MUNICIPAL). ELLIOTT. THE PRINCIPLES OF THE LAW OF PUBLIC CORPORATIONS, by Hon. Charles B. Elliott, Judge of the District Court of Minnesota. Second Edition by John E. Macy, Professor in Boston University Law School. $4.00.

CORPORATIONS—(PRIVATE). MARSHALL. A TREATISE ON THE LAW OF PRIVATE CORPORATIONS. Second Edition by William L. Marshall and William L. Clark. $4.00.

COURTS—LONG ON FEDERAL COURTS. An outline of the jurisdiction and procedure of the Federal Courts, by Joseph R. Long, Professor in Washington and Lee University Law School. Third Edition, $2.50.

CRIMINAL LAW—CLARK & MARSHALL CRIMES. A treatise on the law of Crimes, by William L. Clark and William L. Marshall. Second Edition by Herschel B. Lazell. $4.00.

CRIMINAL LAW—HAWLEY & M'GREGOR. By John G. Hawley, of the Detroit Bar, lecturer on Criminal Law, Detroit College of Law, and Malcolm McGregor, of the Detroit Bar, Secretary of the Detroit College of Law. $2.50.

CRIMINAL LAW—KNOWLTON'S CASES ON CRIMINAL LAW, by Jerome C. Knowlton, Marshall Professor of Law in the University of Michigan. $3.00.

CRIMINAL LAW AND PROCEDURE—OUTLINES. WASHBURN. A manual of Criminal Law, including the mode of Procedure by which it is enforced. Especially designed for students, by Emory Washburn. Third Edition with Notes, by Marshall D. Ewell, of the Chicago Bar. $2.50.

LEADING LAW SCHOOL BOOKS

DAMAGES—RUSSELL'S CASES ON THE MEASURE OF DAMAGES. Selected by Isaac Franklin Russell, Professor of Law in New York University School of Law. $4.00.

DAMAGES—WILLIS. PRINCIPLES OF THE LAW OF DAMAGES, by Hugh E. Willis, Dean of the Law School of Southwestern University. $2.00.

DICTIONARY—CYCLOPEDIC LAW DICTIONARY. Combines in a single volume, Words and Phrases, Brief Encyclopedia, Complete Glossary, Translations, Definitions, Maxims. Presents every word or phrase which may be sought for in a law dictionary. 1,000 pages—thumb indexed. $6.00.

DICTIONARY—KINNEY'S DICTIONARY AND GLOSSARY. A complete, compact, clear and concise ready reference Dictionary, consisting of a Glossary with Words and Phrases. Thumb indexed. $4.00.

DOMESTIC RELATIONS—HOLBROOK'S CASES ON THE LAW OF PERSONS AND DOMESTIC RELATIONS, by Evans Holbrook, Professor of Law in the University of Michigan.

DOMESTIC RELATIONS—PECK. THE LAW OF PERSONS AND DOMESTIC RELATIONS, by Hon. Epaphroditus Peck, Ex-associate Judge of the Court of Common Pleas for Hartford County (Conn.) and lecturer in the Department of Law, Yale University. $3.50.

EQUITY PLEADING & PRACTICE—FLETCHER. A TREATISE ON EQUITY PLEADING AND PRACTICE, with illustrative Forms and Precedents, by William Meade Fletcher, of the Chicago Bar, author of "Fletcher's Corporation Forms and Precedents, Annotated," "Fletcher's Illinois Corporations," etc. $5.00.

EQUITY PLEADING & PRACTICE—RUSH. CASES ON EQUITY PLEADING AND PRACTICE, STATE AND FEDERAL, by G. Fred Rush, of the Chicago Bar. $2.50.

EQUITY PLEADING & PRACTICE—RUSH. THE ESSENTIALS OF EQUITY PLEADING AND PRACTICE, STATE AND FEDERAL, with illustrative Forms and Analytical Tables, and including Forms and Procedure in the Master's Office. Also the Reforms and Changes effected by the United States Federal Laws enforced February 1, 1913, by G. Fred Rush, of the Chicago Bar. $2.50.

EQUITY PLEADING & PRACTICE—RUSH'S TEXT AND CASES COMBINED. $4.50.

EQUITY PLEADING & PRACTICE—SUNDERLAND'S CASES ON EQUITY PLEADING AND PRACTICE, by Edson R. Sunderland, Professor in the University of Michigan Law School. $4.00.

EQUITY PLEADING & PRACTICE—THOMPSON'S CASES ON EQUITY PLEADING AND PRACTICE, by Bradley M. Thompson, Jay Professor of Law in the University of Michigan Law School. $3.00.

EQUITY PLEADING & PRACTICE—VAN ZILE. A TREATISE ON EQUITY PLEADING AND PRACTICE, by Hon. Phillip T. Van Zile, of the Detroit Bar, and author of "Bailments and Carriers." $5.00.

EVIDENCE—HAMMON. A TREATISE COVERING THE BURDEN OF PROOF, PRESUMPTIONS, JUDICIAL NOTICE, JUDICIAL ADMISSIONS, AND ESTOPPEL, by Lewis L. Hammon, author of a treatise on Contracts. $5.00.

LEADING LAW SCHOOL BOOKS

EVIDENCE—HUGHES. AN ILLUSTRATIVE TREATISE IN THE LAW OF EVIDENCE, by T. W. Hughes, Professor of Law in the University of Illinois. $4.00.

EVIDENCE—KENNEDY. A SYNOPSIS OF THE LAW OF EVIDENCE, generally applicable to Trials, by Richard Lea Kennedy of the St. Paul Bar. $2.00.

EVIDENCE—REYNOLDS. LAW SCHOOL EDITION. THE RULES OF EVIDENCE AND OF THE CONDUCT OF THE EXAMINATION OF WITNESSES IN TRIALS AT COMMON LAW AND IN EQUITY AS ESTABLISHED IN THE UNITED STATES, with the reasons for them. A concise manual adapted for use at the Trial Table, by Hon. William Reynolds, of the Baltimore Bar. $3.00.

EXAMINATIONS AT LAW—WIGMORE. CONSISTING OF PRACTICAL PROBLEMS AND CASES COMBINED, from papers contributed by various Law Schools, by John Henry Wigmore, Dean of Northwestern University Law School. $4.00.

EXTRAORDINARY LEGAL REMEDIES—GOODNOW'S SELECTED CASES ON AMERICAN ADMINISTRATIVE LAW, with particular reference to the Law of Officers and extraordinary Legal Remedies, by Frank J. Goodnow, Eaton Professor of Administrative Law and Municipal Science, Columbus University. $5.00.

INSURANCE—BAYS. A HANDBOOK ON THE LAW OF INSURANCE, with Questions, Problems and Forms, by Alfred W. Bays, member of the Chicago Bar, and Professor of Commercial Law in Northwestern University School of Commerce. $1.50.

INSURANCE—BIGELOW'S CASES ON INSURANCE, by H. A. Bigelow, Professor of Law in the University of Chicago Law School.

INTERNATIONAL LAW—BORDWELL'S LAWS OF WAR. A History and Commentary, to Percy Bordwell, Professor of Constitutional Law, University of Missouri. $3.50.

INTERNATIONAL LAW—DWYER'S CASES ON PRIVATE INTERNATIONAL LAW. Second Edition, by John W. Dwyer, Professor of Law in the University of Michigan. $4.00.

INTERNATIONAL LAW—TAYLOR. A TREATISE ON INTERNATIONAL PUBLIC LAW, its origin and growth, by Hannis Taylor, late Minister Plenipotentiary of the United States to Spain, a member of the General Advisory Committee of the American Academy of Political and Social Science. $5.50.

JURISPRUDENCE—PATTEE. THE ESSENTIAL NATURE OF LAW, OR THE ETHICAL BASIS OF JURISPRUDENCE, by William S. Pattee, Dean of the College of Law, University of Minnesota. $2.50.

LEGAL ETHICS—WARVELLE. ESSAYS IN LEGAL ETHICS, by George W. Warvelle, of the Chicago Bar, author of "Warvelle on Abstracts of Title," "The Law of Vendors and Purchasers," "Principles of Real Property," etc., one volume. $1.50.

NEGOTIABLE INSTRUMENTS—BAYS. A HANDBOOK ON THE LAW OF NEGOTIABLE PAPER, containing the text of the Uniform Negotiable Instruments Act, with Questions, Problems and Forms, by Alfred W. Bays, Member of the Chicago Bar, and Professor of Commercial Law in Northwestern University School of Commerce. $1.50.

NEGOTIABLE INSTRUMENTS—BUNKER. THE NEGOTIABLE INSTRUMENTS LAW, WITH ANNOTATIONS, by Robert E. Bunker, of the Michigan Bar, and Professor of the Law of Bills and Notes in the University of Michigan Law School. $3.50.

LEADING LAW SCHOOL BOOKS

NEGOTIABLE INSTRUMENTS—BUNKER'S SELECTED CASES ON THE LAW OF NEGOTIABLE INSTRUMENTS, by Robert E. Bunker, of the Michigan Bar, and Professor of the Law of Bills and Notes in the University of Michigan Law School. $4.00.

NEGOTIABLE INSTRUMENTS—OGDEN. A TREATISE ON THE LAW OF NEGOTIABLE INSTRUMENTS, including Promissory Notes, Bills of Exchange, Bank Cheques and other Commercial Paper, with the Negotiable Instruments Law of the United States, as well as the Pleading, Trial Evidence, and Constructive Tables arranged alphabetically by States, by James Matlock Ogden, of the Indianapolis Bar, and Professor of Law in the Indiana Law School. $4.00.

NEGOTIABLE INSTRUMENTS—SELOVER. A TREATISE ON NEGOTIABLE INSTRUMENTS FOR EVERY STATE, by Arthur W. Selover. Second Edition by William H. Oppenheimer, of the St. Paul Bar. $4.00.

OFFICERS—GOODNOW'S CASES ON THE LAW OF OFFICERS, INCLUDING EXTRAORDINARY LEGAL REMEDIES, by Frank J. Goodnow, President of Johns Hopkins University. $5.00.

PARTNERSHIP—BAYS. A HANDBOOK ON THE LAW OF PARTNERSHIP, with Questions, Problems and Forms, by Alfred W. Bays, Member of the Chicago Bar, and Professor of Commercial Law in the Northwestern University School of Commerce. $1.50.

PARTNERSHIP—MECHEM. THE ELEMENTS OF THE LAW OF PARTNERSHIP, by Floyd R. Mechem, author of "Mechem on Agency," "Mechem on Public Officers," "Mechem on Sales," and Professor of Law in the University of Chicago. $2.50.

PARTNERSHIP—MECHEM'S CASES ON THE LAW OF PARTNERSHIP, by Floyd R. Mechem, author of "Mechem on Agency," "Mechem on Public Officers," "Mechem's Elements of Partnership," Editor of Mechem's Hutchinson on Carriers, "Mechem's Cases on Agency," etc., Professor of Law in the University of Chicago. Second Edition, by Frank L. Sage, Professor of Law in the University of Michigan. $3.50.

PARTNERSHIP—(ENLARGED EDITION) MECHEM'S CASES. Same as above, with addition of Supplement. One volume, Third Edition. $4.50.

PARTNERSHIP—SHUMAKER. A TREATISE ON THE LAW OF PARTNERSHIP, by Walter A. Shumaker. Second Edition. $3.00.

PERSONAL PROPERTY—CHILDS. THE PRINCIPLES OF THE LAW OF PERSONAL PROPERTY, Sales, Chattels and Choses, including Sales of Goods, Sales, Execution, Chattel Mortgages, Gifts, Lost Property, Insurance, Patents, Copyrights, Trade Marks, Remedies of Actions, etc., by Frank Hall Childs, of the Chicago Bar, sometime Professor of the Law of Personal Property in Chicago Kent College of Law. $3.50.

PRACTICE—FOSTER'S FIRST BOOK OF PRACTICE—AT COMMON LAW, IN EQUITY, AND UNDER THE CODES WITH FORMS. Third Edition, by Lemuel H. Foster, of the Chicago Bar. $4.00.

PROPERTY—ROOD'S CASES ON PROPERTY. Second Edition. Decisions, Statutes, etc., concerning the Law of the States and Land, by John R. Rood, Professor of Law in the University of Michigan. $4.00.

LEADING LAW SCHOOL BOOKS

QUIZZERS—SPRAGUE. QUIZ BOOKS FOR LAW STUDENTS. QUESTIONS AND ANSWERS ON ALL SUBJECTS, COVERING ALL BRANCHES OF THE LAW, each, 50 cents. Twenty-eight numbers, as follows: Blackstone, Vol. I; Blackstone, Vol. II; Blackstone, Vol. III; Blackstone, Vol. IV; Kent's Commentaries, Vol. I; Kent's Commentaries, Vol. II; Kent's Commentaries, Vol. III; Kent's Commentaries, Vol. IV; Attachments; Domestic Relations; Criminal Law; Torts; Real Property; Constitutional Law; Contracts; Equity Pleading and Practice; Common Law Pleading; Bills, Notes and Checks; Equity; Agency; Partnership; Sales of Personal Property; Evidence; Elementary Law; Bailments & Carriers; Wills and Estates; Suretyship and Guaranty; Insurance.

QUIZZERS—WALSH. STUDENTS' QUIZ BOOKS. Fourteen numbers. Each, 50 cents.

REAL PROPERTY—BAYS. A HANDBOOK ON THE LAW OF PROPERTY, Real and Personal, with Questions, Problems and Forms, by Alfred W. Bays, member of the Chicago Bar, and Professor of Commercial Law in Northwestern University School of Commerce. $1.50.

REAL PROPERTY—HAWLEY & McGREGOR. A TREATISE ON THE LAWS OF REAL PROPERTY, by John G. Hawley and Malcolm McGregor, Members of the Michigan Bar, and authors of "Hawley & McGregor on Criminal Law." Third Edition. $4.50.

REAL PROPERTY—TIFFANY. A TREATISE ON THE MODERN LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND, by Herbert Thorndyke Tiffany, of the Baltimore Bar, and author of "Tiffany's Landlord and Tenant." Two volumes, $10.00. Same, Students' Edition (two volumes in one), $7.00.

REAL PROPERTY—WARVELLE. THE PRINCIPLES OF THE AMERICAN LAW OF REAL PROPERTY, by George C. Warvelle, of the Chicago Bar, author of a treatise on Abstracts of Title, the "Law of Vendors and Purchasers," "Legal Ethics," etc. Third Edition. $4.00.

ROMAN LAW—SANDARS. THE INSTITUTES OF THE JUSTINIANS, WITH ENGLISH INTRODUCTION, TRANSLATION AND NOTES, by T. C. Sandars, Barrister at Law, Late Fellow of Oriel College, Oxford. First American Edition, with Introduction by W. G. Hammon. $5.00.

SALES—BAYS. A HANDBOOK ON THE LAW OF SALES, of Personal Property, containing a copy of the text of the Uniform Sales Act, and the Uniform Bills of Lading Act, with Questions, Problems and Forms, by Alfred W. Bays, Member of the Chicago Bar and Professor of Commercial Law in Northwestern University School of Commerce. $1.50.

SURETYSHIP—BAYS. A HANDBOOK ON THE LAW OF SURETYSHIP, with Questions, Problems, and Forms, by Alfred W. Bays, member of the Chicago Bar, and Professor of Commercial Law, Northwestern University School of Commerce. $1.50.

SURETYSHIP—SPENCER. SURETYSHIP AND GUARANTY. The general Law of Suretyship including commercial and noncommercial guaranties, and compensated corporate suretyship, by Edward W. Spencer, of the New York Bar, Dean of the Marquette University College of Law. $3.50.

SURETYSHIP—WILSON'S SELECTED CASES ON THE LAW OF SURETYSHIP AND GUARANTY, by Henry H. Wilson, Professor of Law in the University of Nebraska. $4.00.

LEADING LAW SCHOOL BOOKS

TAXATION—GOODNOW'S CASES ON THE LAW OF TAXATION, by Frank J. Goodnow, Eaton Professor of Administrative Law, and Municipal Science in Columbia University Law School. $5.00.

TORTS—COOLEY. ELEMENTS, by Hon. Thomas M. Cooley. $3.50.

TORTS—COOLEY. A NEW LAW SCHOOL EDITION. A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT, by Thomas M. Cooley. Students' Edition, by John Lewis, author of a treatise on the Law of Eminent Domain. $4.00.

TRIAL PRACTICE—HINTON'S CASE ON TRIAL PRACTICE, AT COMMON LAW AND UNDER MODERN STATUTES, by E. W. Hinton, Professor of Law in the University of Chicago. $4.00.

TRIAL PRACTICE—SUNDERLAND'S CASES ON TRIAL PRACTICE, by Edson R. Sunderland, of the Law Department of the University of Michigan. $4.00.

WILLS—BATES' CASES ON WILLS, by Henry M. Bates, Dean of the Law Department, University of Michigan.

WILLS—ROOD. A TREATISE ON THE LAW OF WILLS, including also Gifts Causa Mortis, and a summary of the law of descent, distribution and administration, by John R. Rood, Professor of Law in the University of Michigan. $4.00.