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A Discussion of the Law of Contracts in Restraint of Trade

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A
D i s c u s s i o n
of
The law
of
C o n t r a c t s i n R e s t r a i n t
of
T r a d e.

X-----X

T h e s i s
in
CORNELL UNIVERSITY
School of law

X-----X

By
H.G. Folts

1891

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CONTENTS

	Page
INTRODUCTION	I
THE GUILDS	II
GENERAL OBSERVATIONS1
PART FIRST	5
PART SECOND	9
(A) Voluntary Contracts	9
SPECIAL RESTRAINT	21
AMERICAN LAW of Special Rest'.	31
PROCEEDURE	37
SUMMATION	38
COMPILATION of CASES	39

I N T R O D U C T I O N

It was my original intention to write on the subject of contracts against public policy; but I had not gone far in my search for materials when I became convinced that the law on that head was far too broad in extent, and solid in substance, to allow of a satisfactory compression to the confines of a thesis; so I abandoned the main subject for one of its branches and here, again, I fear that in my attempt, to hew down the accumulated mass, to proper proportions, I have cast away much, as chips which has more value than some I have allowed to remain in the structure.

In view of the fact that much, of more apparent, value to our discussion has been cast aside, in the process of compression I deem it necessary to make some explanation of my object in inserting matter, which appears, as irrelevant, to my theme, as that contained in the next few pages, will at first glance.

In tracing out the development, of the branch, of law on which I had chosen to write. I found the early cases springing from and resting on the social institution hereafter sketched, ~~xxxx~~ to such an extent that I decided that if I would understand the one, I must become familiar with the other; and after acquiring a knowledge of both I found that to build a consistent structure from the material I had gathered I must lay the foundation with the blocks I had gathered from history and so offer the following brief sketch of the guilds.

THE GUILDS

The origin and the fall of this system of society may be briefly stated as follows . It is the natural disposition of human beings when they first forsake a nomadic existence to band together into societies of some nature and usually for one of two objects ; to mutually protect one another, or, ^{for} mutual improvement . Whatever the aims of such organizations their existence is traced through the history of almost every branch of the human race either as the family, tribe, clan, or state.

As it was naturel for crude, barbaric beings to unite in associations for self protection so in an undeveloped state of political economy when the laws of free competition were not understood it was ~~not~~ only to be supposed that individuals following the same business or craft and oppressed alike by unnatural competition should band together for the mutual protection of their interests . Such associations were very common throughout Europe during what is called ~~the~~ "The dark ages" but with these we have no concern and so will pass them with the comment that founded though they were on naturel instincts ~~and~~ they were fostered by false theories and served rather as means of oppression than benefit until the light of the reformation scattered their false hypotheses and disbanded the ~~ass~~ociations which championed them.

It is with the Guilds of England that we are chiefly concerned and I will attempt to show why. When the country was conquered by Willian of Normandy in 1066 there were but few if any societies which resembled the Guilds of a few ~~xx~~ years later but the unnatural condition of society which the

invasion of the conquerer brought about left the Saxon tradesman to compete as best he might with the favored Norman merchant . Not only was the gold of the Jews ,but the goods of the Saxons were considered lawfull plunder by the invaders.

At first the merchants banded together for protection at some place favorable for commerce but out of immediate reach of the Norman robbers around them grew up towns and as the guild law at first governed the association so it came to govern the town . The towns grew and became rich and powerfull so that they were able to demand charters of freedom in return for loans granted to the Crown these charters often retained the guild law as the town law (see Norton) and thus made the merchant guilds a powerfull political factor .

As the Merchant guilds became strong they excluded the "landless man"; that is, those who supported themselvs by hand-crafts so in turn these men banded together and formed the craft or trades guilds .

~~by the~~ There was great jealousy between the two guilds and this lead to the most rigid exclusion. no person, who was not hereditarily elligible, could practice or receive instructions in any trade without binding homself by rigid and often burdensome bonds which often rendered his trade of no consequence to him & after he had ~~been~~ been to the expense and labor of acquiring it. As long as the guilds held their control over the politics of England this condition lasted, and by-laws denying x anv one who was not "free" of the town, that is was not a member of some guild, the right to practice ~~some particular~~

a particular trade under penalty of forfeiture ~~x~~ to the guild whose law, his thus practicing, violated. were frequent and rigidly upheld. So also where a person wished to learn a craft different from his fathers he was usually compelled to give a bond that he would not practice the craft in competition with his instructor and as ~~x~~ other places were barred to him by the by-laws, above mentioned, it practically excluded him from ~~any~~ ^{any beneficial} ~~practical~~ use of his craft without the payment of the fines imposed and as this was often impossible he might receive no benefits whatever from his knowledge.

As soon as the guilds lost their political power these contracts were declared to be void as against public policy and as restraining trade and this principle once established it was rapidly extended to all contracts which hampered trade ~~xxxx~~ whether it be by private contract or public by-law.

The reformation destroyed the power of the guilds in England as it did on the Continent but the ~~re~~formation which destroyed the venom of these contracts was the reformation of them by the courts. *that exercised by a court of Equity.*

GENERAL OBSERVATIONS

First: Our subject is sufficiently defined by the title itself ; it is strictly a discussion of the law of contracts in restraint of trade;but a few observations as to the nature, general limits and classification of the contracts falling within our discussion;together with a definition of the term Trade as used herein, may serve to make our understanding of the subject more concise at the outset and therefore what follows more comprehensible.

(a) Nature: In nature our subject is a Defence that may be urged against certain unconscionable contracts. The mode of doing this and the cases in which it will avail will be set out more fully hereafter .

(b) Limits : Our discussion is limited to a particular

class of contracts which, in some way, interfere with that freedom which every individual has, in society, of supporting himself and family by, what ever lawfull means, he may elect. This may be accomplished by binding a man not to follow his craft or by interfering with free competition or hampering one in his business.

(c) Trade: The term is here used in its broadest sense to include occupation, profession, commerce and traffic and a contract restricting a person in the free exercise of any of these is open to the scrutiny of this defence.

(d) Classification: These contracts are but a division of a large body of contracts open to the more general defence of being contrary to public policy, and to the policy of the law . The following classification of contracts void as against public policy will be found in 14 N. Y. at page 292

Contracts against public policy are divided into .--

- (1) Those in restraint of Trade
- (2) Those in restraint of Marriage
- (3) In corruption of legislation or justice
- (4) Wagering contracts
- (5) In contamination of public morals

Second: It is necessary to a concise discussion that we have a logical division of the subject; accordingly I have adopted the division made use of by Judge Parker in his inimitable opinion in Mitchell-v-Reynolds (1 Pr. Wms. R. 181)

First: Involuntary contracts . Those to which the parties have not willingly consented, as. --

- (a) Grants.
- (b) Customs.
- (c) By-laws.

Second: Voluntary contracts made by the agreement of the parties . These are

- (a) Those of general restraint.
- (b) Those of limited restraint.

Under these two heads I will expand and elucidate the

subject , giving some general, and settled propositions with the authorities sustaining them; and, when necessary, illustrations drawn from the cases, this I will follow with a ~~a~~ short synopsis of the law as it obtains in several of the leading states of the Union. Thus I hope to present a compact yet comprehensive survey of this important branch of law.

P A R T F I R S T :

Sect. 1 : Grants: These are rights conveyed by charter from a superior to an inferior giving that inferior the right to do a certain thing or transact certain business , as expressed in the charter, without molestation or interference under the guaranteed protection of the party granting the charter. In the present discussion these contracts will be divided into three classes for convenience in consideration.

(1) All new charters of incorporation granting the right to trade generally and in exclusion of all others, have been held void from the early case of 8 Co. 121 to the present time . It is held to be an unjust restraint of trade and tending to create monopoly.

(2) A grant to any individual of the sole right to the exercise of any known trade creates a monopoly

and is void both by the provisions of Magna Carta and by the common law, ~~xx xxxxxxxx~~ (11 Co. 84).

(3) A grant of the exclusivs right to enjoy an invention is valid, within the regulations, of the Stat.

12Jac. 1 cap. 1 Sect. 6.

Sect. 2: Customs: The contracts coming under this head are implied rather than experssed and in order that a person may acquire exclusive rights by custom it is necessary to show that he exercises the trade to the advantage of the community, otherwise no rights will accrue and the contract will be void. vid:--

- 8~~Co.~~Co.125
- 1 Leon 142
- 2 Bulst. 195
- Cro. Eliz. 803

(a) If a community of persons claim the exclusive right to exercise some particular trade or art ; an implied

contract will be raised in their favor if it be shown that they use the trade in order to exclude foreigners. This law

is probably obsolete but vid:--
8 Co. 121
11 Co. 52
Carter 68-~~11~~ 114

(b) A custom may suffice to restrain the use of a particular trade in a particular place though no one is either alleged or supposed to use it . vid the case of Rippon in Register 105-6 .

Sect 3: BY-Laws; These relate to certain rights given the Mayor and aldermen of the free towns , by their charters to pass certain by-laws imposing fines upon any person who, not being a guildsman, exercised any trade over which any guild claimed control. The law of this branch of the subject is of little use at present, unless it be analogy to certain powers given modern corporations by charter. in order to

sustain a contract founded on such a by-law it is necessary to show that the by-law was founded on an ancient custom. The cases arising under this head are grouped as follows.--

(a) By-laws to exclude non-guildsmen were held

good if founded on a preceding custom but if there was no

custom to support it the by-law failed . Thus in Woolly-v-Idle

(4 Burr. 1951) A by-law restraining one, not a member of the

Merchant - Tailor guild of Bath , from practicing the trade

of tailor, in Bath, was held good as being supported by an

ancient custom; while in Harison -v- Godman (1 Burr. 12)

a by-law restraining butchers from practicing their trade in

London unless " free of the Butchers Guild " as well as the

City , held bad on demurer as not founded on a custom ; for

at the time of the passage of the by-law any person was free

to practice trade of butcher in London.

For other cases to support the foregoing proposition vid. -

8 Co. 125

Carter 68-114

Hob. 210

1 Bulst. 11

(b) All by-laws made to cramp trade, in general, are

void . vid. --

1 Bulst. 11

2 Tush. 47

Moor 576

(c) By-laws made to restrain trade in order to the

better govern and regulate it, are good if, --

(1) They are for the advantage of the place

and to avoid public nuisance &c.

(2) They are for the advantage of trade and

public improvement.

Mannell-v-Chambers of L-- 1 Stra. 675

Rex -v- Harrison 3 Burr. 1322

pierce -v- Hartun Cowp. 269

PART SECOND

Voluntary contracts

The contracts falling in this part of ~~our~~ our study are by far the ~~more~~ numerous and import^aent of the two. While those we considered in the first part were of some historic interest and some small practical import^ence we have now to consider the live, practical part of our subject. The contracts that we meet with in our practice ; contracts which perplex the profession and deceive the laity and which are constantly straining at the bonds the law has placed about them ; constantly arising under new disguises as multiform and dangerous as the ingenuity of minds bent on deceitful~~X~~ness and dishonesty is exhaustless. As indicated heretofore the subject will now be treated under the two subdivissions of those contracts which are in general and those which are

in special restraint of trade .

Since the eighth year of the reign of Henry the 8th. the law has been well settled that all contracts in general restraint of trade . are void as against public policy , to quote the language of an eminent jurist of England “ The true reason upon which the judgments in these cases of voluntary restraints are founded is the mischief which may arise from them (1) To the party himself by the loss of his livelihood and the subsistence of his family (2) To the public by depriving it of an useful member.” On this double consideration of the interests of the individual and the public it has been uniformly held from the time of vehement Judge Hull (1415) to the latest N.Y. court of appeals decision in point that all contracts and agreements in general restraint of ~~xxx~~ trade are null and void and of no advantage to either party.

The next question which naturally arises is, what is a
a general restraint ? and the answer must be that an exact
definition is beyond the power of the most expert lexicog-
rapher; the latitude is so great and the boundaries so precar-
ious . The term is easily ~~devisable~~^{divisible} into the three factors
of time, place and occupation and these are grouped together
into a bewildering number of combinations and permutations
which complicated by the incidental elements of each case
defy classification or demarkation so that the best that can
be done, in our limited space, is to give in brief a few of
the prominent cases which like the blazed trees on the bound-
ary lines indicate the confines of the field.

Like all rules it has its easy cases and its hard ones
and as it is always easier to solve the hard cases when we
understand the easy ones I shall ^u pursue that order here

Sect. 1: Contracts which can be stamped at sight with this species of illegality are those in which all the three elements of time, place and trade are totally restricted .

Thus in the case of the Weaver reported in the year book of Hen. 5 Vol. 5 , Where a man discouraged at some reverses in his trade signed a bond, for a small consideration, covenanting nevermore to practice the trade of weaver in England was held void and this case settled the law once for all as to this class of restrictions: but in Cheesman -v- Lamby (2 Stra. 739) where a person covenanted “ Not to set up trade within 1/2 mile of plaintiffs’ then dwelling place or any she might see fit to remove to,” even though for a good consideration would have been held void had not the defendant violated the valid part of the contract by setting up trade within a half mile of the plaintiffs original place of business.

Sect. 2 : A contract which restrains a person generally from the use of a secret of trade, with which he has parted for a valuable consideration , is good.vid. --

- Bryson -v- Whitehead 1 Sun. & ST. 74
- Homer -v- Ashford 3 Bing. 322
- Wickens -v- Evans 3 Y. & J. 318
- Young -v- Timmins 1 Camp. & J 331

Sect. 3 : A contract even tho' limited as to ~~place~~ time, to a degree reasonable with the consideration, will be void if the restraint as to place is so indefinite as to amount to a general restraint. Thus a condition that " Defendant would not within two years, after leaving plaintiff's employment, solicit or sell to any customer of plaintiff's or would not follow or be employed in business of coal merchant in nine months ~~after~~" after &c. " without mention as to place was held void as depriving ~~plaintiff~~ defendant for nine months of the benefits of his trade.vid. --

The use of the clause " or elsewhere " may constitute a general restraint , as where the lessor of a brewery covenanted that he would not " During the continu^ance of the demise carry on the business of Brewer or Merchant or Agent for the sale of Ale &c. In S--- or elsewhere &c. " it was held a general restraint. vid. -- Hinde -v- Gray 1 Mann. & Gr. 195

Sect. 5 : A covenant not to carry on the business of Surgeon- Dentist in London or any of the towns in England or Scotland where plaintiff might have been practicing before expiration of defendants apprenticeship, is void. vid. -- Mallin et. al. -v- May 11 M. & W. 652

Sect. 6 : A simple stipulation, even tho' in an instrument under seal, that a trade shall not be carried on in a particular place, without any averement or recital of facts which would render such an instrument reasonable would be void. vid. - Prugnell -v- Close Allyn 67

4

Taylors of Ex. v Close 2 Sh. 350

Claygall v Bachelor Owen 143

Sect. 7 : The restriction of an unreasonably large territory may amount to a general restraint even tho' not co-extensive with the country, as six hundred miles from Westminster, or five hundred miles about London . vid. --

Green -v- Price 13 M. & W. 694

Sect. 8 : A person may bind himself to ~~work~~ use his ~~xxx~~ trade for the benefit of a certain person and no one else and such a contract, if founded on a sufficient consideration, would be good . These are ordinary contracts of hire. vid. -

Pilkington v Scott 15 M. & W. 657

Sect. 9 : Restraint may be indefinite in duration if limited in extent . vid. --

Hitchcock v Coker 1 Lev & P 796

Mallin-v-May 11 M. & W. 652

Sect. 10 : Contracts made by manufacturers tending to regulate wages, prices, hours &c. are void. vid

Hillon -v- Eckersley 6 Ell. & Plk. 47

Next we come to a class of mixed contracts i.e. contracts in which are present both the elements of total and partial restraint . These may be divisible so that the void part may be separated from the good and that which is legal enforced; or they may be so blended as to be inseparable when the entire contract must fall; still again there may be a total restraint of time with a partial restraint of space in which case the contract will be upheld as shown above (Sect. 9)

Sect. 11 : If the contract is capable of division the valid part will be enforced and the void part rejected. vid.-
 Cheesman v Lamby 2 Stra. 739
 Mallin v May 11 M. & W. 652
 Green v Prill 13 M. & W. 694

Sect. 12 : The reasonableness of the restraint will be inquired into and if the restraint imposed is much greater than is necessary to protect the party, for whose benefit the contract is made, it will be decreed void. vid.--

Homer v Grove 7 Bing. 735-43

Procter v Sergeant 2 Man. & G. 20

Sect. 13 : The restraint imposed must not be of a trif-
 ling character ; else the court will not take cognizance of ~~it~~
 it. Thus if a man were to covenant not to wash his hands it
 would not be such a contract as a court would recognize. vid.
 Mitchell v Reynolds 1 Pr. Wms.
 Puff. lib. 5-c, 2.
 21 Hen. 7th. 20

So much for the law of general restraint as judicially
 settled in England. Although the cases cited were, most of
 them at least, decided long ago a careful scrutiny of the ~~and~~
 later reports and digests has failed to disclose any material
 changes ; so that I deem it safe to say that the law of gen-
 eral restraint as set out ~~in~~ in the preceding pages is substan-
 tially the ~~law~~ correct law of England to-day.

We will now take a brief view of the law of general re-

straint as adopted in the United States . There are a few colonial cases (Unavailable except as digested) which seem to follow the English doctrine and it is only after the colonies gained their independence that new questions arose and these were mostly as to what constituted a general restraint within each state ; should it be strictly the ~~state~~ state lines or should it be allowed to extend beyond if reasonable and necessary? Like many other legal problems this one has been solved in a great variety of ways both as to manner of solving and as to result reached . The two extreme doctrines are represented ^{on} ~~to~~ the one hand by Mass. and New York which hold strictly to the state line theory and California on the other which holds that restraint extending beyond the lines is good if reasonable this will be discussed more fully hereafter but see -- Oregon Steamer Co. v Winsor 10 A.L.J. 41

As to contracts in general restraint of trade it is necessary to make but one or two observations and then dismiss the subject .

First: That in America, where the Guild system never existed, many of the questions which we have just considered never arose . Thus in this country if a person, for a good consideration decided to bind himself not to thereafter follow the trade of shoe-maker he might well do it for there ~~were~~ ~~are~~ are many other kindred trades open to him, here, ~~to follow~~ which in England were closed by the door of the Guild Hall and until he had purchased the " Freedom of the Guild", which in many instances he might not be able to do he must remain a town charge or be cast into a debtors cell.

Second: The peculiar composition of our government being made up of States having separate and distinct jurisdic-

ions ; new questions, as to what should constitute total restraint of place, arose which occasion never had, ^{brought} and from the nature of the case never could, bring before the English courts for adjudication.

Third: I have no hesitancy in laying down the rule as absolute throughout the United States "That all contracts in general restraint of trade are void", leaving it for each State to determine, as the occasion arises, what shall be ~~xxxxxxxx~~ considered a general restraint within its jurisdiction.

Our discussion now naturally carries us into the field of contracts in which there is a limited restraint of trade and I will state at the outset that this is at once the most practical as well as the most complicated part of our study. It involves many questions of fact as well as many complicated questions of law, The latter I shall attempt to systematize.

SPECIAL RESTRAINT:

At the very outset we are confronted with difficulty in attempting to formulate a general rule to fit the complex, ~~dx~~ diverse and at times antagonistic law of this part of our subject. Many contracts of partial restraint as well as of general restraint, were upheld prior to the time of Judge Hull (2 Hen. 5, fol. 5.) ~~After~~ After the passionate opinion of that Judge the tide of Judicial consideration turned against every contract that even savored of restraint and for a time every such contract was declared void but in time common sense regained, to some extent, her dominion over prejudice and a few contracts in partial restraint found favor in the sight of the law. The word unsettled correctly expresses the state of the law up to the time that the case of Mitchel v Reynolds came before the courts for decision, when the law was settled

to be this: that while a total restraint voided the contract a partial restraint only made it voidable. The questions since arising have been incidental to their particular cases and these I shall proceed to discuss in their order.

Sect:1. The restraint must be partial, in respect to space and, --

(1) Based on an adequate consideration, or at least more than a colorable consideration must be shown.

(2) The restraint must be reasonable .-

(a) As ~~ax~~ regards consideration paid

(b) As regards protection the party needs.

Sect. 2: In regard to the first point (i.e. that of consideration) it is well stated in Young-v-Timmins by Vaughan to be "Any agreement by bond or otherwise in general restraint of trade, is illegal and void. But such a security given to effect a partial restraint of trade, may be good or bad, according as the consideration is adequate or inadequate

The case just cited, however, did not settle the question of consideration finally and many fine points arose as to how far the courts could inquire in to the adequacy of the compensation . In Gale-v-Reed (8 East 86) Lord Ellenborough states the rule to be “ The restraint on one side ~~enforced~~ meant to be enforced, should, in reason, be co-extensive only with the benefits meant to be enjoyed on the other”. It remained ~~for~~ for the case of Hitchcock-v-Coker(6A. & E. 439) to settle the much mooted question as follows: If the consideration is once shown to possess some bona fide legal value then the parties must act on their own view as to the adequacy of the compensation. This doctrine was emphasized in Pilkington-v-Scott where Alderson, J. lucidly states the rule to be “ 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 bargain for themselves. Although the courts may not enquire into the adequacy of the consideration still such consideration as is imputed by a seal is not sufficient but some actual consideration must be shown, this is contrary to the usual law of contracts under seal but the reason for this difference is indicated by Park, T. in Wells -v- Day (2M. & W. 277), and it seems to be a sensible one, that consideration, in this class of contracts, is required for a different reason from that in the ordinary contract, namely; that here it would ^{be} unreasonable for a man to enter into such a stipulation without some consideration, though it must be left to his own judgment to determine what should be the amount or nature of that consideration.

Thus the RULE, as finally settled seems to be ; That where actual consideration is shown the court will not ~~xx~~ inquire into its adequacy but as to that will rely on the judgment of the parties at the time of making the contract. I will cite only the leading cases on this point, vid, --

Young-v-Timmins 1 Tyrwh. 226
 Pilkington-v-Scott 8 East 86
 Gale-v- Reed 15 M. & W. 657
 Hitchcock-v-Coker 6A. & E. 439
Wallis-v-Day 2 M. & W. 277
Mallam-v-May 11 M. & W. 665,

Sect. 3: The next question we will attempt to dispose of is that of reasonableness and, ~~xxx~~ as I have before indicated, this may be either as regards consideration paid or as regards the amount of restraint imposed . Since the decision of Hitchcock-v-Coker the first point has ceased to be of much practical importance for the adequacy of the compensation will no longer be inquired into and the theory that the re-

straint imposed must be no larger than the consideration paid,
 compensated for, has been abandoned for the more reasonable
 one which I will here set out in the words of Tindal C.J. as
 we find them in Horner-v-Graves (7 King. 743) " We do not see
 how a better test can be applied to the question, whether re-
 asonable 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" It will readily
 be seen that reasonableness, in this sense, is made to depend
 on the facts of each case so that no absolute, universal rule
 can be stated; that is no standard gauge can be given where-
 with to measure ~~the facts~~ in every case and say, without re-
 gard to the facts, whether the restraint is reasonable or
 unreasonable . The best we can do at present is to state that

reasonableness of restraint, in every case, is a question
of fact for the jury. In order to show how this term has been
~~is~~ limited at different times by the courts I will give a di-
 gest of some of the leading cases and for want of a better
 system will adopt a ^{if} ~~chronological~~ order.

A bond not to practice medicine ~~or~~ surgery within 10
 miles of plaintiff for 14 years was held ~~is~~ good as being a
 reasonable restraint in that case. Davis v Mason 2 Str. 739

An agreement not to exercise trade of "Tally-Man" for
 seven years in City of Westminster held good ~~is~~ ~~good~~

Coleman-v-Clark 7 Mod. R. 230

An agreement by an attorney not to practice in London or
 within 100 miles from there ~~is~~ for 7 years was held good.

Funn-v-Guy 4 East 190

For other cases where bond has been held good see--

Hayward-v-Young 2 Chitty 407

Hitchcock v Coker 1 Nev. & P. 796

And cases cited in Smiths leading
 cases at page 770 Vol. 1 Part 2 .

As a general proposition it may be stated that the reasonableness of the restraint depends, in a large degree upon the nature of the trade restrained. Thus in *Horner-v-Graves* (7 Bing. 743) a restriction of 100 miles around York was held to be an unreasonable restraint to protect the interests of a Surgeon Dentist while in *Harms v Parsons* (32 Bev. 328) an area of 200 miles was not considered too great as a protection to a horse hair manufacturer. So in *Proctor v Sergeant* (12 Mann. & Gr. 20) where a milk man bound himself not to sell milk within 5 miles of Northampton Street in Middlesex it was stated (Arbiter) not to be too great a restriction. Again a restraint of 600 miles around London was held too great to be a reasonable protection to a perfumer. As shown before if the contract is severable and part is valid it will be enforced (Sect.11). The point just discussed is well stated and many

of the cases bearing on it collected and ~~XXXXXXXXXX~~ commented upon in Mallan v May (Supra) see also, --

- Cheesman v Mainby (supra)
- Clark v Comer Cs. Tem.Hrd73
- Leighton v Wales 3 M&W 545

Sect. 4: Where the trade sold out is a carrying trade a restraint co-extensive with the route over which the carrying was done will be upheld no matter how ~~a~~ large an area it may cover. vid, --

- Wells v Day 2 Mees & W. 273
- ~~XXXXXXXXXX v Walker 18 XXXX &~~
- Leighton v Wales 3 M. & W. 545

Sect. 5: The mode of obtaining the distance often becomes an interesting question, that is wheith~~r~~ to take an air line or go by the ac^eustomed routes and the rule is that where the deed is silent as to the mode of ascertainin^g the distance, the measurement should be in a straight line. vid, --

- Duignan v Walker 1 Johns. 446
- Stokes v Grissell 14 C.P. 678
- and cases cited.

The deed itself may prescribe the mode of measurement and such a provision in a deed is good and should be followed see, --

Atkins v Kinner 4 Exch. 776;

Sect. 6: If the contract is reasonable when made, subsequently arising circumstances which may render the protection unnecessary. do not affect its operation. vid, --

Elves v Crofts 10 C. E. 241

Jones v Lees 1 H. & N. 189

Sect. 7: As to what constitutes a breach of a contract not to carry on business in a particular place. vid. --

Turner v Evans 2 E. & B. 512 &c.c

Sect. 8: A kindred restraint to those above considered is the ~~restraint~~ of general restraint of alienation of real property ; this in time would bind up business and like all other general restraints, whose tendency is thus, they have been declared void. vid, --

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Jarvis v Marston 2 Vern 251 & cc

American law of special restraint

For the most part the English law on the subject of special restraint prevails in The United States, however, there is some variance from the English doctrine in some of the States, as well as numerous new points never before the English courts for adjudication. These I will briefly state, with their authorities, in the following sections.

Sect. 1: It was early decided in New York, that a contract in restraint of trade general throughout the State is void . see-- Hobbes-v-Lates 7 Cow. 307

In 10 ~~Feb. 64~~ a restraint of all the territory of the State of New York west of Albany, was held to be too large a territory and the contract void. The rule that the restraint imposed must be no greater than the necessities of the case require is quite generally held. In support of this proposition

and as to what has been considered reasonable restraint by

the courts. vid, --

Dean v Emerson 102 Mass. 480

Wright v Rider 36 Cal. 242 c.c.

Lawrence v Kidder 10 Barb. 641

Long v Towe 42 Mo. 545 c.c.

Turner v Johnson 7 Dana. 435.

Sect. 2: A ~~xx~~ consideration must appear in the agree-
ment (Gomps v Rochester 56 Penn.St. 194) but when such a
 consideration appears the court will not ~~x~~ inquire ~~ee~~ into ~~x~~ its
 adequacy. vid, --

Guerand v Dandeleit 32 Md. 561

McClung's Appeal 58 Penn.St. 51

Price v Fuller 8 Mass. 223

Linn v Sigsbee 67 Ill. 75

A seal of itself does not impart a consideration sufficient to uphold a contract in restraint of trade. (21 Wend. 166)

Sect. 3: Subsequent circumstances will not effect the
 operation of a contract which was reasonable when made. vid, --

Cook v Johnson 47 Conn. 175

As to extra-state restraints see O.S.N.Co. v Winsor
 10 A.L.J. 41

Sect. 4: The question of severability of contracts of this nature, has frequently been before the courts. Most of the States hold them to be severable but Calafornia , as usual, holds the contraty dictrine. vid,--

Dean v Emerson 102 Mass. 480

Lang v Wark 2 Oh. St. 519

Peltz v Eichell 62 Mo. 171 c.c.
(contra)

More v Bonnet 40 Cal. 251

Sect. 5: In contracts restraining trade the conditions will be strictly enforced against the obligor. Thus if a man covenant not to carry on a certain trade in a specified locality and receives therefor a consideration, he will be held to have broken the covenant if he sets up business outside the limits but solicits customers within the limits. vid,--

Duffy v Shockey 11 Ind. 70

Whitney v Slayton 40 Me. 224

Treat v S.M.Co. 35 Conn 543

So also if the person merely changes his name and re-enters the restrained district. Richardson v Peacock 26 N.JE. 40

Sect. 6: The question of how the measurement of the restrained territory should be computed arose in the case of Cook-v-Johnson (47 Conn. 175) above cited where the agreement was not to practice dentistry "within a radius of ten miles from Witchfield" it was held that the radius must be taken from the center of the town.

Sect. 7: The transfer of the good will of ones business or practice may be the inducement on which the vendee makes the purchase and this may be shown by the vendee as consideration in support of a contract in limited restraint of trade. vid, --

- Gilman v Dwight 13 Gray 356
- Toutell v Smith 116 Mass. 111
- Mott v Mott 11 Barb. 127

Sect. The law will not presume an agreement void as illegal or against public policy when it is capable of a construction which will make it valid. (86 N.Y. 443)

Sect. 9: The forfeiture, named in these contracts, is generally held to be liquidated damages and not a penalty. In *Nobles v Bates* (7 Cow. 307) ~~Southland, J.~~ Southland, J. says " A more suitable case for the liquidation of damages by the parties, themselves, can scarcely be imagined" .

Sect. 10: A somewhat different rule governs contracts . restricting the publication of Magazines and the writing of articles for the same as no restriction of time or place will invalidate them. vid, -- *Ainsworth v Bently* 14 Wkly. Rs. 630 cc

Sect. 11: All contracts tending to stifle competition are void. vid, -- *Croft v McConoughy* 79 Ill. 346
Arnot v Pittston Coal Co. 68 L. Y. 558

Sect. 12: Also all agreements to corner the market are void. (1) to corner the grain market vid. --
Raymond v Leavitt 46 Mich. 457
(2) to corner the stock market vid. --
Dos Passos' Stock Brokers and Stock Exchanges 454.

28

Sect. 13: Contracts in restraint of trade may be assigned with the business, in aid of which, they are given.

Cal. N. Co. v Wright 6 Cal. 258

Gompers v Rochester 56 Penn. 194

Butler v Burlston 16 Vt. 176

Sect. 14: If the restraint imposed is reasonable; ~~evidence~~ evidence showing plaintiff was not injured by ~~the~~ breach of the condition is inadmissible. vid--

Nobles v Lates 7 Cow. 307 c.c.

Sect. 15: It is not an evasion of the terms of a contract in partial restraint of trade to sell goods to a third party, even with knowledge that such third party does business within the restrained district. Thus where A. agrees not to sell milk in a certain town it is no violation of his contract that he sells to B. with knowledge that B. sells within said town. vid, --

Smith v Martin 80 Ind. 260

PROCEEDURE

At common law the case always arose in an action on Debt

On the bond, the Defendant answered and prayed oyer of the

condition setting up the special defence that the bond was

void in law; to which the plaintiff ~~demurred~~ demurred and the

issue was joined on the demurrer.

The American proced^{recover}ure is an action to liquidated dam-

ages on breach of condition. As these actions are for a sum

of money, only, and that an ascertained amount . I think

judgment could be taken by default, without application to

the court, under the New York code (Sect. 420 C.C.P.)

If the restraint imposed is a valid one, at common law

Equity will decree a specific performance or restrain a brea-

ch by injunction. vid, --

- Hubbard v Miller 27 Mich. 15
- Angier v Webber 14 Allen 211
- Tutler v Curleson 16 Vt. 176
- Beard v Dennis 6 Ind. 200
- Ewing v Johnson 34 Hr. Pr. R. 202

SUMMATION .

The following tests if applied to a contract in which there is an express restraint of trade, will show at once whether the contract be valid or void.--

(1) If there is a total restraint of trade--

(a) In time it is immaterial

(b) In locality, as above set out, it is void

(2) If the restraint is partial it may be good if--

(a) Reasonable with needs of party protected by it

(b) Supported by a substantial consideration

(3) The consideration must be--

(a) Real not fictitious

(b) A seal will not raise a conclusive presumption of consideration.

(c) If real; courts will not inquire into its adequacy.

(4) The remedy is,--

(a) An action to recover damages on contract.

(b) An action in equity for specific performance.

(c) An action in equity for an injunction.

(5) The law action and the equity action may be pursued concurrently.

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Leading English cases.

Mitchell -v- Reynolds	1 Pr. W'm's. R. 181
Cheesman -v- Namby	2 Stra. 739
Tunn -v- Guy	4 East. 190
Hayward -v- Young	2 Chitty 407
Homer -v- Graves	7 Bing. 735
Hitchcock -v- Coker	1 Nev. & P. 796
Archer -v- Marsh	6 A. & E. 959
Proctor -v- Sergeant	2 Mann. & Gr. 20
Mallan -v- May	11 M. & W. 652
Green -v- Prill	13 M. & W. 694
Hillton-v- Eckersley	6 Ell. & B'lk. 47

Leading New York cases

Dunlop -v- Gregory	10 N.Y. 241
Sedgwick -v- Stanton	14 N.Y. 289
Nobles -v- Bates	7 Cow. 307
Chappel -v- Brockway	21 Wend. 157
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Leading Massachusetts cases

Price -v- Fuller	8 Mass. 223
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McClug's Appeal	58 Pa. St. 51
Keeler -v- Taylor	53 Pa. St. 467
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Leading Ohio cases

Crawford -v- Wick	18 Oh. St. 190 & c. c.
Lange -v- Werk	2 Oh. St. 519

California cases

Oregon St'm. Co. -v- Winsor	20 Wall. 64 (10 A. L. J. 41)
Moore -v- Bonnet	40 Cal. 251
Lightner -v- Menzel	35 Cal. 468

New Jersey

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Richardson -v- Peacock	26 N. J. E. 40

Miscellaneous cases

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Linn -v- Sigsby	67 Ill. 75
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