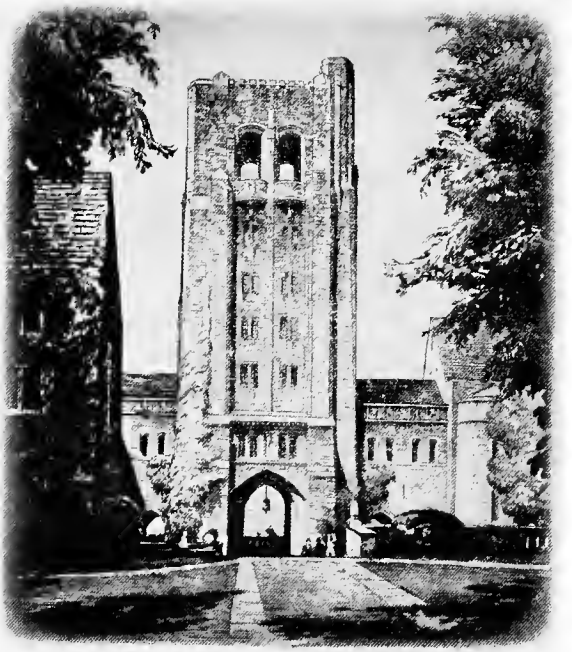

A TREATISE

ON

TRUSTS AND MONOPOLIES.

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TRUSTS AND MONOPOLIES,

CONTAINING

AN EXPOSITION OF THE RULE OF PUBLIC POLICY AGAINST CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE, AND A REVIEW OF CASES, ANCIENT AND MODERN.

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PREFACE.

THE Author offers as a justification for this work the importance of the subject, the increasing number of cases on the rule of public policy involved, and the absence of a previous separate treatise devoted exclusively to it. Great interest centres in public phases of the question, and it is hoped that the following pages will prove of interest and value to many outside the legal profession, and of special use to the latter.

T. C. SPELLING.

CONTENTS.

CHAPTER I.

HISTORICAL DEVELOPMENT OF PRINCIPLE.

CHAPTER II.

AGREEMENTS NOT TO PRACTICE PROFESSION OR FOLLOW TRADE.

CHAPTER III.

AGREEMENTS NOT TO ENGAGE IN BUSINESS.

CHAPTER IV.

AGREEMENTS NOT TO ACCEPT EMPLOYMENT.

PAGES 69–72.

CHAPTER V.

MONOPOLIES OR COMBINATIONS TO SUPPRESS COMPETITION.

PAGES 73–96.

CHAPTER VI.

COMBINATIONS AMONG ARTISANS AND WORKING-MEN.

PAGES 97–109.

CHAPTER VII.

COMBINATIONS AMONG BIDDERS.

PAGES 110–126.

CHAPTER VIII.

APPLICATION OF RULE TO SUPPRESSION OF COMPETITION IN PUBLIC SERVICE.

CHAPTER IX.

APPLICATION OF RULE TO MUNICIPAL GRANTS AND CONTRACTS.

CHAPTER X.

APPLICATION OF PRINCIPLE TO PRIVATE CORPORATIONS.

CHAPTER XI.

WHERE CREATION OF MONOPOLY AND RESTRAINT THE POLICY OF THE LAW.

CHAPTER XII.

MONOPOLIES IN THE FORM OF "TRUSTS."

CHAPTER XIII.

ANTI-MONOPOLY LEGISLATION.

CHAPTER XIV.

ACTIONS AND DEFENCES.

PAGES 244–259.

TABLE OF CASES.

THE FIGURES REFER TO THE PAGES.

A.

B.

[The figures refer to the Pages.]

C.

[The figures refer to the Pages.]

[The figures refer to the Pagee.]

D.

E.

F.

[The figures refer to the Pages.]

G.

[The figures refer to the Pages.]

H.

I.

J.

K.

L.

[The figures refer to the Pages.]

M.

[The figures refer to the Pages.]

N.

[The figures refer to the Pages.]

O.

P.

[The figures refer to the Pages.]

Q.

R.

S.

[The figures refer to the Pages.]

T.

U.

V.

W.

[The figures refer to the Pages.]

Y.

TRUSTS AND MONOPOLIES.

CHAPTER I.

HISTORICAL DEVELOPMENT OF PRINCIPLE.

§ 1. **Of the Primary Right to exchange Values.** — A social existence apart from the exercise of commercial privileges is almost inconceivable. Society is itself a compact between its members; and such compact is the basis, the *referendum*, of the innumerable subsequent contracts and commercial transactions by which, in part, the social state is perpetuated. Therefore the right to trade with his fellow, whether of the same political sphere or in the widest sense, is as much an invaluable and absolute right as the privilege of removing from place to place, — subject, however, to such abridgment as is warranted by considerations of general or local welfare.

§ 2. **The Right limited by Public Policy.** — This public consideration permeates the whole body of the law; and though its province and scope have never been clearly established, it has on many occasions and in a variety of forms been recognized and given effect. It has been aptly remarked that "public policy is a variable quantity; that it must vary, and does vary, with the habits, capacities, and opportunities of the public;"[1] and upon another occasion that it "is a very

[1] Kekewich, J., in Davies *v.* Davies, 36 Ch. Div. 359.

unruly horse, and when once you get astride is you never know where it will carry you."[1] In Woodruff *v.* Berry,[2] the court say: "We are aware that courts tread upon thin ice when they annul contracts because they contravene, or are supposed to contravene, considerations of public policy." In Richardson *v.* Mellish,[3] Best, C. J., said. "I am not much disposed to yield to arguments of public policy. I think the courts of Westminster Hall have gone much further than they were warranted in going on questions of policy. They have taken on themselves sometimes to decide doubtful questions of policy, and they are always in danger of 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 judgment 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." Burroughs, J., joined in the protest of the Chief Justice "against arguing too strongly upon public policy." "It may lead you," said he, "from the sound law. It is never argued at all but when other points fail." In Hilton *v.* Eckersley,[4] the judges differed in opinion as to what policy was in the case before them, and Lord Campbell said: "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

[1] Burrough, J., in Richardson *v.* Mellish, 2 Bing. 229.
[2] 40 Ark. 251.
[3] 5 T. R. 599.
[4] 6 E. & B. 47.

found collated in the report of the recent Bridgewater Case, in the House of Lords, to the effect that if a contract or 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." The Bridgewater Will Case was Egerton *v.* Earl Brownlow.[1] There the judges were summoned to answer questions of law, one of which was: Are all, or any, and which, of the several provisos in the will of the Earl of Bridgewater void? On this question they differed in opinion, Baron Parke saying: "This [public policy] is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may and does, in its ordinary sense, mean 'political expedience,' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to the education, habits, talents, and dispositions of each person who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is in the province of the statesman, and not the lawyer, to discuss, and of the legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only, — the written from the statutes; the unwritten, or common, law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and from the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is best, in his opinion, for the advantage of the community." Yet the Lords thought differently, and showed by their judgments that this doctrine of the public good, or the public safety, being the foundation of the law, an unlimited number of cases might be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public good, and on that alone. Lord Brougham said: "Exceptions have been

[1] 4 H. L. Cas. 1.

made to the expression of 'public policy,' and it has been confounded with political policy. . . . Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law."

§ 3. **Basis of the Rule.** — The rule of public policy contravening contracts in restraint of trade is based upon two reasons, or motives. One is that the performance of such contracts injures the public by depriving it of the restricted party's skill and industry; the other, that the restricted party is himself injured because seeking thereby to preclude himself from pursuing his occupation, and thus being prevented from supporting himself and his family, and indirectly threatening the public with becoming burdened with their support. If neither of these evils ensues, 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.[1] These two reasons have sometimes been subdivided. Thus, in Alger *v.* Thatcher,[2] the learned judge who delivered the opinion 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," and 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 them 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 employment and capacities in which they may be most useful to the community as well as themselves.

[1] Oregon S. S. Co. *v.* Winsor, 20 Wall. 64.

[2] 19 Pick. 51. See also Newell *v.* Meyendorf, 9 Mont. 254; 23 P. 333.

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, which 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." But all these reasons are covered by the two above stated.

§ 4. **Early Views on the Subject.** — 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. As early as the second year of Henry V. (A. D. 1415), we find, by the Year-Books, that this was considered to be an old and settled law. Through a succession of decisions, it has been handed down to us unquestioned, until the present time. The rule was at first given a general and rigid application in England, the courts being somewhat influenced by the prevailing policy of encouraging and stimulating a variety of mechanical arts and infant industries, which policy it was thought might be to considerable extent defeated by tolerating even the slightest restrictions upon the exercise of one's trade. Accordingly, in Colgate *v.* Batchelor,[1] a bond having been given by a haberdasher not to exercise his trade within the cities of Canterbury and Rochester for the space of four years, the court adjudged that "the condition was against law to prohibit or restrain any to use a lawful trade at any time or at any place." The courts of that period (reign of Henry V.) were influenced by another reason; namely, no man could under the existing law exercise any trade to which he had not been duly apprenticed and admitted: so that if he covenanted not to exercise his own trade, he practically covenanted not to exercise any, — in other words, not to earn his living.[2] The case of the Ipswich Tailors[3] was also

[1] Cro. Eliz. 872. See also Wright *v.* Ryder, 36 Cal. 342.

[2] Pollock on Contracts, 313; Parsons on Contracts, Vol. 11, 255.

[3] 11 Coke, 540.

decided upon the principle that "no man could be prohibited from working in any lawful trade." But the provision to which exception was taken, because of its being in restraint of trade in that case, was found in a by-law of an association of tailors.

§ 5. **Earliest Modification of the Rule.** — The first case which recognized that a contract might be valid in restraint of trade for a time certain, and for a limited and definite place, was that of Rogers *v.* Perry.[1] But in the celebrated Ipswich Tailors' Case,[2] the court declared it as a common-law principle that "No man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, and especially in young men, who ought in their youth (which is the seed-time) to have lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and, therefore, the common law abhors all monopolies which prohibit any from working in any lawful trade." And in another case,[3] it was considered unimportant whether or not such a contract was based upon a valuable consideration.

§ 6. **Modern Modifications of the Rule.** — Even as early as the date of the cases last noticed, the courts of England began to distinguish between contracts restrictive without limit as to the whole realm, and such as were only in partial restraint of trade, and intimated that if based upon a consideration, contracts in partial restraint were valid; and finally Chief Justice Parker (Lord Macclesfield), in Mitchell *v.* Reynolds,[4] declared the true doctrine to be that "voluntary restraints by agreement between two parties, if they amount to a general restraint of trading by either party, are void whether with or without

[1] Bulstr. 136.

[2] 11 Coke, 540.

[3] Prugnell *v.* Gosse, 11 Coke, 540.

[4] 1 P. Williams, 181. See also Mandeville *v.* Harman, (N. J.) 7 A 37; Ellerman *v.* Chicago Junction Railways & Union Stock-Yards Co., (N. J.) 23 Atl. 287; Grasselli *v.* Lowden, 11 Ohio St. 349; Holmes *v.* Martin, 10 Ga. 503; People *v.* Brockway, 21 Wend. (N. Y.) 157.

consideration; but particular restraints of trading, if made upon a good and adequate consideration, so as to be a proper and reasonable contract, are good." And the test to be applied, in determining whether a restraint of trade is reasonable or not, is to consider whether the restraint is only such as is necessary to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public.[1]

§ 7. **Public Interest the Ruling Consideration.** — From the earliest adjudications upon this branch of law down to the latest, public interest, or, as it is usually termed, public policy, has been the crucial test of the validity of a contract alleged to be in restraint of trade. Where the public right or welfare would not be injuriously affected by allowing the particular contract to be enforced, such contract being otherwise valid and not inequitable, courts have never assumed to set them aside or refused enforcement merely because a party has imposed upon himself unnecessary restraints in the matter of contracting, engaging in business, or accepting employment.[2] This test was first applied in the case of Mitchell *v.* Reynolds (above cited), where, though the immediate interest of the party was also regarded, the public interest was distinctly recognized as the real criterion. It should perhaps be remarked here that with this proposition there will be found in future pages many *dicta* in apparent conflict. But a careful study will lead to the conclusion that every attempt of a court to justify a decision, declaring a restrictive contract void on grounds of mere private justice, ignores or violates some established principle of the law of contracts as applied where no question of public policy is involved. For instance, take the rule laid down by Chief Justice Parker in Mitchell *v.* Reynolds, namely, that it would be unreasonable to contract for a certain loss on one side which could be no benefit on the other. This expression in various forms has been since employed in a great many cases, both American and English, and is literally correct; but it has its public as well as its private

[1] Mandeville *v.* Harman, (N. J.) 7 A. 37.

[2] See Skrainka *v.* Scharringhouse, 8 Mo. App. 522.

and individual bearing. Any restraint which is not necessary for the party's protection in the matter of exercising his trade or efforts at once invades the domain of public policy. Beyond the necessity and interest of the immediate parties to a contract lies the public interest. One can contract away his right to follow a particular trade in a particular place, but it is unnecessary, *and also a public detriment* for him to contract not to follow the trade elsewhere, or to follow no trade, or engage in no manner of business or occupation whatever.

§ 8. **No Artificial Limitations as to Place.** — The early cases in this country recognized the early English rule. But in Chappel *v.* Brockway,[1] the court saw nothing in the contract before it calling for an application of the rule. The facts were that the plaintiff and defendant were competitors in running packet-boats on the Erie Canal, between Rochester and Buffalo, and the defendant, for the consideration of $12,500, was induced to sell out to the plaintiff his boats and other property connected with the business, and to enter into a bond in the penal sum of $25,000 that he would not at any time thereafter own, run, or be interested in any line of packet-boats on the canal, within the limits before occupied by him. It was held that the bond was valid; there being not only a sufficient pecuniary consideration, but a good reason for the contract.

The court said: "Contracts which go to the total restraint of trade, as that a man will not pursue his occupation or carry on business anywhere in the State, are void, upon whatever consideration they may be made. They must be injurious to the public, and no good reason can be shown why one individual should thus better himself, or another individual should contract for the restraint. The obligation is injurious to one party, without being beneficial to the other. But there may be good reasons for allowing parties to contract for a limited restraint, as that a man will not exercise his trade or carry on business in a particular place; and when such reasons are shown, the contract will be upheld and enforced. The common-law

[1] 21 Wend. 157.

rule on this subject, undoubtedly, had its origin at a time when there were comparatively very few mechanics and tradesmen, and when there was much more reason for guarding against restraints of this kind than there can be now. Still, I am unable to say that the reason of the rule has so entirely ceased that the rule itself is at an end. It must be admitted, however, that courts at the present day look upon contracts of this description with much less jealousy than they did at a former period. At one time the contract, however free from objection in other respects, would have been held void if made in the form of a penal obligation. But there is no longer any doubt that the party may bind himself to the performance of such a contract under a penalty, as well as by a covenant or promise. The modern decisions have also allowed a larger restraint than would formerly have been sanctioned, and one or two of the recent cases have gone nearly, if not quite, far enough to give up the principle upon which the courts originally acted, though without professing to do so."

While local and State lines are even now sometimes regarded, it is generally conceded that owing to the increased facilities for communication and commercial intercourse, whereby far distant markets are brought to one's very doors, other considerations besides distance and territorial extent must enter into the consideration in each case. Some occupations are, as they have ever been, essentially local, while the success of other lines of enterprise requires their prosecution across and beyond State lines, and sometimes beyond the high seas. A fuller discussion of this suggestion will be reserved, however, for another place.[1] But a contract so broad in its restrictions as to cover the whole country would be sustained only under extraordinary circumstances, unless it had for its subject a patent, copyright, or trade secret.[2]

§ 9. **Of the Burden of Proof.** — One important result of the establishment of the modern doctrine, that the question of whether a contract is so restrictive as to infringe public policy is open to extrinsic inquiry, is to shift the burden of proof from

[1] *Infra*, §§ 14, 22.

[2] *Infra*, Chap. XI. As to trade secrets, see also § 32.

the covenantee to the covenantor in all cases where no public duties arise from the nature of the business or occupation affected by the contract. Formerly, contracts in restraint of trade were held *prima facie* bad, but might be shown to be valid if certain elements were present, one of which was a good consideration; and the presence of a seal alone was not sufficient to destroy the presumption of invalidity.[1] Therefore even in the case of a contract under seal it was required that the declaration should aver some consideration.[2] But this doctrine has been repudiated in England, and never was accepted in this country. In a recent case[3] Mr. Justice Chitty, in the lower court, said: "When a covenant or agreement is impeached on the ground that it contains an unreasonable restraint of trade, the duty of the court is, first, to interpret the covenant or agreement itself, and to ascertain, according to the ordinary rules of construction, what is the fair meaning of the parties, and then to apply the rule as to reasonableness with reference to the extent of the impeached covenant, and to see whether it goes too far; in other words, to adopt the modern rule with reference to perpetuities, — a cognate subject, where, when a limitation is impeached on the ground of being too remote, the right way is to consider the instrument without reference to the rule of perpetuity, and then, having ascertained the true meaning of the parties, to apply the rule." On appeal, Lindley, L. J., agreed with this view, saying: "I think that Mr. Levitt's contention that you are to treat a restraint of trade as *prima facie* bad, and throw upon the person supporting it the onus of showing that it is reasonable, is introducing a wholly unsound principle into the construction of documents."

§ 10. **Adequacy of Consideration not investigated.** — It may now be safely asserted as a well-established proposition that with respect to the consideration for such contracts the same rules govern as in passing upon other contracts. The whole

[1] Ross *v.* Sadgbeer, 21 Wend. (N. Y.) 166.

[2] Metcalf on Contracts, 270; Gompers *v.* Rochester, 56 Pa. St. 194; Hulton *v.* Parker, 7 Dowl. 739.

[3] Mills *v.* Dunham, 1 Ch. 576 (1891).

law on the question is thus stated by Tindal, C. J., in Hitchcock *v.* Coker :[1] "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 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 favored 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 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. . . . It is enough, as it appears to us, that there is actually a consideration for the bargain, and that such consideration is a legal consideration, and of some value."

§ 11. **Elasticity of the Principle.** — Since public policy is a variable and indefinite quantity, and because it is the touchstone of each decision herein, it is not strange that the decisions are greatly affected by the nature of the article or right, and the public or private character of the business forming the subjects of contracts. There is practically no limitation upon

[1] 6 Ad. & El. 456. One dollar has been held a sufficient consideration not to run a stage over a particular route. Pierce *v.* Fuller, 8 Mass. 223. See also Pilkington *v.* Scott, 15 M. & W. 657 ; Guerand *v.* Dandelet, 32 Md. 561; McClurg's Appeal, 58 Pa. St. 51. Compare Young *v.* Timmins, 1 Fyrth, 226.

the power to restrain by contract where it is the object and established policy of the law to confer exclusive rights, — of patents and copyrights, for instance.[1] The same rule applies where either the permanent or the temporary curtailment or suppression of the particular act, traffic, or practice is the policy of the law.[2] Again, much greater latitude is given parties who contract concerning ordinary private pursuits, wherein the public is not supposed to be directly interested, than where the business forming the subject of the contract is public or quasi-public.[3]

§ 12. **Construction.** — Whether or not the contract is void, as being in restraint of trade and against public policy, is a question of law for the court to determine.[4] Grants of monopolies in restraint of trade, and against public convenience and improvement, are to be construed strictly against the grantees.[5]

In Express Co. *v.* Meserve,[6] the agreement was "not to do any express business over any road running to a place on the line of the plaintiff's business;" and it was held no infringement to act as servant and messenger of another company doing express business over such road. In Tabor *v.* Blake,[7] the condition of the bond was that "neither of the obligors should, for themselves or either of them, open or cause to be opened a grocery, billiard saloon, or eating saloon, for trade in the village of Woodsville." It was held that "conducting the business as agent for his wife was not a violation of the condition of the bond by the defendant; and that in conducting the business as servant of another he had not opened or caused to be opened a billiard and eating saloon for himself."

A further illustration of the strict construction given to such contracts is the case of Bowers *v.* Whittle,[8] where it was held that a person contracting not to practise or to do any

[1] *Infra*, Chap. XI. [2] *Infra*, § 117. [3] See Chaps. VII., VIII.
[4] Kellogg *v.* Larkin, 3 Chand. (Wis.) 133.
[5] Westfall *v.* Mapes, 3 Grant (Pa.) Cas. 198.
[6] 60 N. H. 198. [7] 61 N. H.
[8] 63 N. H. 147. See also Smith *v.* Gibbs, 44 N. H. 335.

dentistry on his own account or by any agent within certain limits, is not restrained by injunction from working for another at the business of dentistry within the specified limits.

So, where one undertakes the management of the business of a chemist, having covenanted against carrying on the same business in his own name and for his own benefit, or in the name and for the benefit of any other person, within a certain radius, under a specified penalty named by bond, and he afterwards solicits orders for another chemist within the limits specified, the effect of such conduct upon the covenant in question is regarded as too doubtful to warrant a preliminary injunction.[1]

And where, upon the sale of his medical practice, a physician agreed not to "re-settle" in the same town, it was held that he was bound thereby not to again take up his residence in such town for the practice of his profession, but that he might practise in that locality while residing elsewhere.[2] So, where a woman sold a bakery, and covenanted that she would not "engage in the same business directly or indirectly" in the same place for ten years, it was held no ground for an injunction that she had built and fitted up a building suitable for her son to carry on the business.[3]

§ 13. **Form of Contract immaterial.** — From the nature of the case, the principle can never be invoked against other than express contracts. Not even a partial restraint of trade can arise by implication. But as there are many forms and methods of expressly creating and imposing contractual obligations, the kinds of contracts to which the principle may be applied are also numerous. Unlawful restraints may be imposed in an ordinary sealed or unsealed contract or conveyance, or in a license. The attempt to illegally create a monopoly may be found in a municipal ordinance, a charter or a "trust" agreement between combining individuals or corporations, all of which will be more fully explained and illustrated in future chapters.

[1] Clark *v.* Watkins, 9 Jur. (N. S.) 142.
[2] Haldeman *v.* Simonton, 55 Iowa, 144.
[3] Harkinson's Appeal, 78 Penn. St. 196.

CHAPTER II.

AGREEMENTS NOT TO PRACTISE PROFESSION OR FOLLOW TRADE.

§ 14. **No fixed Territorial Limits.** — As was shown in the preceding chapter, all attempts to establish an arbitrary rule as to territorial limits beyond which one may not contract away his right to apply himself to a particular occupation, calling, or enterprise have failed. A similar line of reasoning is pursued in the case of a profession, as where a trade or a particular business occupation forms the subject of the contract.[1]

[1] In Whittaker *v.* Howe, 3 Beav. 383, Lord Langdale, M. R., said: "The question, therefore, is, whether the restraint ought to be considered as reasonable in this particular case. The business is that of an attorney and solicitor, which, to a large extent, may be carried on by correspondence or by agents, and as to which it has already been decided that a restraint of practice within a distance of one hundred and fifty miles was not an unreasonable restraint. It was decided in the case of the surgeon dentist, where the occupation required the personal presence of the practiser and the patient at the same place, that a restraint of practice within a distance of one hundred miles was an unreasonable restraint. 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 one hundred and fifty miles does not describe an unreasonable boundary, — I must say, as Lord Kenyon said in Davies *v.* Mason, 5 Term R. 118, 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.'"

§ 15. **Duration of Restraint unimportant.** — A contract not to practise a profession or to follow a trade within certain limits is not void, simply because the duration of the restraint is not limited.[1]

[1] French *v.* Parker, 16 R. I. 219; 14 A. 870; Warfield *v.* Booth, 33 Md. 63; Martin *v.* Murphy, (Ind.) 28 N. E. 1118; *contra*, Mandeville *v.* Harman, 42 N. J E. 185; 7 A. 37. In Hitchcock *v.* Coker, 1 Nev. & P. 796, also 6 A. & 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 acquire, 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. In French *v.* Parker, *supra*, the defendant contended that the ground of this decision is that there is, in the case of a trade, a goodwill, which may be bequeathed or may pass as assets, and which would therefore be more valuable for a continuance of the restraint after the trader's death; whereas there is no goodwill 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 physician, is unreasonable, because it will avail nothing. But the court in answer said: "We think this too narrow a view of the decision. It seems to us that the real principle of decision in Hitchcock *v.* Coker was this, that if the contract be otherwise valid, it will not be held to be invalid simply because the restraint may continue beyond the life of the party for whose benefit it is accorded, if for any other reason it may be beneficial to him to have it so continue. In Archer *v.* Marsh, 6 A. & 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

One of the early cases in support of this principle was Bunn *v.* Guy,[1] in which the covenant of an attorney not to practise within certain limits was held to be good, although the restraint was unlimited as to time. The main reason given for the decision was that the goodwill of a 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, and that this reason is as valid in the case of a profession as of a trade; for whether, technically speaking, there be any goodwill 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. When a party wishes to retire from his practice and sell it, he can sell it for more, if he can secure the purchaser from competition with the covenantor forever, than he could if he could only secure him from such competition during his own life. So, if the covenantee wished to take in a partner, he could for the same reason make better terms with him. The decision above noted has been followed in numerous subsequent cases.

Thus, the party restrained in Davis *v.* Mason[2] was a surgeon; in Hayward *v.* Young,[3] a surgeon and man midwife; in Mallon *v.* May,[4] a surgeon and apothecary; in Butler *v.* Burleson,[5] a physician and surgeon; and in McClurg's Appeal,[6] a physician. In all these cases the contracts were

the sacrifice made by the other." This, if we understand it correctly, is equivalent to saying that, if the restraint be not otherwise unreasonable, the courts will leave the parties to make their own terms in regard to its duration. This is consonant with the uniform course of decision both before and since Hitchcock *v.* Coker. See Catt *v.* Tourle, L. R. 4 Ch. App. 654.

[1] 4 East, 190.

[2] 5 Term R. 118.

[3] 2 Chitty, 407.

[4] 11 M. & W. 652.

[5] 16 Vt. 176.

[6] 58 Pa. St. 51. See, also, Gilman *v.* Dwight, 13 Gray, 356; Atkyns *v.* Kinnier, 4 Exch. Rep. 776; Hoyt *v.* Holly, 39 Conn. 326.

sustained, though unlimited as to time, simply because the area of restriction was not unreasonable.

§ 16. **Public Policy the Real Test.** — The touchstone of public interest in the hands of the court was applied in all these cases; and in Butler *v.* Burleson [1] was made to give forth this expression: "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." And in French *v.* Parker [2] the court say: "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 after coming into fruit is not often the better for it, and it may be questioned whether this consideration is not of itself reason enough to allow the parties to suit themselves."

§ 17. **Illustrations. — Injunction herein.** — In Hastings *v.* Whitley,[3] 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 practising his profession after the obligee's death. The court held that the obligation was coextensive 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 goodwill of an apothecary is often disposed

[1] 16 Vt. 176.
[2] 16 R. I. 219, 223; 14 A. 870.
[3] 2 Exch. Rep. 611.

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 is a mere trade.

In Whittaker *v.* Howe,[1] an agreement by a solicitor not to practise 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 breach. There the restraint was not unlimited; but plainly it might have lasted for years after the plaintiff's death. Such 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.

§ 18. **Principle applied to Ordinary Mechanical Trades.** — There is but little, if any, difference in the application of the general principle whether the restrictive contract involves a learned profession or a trade. Nor does it seem important whether the exercise of a trade calls for only ordinary or the highest degree of skill. In either case the decision must turn upon the requirements of the parties in view of the public interest. The general rule is that contracts restraining the exercise of a trade in a particular locality, when founded upon a sufficient consideration, are good and valid, if there be a fair and reasonable ground for the restriction. The restraint, however, must be confined within reasonable limits.

This rule was given application in a Massachusetts case,[2] where it was decided that a contract by a physician for the sale of his "practice and goodwill" 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.

There have been numerous decisions upon contracts relat-

[1] 3 Beav. 383.

[2] Dwight *v.* Hamilton, 113 Mass. 175.

ing to the practice of medicine. The following restrictive stipulations have been held valid: not to practise for fourteen years within ten miles of a given place;[1] at any time, within seven miles;[2] at a given place, or within twelve miles thereof, without the covenantee's consent during his lifetime, or within ten years after his decease.[3] One about to remove from a village agreed, in consideration of $500, to sell defendant his practice, and to recommend him to his patrons, and to use his influence in his favor, reserving the right to practise in the village when called on to do so. It was held that he could recover the $500 from the defendant.[4] A contract "not to locate, with a view of resuming his profession, within a circle of thirty miles around T.,"[5] was upheld. The same conclusion was reached with respect to a sale of a house and practice, with a condition "not to establish, nor attempt to establish, a medical practice within the aforesaid township of Chili, nor within six miles of" the house;[6] so a similar sale, with a condition not to practise in the town or within fifteen miles thereof, "by himself, agent, or otherwise," was held not so far restrictive as to contravene public policy.[7]

A sale of land and a practice, with a stipulation not to resettle in M., so long as the plaintiff should be located there, allows the vendor to practise, but not to reside there.[8]

A guaranty by the vendor "that no other physician, for the space of four years, will establish himself in this place, as a competitor, unless the increased population of the place should warrant it," or unless through the purchaser's fault,

[1] Davis *v.* Mason, 5 Term R. 118.

[2] Sainter *v.* Ferguson, 7 C. B. 716; same principle, Atkyns *v.* Kinnier, 4 Exch. 776.

[3] Fox *v.* Scard, 33 Beav. 327.

[4] Hayt *v.* Holly, 39 Conn. 326.

[5] Mell *v.* Mooney, 30 Ga. 413; approved in Goodman *v.* Henderson, 58 Ga. 570.

[6] Linn *v.* Sigsbey, 67 Ill. 75.

[7] Miller *v.* Elliott, 1 Ind. 484. See McClurg's Appeal, 58 Pa. St. 51; Betts's Appeal, 10 W. N. C. (Pa.) 431.

[8] Halderman *v.* Simonton, 55 Iowa, 144. See also Warfield *v.* Booth, 33 Md. 63; Gravely *v.* Barnard, 43 L. J. (Ch.) 659; L. R. (18 Eq.) 518.

and agreeing, in the former event, to refund the purchase-money, is valid;[1] and a contract not to practise medicine nor in any manner do business as a physician in the county of Oswego at any time after May 1st, 1851, was sustained.[2] The same principles govern restrictive contracts between dentists.[3]

§ 19. **The New Jersey Doctrine.** — In New Jersey, while the general test of reasonableness and necessities of the parties is recognized, it is held that a covenant that a physician shall not, "at any time hereafter," engage in practice at Newark, is void, since it would prevent such physician from practising there, though the other party to the covenant shall die.[4]

In reaching this conclusion, the court reasoned thus: "The fault imputed to the covenant is that the restriction which it imposes is to endure for an unreasonable period of time, — for a much longer period than will be necessary for the protection of the complainant. It interdicts the defendant, it will be observed, from practising medicine or surgery in the city of Newark at any time hereafter. The restraint covers the whole period of the defendant's life; and if an injunction is awarded enforcing the covenant according to its terms, the defendant can never at any time hereafter practise his profession in the city of Newark, though the complainant may the next year, or even the next month, after the injunction issues, lose his life or his reason, or remove to another field of practice. Under such circumstances, the injunction would give no protection to the complainant, — he would need none, — and the only purpose the injunction could serve would be to causelessly oppress the defendant. . . . 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,

[1] Gilman *v.* Dwight, 13 Gray, 356.

[2] Holbrook *v.* Waters, 9 How. Pr. 335.

[3] See Mallan *v.* May, 11 M. & W. 653; Horner *v.* Graves, 7 Bing. 735; Cook *v.* Johnson, 47 Conn. 175; Clark *v.* Crosby, 37 Vt. 188; see Alcock *v* Giberton, 5 Duer, 76.

[4] Mandeville *v.* Harman, 42 N. J. E. 185; 7 A. 37.

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 market value. And if the complainant should make sale of his practice in his lifetime, 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."

§ 20. **Principle applied to Trade of Dyer.** — In Guerand *v.* Dandelet,[1] the plaintiff had leased from the defendant certain premises known as "Guerand's Dyeing and Scouring Establishment" at an annual rental of $1000. In the lease was incorporated an agreement by which the lessor sold to the lessees the custom, good-will, name, and utensils then in, upon, and about the leased premises, theretofore known as "Guerand's Dyeing and Scouring Establishment," together with the right to use the same name and style as theretofore, and carry on the business of dyeing and scouring, for the sum of $3,000, payable in instalments; and Guerand, the lessor, covenanted that, on the payment of the purchase-money for the custom, good-will, name, and utensils sold, he

[1] 32 Md. 561.

would not, at any time thereafter, "exercise or conduct, in the city of Baltimore, the trade or profession of a dyer or scourer, nor directly or indirectly compete with the aforesaid lessees and vendees for the goodwill and custom sold as aforesaid."

It was urged in argument that the restriction should not, by construction, be extended beyond the period of the partnership between the parties to whom the lease was made, and the custom and good-will were sold; and as the partnership terminated with the expiration of the term of the lease, the complainant individually had no right to the relief sought. In that, however, the court did not agree. It considered that the vendor had bound himself, for the period of his life, to refrain from all competition for the good-will and custom sold. And the circumstance that the parties to whom the sale was made had dissolved their partnership, did not release the covenantor from his obligation to observe his covenant. The party continuing the business became entitled to the benefit of the covenant by virtue of the articles of co-partnership between himself and his co-partner, and the subsequent assignment of the latter.

§ 21. **Restrictive Stipulation in Connection with Sale of Goodwill.** — The good-will of a trade or business is an interest which may be valued as between partners, and may, therefore, be assigned, with the premises and the rest of the effects, by the partner retiring, to the one remaining in the business.[1] In the case of Hitchcock *v.* Coker,[2] it was said, by Chief Justice Tindal, speaking for the court: "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 such restriction were not allowed to be unlimited in point of duration, the subject of the contract might never be salable, as it could at any moment be rendered

[1] Story on Partn., § 99.

[2] 6 Ad. & El. 493.

valueless by the competition of the vendor. The general rule against covenants in restraint of trade is founded largely upon the policy of the law, which favors trade and enterprise; and the reason of the exception engrafted upon that rule is, as was observed by Maule, J., in Rannie *v.* Irvine,[1] "that the exception is in furtherance of the rule itself. If it were held that a party selling the good-will of a business could not restrain himself from using for his own profit that which he has agreed to sell, that would operate as a restraint of a very injurious kind." And, in the case just referred to, the assignor of a lease and the good-will of the business of a baker agreeing that he would not, during the term assigned, solicit the custom of or knowingly supply bread or flour to any of the customers then dealing at the premises, without the consent of the assignee, it was held not to be unreasonable restraint of trade.

§ 22. **The Test of Reasonableness with Reference to Territorial Extent.** — The test of reasonableness applies to all the terms of the contract alleged to be so restrictive as to render it unenforceable, because contrary to public policy. In the preceding sections of this chapter it is shown that if not general but local in territorial operation, a contract involving the sale of the good-will of a trade or profession containing restrictive stipulations may be unlimited in its duration. The duties of one pursuing a learned profession or a skilled trade rarely extend throughout an entire nation, or even State, and usually cannot be successfully and legitimately prosecuted beyond a circle whose boundary is a few miles from its centre; though there are exceptional cases. But the reasonableness of the territorial restriction must be determined by the necessities and circumstances of each case.

In Taylor *v.* Blanchard,[2] a contract by which a shoemaker was restrained from exercising his trade throughout Massachusetts was held void, as too extensive. But this decision is not in conflict with the now accepted doctrine; since the business of a shoemaker is essentially local in character, such an extensive restriction could be of no benefit to the covenantee.

[1] 7 Man. & Gr. 969.

[2] 13 Allen (Mass.) 370.

In Bingham *v.* Maigne,[1] it was held that a contract not to exercise the trade of making printer's rollers and composition in New York city, or within two hundred and fifty miles thereof, was void under the New York statute, as in restraint of trade, the person so agreeing being a journeyman or apprentice.

§ 23. **Construction — Meaning of "Locality," "Vicinity," &c.** — In agreements not to engage in business or practise a profession in a given town or city or in its vicinity or neighborhood, the latter limiting words must be construed according to the size of the town or city, its location and environment. In Timmerman *v.* Dever,[2] ten miles distant from the city of Hastings was held to be within its vicinity, the court saying: "Of course the extent of territory included in the term 'vicinity of the city' must necessarily depend in a great measure upon the size of the city, its location, and particular surroundings; and under all the circumstances as they appear upon this record I think the territory surrounding the city for the distance of ten miles from its corporate boundaries a reasonable limitation, and one which may be safely regarded as within the contemplation of the parties when they made their contract." And in another case it was held that a bond by a physician that he would not locate himself and practise his profession within six miles of C., and in case he should so locate and practise, he would pay the obligor a certain sum for each and every month that he should so practise, is forfeited if he practise within, although he resides without, the prescribed limits.[3] But where the contract consisted of a sale of a house and practice, with an agreement not to practise in the town for ten years, and, if required by plaintiff, to give a bond in $5,000 penalty not to do so, this was held not to fix

[1] 52 N. Y. Super. Ct. 90.

[2] 52 Mich. 34; see Carroll *v.* Hickey, 10 Phila. 308.

[3] Smith *v.* Smith, 4 Wend. 468; Mott *v.* Mott, 11 Barb. 127. A purchase of the obligor's house and of one-half of his medicines, jars, and bottles, and payment therefor, will sustain an action on his bond not to settle or continue as a practitioner of medicine within fifteen miles of P., after a specified time, Thompson *v.* Means, 11 Sm. & Marsh. 604.

the plaintiff's damages for violation of the covenant at $5,000, where such bond was never asked for or given.[1] On the other hand, a bond in $1,000, conditioned that B. should not "practise medicine within five miles of S., in which place he has this day deeded certain property to T.," indicates on its face that the $1,000 is a penalty; but circumstances showing an intention that it was liquidated damages may be proved.[2]

§ 24. **Such Contract may amount to an Indefinite Copartnership.** — In Carroll *v.* Giles,[3] plaintiff had agreed to furnish for defendant everything necessary to run a barber-shop in a certain town; and the latter agreed not to do any work as a barber for any one else, or to open a shop for himself in such town at any time, and to convey to plaintiff the patronage which had been extended to him. The proceeds of the business were to be equally divided between them. It was held that such agreement was only a contract of indefinite partnership; and defendant's stipulation never to do any barbering business outside of plaintiff's shop was unreasonable, and would not be specially enforced, or its violation enjoined. McGowan, J., delivering the opinion, said: "There is not much science or power of mind necessary in the business of barbering, but some degree of skill and practice are required, and, being a trade, we suppose that, so far as the nature of the business is concerned, we may consider it as within the principle above indicated. But is this a case falling within the rule? It does not strike us so. There was no sale here of 'a business' and 'goodwill' by the defendant, in which the price paid was enhanced by the vendor stipulating not to carry on the same business in a specified locality and for a specified time. It is true that the defendant was a barber, going about the town and county barbering, but had no shop, patronage, or goodwill to sell. The plaintiff did not purchase his outfit from the defendant, giving him a liberal price, in consideration of his unusual stipulation to stay with him or go out of the business."

[1] Amendon *v.* Gannon, 6 Hun, 384; see Niver *v.* Rossman, 18 Barb. 50.

[2] Bigony *v.* Tyson, 75 Pa. St. 157.

[3] 30 S. C. 412; 9 S. E. 422.

CHAPTER III.

AGREEMENTS NOT TO ENGAGE IN BUSINESS.

§ 25. **Governed by Public Interest and the Test of Reasonableness.** — The rule of public policy is most frequently invoked against contracts between business men, firms, and corporations engaged in the same line of business. Of course this class may be extended to include those larger and far reaching combinations resulting in monopolies, one form of which is the modern "trust;" but a consideration of these will be deferred.

In contracts between two or more parties alleged to be against public policy, because too broad in their restrictions, the interest of the parties, while important, is not scrutinized with so much solicitude for the immediate protection of the public as where, through large combinations by parties possessing enormous capital, the welfare of the whole country or of a large section is immediately and directly threatened. In ordinary cases the judicial attention is fixed upon the remote tendency to injure, rather than upon impending or actual injury to public interests. But in either case, and in all such cases, the reasonableness of the terms of the particular con-

tract in view of the public interest is the test by which its validity is determined.[1]

In Central Shade-Roller Co. *v.* Cushman,[2] several parties, severally engaged in the business of manufacturing and selling balance shade-rollers, for the purpose of avoiding competition had organized themselves into a corporation, and severally entered into an agreement with the corporation, so organized, that all sales of the shade-roller should be made in the name of the corporation, and at once reported to it; that, when either party should establish an agency in any city for the sale of a roller made exclusively for that purpose, no other party should take orders for the same roller in the same place; and that the prices for rollers of the same grade, made by the different parties, should be according to an agreed schedule, subject to changes upon recommendation of three-fourths of the stockholders. The agreement was held valid, and not void as in restraint of trade. The decision turned in part upon the fact that the agreement related to patent rights, in which it is the very design of the law to grant a monopoly. It was also determined that 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 schemes through its agency, instead of that of a pre-existing person, was immaterial. But the court advanced as an additional reason for holding the contract valid and enforceable that it did not tend in any respect to limit or decrease production or sale of the article, or enhance its price. W. Allen, J., in the course of a lengthy opinion, said: "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,[3] 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

[1] See Ellerman *v.* Chicago &c. Co., (N. J. Ch.) 23 A. 287; Hubbard *v.* Miller, 27 Mich. 15; Washburn *v.* Dorsch, 68 Wis. 436; 32 N. W. 551; Kellogg *v.* Larkin, 3 Chand. (Wis.) 133; Mueller *v.* Kleine, 27 Ill. App. 473.

[2] 143 Mass. 353; 9 N. E. 629.

[3] 79 Ill. 346.

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, 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 the 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 are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price, and to prevent the injurious effects both to producers and customers 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."

But in Western Wooden-Ware Association *v.* Starkey,[1] the Supreme Court of Michigan held that a contract between a domestic firm and a foreign corporation, both engaged in the manufacture and sale of wooden-ware, whereby the former sells its stock, material, tools, and machinery to the latter, and agrees not to manufacture or sell wooden-ware in seven named States for five years, nor to permit its property to be used for that purpose during the time limited, is in restraint of trade, and void.

The court seems to have taken a broad view of the circumstances and environment. This extract is from the opinion by Long, J.: "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

[1] 84 Mich. 476; 47 N. W. 604; distinguishing Hubbard *v.* Miller, 27 Mich. 15, and Beal *v.* Chase, 31 Mich. 490. The following restrictive contracts were held reasonable and valid: An agreement for liquidated damages for breach of a condition in the contract of sale of a beer saloon that the seller will not open a saloon within two thousand feet, and within two years, Mueller *v.* Kleine, 27 Ill. App. 473; an agreement not to engage in a particular business in a certain town for five years, leaving the party at liberty to engage in any other business in that town, or in that business in any other town, Washburne *v.* Dorsch, 68 Wis. 436; 32 N. W. 551; a covenant, by parties selling the plant and business of stockyards to the owner of other stockyards, not to engage in the business for a certain number of years, nor in the place where they are located, or within two hundred miles thereof, Ellerman *v.* Chicago Junction Railways & Union Stock-Yards Co., (N. J. Ch.) 23 A. 287; an agreement not to engage in business in opposition to A so long as A should continue to do business, Mackinnon Pen Co. *v.* Fountain Ink Co., 48 N. Y. Super. Ct. 442; an agreement by one who has been sued for the breach of a patent that, in consideration of the dismissal of the suit and of a right to the partial use of the patent for a year, he will not manufacture nor put up the patented article during the existence of the patent, Billings *v.* Ames, 32 Mo. 265; an agreement between two persons for the manufacture and sale of a certain patented article, which provides for the continuance of the manufacture by one of them, and that the other after a certain time shall abstain therefrom, Kinsman *v.* Parkhurst, 18 How. 289; an agreement, made upon the dissolution of a copartnership and purchase by one of the firm of the stock in trade, that the retiring partner shall not engage in the business for a specified period of time, or so long as the other shall continue such business, Curtis *v.* Gokey, 68 N. Y. 300.

bill that it is organized for 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 materials which enter into their manufacture, and 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 is extensively engaged in such business; and that it sells its 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 Olmstead, and carry on the business of manufacturing these articles in this State, but, from the terms of the contract, it is manifest that it 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."

§ 26. **No Arbitrary Territorial Limitation in this Country.** — In a few cases courts have assumed that, in analogy to the rule laid down in the earlier English cases, and taking the geographical State divisions as typical for this purpose of the United Kingdom of Great Britain, contracts restrictive as to an entire State were presumptively void. Thus in More *v.* Bonnet[1] it was held that a contract in which covenantor agreed not to afterwards engage in the business of asphalt paving anywhere in the entire State of California was void; and no inquiry appears to have been made as to, nor was any importance attached to, the nature of the business.

So in Taylor *v.* Blanchard[2] a contract by which it was sought to restrain one of the parties from pursuing the occupation of manufacturing shoe-cutters within the State was held void because too extensive, though there was ample consideration for the contract. In nearly, if not all, the most recent cases, however, the idea of an absolute or artificial limitation upon the right to restrain the right to pursue a manufacturing or mercantile calling, whether measured by State or geographical boundaries, has been repudiated. In this country especially, where State lines interpose such a slight barrier to social and business intercourse, it is often difficult to decide whether a contract not to exercise a trade in a particular State is, or is not, within the rule. It has sometimes been held to be so, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another State, in order to pursue his avocation. But this mode of applying the rule must be received with some caution. This country is substan-

[1] 40 Cal. 251. See also Wright *v.* Ryder, 36 Cal. 357.

[2] 13 Allen (Mass.), 370.

tially one country, especially in all matters of trade and business; and it is manifest that cases may arise in which it would involve too narrow a view of the subject to condemn as invalid a contract not to carry on a particular business within a particular State. Suppose the case of two persons associated in business as partners, and engaged in a manufacture by which they supply the country with a certain article, but the process of manufacture is a secret; and they agree to separate, and one of the terms of their separation is, that one of the parties shall not sell the manufactured article in Massachusetts, where the other resides and carries on business; and that the latter shall not sell the article in New York, where his associate is to reside and carry on business. Can there be any doubt that such an agreement would be valid and binding? Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered. It is well settled that a stipulation by a vendee of any trade, business, or establishment that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business, or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this 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 business of 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 to only 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, and that the country be not deprived of the benefit of his exertions.[1] In logical consonance with this view, it was held that an agreement "not to engage in the manufacture of any thermometers of any kind or description, nor of any storm-glasses, at any place within the United States at any time within a period of ten years

[1] Oregon Steam Nav. Co. *v.* Winsor, 20 Wallace, 64, 67. The gist of the decision in this case is that where A, engaged in navigating waters of California alone, sold, in 1864, a steamer to B, engaged in navigating a particular river of Oregon and Washington Territories, subject to a stipulation that he, B, would not employ it or suffer it to be employed for ten years from the date of the sale, in any waters of California, and B, three years afterwards, *i. e.*, in 1867, sold the same steamer to C, engaged in navigating Puget's Sound, subject to a stipulation that she should not be run or employed on any of the routes of travel, or the rivers, bays, or waters of the State of California, or the Columbia River and its tributaries, for the period of ten years from May 1, 1867, — *Held*, that the contract was not wholly void as in restraint of trade, but was divisible and valid for the seven years during which the covenantor had a right to control the running of the steamer. Same principle, Dunlop *v.* Gregory, 10 N. Y. (6 Seld.) 241. *Held valid*: A bond not to engage in the business of iron-casting within sixty miles of Calais, said area containing but few places of much business, Whitney *v.* Slayton, 40 Me. 224; a contract by the vendor of a butcher's stall not to sell, or cause to be sold, any meat of a particular kind within the city during two years, Wintz *v.* Vogt, 3 La. Ann. 15; Veryes *v.* Forshee, 9 La. Ann. 294; an agreement to give up keeping a tavern at a place half a mile from the plaintiff, on the same road, Heichew *v.* Hamilton, 3 Iowa, 596; a contract to "withdraw from the ice business in Greenfield," Handforth *v.* Jackson, 150 Mass. 149; 22 N. E. 634; an agreement to withdraw from purchasing hides in the Savannah market, Goodman *v.* Henderson, 58 Ga. 567. In the following cases the restrictions were adjudged reasonable, and not injurious to the public: Beard *v.* Dennis, 6 Ind. 200; Nobles *v.* Bates, 7 Cow. (N. Y.) 307; Pierce *v.* Fuller, 8 Mass. 223; Perkins *v.* Lyman, 9 Mass. 522; Stearnes *v.* Barrett, 1 Pick. (Mass.) 450; Palmer *v.* Stebbins, 3 Pick. (Mass.) 188; Pyke *v.* Thomas, 5 Bibb (Ky.), 486; Webb *v.* Noah, 1 Edw. (N. Y.) 604; Ellis *v.* Jones, 56 Ga. 504; Gill *v.* Ferris, 82 Mo. 156; Arnold *v.* Kreutzer, 67 Iowa, 214; Hedge *v.* Lowe, 47 Iowa, 137. But a bond conditioned that the obligor shall never carry on, or be concerned in, the business of founding iron, was held void, Alger *v.* Thacher, 19 Pick. (Mass.) 51. See also Brewer *v.* Marshall, 19 N. J. Eq. 537.

from date," is not a general restriction of trade, and is not void on the ground of public policy.[1] Upon these principles it would evidently be absurd to say that the artificial and in this connection wholly imaginary line which separates two States should measure the extent of the right of a tradesman or manufacturer to secure protection by contract upon the purchase of a plant or the good-will of a business. It is clear, from the opinion of Chief Justice Fuller in Gibbs *v.* Baltimore Gas Co.,[2] that he does not recognize an arbitrary rule as to territorial limitations in such contracts. He says: "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 party 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." The decision was against the enforceability of the contract before the court, but was influenced by the public duties due by one of the parties.

§ 27. **Unsettled State of the Law in England.** — The question as to whether there is any inflexible rule that contracts restrictive throughout the whole realm of England are null and void, appears to be still unsettled. Though in Mitchell *v.* Reynolds,[3] a leading case in England on this branch of the law, such a rule was asserted to exist, yet it will be observed that the reason given for its application in that case was that so extensive a restraint could be of no possible benefit to the covenantee. Nor should the period of the decision, 1711, be overlooked. Since that date there has been great change and improvement in means of transportation and communication, by which distances have been shortened, and inhabitants of the various cities of Great Britain, like those of other modern nations, have become, for commercial purposes, next-door neighbors to each other. But the doctrine of the case last mentioned has received judicial sanction and approval in later

[1] Watertown Thermometer Co. *v.* Pool, 51 Hun, 157; 4 N. Y. S. 861.
[2] 130 U. S. 396.
[3] 1 P. Wms. 181.

cases.[1] But in other cases the existence of any arbitrary and unchangeable rule on the subject has been either positively or indirectly denied.[2] These are to the effect that if the contract answers the test of reasonableness laid down by Tindal, C. J., in Mitchell *v.* Reynolds, viz., if the restraint is no larger than is required for the protection of the covenantee's interests, it is valid, no matter whether it is unlimited as to space or not.

In Warde *v.* Byrne,[3] the facts were as follows: The defendant gave a bond to the plaintiff (a coal merchant in London), by which, after reciting that the plaintiff, at the request of the defendant, had received and taken the defendant into his service in the capacity of town-traveller and collecting-clerk, it

[1] Warde *v.* Byrne, 5 M. & W. 548; Hinde *v.* Grey, 1 Man. & Gr. 195; Allsopp *v.* Wheatcroft, 15 L. R. (Eq.) 59. See also Davis *v.* Davis, 36 L. R. (Ch. Div.) 35.

[2] Rousillon *v.* Rousillon, 14 L. R. (Ch. Div.) 351; Whittaker *v.* Howe, 3 Beav. 383. See also Leather Cloth Co. *v.* Lorsont, 9 L. R. (Eq.) 345; Jones *v.* Lee, 1 H. & N. 189. Hitchcock *v.* Coker, 7 Bing. 735, may also be cited in support of this result, since Chief Justice Tindal in the last-mentioned case admitted that what is reasonable depends upon the varying circumstances of each case. To the same effect is Gale *v.* Reed, 8 East, 79, which was an action for breach of a contract entered into between partners upon its dissolution.

[3] 5 M. & W. 547. After disposing of the question arising upon the proper construction of the contract, Parke, B., said: "Now, a restraint prohibiting a party from carrying on trade within certain limits of space would be good, and a contract entered into for the purpose of enforcing such an agreement as that would be valid; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made; and all the cases cited appear to turn on the question as to the limit of space within which the restriction should extend. Now, where a limit as to space is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade, — he will carry it on in the same way elsewhere; nor within the limited space will they be deprived of the benefit of the trade being carried on, because the party with whom the contract is made will most probably within those limits exercise it himself. But when a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favor of a total restriction on trade, limited only as to time."

was conditioned (*inter alia*) that the defendant should not, within two years after leaving the plaintiff's service, solicit or sell to any customers of the plaintiff; that he should not follow or be employed in the business of a coal merchant for nine months after he should have left the employment of the plaintiff; and that he should not leave his employment without giving a month's notice. It was held (Lord Abinger, C. B., dissenting), that the effect of this condition, if allowed to operate, was to prevent the defendant from setting up in business as a coal merchant on his own account, or being employed in that business by another person for the time limited, and that the bond was void, because unlimited in point of space.

In Leather Cloth Co. *v.* Lorsont,[1] the disposition to repu-

[1] 9 L. R. (Eq.) 345. Sir W. M. James, V. C., said: "No doubt the covenant is expressed in very large and full terms, and it is insisted that the mere fact that the covenant is 'not to carry on nor allow to be carried on in any part of Europe,' is in itself what is called a general restraint of trade, and that what is called a general restraint of trade is a restraint of trade throughout the United Kingdom, and that in that form a restraint of trade extending throughout the United Kingdom is upon the face of it bad, though something short of it may be allowable, provided the circumstances justify it. 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 mutual, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. . . . Now, in this case the subject-matter of the contract was a particular manufacture, carried on partly under patents, and partly by processes which, it is to be assumed, were not known except to the vendors themselves and their agents and workmen. That being the subject-matter of the contract, the stipulation is, that the vendors will not set up a similar manufacture in Europe, and will not communicate the process of the manufacture anywhere, so as to interfere with the enjoyment by the intended company of the benefits thereby agreed to be purchased. This case, as it seems to me, much more resembles the sale of a secret, which has been held to be perfectly good, with a stipulation unlimited as to time and place as to communicating the secret, or dealing with it so as to interfere with the purchaser. It is settled by authority that a man may bind himself not to communicate that process to anybody else anywhere, under any circumstances, in any part of the world. But how would it be possible to enforce such a covenant as that, — not to communicate the process, — if he were at the

diate the early decisions, wherein an unbending rule was recognized, was clearly manifested. It was declared that although public policy requires that every man shall be at liberty to work for himself, and shall not deprive himself or the State of his labor, skill, or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labor, skill, or talent, and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable, having regard to the subject-matter of the contract. The important facts in this case were as follows: Upon the formation of a company for the purchase and working of a certain process of manufacture introduced into England from America, the agreement for the purchase contained a provision that the vendors "will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions now manu-

same time to be at liberty to carry on that same trade, with the same processes, in such a way that they would have to be communicated to every servant and workman engaged by him in the trade? He is entitled to restrain himself from communicating, and is thereby enabled to get a higher price for that which he is selling. The fact that he is so entitled to restrain himself from communicating the process, entitles him also to restrain himself from carrying on a manufacture which would involve the communication of the process. Independently, therefore, of those words, 'so as in any way to interfere with the exclusive enjoyment,' I am of opinion that there is nothing in this covenant which violates the rules of law, or which is in contravention of the decided cases, when the principles upon which those cases have been decided come to be properly considered. But if there were anything in a covenant so standing which might be supposed to be in contravention of some of the decided cases, I am satisfied that these words, 'so as in any way to interfere with the exclusive enjoyment of the company,' do properly and sufficiently modify and qualify it; the principle being that you are not to have any more restraint than is necessary for the benefit of the purchasers. The company say, We do not ask for any unreasonable or capricious restraint upon you, we only ask you to bind yourself not to do something which will interfere with that which you profess to sell to us, and for which you have received a consideration. I am of opinion, therefore, that the covenant is one capable of being enforced in this court."

factured in the business or manufactory" (of the vendors), "and will not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased." It was held that the restriction contained in this clause was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers, and was capable of being enforced against the vendors.

In Allsopp *v.* Wheatcroft,[1] Wickens, V. C., while expressly recognizing the rule of the earlier cases that a covenant not to carry on a lawful trade unlimited as to space is void on its face, admitted an inclination on the part of courts to repudiate all arbitrary or — to use his words — "hard and fast" rule, and found other reasons for his decision than the unlimited scope of the contract. He said: "But the conclusion here would be the same if no rule existed. Messrs. Allsopp & Co., brewers at Burton-on Trent, engaged a traveller to seek orders for their beer, and bound him by a covenant, which has been so often read that I need not mention the terms of it. Of course the protection that they sought was primarily against the competition of other brewers of real or pretended Burton ale, and their first object was to prevent the defendant from turning against them his connection with, and knowledge of, their customers. This they might reasonably and lawfully have stipulated for. But the covenant goes further than this, and, in fact, beyond anything that can be reasonably required for the plaintiffs' protection. It seems to me that, according to the view taken in the cases, it could not have been held necessary for the plaintiffs' protection to prevent the defendant from soliciting orders for ale of other Burton brewers in places where Burton ale had never been sold or heard of; and probably, as Mr. Pearson argued, the covenant would, even within the limits where Allsopp's company had customers, prevent lawful acts of the defendant which would injure the plaintiffs. I am bound by the authorities to hold the covenants inoperative independently of any absolute rule requiring the alteration of area."

[1] 15 L. R. (Eq.) 59.

In Rousillon *v.* Rousillon,[1] the decision in Allsopp *v.* Wheatcroft was expressly disapproved, and that in Leather Cloth Co. *v.* Lorsont followed; and it was declared that there was no absolute rule that a covenant in restraint of trade is void, merely because it is unlimited in regard to space, Fry, J., saying: "But then it is said that, over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract, being in its terms unlimited as to space, and therefore extending to the whole of England and Wales, must be void. Now, in the first place, let me consider whether

[1] 14 L. R. (Ch. Div.) 351. The facts in the case of Hitchcock *v.* Coker, 6 A. & E. 438, 453, were as follows: The consideration for the agreement was 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, was 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 five thousand pounds sterling as and for liquidated damages. Chief Justice Tindal said: "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."

such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local. If this rule existed, it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule if it existed would apply in two classes of cases. It would apply where the want of a limitation of space was unreasonable, and also where it was reasonable. Now, in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the universality of the prohibition was reasonable; that is, it would only operate where it ought not. For the existence of such a rule I should require clear authority. In the next place, the rule is pressed upon me as an artificial rule, an absolute rule, or, as it was called by the late Vice-Chancellor Wickens, a 'hard and fast' rule. Such a rule might always be evaded by a single exception. No exception can be said to be colorable to a rule of this description, because you can only judge whether an exception be colorable or not by the principle of the rule, and if the rule be really an artificial one, without principle, there is no criterion for saying whether the evasion is colorable or not. It appears to me for these reasons that I ought not to hold such a rule to exist unless it be clearly established." He then reviewed and criticised prior decisions on the question, and proceeded: "I have, therefore, upon the authorities, to choose between two sets of cases, those which recognize and those which refuse to recognize this supposed rule; and, for the reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognize 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."

§ 28. **Same Subject. — Progress and Development. — Later Views of State Sovereignty.** — Courts readily adapt the application of legal principles to changed conditions, material and political. Especially is this observation true of commercial law. Therefore, when we consider the early decisions of the courts to the effect that contracts restrictive as to a whole State were *prima facie* void, we should also consider the then existing social and commercial conditions, and also the then prevailing views on the subject of State sovereignty. At a comparatively early period in New York the court doubted the propriety of rigidly applying the English decisions to the States considered as separate sovereignties. The disposition to follow the English, or, as it was termed, the common law view, found expression in Lawrence *v.* Kidder,[1] though it will be observed that the court evinced some doubts of the soundness of its decision, saying: "The next question is, whether in passing upon contracts of this description, we are to confine our view to our own State, or whether we are to look at the whole United States as constituting a single State or nation. In other words, whether the same rules are to be applied to a contract embracing the State of New York alone, as by the common law has always been applied to those embracing the whole territory of Great Britain. This question involves a variety of considerations, and permits perhaps of considerable discussion. But there are one or two leading ideas, which, in my view, are decisive of it. In the first place, the people of this State have no control over, or influence upon, the municipal laws of the other States. They may, if they please, impose the most burdensome restrictions upon particular trades. We cannot say, therefore, that a restraint which is co-extensive with this State leaves the residue of the Union open to the party to pursue unrestrained

[1] 10 Barb. 641. See also More *v.* Bonnet, 40 Cal. 251; Wright *v.* Ryder, 36 Cal. 357; Taylor *v.* Blanchard, 13 Allen (Mass.), 370; Oregon Steam Nav. Co. *v.* Hale, 1 Wash. Ter. 283. In the last case a covenant between citizens of Washington Territory and an Oregon corporation not to run a steamboat, or allow its machinery to be employed on any other boat, in any of the waters of Oregon or California, and any of the waters of Washington Territory, was held void, as against public policy.

the same trade. Again, it is repugnant to the general frame and policy of our government to regard the Union, in respect to our ordinary internal and domestic interests. It is by no means the same thing to the people of this State whether an individual carries on his trade within or without its borders. I am, therefore, of the opinion, independent of authority, that a contract prohibiting to an individual the pursuit of any trade or employment throughout the State of New York should be regarded as a contract in total restraint of trade within the rule of the common law."

The liberality of this early view of the subject is significant when we consider that at the time the States were for the most part thinly settled, and communication between one part of the State and the other was very difficult. It is also important in this connection to bear in mind that the doctrine of state sovereignty, with all its import, was then rife; and any contract whose restrictive stipulation was co-extensive with an entire State was viewed in the same light as those in England which were restrictive throughout the whole realm.

But in Beal *v.* Chase,[1] a provision in a contract for the sale, upon full and adequate consideration, of a printing and publishing establishment, and business and good-will, together with a newspaper and the copyright of certain books, that the vendor should not engage in the business in the State so long as the vendee should continue in the business at the place of sale, was held not an unreasonable restraint of trade, where the business so sold extended over substantially the whole territory of the State, and was sustained against objections that it was void as being against public policy. The leading opinion was written by Justice Christiancy, and filed after his resignation. In it he states the facts in detail, then discusses the case of Mitchell *v.* Reynolds as the leading case on this branch of law, and proceeds: "This case is the foundation of the rule relied upon; and the *dictum* of the learned judge most unequivocally shows that the reason for his opinion that a restraint is co-extensive with the kingdom would be void, was the impossibility that one man could have an interest in

[1] 31 Mich. 490. In substantial accord with the decision in Beal *v.* Chase was that in Henshoff *v.* Bontineau, (R. I.) 19 A. 712.

a restraint so broad upon the trade of another. This decision was made more than a century and a half ago, and for a condition of things and a state of society wholly different from those which now prevail. It may have been quite true at that time, that to a person following any particular trade, profession, or occupation in London, it would be wholly immaterial whether any person was or was not following the same trade, profession, or occupation in Newcastle, since the little business intercourse, and the difficulty and the delay of communication, would wholly preclude anything like competition between two persons in the same occupation thus circumstanced. But it cannot be said that the same fact is true any longer in England, or that it could be true of the State of Michigan to-day. In some occupations it is well known that rivalry and competition are active between professional men, artisans, and merchants located at extreme points, and that in some cases this competition may be quite as severe and effective at a distant point as in the same locality where another is located. Indeed, in some cases where a single house is competent to supply all demands of a State in its line, or where one manufactory would be fully equal to all its wants, the one establishment would not only have an interest in keeping out any other, but it would be interested to the whole value of its business, which the competition might render utterly worthless. If, therefore, we look only to the interests of the parties contracting, there would seem to be nothing in the reasons assigned by Chief Justice Parker which should necessarily preclude a contract as the one here disputed, provided the proper interest appeared to support it."

§ 29. **Nature of the Business important.** — Since the courts are mainly influenced in their decisions by the circumstances of each case, the nature of the business forming the subject is always an important, and sometimes a controlling, consideration. A contract involving a restriction upon the production or sale of a commodity of prime necessity will be viewed with much less favor than where the article is of rare production, and the result of a secret or complicated and delicate process. Accordingly, it was held that an agreement between two manu-

facturers of glue from fish skins under a supposed valid patent, the object of which was to avoid competition between themselves, and secure to each a reasonable profit, was not against public policy, the article in question not being one of prime necessity, nor a staple commodity ordinarily bought and sold in the market.[1] Knowlton, J., delivering the opinion, said: "The defendant rests its defence on several grounds. It contends that the contract as originally made was void, as contrary to public policy; but it cannot be enforced, because, the patent being valid, there was no sufficient consideration for it; that, if it is binding, the plaintiff has a complete and adequate remedy at law; that if the plaintiff is entitled to any relief at all, it should be compelled to take its proportion of the waste received by the defendant under the long-term contracts with third parties; and, finally, that if the plaintiff had a right to specific performance of the contract, it has lost it by reason of its own conduct, and the conduct of the defendant, to which it has assented since the original contract was made. The original purpose of the contract was to regulate the business of manufacturing a product under what was supposed to be a new invention, on which letters patent of the United States had been issued, whereby an article then nearly worthless might be converted into an article of large value. The use to which the fish skins were put under this invention gave them their market value. The plaintiff and defendant sought to unite with each other in the purchase of the raw material, so that they might not be tempted to overbid each other, and thus to raise it to an unreasonable price, and also to agree on the price at which the manufactured articles should be sold, so that they might be secure in a reasonable profit. Even if they hoped for gain by their joint exertions, or by the possession of a patent, as to the value of which they were subsequently disappointed, their contract had no relation to an article of prime necessity, or to staple commodities ordinarily bought and sold in the market, but to a particular article, of which both were manufacturers under the same process, and

[1] Gloucester Isinglass & Glue Co. *v.* Russia Cement Co., (Mass.) 27 N. E. 1005. See also Shade Roller Co. *v.* Cushman, 143 Mass. 353; 9 N. E. Rep. 629.

to an article used in the manufacture, which was of little value to any other use."

Contracts not to engage in a particular business, which would otherwise be void in unlimited restraint of trade, are sometimes sustained on the grounds that the trade is but lately discovered, and from its nature or the circumstances can be beneficial only to a few persons. Thus, a covenant not to engage in any voyage to the northwest coast of America for the purpose of trafficking with the natives for a period of seven years was held valid, for the reason that the contract in question, instead of being injurious to the public, might result in benefit to the community, as its natural tendency would be to prevent the trade being overdone, and so becoming unprofitable to all.[1]

But the benefit of relaxation of the rule on account of the peculiar restricted character of the business was refused where the thing dealt in was insurance; and where several insurance companies entered into a compact to equalize rates of insurance in a large city, and agreed not to insure for less rates under a penalty, the agreement was held void.[2] The court said: "To hold that such an agreement should meet with any favor or sanction in law, would be making an exception of the business of insurance to a rule that applies to every trade or class of business and industry in the world. But, in effect, that is the claim that is made, and the difference that is said to exist is strongly pressed upon the court. It is claimed that insurance is not trade or commerce, and hence the rules relating to contracts that restrain trade should have no force here; and yet all the cases upon which plaintiff relies, and upon the authority of which it is claimed this contract can be upheld, are adjudications in the lines of business which, it is said, are so dissimilar to the business of the plaintiff that the rule cannot apply. No good reason has been given that will hold insurance exceptional, and accord to it a support that is denied to every other branch of industry. Business and law regard insurance as a commodity in the market, to be purchased as any other property

[1] Metzger *v.* Cleveland, (2d Supr. Ct.) 3 Ind. L. Mag. 42.

[2] Perkins *v.* Lyman, 9 Mass. 522.

or beneficial interest. But if such was not the case, reason and analogy would alike condemn contracts with regard to the same whenever the interests of the public are injuriously affected. A contract that destroys rivalry in business, and stifles competition in fixing rates of insurance, is as prejudicial to the public interest as if it were a combination of merchants and tradesmen to maintain an unalterable standard for the price of cloth or calico, beef or butter. To condemn a combination formed to prevent competition for the furnishing of the materials used in the construction of a house, or in the work of its erection, and yet uphold a contract that will prevent competition in insuring it, is to lose sight of substance, and pursue a shadow. The law, by reason of its adaptability, is able to meet the varying phases of all business transactions. That competition is the life of trade, is not the language of the street alone, it is a proverb in law. That the tendency of this contract is to destroy rivalry in the business, and to prevent that active competition which would otherwise exist, is too plain for serious controversy. But it is said in this case that the arbitrary rate so established is on a sound business principle, and in the interest of the insured, in this, that it enables the insurance companies to do a safe business, and prevents their insolvency. That is not the principle by which the business of this trading and commercial age is governed. The merchants, the tailors, the grocers, or the manufacturers do not establish an inflexible standard of prices, and place them low, that the paying power of the customer may not be impaired; and it may be that such insurance companies as loan their surplus in the various States do not make such investments at the lowest possible rate of interest, that the borrower may be better able to pay the principal. However fair the phrase used by the pleader may seem, that the contract was in the interest of the insured, the judicial vision must not be obscured by the declaration of such a purpose, but, as I have said, must ascertain the tendency, aim, and general scope of the contract from the whole of its provisions. The law favors trade; and its first aim is to promote the public interest, and after that to preserve individual rights; and it will not permit any one to restrain

a person from doing what the public welfare requires that he should do. If all the insurance companies had the same amount of capital, and were organized under the same laws, made the same investments, did the same amount of business, were officered with the same number of men, paid the same salaries and taxes, and maintained their companies at the same expenses generally, it might then be said with more propriety that there is no room for competition or a varying standard of rates, and that the laws of safe business require an iron standard of prices, to which all should adhere. But for reasons that readily occur to any one, and as suggested in the supposition I have made, it can be clearly discerned that there is as much room and need for competition in that as in any other branch of business." Since the public interest is the primary consideration, great latitude in the matter of uniting their interests and business will be allowed all persons and associations engaged in relieving distress and dispensing other forms of charity. Thus, in National Benefit Co. *v.* Union Hospital Co.,[1] two companies were engaged in the business of issuing "benefit certificates," entitling the holders, in case of sickness or injury, to maintenance, care, and medical treatment in any hospital provided by the company. The plaintiff had established a lucrative business of this kind in the States, among others, of Minnesota, Wisconsin, and the northern peninsula of Michigan, and had acquired valuable contracts with hospitals in that territory, entitling the holders of its certificates to treatment in such hospitals. The two companies entered into a contract, by the terms of which the plaintiff agreed to refrain, for the term of three years, from selling certificates in the territory named, except to railroad employees, and to turn over, as far as in its power, to the defendant its hospital contracts, in consideration of which the defendant agreed to pay plaintiff a certain sum of money, and also to refrain, for a like period of three years, from selling certificates to railroad employees within the territory referred to. It was held that the contract was not void as being in restraint of trade. The case was distinguished from a combination between pro-

[1] 45 Minn. 272; 47 N. W. 806.

ducers to limit the production of an article, so as to acquire a monopoly and then enhance prices, and cases where a quasi-public corporation enters into a contract restrictive of its business which would disable it from performing its duty to the public.

§ 30. **Contracts too broad as to Space not aided by Limitation as to Time.** — While, as has been seen, a contract sufficiently limited in point of space within which to operate is not rendered invalid because of its being unlimited in point of duration,[1] yet the converse of this proposition does not hold true. Accordingly, it was held that a condition, in a sale of a dry-goods business, not to engage in that business for five years, with no limitation as to place, was void.[2] The

[1] *Supra*, § 15.

[2] Wiley *v.* Baumgardner, 67 Ind. 66; s. c. 49 Am. Rep. 427. As this may be considered the leading case in this country on this branch of the rule, it may be well to give a fuller account of it. The action was upon a contract in writing, by which the appellant sold to the appellees the former's entire stock of dry goods, boots and shoes, merchandise and fixtures, in his store in Bluffton, at cost, less a certain per cent, and agreed to transfer to them his lease on the building occupied by him for his store-room, and his unexpired insurance on said stock, and agreed "not to engage in the dry goods business for a term of five years from" the date of the agreement, being the 29th of December, 1881, the appellees agreeing on their part, by way of payment, to transfer to the appellant a certain farm, which was to represent the sum of $6,000, to execute to him their promissory note for $1,000, and for the balance to execute their promissory notes, secured by mortgage on certain lands of one of the appellees. And it was agreed by all the parties that "for the faithful performance of the above contract, we hereby bind ourselves to each other in the sum of $1,000, liquidated damages."

It was alleged that, the appellees intending to engage in the dry goods business in said town, the contract was entered into by them, and the appellant for such purpose; that immediately after the purchase the appellees engaged in said business in said town, and that they were still continuing the same. The breach alleged was that in September, 1882, the appellant purchased a large stock of dry goods, of the value of $10,000, and with them opened a dry goods store in said town, within a few doors of the place of business of the appellees, and engaged in the dry goods business in said town, and still continued the same; that during the time he had been thus engaged in business, he had sold a large amount of dry goods in said town, the amount of $10,000, thereby

reasons for so holding were thus very aptly expressed by the court: "In the contract now before us the transaction was not expressed as a sale of the good-will of the business. But it would have made no difference if there had been an express sale of the good-will. Where a person carrying on any business sells his stock in trade, or his business and his good-will, and in the transaction agrees not to carry on the same business, with a limitation upon the restraint as to the time, but none as to space, the agreement as to such restraint is wholly void. This must be so if the test be that the contract is to be supported or avoided on the ground of public policy. If it be prejudicial to the public interest for a citizen to be debarred from pursuing anywhere the calling in which he has acquired skill or proficiency, or to encourage the establishment of monopolies by preventing competition, it must be so for definite as well as for indefinite periods of time. A contract that would put it in the power of one party to prevent the other from carrying on his calling anywhere whatever is unreasonable."

§ 31. **Restrictive Stipulations in Contract of Sale of Good-will.** — A restrictive contract wherein the good-will of a business is conveyed stands upon a somewhat different footing from an outright covenant not to compete in the same market with the covenantor. The good-will of a business establishment has been almost from time immemorial regarded as itself in the nature of an article of personal property, susceptible of ownership, sale, and transfer,[1] and is

taking away from the appellees said trade, to their damage $1,500, for which they demanded judgment. Upon the case thus presented, the decision as stated in the text followed.

[1] In Wedderburn *v.* Wedderburn, 22 Beav. 84, it was said by the Master of the Rolls that "the good-will of a trade, although inseparable from business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity." Judge Story defines it as "an advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punc-

sometimes given express statutory recognition as such.[1] This being the case, there is no less reason for enforcing covenants whereby its enjoyment by a vendee are secured against the competition of the vendor thereon, upon a like sale and conveyance of real estate with a covenant for peaceable enjoyment, as against the claims of the covenantor, his heirs and assigns. Accordingly, where a tradesman in a city sold a shop, and, in order to induce the purchaser to make the purchase, promised that he would not carry on the same kind of business within certain limits, it was held that the contract was founded on a good and sufficient consideration, and that the restriction as to trade being confined to small limits was not against the policy of the law.[2] The same conclusion was reached where defendant sold to plaintiff his type-

tuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." Story on Part. 99. In Lindley on Partnership, 842, the author, commenting on the meaning of the term "good-will," says that "it is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good-will has a marketable value, whether the business is that of a professional man or of any other person." In Smith *v.* Everett, 27 Beav. 446, Sir John Romilly says, "I entertain no doubt that if persons carry on business and one of them dies, a share in the good-will, where it is of any value at all, forms part of the estate of the deceased partner." These citations are sufficient to show that the good-will of a trade or business, when connected with it, is property.

[1] Statutes defining personal property, and including in the definition the good-will of a business, have an important bearing in some cases. Thus, the Ohio statute provides that "any personal property, including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest, or inheritance, or by purchase with her separate money or means, or be due as the wages of her separate labor, or to have grown out of any violation of her personal rights, shall, together with all income, increase, and profits thereof, be and remain her separate property, and under her sole control." 68 Ohio L. 48. In Morgan *v* Perhamus, 36 Ohio State, 517, 522, the court say: "This provision is very comprehensive. Its object was to cut off the common law rights of the husband to the personal estate of the wife, whether *choses in action* or *choses in possession*, unless reduced to his possession with the express assent of the wife."

[2] Pierce *v.* Woodward, 6 Pick. (Mass.) 206.

writing supply business, and agreed that for fifteen years he would not, "either in his own name or otherwise, directly or indirectly, engage in, or aid or instigate others to enter upon or be interested in, any business of like nature to that herein by him sold to" plaintiff.[1] But it is well settled that the sale of the good-will of a business without more, does not imply a contract on the part of the vendor not to engage again in a similar business. If the purchaser wishes to protect himself from the rivalry of his vendor, he must take care to obtain a stipulation to that effect.[2] With much greater reason is a party's successor or administrator not impliedly excluded from the privilege of again engaging in business.[3]

§ 32. **Same Rule applies to Sales of Trade Secrets.** — A secret process, whether for the manufacture of a commodity of ordinary consumption, or for the preparation of a medicinal compound, is subject to sale and transfer like the good-will of a business. And while the general test of reasonableness and considerations of the public interest control the decisions in such cases, yet much broader territorial restrictions are allowed for the protection of the vendee of a secret process than where one merely purchases the good-will of a business establishment. The object of such agreements is not to restrain trade, but to insure to the purchasers of an interest in the secret the full benefit of their purchase. Usually the only way of securing that result is by restraining its use without limit. If the secret is valuable, the purchasers are interested in controlling its use at other places than that in which they think proper to carry on the business in person. Even if they could not do this, still, they might sell out the secret to others, to be used within limits. Whatever burden

[1] Underwood *v.* Smith, (Com. Pl. N. Y.) 19 N. Y. S. 380.

[2] Churton *v.* Douglas, Johns. Ch. (Eng.) 174; Labouchere *v.* Dawson, L. R. 13 Eq. Cas. 322, 324; Johnson *v.* Halleley, 34 Beav. 63, 66; s. c. 2 De G. J. & S. 446; Hall *v.* Barrows, 33 L. J. Ch. 204; Leggott *v.* Barrett, L. R. 15 Ch. Div. 306, 312; White *v.* Jones, 1 Abb. (N. Y.) Pr. (N. S.) 328, Moody *v.* Thomas, 1 Disney (Ohio), 294; Rupp *v.* Over, 3 Brewst. (Pa.) 133.

[3] Davies *v.* Hodgson, 25 Beav. 177.

is imposed upon the vendors in such cases is of benefit to the vendee.[1] The public are not prejudiced by the transfer of a secret art. If it be worth anything to its original owner, he would use it and keep it a secret; and it is of no consequence to the public whether the secret art be used by him or another.[2] And in Tode *v.* Gross,[3] the court sustained a stipulation which was absolutely unlimited in its restriction either in point of time or space. In support of this conclu-

[1] Taylor *v.* Blanchard, 13 Allen (Mass.) 370.

[2] Vickery *v.* Welch, 19 Pick. (Mass.) 523; Stearnes *v.* Barrett, 1 Pick. (Mass.) 442.

[3] 51 Hun, 644; 4 N. Y. S. 402; 28 N. E. 469. In this case the defendant, who owned a factory for the manufacture of a certain kind of cheese, designated by a certain name, sold it, together with the secret of the manufacture, to plaintiffs, and covenanted that neither she nor her husband, her father, nor her brother-in-law, who had all assisted her in running the factory, should impart the secret to any other person than plaintiffs, nor engage in the business of manufacturing or selling such cheeses. The covenant further provided that for any violation of the agreement by defendant, without mentioning the others, a certain sum should be paid by her as damages. It was *held*, that the defendant made herself liable for any violation of the covenant by her husband, father, or brother-in-law, though such violation might be against her efforts to prevent it, and that such covenant is not void as in restraint of trade. See also Jarvis *v.* Peck, 10 Paige (N. Y.), 118; Hard *v.* Seeley, 47 Barb. (N. Y.) 428; Fowle *v.* Park, 131 U. S. 88; Gloucester Isinglass & Glue Co. *v.* Russia Cement Co., (Mass.) 27 N. E. 1005; Leather Cloth Co. *v.* Lorsont, L. R. 9 Eq. 345.

A covenant by the vendor of a secret process for dyeing, not to use the secret for twenty years, is valid. Bryson *v.* Whitehead, 1 Sim. & Stu. 74.

On the same principle, a promise to keep secret a process sold is binding. Morrison *v.* Moat, 9 Hare, 241. See also Williams *v.* Williams, 3 Mer. 157, 158; Yovatt *v.* Winyard, 1 J. & W. 394; Abernethy *v.* Hutchinson, 3 L. J. Ch. (O. S.) 209, 213, 219; Tipping *v.* Clarke, 2 Hare, 383; 24 Eng. Ch. R. 383 (Am. ed.); Nessle *v.* Reese, 29 How. Pr. (N. Y.) 382; Barnes *v.* McAllister, 18 How. Pr. (N. Y. Sup. Ct.) 534; Garrison *v.* Nute, 87 Ill. 215.

An agreement upon sale of a manufacturing process not to manufacture any article of a disinfectant nature for fourteen years, is valid. Hogg *v.* Darley, 47 L. J. Ch. Div. (N. S.) 567.

So is an agreement in sale of a secret process for converting cast iron into malleable iron. Jarvis *v.* Peck, 10 Paige (N. Y.), 118. To same effect, Alcock *v.* Gibberton, 5 Duer (N. Y.), 76; Vickery *v.* Welch, 19 Pick. (Mass.) 523.

sion the court reasoned thus: "The business carried on by defendant was founded on a secret process known only to herself and her agents. She had the right to continue the business, and by keeping her secret to enjoy its benefits to any practical extent. She also had the right to sell the business, including as an essential part thereof the secret process; and, in order to place the purchasers in the same position that she occupied, to promise to divulge the secret to them alone, and to keep it from every one else. In no other way could she sell what she had, and get what it was worth. Having the right to make this promise, she also had the right to make it good to her vendees, and to protect them by covenants with proper safeguards against the consequences of any violation. Such a contract simply left matters substantially as they were before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. 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 upon 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 agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory." The principles underlying the rule of public policy upon a restrictive contract, the subject-matter of which is a secret process, was ably discussed by Chief Justice Fuller in Fowle *v.* Park.[1] In passing upon the validity of an assignment for a valuable consideration, by the proprietor of a secret medicinal compound, of the exclusive right to manufacture and sell it in certain States and Territories, with a covenant by the assignor not to manufacture or sell the article in such Territory, and a covenant by the assignees not to manufacture or sell it in other territory, he said: "Relating as these contracts did to a compound involving a secret in its preparation, based as they were upon a valuable consideration, and limited as to the space within which, though unlim-

[1] 131 U. S. 88, 96.

ited as to the time for which, the restraint was to operate, we are unable to perceive how they could be regarded as so unreasonable as to justify the court in declining to enforce them. The vendors were entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers; and the purchasers were entitled to such protection as was reasonably necessary for their benefit. Williams had and transferred property in the secret process of manufacturing the article he had discovered, and he and his grantees could claim relief as against breaches of trust in respect to it. The policy of the law is to encourage useful discoveries by securing their fruits to those who make them. If the public found the balsam efficacious, they were interested in not being deprived of its use; but by whom it was sold was unimportant."

§ 33. **Restrictions in Connection with Transfers of Trade-Marks.** — The right of the owner or assignee of the beneficial interest in a trade-mark to protection in the use and enjoyment of the same is a well-defined branch of jurisprudence. The bearing of the rule of public policy under consideration is sometimes an important question in passing upon contracts pertaining to trade-marks. The sale and transfer of a trade-mark usually forms part of the sale of a business and its good-will, as in the case of Watertown Thermometer Co. *v.* Pool.[1] In that case plaintiff alleged and defendants admitted by demurrer that his business in the manufacture and sale of thermometers and storm-glasses required for its proper development the entire United States, and that one of the considerations which induced plaintiff to purchase defendant's good-will and trade-mark was such restriction, "which would enable plaintiff to fully develop its business throughout the

[1] 51 Hun, 157; 4 N. Y. S. 861. See also Leather Cloth Co. *v.* Am. L. Cloth Co., 11 Jur. (N. S.) 513; Ainsworth *v.* Walmsley, 44 L. J. 355; Kidd *v.* Johnson, 102 U. S. 617; Witthaus *v.* Braun, 44 Md. 303; Solis Cigar Co. *v.* Pozo (Colo.) 26 P. 556; Russia Cement Co. *v.* Le Page, 147 Mass. 206; Frazer *v.* Frazer Lubricator Co., 121 Ill. 147; 13 N. E. 639.

whole United States, without interference on the part of defendant." It was held that the restraint, though general, was co-extensive with the interests to be protected and the benefits to be conferred; that it imposed no restriction on defendants which was not beneficial to plaintiff, or unreasonable, or unnecessary for plaintiff's protection; and the consideration was such as made it reasonable for the parties to enter into it. The court in the course of an elaborate opinion said: "The cases cited seem to sustain the doctrine that a restriction which is no greater than the interest of the vendee requires, and by giving which the vendor has obtained an increased price for what he sold, is valid, though it extended through the whole kingdom or country. In this case the defendants, by their demurrer, admit that the business of the plaintiff in the manufacture and sale of thermometers and storm-glasses required for its full and proper development the entire territory embraced within the United States, and that one of the considerations that induced the plaintiff to make such purchase and pay the consideration named, was such restriction, which would enable it to fully develop its business throughout the whole United States, without interference on the part of the defendant. Assuming this, as we must, and it seems quite clear that the restraint, though general, is at the same time co-extensive only with the interest to be protected, and with the benefit meant to be conferred by this agreement, that it imposes no restriction upon the defendants which is not beneficial to the plaintiff, or which was unnecessary for its reasonable protection, and that it was induced by a consideration which made it reasonable for the parties to enter into it."

§ 34. **Restrictions in Conveyances and Leases.** — Covenants in conveyances of real estate, whereby the grantor inhibits the grantee from engaging in trade on the premises conveyed, are sometimes treated as contracts in partial restraint of trade, and in other cases as simply reservations of an easement. But whatever the character or name given to such negative provisions, it is well settled that they are valid, and susceptible of specific enforcement by injunction.

Morris *v.* Tuscaloosa Mfg. Co.[1] was a case of this nature, the conveyance containing an express stipulation and reservation that the premises conveyed should be used as a residence only, and not for carrying on any trading or mercantile business. The reservation was held not contrary to public policy, nor otherwise illegal, and enforceable not only against the immediate vendee, but against his successors in estate. Stone, C. J., delivering the opinion, said: "The real contention in this case is, that the reservation or limitation was incorporated in the deed for the purpose of retaining in the manufacturing company a monopoly in the sale of merchandise; that such monopoly is contrary to public policy; and that the court of chancery, which is a court of conscience, will not lend its aid to the perpetuation of such a scheme." After reviewing and commenting upon the authorities, he proceeded: "Neither of these cases, in our judgment, sustains the position taken by the appellant's counsel. Neither of them presents the case of a purchase of a partial, qualified, or restricted interest in realty, taken possession of under a conveyance containing reservations, and afterwards throwing off the restraints, and maintaining a right to the unqualified use. Nor have we been referred to any case which asserts that doctrine. To recognize such doctrine would be to place a very dangerous restraint on the power of alienation, which is supposed to be inherent in the ownership of property."

In two prior cases[2] different conclusions were reached, but upon distinguishing facts. In Trustees & Co. *v.* Thatcher,[3]

[1] 83 Ala. 565; 3 So. 689. See also Long *v.* Towl, 42 Mo. 545.

[2] Trustees of Columbia College *v.* Thatcher, 87 N. Y. 313; 41 Am. Rep. 365; Foll's Appeal, 91 Pa. St. 434; 36 Am. Rep. 671.

[3] *Supra.* Many reasons may be urged why relief should not have been granted in the case of Foll's Appeal, 91 Pa. St. 434, not the least potent of which is the fact that the purpose and prayer of the bill were to obtain specific performance of an executory contract for the purchase of bank-stock, a species of personal property. The court denied relief, because it appeared that the object of the purchase was to obtain control of the bank, — a national bank, — by becoming owner of a majority of the stock. The court said: "While the legal right of the complainant to buy up sufficient of the stock of this bank to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of

two land proprietors owned adjacent lands in the city of New York. The lands were high up town, beyond the range of business enterprises, and were well adapted to family residences. For mutual benefit they entered into a covenant, one with the other, "that only dwelling-houses should be erected thereon, and not to carry on or suffer any kind of manufactory, trade, or business thereon." There does not appear to have been any inducement to this contract and covenant, save the profit or comfort each was expected to derive from its observance, nor any consideration other than the mutual agreement of the parties. No change of property took place, and neither acquired lands from the other. It was, at most, only an interchange of an easement or servitude each landholder imposed on lands previously owned, and still retained by him. In the growth of the city, business enterprises pressed upon the lands embraced in the covenant, and an elevated street railway was constructed, which passed the premises, and rendered them much less desirable as sites for private residences. A bill was filed by one of the parties to the covenant, to hold the other to its observance. Relief was denied, on the ground of the changed conditions. Among other things, the court quoted many authorities, and said: "Though the contract was fair and just when made, the interference of the court should be denied if subsequent events have made performance so onerous that its enforcement would impose great hardships upon him, and cause little or no benefit to plaintiff."

It may be stated as a general rule, to which peculiar cir-

equity will lend its aid to help him. A national bank is a quasi-public institution. While it is the property of its stockholders, and its profits inure to their benefit, it was nevertheless intended by the law creating it that it should be for the public accommodation." We might further extend the quotation, but consider it unnecessary. The decision might have been safely placed on the single ground, that the bill prayed the specific performance of a contract for the sale of personal property, and gave no special reason of merit why the general rule in such cases should be departed from. Equity will not, in general, decree the specific performance of contracts concerning chattels, unless such chattels have some "special value to the owner," or are "unique, rare, and incapable of being reproduced in money." 3 Pom. Eq. 1401–2.

cumstances may give rise to an occasional exception, that restrictive covenants in deeds, leases, and agreements limiting the use of land in a specified manner, or prescribing a particular use, which create equitable servitudes on the land, will be specifically enforced in equity by means of an injunction, not only between the immediate parties, but also against subsequent purchasers with notice, even when the covenants are not of the kind which technically run with the land.[1]

§ 35. **Ordinary Contracts granting Exclusive Trading Privileges.** — An exclusive trading privilege may be granted by independent contract without being connected with a sale or lease of real estate. Such contract when not oppressive, and when based upon a valuable consideration, is not within the rule of public policy under consideration. But it must secure an exclusive enjoyment of the privilege only as against a single individual, while all the world besides is left at full liberty to enter on the same enterprise, and there must not only be a consideration for the contract, but there must be a good reason for entering into it; and it must impose no restraint on one party which is not beneficial to the other.[2] Within these rules the restrictions were held valid and enforceable in the following cases: where a contract to furnish a party with sewing-machines at a discount, and upon a credit, provided that such party should deal exclusively in the machine sold by the party agreeing to furnish and to purchase the same of him exclusively;[3] a contract by which one party, at his own lime-kiln, agreed to manufacture for another party a certain number of barrels of lime within a given time, for which he was to receive a given sum per barrel, and which provided

[1] Pom. Eq. Jur. § 1342. See also Sprague *v.* Snow, 4 Pick. 54; Cowdry *v.* Colburn, 7 Allen, 9; Parker *v.* Nightingale, 6 Allen, 341; Hubbell *v.* Warren, 8 Allen, 173; Brewer *v.* Marshall, 4 C. E. Green, 543; Washb. Easements, 114–5 *et seq.* An agreement of the vendor, in consideration of the sale of a lot, not to build a flat in the immediate neighborhood, is not against public policy as being in restraint of trade. 14 N. Y. S. 362, reversed; Lewis *v.* Gollner, (N. Y. App.) 29 N. E. 81.

[2] California Steam Navigation Co. *v.* Wright, 6 Cal. 258.

[3] Brown *v.* Rounsavell, 78 Ill. 589.

also that during the continuance of the agreement the party manufacturing the lime should not sell to any other person any lime;[1] a contract whereby a dentist agreed to purchase artificial teeth of a manufacturer on condition that the latter should not sell such teeth to any person in the town where the dentist resided;[2] a contract to sell a brand of cigars to no one in the State but defendant, and to give him the exclusive agency for such sale;[3] an agreement between two traders in live stock that the first would sell the other all his commodities, and that the second would buy from the first alone;[4] where one whose only business was selling sand from land which he owned, having refused to sell a piece of the land, on the ground that it would hurt his business, at last agreed to do so on the vendee's stipulation not to sell sand from it;[5] an agreement made by a drummer with a purchaser not to sell a certain kind of goods to any one else in the same town.[6] And it was held that the complaint in an action for breach of a covenant not to sell asphalt for pavements and blocks, except to certain persons in certain cities, does not show *prima facie* that the contract is void as tending to create a monopoly, or to enhance the price of asphalt pavements.[7]

§ 36. **Agreements not to manufacture or deal in a Single Article.** — Scarcely distinguishable from those discussed in the two last preceding sections, and likewise valid on the same principles, are contracts whereby a party stipulates for protection from competition in the manufacture or sale of a single article or commodity.[8]

§ 37. **Where Covenantor retains an Interest.** — A contract which would otherwise be void, because too broad in its

[1] Schwalm *v.* Holmes, 49 Cal. 665.
[2] Clark *v.* Crosby, 37 Vt. 188.
[3] Newell *v.* Meyendorf, 9 Mont. 254; 23 P. 333.
[4] Live-Stock Ass'n *v.* Levy, 54 N. Y. Super. Ct. 32.
[5] Hodge *v.* Sloan, (N. Y.) 17 N. E. 335*.
[6] Keith *v.* Hirschberg Optical Co., 48 Ark. 138; 2 S. W. 777.
[7] Barber Asphalt Paving Co. *v.* Brand, 7 N. Y. S. 744.
[8] Gillis *v.* Hall, 2 Brewst. (Pa.) 342. See also Bowser *v.* Bliss, 7 Blackf. (Ind.) 344.

restrictions, may sometimes be enforced against the covenantor on the ground that in it he has not deprived himself of a continuing interest in the business forming the subject of the contract, and therefore is not injured, but rather benefited, by entering into it.

Thus, in Diamond Match Co. *v.* Roeber,[1] it was held that a contract made by a seller with the purchaser that he should not at any time within ninety-nine years, directly or indirectly, engage in the manufacture or sale of friction-matches, excepting in the capacity of agent or employee of said purchaser, within any of the several States of the United States of America, or 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, was not void as a covenant in restraint of trade.

The reasoning in support of the decision appears unsound in the light of authority and general principle. But there is a feature of the case upon which the decision is reconcilable with the preponderance of authority. It crops out as a mere suggestion rather than as an argument. It is the fact that a part of the consideration for the contract was a large amount of stock in the corporation formed to carry on the very business sold, which the defendant received; and thus, instead of excluding himself from engaging in the business anywhere within the designated limits, he became *pro hac vice* a partner with his successors in interest. So where one of two rival manufacturers of washing-machines entered into a contract with the other under which he discontinued business and became the other's partner for five years, a scale of selling prices being agreed upon, it was held that such contract was not void as in restraint of trade.[2]

§ 38. **Divisibility of such Contracts.** — Such a contract or the restrictive stipulation therein, being subject to the same general principles of law with respect to its enforceability,

[1] 100 N. Y. 473; 13 N. E. 419.

[2] Dolph *v.* Troy Laundry Machinery Co., 28 Fed. Rep. 553.

may in a proper case be held void in part, and in part valid; but for this purpose it is necessary that the consideration for the illegal and void parts shall be severable from the rest of the consideration. In Smith's Appeal[1] the defendant, by a contract for a valuable consideration, agreed with plaintiff that he would not thereafter engage in the business of manufacturing ochre "in the county of Lehigh or elsewhere." He subsequently went into the business of manufacturing ochre in Lehigh county, and, upon a bill for injunction to restrain him from continuing the same being filed by plaintiff, he answered that his contract was in restraint of trade, and therefore contrary to public policy. It was held that the contract was divisible as to place; that while it was void outside of Lehigh county, it was good within the county; that it was competent for the defendant to make the contract; and that it was reasonable, and not oppressive. And in Pelz *v.* Eichele,[2] it was held that a contract not to engage in a particular trade for a specified time, "in the city of St. Louis, or at any other place," was divisible, and, as to the restriction imposed in St. Louis, was not void as in restraint of trade. So in Dean *v.* Emerson,[3] the general principle was applied, that one may be liable for a breach of a covenant not to be interested in a certain business — as the manufacture of daguerreotype materials — within a certain precinct, although a covenant in the same indenture not to be interested for five years in the same business within the United States may be void, as in restraint of trade. But in Bishop *v.* Palmer[4] it appeared that by the terms of a written agreement, the plaintiff, in consideration of the payment of a certain sum, agreed to sell and transfer to the defendants all his interest in the business of manufacturing bed-quilts, and dealing in cotton-waste, then carried on in the city of F. And he covenanted (1) that for the period of five years he would not engage in the business of manufacturing or dealing in bed-quilts, or in any business of which that might form a part; (2) that he would not engage in the waste business in F., or buy waste of the mills in F.; (3) that he would not purchase waste of certain mills named.

[1] 113 Pa. St. 579; 6 A. 251.
[2] 62 Mo. 171.
[3] 102 Mass. 480.
[4] 146 Mass. 469; 16 N. E. 299.

The defendants' promise was made in consideration of the sale of the business, etc., and the faithful performance of the covenants and agreements contained in the written instrument. 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, and there was no way of ascertaining what valuation was put by the parties upon either portion of it. It was held that the first covenant was illegal and void, as being in restraint of trade, and that as it formed a part of the consideration for the defendants' promise, and was not severable from the rest of the consideration, no action could be supported upon defendants' promise. The court, *per* Allen, J., said: "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 a part. . . . 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." And the court, upon the reasoning just quoted, held that no action was maintainable. Likewise in More *v.* Bennet,[1] the contract not to engage in a

[1] 40 Cal. 251. In Santa Clara Val. M. & L. Co. *v.* Hayes, 76 Cal. 387, it was claimed by appellant that the contract was divisible, and the first part could stand though the latter be illegal. But the court said:

particular business "in the city and county of San Francisco or State of California," was held void, because in restraint of trade and against public policy; and being an entire contract, it could not be severed so as to enforce that part relating to the city and county of San Francisco, and reject that part relating to the State of California. Rhodes, C. J., delivering the opinion, said: "No precise rule can be laid down for the solution of the question whether a contract is entire or separable; but it must be solved by considering both the language and the subject-matter of the contract. There were not two distinct areas, for the one included the other. The defendant's business was not carried on in the two distinct areas as two separate occupations, but the complaint avers that the defendant was carrying on the business in the State, and that he sold such business to the plaintiff. When the price is expressly apportioned by the contract, or the apportionment may be implied by law to each item to be performed, the contract will generally be held to be severable; but no such apportionment can be made of this contract. When the contract provides for the restraint of the business within the State, if the mention of any subdivision of the State will make the contract severable, then it would be easy to defeat

"If the whole vice of the contract was embodied in the promise of the defendants not to sell lumber to other persons, the illegality would lie in the promise alone, and it might be contended, with great force, that this promise was divisible from the agreement to sell. Under the findings of the court, however, the illegality inheres in the consideration. The very essence and mainspring of the agreement — the illegal object — 'was to form a combination among all the manufacturers of lumber at or near Felton for the sole purpose of increasing the price of lumber, limiting the control thereof to be manufactured, and give plaintiff control of all lumber manufactured,' etc. This being the inducement to the agreement, and the sole object in view, it cannot be separated and leave any subject-matter capable of enforcement, as was done in Granger *v.* Empire Co., 59 Cal. 678; Treadwell *v.* Davis, 34 Cal. 601; and Jackson *v.* Shawl, 29 Cal. 267. The case falls within the rule of Valentine *v.* Stewart, 15 Cal. 404; Prost *v.* More, 40 Cal. 348; More *v.* Bennet, 40 Cal. 251; Forbes *v.* McDonald, 54 Cal. 96; Arnot *v.* Pittston & Elmira Coal Co., 68 N. Y. 559. The good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good, and therefore the subject of an action."

the rule prohibiting contracts in total restraint of trade by mentioning in the contract each subdivision of the State; and when it is objected that the limits are unreasonable, it will be answered that the plaintiff seeks to enjoin the defendant from pursuing the business in only one of the cities or towns mentioned in the contract." The whole doctrine of the divisibility of contracts is applicable to these as to other contracts; and 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.[1]

§ 39. **Same Subject.** — Though a contract be unobjectionable on account of the space within which it is operative, it may be partially ineffective by reason of the inability of the party in point of interest or right during a portion of the time during which it is to run. Thus, in Oregon Steam Navigation Co. *v.* Winsor,[2] Justice Bradley, in course of a luminous opinion, said: "It is true that the stipulation in question covers a period of time which extends three years beyond the period for which the Oregon Company is bound to the California Company. The latter would expire on the 1st of May, 1874, and the stipulation in question extends to the 1st of May, 1877. This extra period of three years, in reference to the waters of California, is not necessary to the protection of the Oregon Company. The company is under no obligation with regard to those three years. But the suit is brought and the breach is alleged for a portion of time during which the Oregon Company is bound to protect the

[1] See 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.

[2] 20 Wall. 64, 67.

California Company from the interference of said steamer. And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon Company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether.'"

§ 40. **The Question of Consideration.** — In keeping with the prevailing prejudice inspiring the earlier English decisions when a contract restrictive of trade was involved, a rule was established, and for a long time observed, to the effect that, such a contract being *prima facie* void, the burden was on him seeking to enforce it to show, not only that the restriction was reasonable, but that the contract was based upon a valuable consideration; and this rule was as rigidly applied to sealed as to unsealed contracts. But the modern tendency of the courts is to treat such contracts, with respect to the matter of consideration, just as other contracts are treated.[1]

In regard to the adequacy of the consideration there has never been any diversity of opinion. Whether the consideration for the restraint is adequate or not, is a question that the court will not inquire into. It is sufficient that the contract shows on its face a legal and valuable consideration; but whether adequate or inadequate to the restraint imposed must be determined by the parties themselves, upon their own view of all the circumstances attending the particular transaction. If it were otherwise, it would be the court, and not the parties, that would make the contract. All that the court is required to do in passing upon the validity of the covenant is to determine whether the restraint is reasonable

[1] *Supra*, § 10.

and consistent with law, and whether there be a legal consideration to support it.[1] And it is competent for the parties to the contract to liquidate the damages to be recovered upon a breach.[2]

§ 41. **Construction.** — Contracts restrictive of trade are strictly construed as against the covenantee. The whole idea is fully, though somewhat awkwardly, expressed by the Kansas Supreme Court in these words: "All contracts of this kind are to some extent against public policy, and hence their provisions should not be extended by construction or implication so as to favor parties desiring to enforce them beyond what their terms would most clearly require. They are not anywhere to be looked upon with favor; and where a party desires to enforce one of them, he must simply take what he has in the clearest terms got."[3]

§ 42. **Admissibility of Extrinsic Evidence.** — The ordinary rules governing the admissibility of parol evidence to annex incidents, explain terms, and show the situation of the parties and circumstances surrounding the subject-matter are applicable to these contracts. Thus, in Moore & Handley etc. Co. *v.* Towers etc. Co.,[4] it was held that extrinsic evidence is admissible to place a restricted meaning upon general restrictive covenants, and thus exempt the contract from the general rule. On this point the court say: "It is insisted that the agreement of Moore, Moore, & Handley 'not to handle any more plough-blades or plough-stocks,' is an unreasonable restriction on trade, in that it contains no limitation as to the place or locality at or in which they are to refrain from carrying on the specified business. It is true that such contracts

[1] California Steam Nav. Co. *v.* Wright, 6 Cal. 258; Duffy *v.* Shockey, 11 Ind. 70; Pierce *v.* Fuller, 8 Mass. 223; Hitchcock *v.* Coker, 6 Ad. & El. 439; Archer *v.* Marsh, 6 Ad. & El. 966; Leighton *v.* Wales, 3 M. & W. 551; Pilkington *v.* Scott, 15 M. & W. 657; Sainter *v.* Fergusson, 7 C. B. 716.

[2] Hoagland *v.* Segur, 38 N. J. L. 230. See Doty *v.* Martin, 32 Mich. 462; Caswell *v.* Gibbs, 33 Mich. 331.

[3] Roller *v.* Ott, 14 Kansas, 461.

[4] 87 Ala. 206; 6 So. 41.

must be limited as to the space they are intended to cover, or they cannot be supported. The meaning of a contract of this character, however, is not to be found solely from a consideration of its expressed terms. Courts look to all the circumstances surrounding the parties and attendant upon the transaction, and, from a consideration of these circumstances in connection with the expressions of the undertaking, they will first construe the contract, and then proceed to pass upon its reasonableness as thus construed. In the case at bar the facts were, that both parties were engaged in a certain business in and covering that part of the State of Alabama which embraces and lies north of the city of Birmingham. It was a character of business, as conducted by them, which could reasonably and naturally be carried on throughout the territory. Over this space they were dealing in competition with each other, and presumptively the operations of each were detrimental to the trade of the other, and the agreement of either to desist from these operations redounded to the advantage of the other. The bill alleges, and the answer does not deny, that the written agreement, copied above, was made with respect to the trade thus carried on in the territory including and north of Birmingham, in Alabama. The contract will, therefore, be construed with reference to these facts, and held to mean that Moore, Moore, & Handley would not handle plough-stocks and blades in competition with, or opposition to, the Towers Hardware Company within the territory covered by their previous competition, and described as that part of Alabama which includes and lies north of Birmingham. Thus construed, it becomes specific as to time, space, and character of the dealing intended to be restrained, and is reasonable and valid."

§ 43. **What constitutes Violation.** — It being determined that a contract, though in partial restraint of trade, is valid and enforceable, of course the questions of whether it has been in fact violated, and of what constitutes a violation, will become important. But a consideration of this important branch of the law may be found in works on contracts, and would scarcely be looked for in a work under this title. One

or two illustrative cases, without impropriety, may be noticed, however, and their examination will lead to other authorities, if further information is desired. In Finger *v.* Hahn[1] it was held that a covenant not to carry on the retail butcher business, or operate any butcher business, except the wholesale, in a certain place, was broken by the covenantor working on a salary in a grocery store which did a butcher business in connection with the grocery business, buying and selling meats for the store, and influencing trade thereto. In Dethlefs *v.* Tamsen,[2] the extent to which a retiring partner incurs restraint by selling the good-will and agreeing not to carry on a competing business was considered; and it was held that evidence that a new store for the same business, opened by the retiring partner within two doors of the old one, resembling the latter in appearance, was competent on the question of breach of agreement and damages. So was evidence of the falling-off of receipts in the old store after the opening of the new one; but that specific proof of the particular customers whose trade was lost need not be made.

[1] 42 N. J. Eq. 606; 8 A. 654.
[2] 7 Daly (N. Y.) 354.

CHAPTER IV.

AGREEMENTS NOT TO ACCEPT EMPLOYMENT.

§ 44. **General Principles applicable.** — There have been but few adjudications upon contracts purely restrictive of the right to accept employment. This is probably owing to the little value of such contracts disconnected from a stipulation to serve exclusively the promisee. But there is no doubt of the application of the general principle, and of the test of reasonableness to such agreements. Among the rare instances in which contracts have come under consideration, they have been enforced or held invalid according to the circumstances of the parties and the nature of the employment; and a covenant made by the patentee of a process of manufacture in a business not local in its character, for the purpose of selling the patent to better advantage, and as a part of the transaction of sale, and for one and the same consideration received by him for the patent, to use his best efforts to invent improvements in the process and to transfer them to the buyer, to do no act which may injure the buyer or the business, and "at no time to aid, assist, or encourage in any manner any competition against the same," is not necessarily void as in restraint of trade.[1]

§ 45. **Construction.** — No agreement not to contract for employment will be implied from the terms of a contract, unless such meaning be necessarily deducible; and a contract not to practise dentistry on one's own account or by any agent

[1] Morse Twist &c. Co. *v.* Morse, 103 Mass. 73.

within certain limits, is not violated by working for another.[1] So where action was brought on a bond conditioned that the defendant should not travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise, it was held that the condition of the bond was not broken by the defendant's entering into service as traveller for a brewer.[2]

§ 46. **Contracts for Exclusive Service.** — There is a clear distinction, but a close analogy, between a contract whereby a party binds himself not to accept employment from any one, and one whereby he agrees to devote his services exclusively to the covenantee. It is well settled that the rule of public policy cannot be invoked against contracts of the latter description when based upon valuable consideration, and their terms are not unreasonable or oppressive. As a general rule, such contracts are entered into by employers with persons possessing superior mental and physical gifts or training in some calling or profession; but in a proper case of ordinary employment a contract of this nature will be enforced by injunction, especially where, by reason of a party's capacity and acquaintance with the business, his services are of peculiar value, and the damages for a violation not susceptible of estimation by any known standard, although the contract provides for a stipulated sum as a forfeit upon its violation.[3] Thus it was held that a contract by which one, in consideration of employment by a merchant engaged in the instalment clothing business, agreed for one year after the employment ceased not to engage in, or be concerned or interested in, the instalment clothing business in a certain city on his own account, or as the agent or employee of any other person, "in any capacity," only prevented his accepting employment in the instalment clothing business, and was not objectionable, as imposing a restraint on the employee greater than was necessary for the fair protection of the employer, or as interfering with the interest of the public in the employee's labor.[4]

[1] Bowers *v.* Whittle, 63 N. H. 147; s. c. 56 Am. Rep. 499.
[2] Josselyn *v.* Parson, L. R. 7 Exch. 127.
[3] National Prov. Bank *v.* Marshall, L. R. 40 Ch. Div. 112.
[4] Sternberg *v.* O'Brien, (N. J. Ch.) 22 A. 348.

§ 47. **Same. — With Inventors.** — Nothing is better known than this, that when persons have turned their attention to a particular class of invention, they are likely to go on and invent, and likely to continuously improve the nature of their invention, and continuously to discover new modes of attaining the end desired. Persons, therefore, who buy patents of inventors are in the habit of protecting themselves from the utter destruction of the value of the thing purchased by bargaining with the seller that he shall not use any new invention of his for producing that product, in which they are about to deal, at a cheaper rate; because if he were allowed to do so he might, the day after he sold his patent, produce something which, without being technically an infringement, and without being technically an improvement, accomplish the desired object in some other way, and utterly destroy the value of that which they had purchased. They therefore, not unreasonably, and not unusually, make it a part of their bargain that whatever the man discovers of the same kind in the shape of machinery or apparatus which will produce the product in which they are about to deal, shall belong to them.[1]

In Morse Twist &c. Co. *v.* Morse,[2] the court *per* Chapman, C. J., say: "The language of the contract implies that, when the plaintiffs joined the defendant in his new business, they had confidence in his mechanical skill and ingenuity, and intended to avail themselves of it for the benefit of the business in which he induced them to embark; and that it was a material part of the consideration for which they paid him so considerable a sum and invested their capital. It was not in restraint of trade, nor contrary to public policy, that the defendant should contract to render to the plaintiffs his exclusive services in this respect. This part of the contract he is alleged to have violated. And although the defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the formation of the company; and

[1] Printing &c. Co. *v.* Sampson, L. R. 19 Eq. Cas. 462, is the leading English case on this subject.

[2] 103 Mass. 73.

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."

§ 48. **Same. — Actresses, Singers, etc.** — Though ordinarily courts of equity refuse to enjoin the violation of restrictive covenants in contracts for personal services, the remedy at law being deemed adequate, it is otherwise when the services contracted for require particular skill, or are unique, or extraordinary in their nature, such as those of eminent singers, actors, artists, and the like. While courts will not undertake to compel the specific performance of such contracts, they will restrain by injunction their violation, especially in the cases of singers and actors, by enjoining their singing or acting elsewhere or for others.[1]

[1] Spelling, on Extraordinary Relief, sec. 493, citing numerous authorities.

CHAPTER V.

MONOPOLIES OR COMBINATIONS TO SUPPRESS COMPETITION.

§ 49. **General Suggestions.** — In the three preceding chapters we have for the most part considered contracts wherein the restrictive stipulation was only collateral to the principal subject-matter of the contract, consisting of the purchase of a plant or stock-in-trade and good-will of a business or profession, or of an exclusive right to the service of one peculiarly endowed or trained. We come now to consider those agreements of a more far reaching importance, having for their sole or main object the suppression of competition. For a clear distinction between the two classes of cases it would be difficult to improve upon the explanation of Justice Bailey in More *v.* Bennett:[1] "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 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

[1] Ill. 29 N. E. 888.

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." [1]

§ 50. **No Rigid Rules on the Subject.** — But the creation of monopoly is not always illegal, nor is there any cast-iron rule of law against the suppression of competition by mutual agreements. No reliable rules for determining to what extent competition may be suppressed or bought off without contravening public policy against monopolies can be laid down. Virtually the same state of facts has in different courts led to opposite decisions. This must of necessity ever be so while so indefinite an idea as that designated by the term "public policy" is made the test and basis of decision. The character of the institutions, the temper of the people, and the peculiarities of the business and industry in which they are engaged within the jurisdiction where a question arises have their separate and combined influence in shaping the policy of the State and the views of the courts. Much more do local statutory and constitutional provisions affect the question. The most important factor of commercial life is the liberty of contracting, and it should not be abridged except

[1] See People *v.* N. R. Sugar Ref. Co., 121 N. Y. 696; 5 Ry. & Corp. L. J. 56, 65; Hooper *v.* Vanderwater, 4 Denio, 349; Stanton *v.* Allen, 5 Denio, 434; Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 186; Salt Co. *v.* Guthrie, 35 Ohio St. 672; Craft *v.* McConoughy, 79 Ill. 339; Hoffman *v.* Brooks, 11 Weekly L. Bul. 358.

where it is made clear that the public will be injuriously affected by its unrestrained exercise. Freedom of all kinds may be abused, and commercial freedom as well as any other privilege degenerate into license. When, as is sometimes the case, excessive competition has become, or is about to become, ruinous to private parties, which it is to the public interest to prevent rather than to encourage, anti-competitive contracts are reasonable, and should be upheld. It is only when such contracts are publicly oppressive that they become unreasonable, and should be condemned as contrary to public policy. But except in cases possessing peculiar features it may be safely asserted upon all the authorities, ancient and modern, that a combination the tendency of which is to prevent general competition and to control prices, is detrimental to the public, and consequently unlawful.

§ 51. **Early Principles applicable.** — Whatever the growth in intensity of the solicitude of courts for the public protection, evinced in recent decisions, to meet new dangers, the same principles are applied now as at earlier periods. The modern forms of monopoly are in many respects similar to, and have the same objects as, the middle age monopolies, such as existed in the Elizabethan era, as described by Lord Coke.[1]

§ 52. **Creation of Scarcity and Enhancement of Price, as Tests.** — It has been seen that the courts are not governed by any hard and fast rule in determining whether a particular contract is in restraint of trade and amenable to the rule of public policy rendering such contracts invalid, the test being whether the restriction is reasonable and necessary to the party's protection, the public interest being constantly kept in view. The nearest to a definite proposition which may be advanced is that any compact between two or more persons or corporations affecting any article or commodity of which the public must have a constant supply, the sole intent and direct tendency of such arrangement being the creation of a scarcity or the enhancement of the price, will be nullified

[1] Case of Monopolies, 11 Coke, 84.

by the courts, or specific enforcement refused. When the undefinable nature of the subject is considered, it is little wonder that the decisions upon apparently similar facts are so variable, and that it is almost impossible to deduce general abstract rules from them. But the courts have an almost unlimited range of discretion in deciding upon the facts of each case as presented, whether the restriction be reasonable and necessary, or inimical to the public interest, because calculated to stifle competition, and lead to extortion and oppression. Perhaps the clearest statement of the considerations which should control herein, is to be found in the case of Arnot *v.* Pittston & E. Coal Co.[1] The facts were considered to clearly warrant the court, upon action brought by one of the parties thereto, to hold the agreement void on account of its inevitable effect to maintain exorbitant prices. Briefly stated, it was an agreement between two large coal-mining companies, that one would take all the coal the other should mine, and the other should not sell to any third parties, and was made with intent to control the market and maintain an exorbitant price. The action was brought by the assignee of one of the parties to the agreement to recover the price of a large quantity of coal sold and delivered under the agreement. The court said: "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 product of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements 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

[1] 68 N. Y. 568, citing among other cases that of Tracy *v.* Talmadge, 14 N. Y. 162.

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." In Santa Clara Valley M. & L. Co. *v.* Hayes,[1] the

[1] 76 Cal. 387; 18 P. 391. A similar case was that of Pacific Factor Co. *v.* Adler, 90 Cal. 110; 27 P 36, where it was held that a contract for the sale of grain-bags, providing that the vendee should have the exclusive sale of the same to the amount of 187,500, and the vendor agreed not to sell or offer the same for sale to any other person, and, if the vendee failed to sell the full amount, the vendor agreed to accept the sale of a *pro rata* amount, and such contract was a part of a scheme to gain a monopoly, was void, as against public policy, and there could be no recovery for a breach thereof. Garoutte, J., delivering the opinion, said: "While it is clear that public policy favors the utmost freedom of contracts within the limits of the law, and requires that business transactions should not be fettered by unnecessary restrictions, yet agreements in restraint of competition, that threaten the public good, entered into with the object and view of controlling, and if necessary suppressing, the supply, and thereby enhancing the price of articles of actual necessity, that embrace in their evil effects all the territory and practically all the people of this great State, become a grave menace to the best interests of the commonwealth, and therefore are opposed to sound public policy. The entire number of bags in the State on the 16th day of May, 1888, and which would arrive prior to January 1, 1889, amounted to forty-two millions. The annual demand for bags was thirty-two millions. The plaintiff entered into this 'scheme' or 'plan' to obtain the control of these forty-two million bags, and in pursuance of said plan by contract did actually secure the control of thirty millions of these bags from the owners and holders thereof.

"The plaintiff did not purchase the bags; at the same time, by the rigor of its contract, it prevented the owners from selling them.

"It is clear this 'scheme,' or 'plan,' was devised, and these contracts entered into, for the purpose of removing all competition, and thereby compelling the farmers to purchase bags from plaintiff at a price in excess of their real value.

"Plaintiff controlled three-fourths of all the bags which were in the State, or which would arrive within the ensuing six months. It held the bag market in its hands, for competition was gone, and the price demanded must be paid.

"These agreements were not entered into for the purpose of aggregating capital, not for greater facilities in the conducting of their business, nor for the protection of themselves by a reasonable restraint upon active competitors, but for the purpose of regulating, controlling, and withholding the supply of bags, and thereby to take an unjust advantage of the

action was brought to recover ten thousand dollars for a breach of a contract entered into between plaintiff, a corporation, and defendants, who were engaged in the manufacture of lumber near Felton in the county of Santa Cruz, California, whereby the latter agreed to make and deliver to the former during the lumber year of 1881, two million feet of lumber at eleven dollars per thousand feet. Defendants agreed not to manufacture any lumber to be sold, during said period, in the counties of Monterey, San Benito, Santa Cruz, or Santa Clara, except under the contract, and to pay plaintiff twenty dollars per thousand feet for any lumber manufactured and sold to parties other than plaintiffs. Defendants failed to comply with the contract. The findings of fact in the lower court, adopted in the Supreme Court, were a follows: "That plaintiff was the owner of three sawmills near Felton, and that various other parties were likewise owners of similar mills in the same vicinity. That for the purpose of limiting the supply of lumber and increasing the price thereof a plan was devised by which plaintiff was to lease all the mills for the year 1881, where such leases could be obtained, and where that could not be done, to contract with the parties owning mills, and not willing to lease by contracts similar to the one entered into with defendants; that during the year 1881 plaintiff should shut down two of its own mills, and also as many of the mills by it leased as might seem necessary, in order to limit the supply of lumber in the four counties hereinbefore named;

farmers' necessities, by disposing of the fruits of its unlawful labors at an unreasonable advance in price."

A contract between several companies, under which it is agreed not to sell goods within certain territorial limits for a specified time, and that no company shall sell more than a certain per cent of the whole amount sold by all the companies, is void, under Civil Code, §§ 1673–1675, which provide that every contract, by which one is restrained from exercising a business or calling, is void to that extent, except that one who has sold the good-will of a business may agree not to carry on a similar business within a specified county or town, and that, in anticipation of dissolution of a partnership, a partner may agree not to carry on a similar business in the town or city where the partnership was located. Vulcan Powder Co. *v.* Hercules Powder Co., (Cal.) 31 P. 581; Same *v.* California Vigorit Powder Co., Id. 583.

that this contemplated scheme was carried out, including the contract with defendants as a part thereof. That the sole and only object, purpose, and consideration upon the part of plaintiff in entering into these contracts was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount to be manufactured, and giving plaintiff the control of all lumber manufactured near Felton for the year 1881, and control of the supply of lumber for that year in the counties mentioned. That the direct effect of this was no wholesale market for lumber at Felton, and dealers could not purchase in any considerable quantity during 1881. The court further found that the contract was against public policy, and that plaintiff was not damaged, etc. Upon the question whether the contract sued upon was void as in restraint of trade and against public policy, Searles, C. J., delivering the opinion, said: "In the case at bar the facts are, as we think, even stronger against the plaintiff than in Arnot *v.* Pittston & Elmira Coal Co. Here it entered into a contract with the object and view to suppress the supply and enhance the price of lumber in four counties of the State. The contract was void as being against public policy, and the defendants, as they had a right to do, repudiated the contract. Plaintiff, who has parted with nothing of value, now seeks to recover damages for non-delivery of lumber under this contract. Plaintiff had an undoubted right to purchase any or all of the lumber it chose, and to sell at such prices and places as it saw fit; but when, as a condition of purchase, it bound its vendor not to sell to others under a penalty, it transcended a rule the adoption of which has been dictated by the experience and wisdom of ages as essential to the best interests of the community, and as necessary to the protection alike of individuals and legitimate trade. With the results naturally flowing from the laws of demand and supply the courts have nothing to do; but when agreements are resorted to for the purpose of taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities, the courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto."

§ 53. **Same Subject, further illustrated. — Combination among Manufacturers, Steamboat Owners, Sheep-brokers.** — In De Witt Wire-Cloth Co. *v.* New Jersey Wire-Cloth Co.,[1] it was held that an association of manufacturers of wire-cloth, formed for the avowed purpose of regulating the price of the commodity, each of the members stipulating under a heavy penalty that he would not sell at less than a specified rate, was contrary to public policy, and illegal. In Stanton *v.* Allen,[2] 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.* Vanderwater,[3] 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, by the terms of 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. But little importance seems

[1] 14 N. Y. S. 277.

[2] 5 Denio (N. Y.) 434.

[3] 4 Denio (N. Y.) 349. See also Anderson *v.* Jett, (Ky.) 12 S. W. 670; Handforth *v.* Jackson, 150 Mass. 149.

to have been attached to the public nature of the business of the parties in the last two cases. On the same public grounds it was held that an agreement between sheep-brokers to enter into an association for the protection of their interests and to prevent competition, and to pay to the treasurer thereof a certain amount for each sheep sold by them, and to receive, each, an arbitrary proportion of the sum so accumulated, was against public policy and void, where it was made as a part of and in furtherance of an agreement between sheep butchers to form an association for like purposes, and an agreement between the two associations and the members thereof, whereby the brokers stipulated not to slaughter any sheep, and to sell none, except to members of the butchers' association, without paying for each one sold to others fifteen cents, the butchers binding themselves to buy sheep from the members of the brokers' association only, and to forfeit the same amount for each one bought from others; and that it was competent to show such auxiliary and contemporaneous agreements, although the action was one brought by the brokers' association to recover a penalty for the breach by one of its members of the first-named agreement.[1]

The courts of New York and Massachusetts have sometimes evinced great liberality in allowing the combination of kindred enterprises; and it has been sometimes remarked by contributors to periodicals that there is a conflict of authority between the courts on this subject of combinations which do not assume the form of a trust. It cannot be said, however, to be a conflict of decision, since, as herein frequently stated, courts have predicated their conclusions upon the peculiarities of each case as presented. If, from the nature of the business and the necessities of the case, it appears that the restraint imposed is required for the adequate protection of

[1] Judd *v.* Harrington, (Com. Pl. N. Y.) 19 N. Y. S. 406. So in Urmston *v.* Whitelegg, 63 Law T. 455, it was held that a contract by which members of an association bind themselves not to sell mineral waters at less than a specified price, or such other price, not being less than the price specified, as a committee may from time to time direct, was a contract in restraint of trade, without consideration, and cannot be enforced.

the parties in the prosecution of a particular line of business, the courts usually uphold the agreement imposing it, notwithstanding that production is thereby diminished, and prices are enhanced. Thus, in Central Shade Roller Co. *v.* Cushman,[1] where considerable attention was given to the nature of the business in which the parties were engaged, and to the probable results of carrying out the agreement as affecting the price, the agreement was held valid, and not in restraint of trade.

§ 54. **Combination among Owners of Water-rights.** — A new application of the rule may be found in a recent Montana case.[2] It was held that where, by the terms of a contract entered into between several owners of different water-rights connected with the working of certain placer-mining land, it was covenanted that each of said owners, under the penalty of ten thousand dollars as agreed and liquidated damages, should not sell his water-right, or interest therein, without the written consent of all the parties thereto, and also, that, without such written consent, neither should make any sale to or settlement or compromise with certain parties who were then endeavoring to obtain the possession of said water-rights, or any other person or persons who might thereafter endeavor to obtain possession of the same; also that each should join with the others in the event of any litigation arising with reference to said water-rights, — such a contract was void,

[1] 143 Mass. 353; 9 N. E. 629. In this case it appeared that several parties, severally engaged in the business of manufacturing and selling balance shade-rollers, for the purpose of avoiding competition had organized themselves into a corporation, and severally entered into an agreement with the corporation so organized, that all sales of the shade-roller should be made in the name of the corporation, and at once reported to it; that when either party should establish an agency in any city for the sale of a roller made exclusively for that purpose, no other party should take orders for the same roller in the same place; and that the prices for rollers of the same grade, made by the different parties, should be the same, and should be according to a schedule contained in the contract, subject to changes which might be made by the corporation upon recommendation of three-fourths of the stockholders.

[2] Ford *v.* Gregson, 7 Mont. 89; 14 P. 659.

because contrary to public policy (particularly so in Montana, where water is the subject of sale), and as being analogous to contracts in restraint of trade.

§ 55. **Forestalling and "Cornering" the Market.** — Various unsuccessful attempts have been made from time to time to distinguish the ancient offence of forestalling the market from the modern "corner" and monopoly.

To forestall the market was only possible where the sources of supply and production were barely equal to the demand, and had reference to buying up in advance what others produced or were to produce, and by this means creating a scarcity and securing an advance price.[1] "Corners" in the stock and produce markets are offences similar to forestalling, but they are not the same. While the public are incidentally injured by them, the immediate victims and greatest sufferers are persons who have "sold short" after all the products or particular class of stocks have been bought into the pool or "cornered." "Corners" are nevertheless fraudulent, illegal, and void;[2] and any one injured by a "corner" being organized may recover in equity money exacted from him through its operation.[3] The criminality of forestalling consisted as much in the fact that it took the community by surprise as that it created a monopoly. It was temporary in its effect, and necessarily local in its operations.[4]

All agreements forming the basis of "corners" and monopolies are void, whether of temporary duration or designed to continue indefinitely. The principle was applied where two parties had entered into a combination to purchase a controlling interest in the stock of a corporation for the purpose of creating a "squeeze," or "corner," in the market;[5] also where several parties had entered into a combination to make a corner in the wheat market by purchasing more wheat than there was then offered for sale, thereby forcing the price to a

[1] Cooley's Bl. 159.

[2] Sampson *v.* Shaw, 101 Mass. 145; Raymond *v.* Leavitt, 40 Mich. 447.

[3] Barry *v.* Croskey, 2 J. & H. 1.

[4] Spelling, Priv. Corp., sec. 115.

[5] Sampson *v.* Shaw, 101 Mass. 145. See Raymond *v.* Leavitt, 46 Mich. 447; s. c. 41 Am. Rep. 170.

higher rate, expecting to afterwards realize profits by settling with sellers failing to deliver.[1]

Of a similar character and likewise illegal was a combination of all the grain-dealers in a town in the form of a co-partnership, the object of which was to control the price of grain storage, shipments, and rates.[2]

§ 56. **"Tying up" Stocks.** — The process by which a corner in the stock of a particular corporation is created is often designated as "tying up" stocks, and is usually done for speculative purposes. When successfully accomplished, it creates a "squeeze" in the market in the same way as where a commodity is "cornered." Various schemes have been resorted to and devices employed for doing this. Sometimes "irrevocable proxies" are obtained from all owners of the stock, and held by a common agent or trustee.[3] In other cases trust certificates have been issued.[4]

[1] Wright *v.* Crabbs, 78 Ind. 487.

[2] Craft *v.* McConoughy, 79 Ill. 346. Compare Kellogg *v.* Larkin, 3 Pinney (Wis.) 124. See also on the general principle Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173. See Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666, 10 Cent. L. J. 432, for a similar ruling in a salt combination case. But *contra*, Ont. Salt Co. *v.* Merchants' Salt Co., 18 Gr. (U. C.) Ch. 540. Said the court in Raymond *v.* Leavitt, 46 Mich. 447; s. c. 41 Am. Rep. 170: "The object of the arrangement between the parties was to force a fictitious and unnatural rise in the wheat market, for the express purpose of getting the advantage of dealers and purchasers whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use that commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the community is universally recognized. . . . We must wilfully shut our eyes," continued he, "before we can fail to see that a combination between a man who furnishes money, and dealers who manipulate the market, where the money invested is but a trifling percentage of the property to be handled, and where the only intent is to produce unnatural fluctuations in prices, is entirely outside the limits of buying and selling for honest trade purposes. It is the plainest and worst kind of produce gambling, and it is impossible for any but dangerous results to come from it."

[3] Woodruff *v.* Dubuque, etc. R. R. Co., 30 F. 91. See also Brown *v.* Pac. Mail Steamship Co., 5 Blatchf. 525, holding that such proxies are irrevocable, but not void. Reed *v.* B'k of Newburgh, 6 Paige, 337.

[4] See Griffith *v.* Jewett, 15 Weekly Law Bull. 419; Vanderbilt *v.* Bennett, 19 Abb. N. C. 460; 2 Ry. & Corp. L. J. 409.

All such arrangements are restrictive of trade and illegal, and any party may withdraw at pleasure.[1] But the principle is not extended to interfering with the proper rights of ownership of stock and enjoyment of the privileges of stockholders; and it is well settled that a mutual understanding between stockholders for the purpose of controlling the affairs of a corporation, or with the object of effecting a joint sale, may legally be entered into.[2] Accordingly, it was held that an agreement among three persons, owning a majority of the stock of a corporation, to elect the directors, control its officers and agents, and manage its affairs, that among themselves a majority should rule, and that they should act as a unit, as a majority should determine, was valid.[3]

"There is no limitation upon the right of an individual to acquire any number of shares of stock in any number of corporations, whether their business be competitive or otherwise; nor is it to be presumed that one holding a controlling interest in more than one such corporation will so guide or control the affairs of either as to prejudice his associates therein, for the purpose of promoting his own advantage in connection with the others. The remedies properly applicable to breaches of official duty and trust are amply sufficient for the protection of the public against merely possible, or even probable, violations thereof; and the policy of the law is not invaded by a contract, upon whose performance a wrong may be perpetrated, unless it be the purpose and intent of the parties concerned that such shall be its actual effect."[4]

But a contract to transfer a number of shares of the stock of a national bank in order to enable a party to obtain control of the bank was held to be so far affected with a public interest as to render it unenforceable by action for specific performance in equity.[5]

[1] Fisher *v.* Bush, 35 Hun, N. Y. 641; Havemeyer *v.* Havemeyer, 43 N. Y. Sup. Ct. 506; Moses *v.* Scott, 84 Ala. 608; 4 South Rep. 742; Harper *v.* Raymond, 3 Bosw. (N. Y.) 29.

[2] Havemeyer *v.* Havemeyer, 11 Jones & Sp. (N. Y.) 506, 516; Quincy *v.* White, 63 N. Y. 370.

[3] Faulds *v.* Yates, 57 Ill. 416. See Barnes *v.* Brown, 80 N. Y. 527.

[4] Havemeyer *v.* Havemeyer, 11 Jones & Spenc. (N. Y.) 506, 516. See also O'Brien *v.* Brietenbach, 1 Hilt. 304.

[5] Foll's Appeal, 91 Pa. St. 434.

Nor does this liberal rule as to transfer of corporate stock extend to the corporations themselves. A corporation has no implied power to deal either in its own shares of stock,[1] or in those of other corporations.[2] Much less may a *quasi* public corporation buy up the shares of a corporation engaged in the same business with a view to getting control of it, and thus creating a monopoly.

§ 57. **Form assumed immaterial.** — The forms in which monopolistic agreements have been presented to the courts from time to time were numerous and various. But courts will not regard mere forms; nor will they permit any subterfuge to defeat public justice, or to thwart their efforts to protect public interests. And where the obnoxious agreement was in the form of articles of copartnership, the partnership was ignored, and its true character considered.[3] In this case the court held that a contract entered into by the grain-dealers of a 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 should 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, was in restraint of trade, and consequently void, on the ground of public policy.

A case very similar to the one just noticed was that of India Association *v.* Kock.[4] The facts were succinctly stated in the opinion as follows: —

"On the 7th August, 1856, an association of eight commercial firms in New Orleans, holders of 7410 bales of India cotton bagging, was formed into what they called a copartnership for the sale of India bagging, but which ought to be called a partnership to prevent the sale of India bagging; for, by their articles of association, the subscribers bound themselves, for the term of three months, not to sell any bagging,

[1] Spelling, Priv. Corp. sec. 168 *et seq.*
[2] Spelling, Priv. Corp., sec 172, and cases cited.
[3] Craft *v.* McConoughy, 79 Ill. 346.
[4] 14 La. An. 168.

nor to offer to sell any, except with the consent of the majority of them, expressed at a meeting, under the penalty of ten dollars for every bale so sold, or offered to be sold. It must be observed that the 7410 bales of India bagging held by the members of this association, in unequal proportions, did not cease to be the property of the individual members. It is indeed said, in the fifth article of association, that the bagging is accepted by the association for the benefit of its members individually and separately, at the rate of twenty cents per yard. But this clause means nothing if it does not mean that each member of the association accepts his own stock of bagging at that price; for at the end of three months each member was to resume the uncontrolled disposal of his own stock of bagging; and it is admitted by plaintiffs that two of the members, holders of 2,605 bales, withdrew from the association before the expiration of the limited term of three months.

"This suit is brought against one of the members, by the manager of this association, for the recovery of a penalty of $7,400, for having sold seven hundred and forty bales of bagging in contravention of the articles of association. Defendant denies having sold as alleged, and claims in reconvention, of plaintiffs, $3,000 and upwards, for so much paid them for sales made by him in excess of twenty cents per yard. From the argument, the whole dispute seems to be about a lot of one hundred and one bales of bagging sold on the 7th November, 1856; one party asserting that date to have been within the term of the association, while the other party contends that its term expired on the 6th November."

Upon the character of the contract thus presented, the court said: "This is a case which ought never to have come before us. The agreement between the parties was palpably and unequivocably 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."

But there is a distinction between such agreements and those between actual partners, whereby they fix a minimum

price for which they will sell articles or perform services, there being no intention or attempt to create a monopoly or control prices. Thus, when four persons formed a co-partnership for dealing in recruits, and all were to share in the profits realized by either in the sale of recruits to the government, and to sell none below $500, the agreement was held valid.[1]

The reason for the distinction is obvious. Persons who form a co-partnership become one person in co-partnership affairs, and as such may fix such prices, whether high or low, as they see proper.

§ 58. **Illegal Restriction in By-law.** — The word "trade" has a comprehensive as well as a narrow sense, and in its wider meaning cannot be restricted to public injury by means of the adoption and enforcement of a by-law of an association of persons engaged in any occupation or line of business. An early case, applying the rule of public policy to such a by-law, has been previously noticed.[2] A somewhat similar case, leading to the same conclusion, was that of More *v.* Bennett.[3] There is this important distinction, however, between the earlier and the late case: in the former the obnoxious provision was found in the by-law only; while in the latter the illegality inhered in the object and purpose for which the association was organized. It was composed of stenographers, following their trade in the city of Chicago, and was ostensibly formed to establish and maintain uniform rates of charges, and to prevent competition among its members, under certain penalties. It was held that its objects were illegal, as in restraint of trade and against public policy, and that one member could not maintain an action against another for damages occasioned by the latter underbidding the former, in violation of the rules of the association. Justice Bailey, delivering the opinion, said: "Whatever may be the professed objects of the association, it clearly appears, both from its constitution and by-laws, and from the

[1] Marsh *v.* Russell, 66 N. Y. 288; reversing s. c., 2 Lawr. 340.

[2] Ipswich Tailors' Case, 11 Coke, 540; *supra*, §§ 4, 5.

[3] Ill. 29 N. E. 888. This subject more fully discussed *infra*, Chaps. VI., X.

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 the by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take 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." After citing and commenting upon authorities in support of the general principle, he continued: "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."

§ 59. **Monopolistic Provision in Conveyance or Lease.** — There is virtually no limit to the right of contracting parties to grant exclusive trading privileges as between themselves, so long as neither the public interests nor the rights of third parties are affected.[1] The public and strangers are not concerned in the disposition which a person makes of his money or property after he has acquired it. But when parties having it in their power to create a monopoly or deprive

[1] *Supra*, §§ 34, 35.

others, be the number ever so small, or the sphere of their action ever so narrow, of the benefits of competition in trade, and they abuse their advantage by entering into a compact, — in no matter what form, — which to carry out may lead to the suppression of competition, and extortion in the sale of every-day necessities, — courts will declare such contracts illegal and void, when enforcement is sought by one of the parties thereto. Accordingly, in Crawford *v.* Wick,[1] it was held that a stipulation in the lease of a coal mine that the lessee should exercise his influence over his employees to induce them and their families to purchase goods, wares, and merchandise only at the store of the lessor, that the lessee should not accept any order given upon him by any of his employees for goods, etc., purchased of any other person or firm, nor give to any employee an order on any other store, nor any note or other evidence of indebtedness to be transferred to any other store for goods, wares, or merchandise, was unlawful, being in restraint of trade, to the injury of others, and tending to monopoly, extortion, and oppression.

In this case the court, after discussing general principles and citing authorities, say: "Now, in the light of these principles, retaining our common-sense in its integrity, and not allowing our vision to be obscured by so flimsy a veil as that which is attempted to be cast over the provisions of this contract by the use of fair-seeming phrases, 'in a reasonable and proper manner,' 'so far as the same can be reasonably and fairly done,' and the like, let us look into some of the particular provisions of this store contract, into its general scope and tendency, and into the character and aims of the scheme which it embodies, organizes, and discloses.

"Selecting, now, a single gem from the casket of precious things, we hold it up to the light. Here it is: The lessees agree that they will not 'accept, receive, or pay any order or orders drawn by any of' their 'employees or agents, or their representatives, for goods, wares, or merchandise, . . . purchased by him or them of any other store, firm, or persons, nor *give* any such employees or agents any order or

[1] 18 Ohio St. 100.

orders to any other store, firm, or persons for goods, wares, or merchandise, or any note or other evidence of indebtedness, in order that the same may be disposed of or transferred for goods, wares, or merchandise, contrary to the spirit of this agreement,' etc. Now, throwing over these stipulations a mantle of charity broad enough to cover a multitude of sins, and with a web thick and dense enough to conceal from our sight their otherwise obvious intention, what is their tendency, and what would be their probable practical operation? A lessee of a coal-mine who submits to a contract, the terms of which are so repulsive and degrading to himself, may well be supposed to be far from independent on the score of pecuniary means; and the last stipulation in the above extract from the contract presupposes that he will become indebted to his workmen, and hence be obliged to give them 'notes or other evidence of indebtedness,' to be by them transferred for personal and family necessaries. Suppose such a case to occur. The lessee becomes indebted to his workmen. Perhaps the mine has not become productive, or the means of transportation are not obtainable, or the market for coal happens to be glutted. The workmen want provisions and clothing for themselves and families, and the notes of their employer to be negotiated in exchange for these necessaries; and these they can have, but in such a way only as to hedge them out from the benefit of competition among shopkeepers. They must take their notes to the store of Wick, and trust to his sensitive conscience and regard for fair and just dealing, first, as to the amount of discount they must allow him on their notes transferred to him, and second, as to the prices he will exact for the goods they receive in exchange. Again, the terms of the contract presuppose, and assuredly it is no violent presumption, that circumstances may exist which will render it necessary for the workman to anticipate his wages. Suppose such a case. Sorely needed wages are not yet earned. Perhaps he is ill, and has to await the return of health to earn them. At all events, pay-day is yet in the future. He goes or sends around among the retail shops, and being known as one of Crawford & Murray's coal-diggers, he finds that, for some inexplicable reason, prices of needed articles are high

at Wick's, while at other shops they are comparatively low. The simple soul prefers to deal with some one of the latter. He goes to its proprietor, states his situation and necessities, and proposes the purchase of certain necessaries, and for the price of them to give an order on his employer, to be paid out of his wages when they accrue. The shopkeeper answers, 'Yes, you can have what you need at the regular prices named, provided your employer will accept your order. Call again to-morrow, and in the mean time I will see him, and so be able to give you an answer.' Accordingly, on the next day he calls again, and is told that his employer says that he is under a contract to accept no order from a workman unless it be given on Mr. Wick. And so he too is turned over to the alternative of either doing without the things which he needs, or of subjecting himself to the tender mercies of 'the party of the other part' to the store contract.

"Having thus, in the most moderate colors which my estimate of the character and tendency of this store contract permits, endeavored to depict one of its characteristic features, I place it side by side with the time-honored principles announced by Chief Justice Wilmot, and submit it to the ordeal of those principles: 'Whatsoever a man may lawfully forbear, that he may oblige himself against; except where a third person is wronged, or the public is prejudiced by it.' 'It is the duty of all the courts of justice to keep their eye steadily upon the interests of the public, even to the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give it no countenance or assistance in *foro civili*."

The decision in George *v.* East Tennessee Coal Mine[1] is apparently in conflict with the decision just noted; but it will be observed that the contract passed upon in the Tennessee case did not provide that any act should be done to disable or hinder the workmen from trading elsewhere if they chose, or found it to their interest to do so. It simply provided that the manufacturer should furnish the trade of his workmen, as far as he was able to do so, to the storekeeper,

[1] 15 Lea (Tenn.) 455; 15 Am. R. 425.

and that the latter should pay eight per cent on all sales to the former.

§ 60. **Territorial Limits not regarded.** — In the case of an agreement resulting in an actual monopoly, or the essential tendency of which is to suppress competition, the extent of space or duration of time within which it is designed to operate is unimportant. This idea was thus expressed by Justice Marr in the case of Texas Standard Cotton Oil Co. *v.* Adour:[1] "We can scarcely conceive how mere territorial limits can be the controlling test in all instances of the legality of the restraints imposed upon the ordinary course of trade. This criterion may do very well when applied to the occupation or profession of one man, or even a few individuals; for neither their labor, industry, business, nor services may be so necessary to the public as not to be dispensed with without inconvenience or injury. It appears to us, however, that the case is very different in regard to trade or commerce in those articles of prime necessity, or even of very frequent use, among a large number of people in any given locality. Does any doubt that a combination of a number of most extensive dealers in flour, meal, or oil, etc., in one great city to sell these commodities at only one price, or not at all, within the limits of that city, would affect the interests of the public, and perhaps also some of the individual dealers, much more extensively and disastrously than a similar agreement extended to a greater area of country, but in which only a few people reside, or require such articles? It would seem that the injurious effects upon the public interest would be in proportion to the number of people affected by the restrictions, though we are not unaware that this position has not been deemed tenable by some of the authorities in cases where the right to exercise a trade or profession within a particular district or locality has been restricted by contract. We think that territory cannot be the sole test, though in the present instance the contract embraces such extensive territory and such a number of localities as to bring it even within that rule. In determining the reason-

[1] Tex., 19 S. W. 274. This case more fully noticed *infra*, § 61.

ableness of the restraint, the effect upon the interest of the public is a better test."

§ 61. **Actual Monopoly need not be shown.** — Courts will take judicial notice of the inevitable effect of carrying out a contract whose object is the suppression of competition in commodities which are necessary and useful to the public; and to make this available as a defence it is not necessary that it appear by the literal terms of the contract that a monopoly has been or will be created by enforcing it. In More *v.* Bennett,[1] the court decided that a compact among a considerable number of stenographers in Chicago, in the form of an association to keep up prices and enforce the terms of the compact by penalties, was in restraint of trade and illegal, though there were many stenographers in the city and in Cook county who had not become members of the association. In the course of the opinion Justice Bailey said: "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 majority 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." So where the grocers in a certain town had agreed with a firm which was about to open a butter store that they would not buy any butter for the term of two years, the court, in passing judgment in an action on the contract, said: "It is not necessary that the enforcement of the agreement would actually create a monopoly in

[1] Ill., 29 N. E. 888.

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."[1] One of the most important cases applying this principle involved one of the constituent corporations in the great Standard Oil Trust.[2]

The court, *per* Marr, J., after stating the facts and construing the terms of the contract, proceeds: "It thus appears that the above artificial regulations of the value or prices of these staple articles of trade, as well as the arbitrary restrictions imposed by the contract upon the right to deal in them in the usual or customary course of legitimate business, were intended to apply to and control, as far as the contracting parties were able to do, the market in reference to these staples, and the agreement embraces within its operation the chief cities or commercial centres of the State, as well as the cotton-producing regions thereof, as we may judicially know.[3] There seems to us to be scarcely anything lacking to characterize the combination between the parties in this case,

[1] Chaplin *v.* Brown, (Iowa) 48 N. W. 1074.

[2] Texas Standard Cotton Oil Co. *v.* Adour, (Tex. Sup.) 19 S. W. 274. In this case, plaintiffs, representing four cotton-seed mills, and defendants, representing a large number of like mills, all independent dealers in cotton seed, and manufacturers of products therefrom, entered into a contract which provided that plaintiffs, in consideration of "covenants" therein, should deliver to defendants the entire yield of their mills, and defendants guaranteed plaintiffs a certain profit per ton. The prices to be paid for seed cotton were established, and were to be changed only by "mutual agreement of the parties." Defendants were authorized to establish from time to time "the minimum prices at which all meal cake and lint produced at plaintiffs' mills shall be sold," and it was agreed that plaintiffs "shall not purchase any seed, or ship any from" a certain place; and a specified proportion of seed shipped from certain other places to be "subject to be bought by" defendants. *Held*, in an action to recover the net profits under the guaranty, that the contract was void, as being in restraint of trade, and plaintiffs could not recover.

[3] Citing Gulf Col. & S. F. Ry. Co. *v.* State, 72 Tex. 409; 10 S. W. 81; 1 Whart. Ev., §§ 329, 330; Pike *v.* Thomas, 7 Am. Dec. 741.

as evidenced by the language and purpose of their agreement, as a complete monopoly, except the proof that they were the only parties who were engaged at the specified localities in the manufactures referred to in the contract at the time it was made. It is not improbable that every cotton oil mill in the State was represented in this combination, or was intended to be brought into it eventually; but as this is not alleged in the petition, we cannot presume it. We must admit some limit even to judicial knowledge. But to render the contract void it is not necessary that it should create a pure monopoly. It would seem that the agreement may be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices independent of the law of demand and supply, and to such an extent as to injuriously affect the interest of the public or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restriction imposed by the contract. Likewise, the agreement may be in some instances void because of unreasonable restrictions imposed upon even one of the parties to it." The popular as well as the legal name for the result of agreement when successful in the intended object is "monopoly."

CHAPTER VI.

COMBINATIONS AMONG ARTISANS AND WORKING-MEN.

§ 62. **General View of Subject.** — Whether or not all kinds of services, skilled and unskilled, are to be regarded as mere commodities, it may be stated as a well-settled general rule that combinations to control wages, whether organized by wage-earners to raise them, or by employers to lower them, are not to be dealt with by the courts as coming within the rule of public policy under consideration. Probably no case can be found of an adjudication upon a contract in any other form than that of a provision in the articles or by-laws of an association. In several cases where these provided for a penalty for a violation by accepting a less rate of wages than that fixed or agreed upon by resolution, or upon different terms than those prescribed, it was held that the penalty was collectible, if the restrictive provision were otherwise valid and reasonable.[1]

[1] Masters Stevedores Association *v.* Walsh, 2 Daly (N. Y.) 1; Collins *v.* Locke, L. R. 4 App. Cass. 674. See also Commonwealth *v.* Hunt, 4 Met. (Mass.) 111; Walker *v.* Cronin, 107 Mass. 555; Carew *v.* Rutherford, 106 Mass. 114; Perkins *v.* Rogg, (Supr. Ct., Cinn.) 28 Wkly. Law Bul. 32; Rogers *v.* Evarts, 17 N. Y. S. 264. In Rex *v.* Mawbrey, 6 T. R. (D. & E.) 619, a case in which journeymen had combined to raise their wages, the justice who delivered the opinion said: "Each may insist upon raising his wages if he can; but if several meet for the same purpose, it is illegal." The same view was expressed in Rex *v.* Journeymen Tailors of Cambridge, 8 Mod. 10. But these decisions were based upon a statute which condemned "any agreement or contract for an advancement of wages." 2 and 3 Edw. VI. 15.

The case of People *v.* Fisher, 14 Wend. (N. Y.) 9, also arose under a statute making it criminal to commit "any act injurious to trade or

§ 63. **Labor Combinations to control Wages.** — Criminal informations against associations organized to control wages have sometimes been prosecuted as for common law conspiracies. Such prosecutions have been in this country uniformly held not maintainable. The whole law on this phase of the subject was comprehensively expressed by Chief Justice Campbell in Hilton *v.* Eckersley,[1] where he said: "I cannot bring myself to believe 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 designating or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, and liable to punishment 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, on the other, can be considered guilty of a crime in trying by lawful means to lower them."

§ 64. **Rationale of the Rule as applied to Agreements to control Wages.** — That the rule of public policy under consideration is a "variable quality," is in nothing more clearly shown than in the exception made in the case of labor organizations, if it may be properly considered an exception. It is obvious that if two or more wage-earners can agree upon a low or a

commerce," and is not in point any more than are the English cases above cited. To same effect see also People *v.* Frequier, 1 Wheeler's Cr. Case, 142, in which no mention of the statute referred to in People *v.* Fisher, *supra*, is made; State *v.* Donaldson, 32 N. J. L. (3 Vr.) 151; People *v.* Melvin, 1 Yates Sel. Cas. 112; Rex *v.* Ferguson, 2 Stark. 489; The Masters Stevedores Association *v.* Walsh, 2 Daly (N. Y.) 1; Collins *v.* Locke, L. R. 4 App. Cas. 674; Rigby *v.* Connol, L. R. 14 Ch. Div. 482, 492; Reg. *v.* Rowlands, 17 A. & E. (N. S.) 671; s. c. 5 Cox, C. C. 436; Reg. *v.* Duffield, 5 Cox, C. C. 404; Reg. *v.* Hewitt, Id. 162; Rex *v.* Bykerdike, 1 M. & Rob. 179.

[1] 6 E. & B. 47, 62. To same effect are Reg. *v.* Rowlands, 17 A. & E. (N. S.) 671; Reg. *v.* Duffields, 5 Cox, C. C. 404; Sayre *v.* Louisville Ben. Ass'n, 1 Duv. (Ky.) 143.

reasonable rate, all those employed in a particular line of work may agree upon a high rate; in which case the latter becomes *pro hac vice* "reasonable" as those in the combination choose to term it. Now, in this matter of wages, all the capital in the country engaged in productive industry represents demand, and all the labor in the country represents supply. Agriculture, commerce, transportation, mining, and the thousand other forms of investment requiring the employment of persons for wages are each factors in the grand total of demand. The supply, to satisfy this demand, consists of the multitudinous, ever-changing, recruiting, disbanding, and reorganizing army of mechanics, miners, farm-hands, clerks, sailors, railroaders, employees in manufacturing establishments, etc. In the absence of artificial restraints, the price of labor is fixed by the whole body of laborers meeting all the lines of demand. Demand and supply must always meet to put a price on anything. Oxygen, in its pure state, is a deadly poison; but combined with hydrogen, it forms the air which we breathe, and without which we could not exist. So, demand for labor, without supply, is death to production; and supply of labor, without employment, is death to wages. It is plain that if a merchant, house-builder, manufacturer, or anybody else requires labor, he will neither do any manufacturing, nor anything else requiring help, nor will he pay any wages whatever, unless he finds persons willing to enter his service. It is equally plain that he will offer the smallest price at which it can be obtained, and also that laborers will demand the highest price obtainable.

For these obvious reasons it is apparent that if the rule against restraint of trade were given its rational and equal application and effect, combinations among employees to raise wages on the one side, and of employers to reduce them on the other, would be declared illegal, to the extent, at least, of defeating enforcement of agreements forming the basis of such combinations. The true reason for making an exception herein is the inutility of doing otherwise, supplemented by a disposition of judges to fall into the drift of popular sentiment favorable to the numerically preponderating class who contribute so much to the general prosperity, and share so comparatively

small a proportion of the aggregate result. Handicraftsmen may not only combine peaceably to secure good wages, but if they do not resort to intimidation or violence, they may persuade their fellow-workmen to leave the service of their employers in order to compel an advance in wages without invading any constitutional rights of the latter.[1]

§ 65. **Same. — When illegal.** — While the law is clear that workmen have a right to combine for their own protection and to obtain such wages as they agree among themselves to demand, yet a combination for the purpose of injuring another presents a different question; and a combination, ostensibly for the purpose of securing fair wages, which contemplates a resort to unfair or illegal means for doing this, the employment of which will injure others not parties to the association, will be condemned by the courts. Thus, a trades-union, one of the rules of which provided for the intimidation of men who were employed to take the places of members of the union who should "strike" for higher wages, was declared illegal.[2]

Similar decisions were reached where a number of shoemakers combined and agreed not to work for any one who employed men working below the standard of wages fixed by themselves;[3] also where one of the rules of an association provided that any member binding his son in a shop where non-union men were employed should be fined.[4]

The decision in Commonwealth *v.* Hunt[5] was to the effect that when an association was formed and provided for the

[1] Rogers *v.* Evarts, 17 N. Y. S. 264.

[2] Reg. *v.* Rowlands, 17 A. & E. (N. S.) 671. See also Reg. *v.* Druitt, 16 L. T. (N. S.) 855; Carew *v.* Rutherford, 106 Mass. 1.

[3] People *v.* Fisher, 14 Wend. 9. See also People *v.* Melvin, 1 Yates Sel. Cas. 112 (Cordwainers' Case); People *v.* Frequier, 1 Wheel. Cr. Cas. 142 (Hatters' Case); Rex *v.* Ferguson, 2 Stark. 489; The Masters Stevedores Association *v.* Walsh, 2 Daly (N. Y.) 1; Reg. *v.* Rowlands, 17 Q. B. (A. & E., N. S.) 671; s. c. 5 Cox C. C. 436; Reg. *v.* Duffield, 5 Cox C. C. 404; Reg. *v.* Hewitt, Id. 162; Rex *v.* Bykerdike, 1 M. & Rob. 179.

[4] Rigby *v.* Connol, L. R. 14 Ch. Div. 482, 492; Hornby *v.* Close, L. R. 2 Q. B. 153.

[5] 4 Met. (Mass.) 111.

imposition of a penalty upon its members for violations of its by-laws, one of which forbade any of them to work for any person who should employ non-members, was not illegal. But in the light of authority such by-law provision was invalid.

While working-men have a perfect right to meet and combine to fix the rate of wages at which they will give their labor to employers, they cannot bind themselves to carry out their object by threats, intimidation, violence, obstruction, or by molestation of others in the enjoyment of their legal rights. Accordingly, a rule of a trades-union which prescribed penalties for violations of its rules by employers, to be paid by the latter in order to procure immunity from interference with their employees or those who should seek employment with them, was held illegal and void.[1]

The same conclusion was reached concerning a rule of a relief and benefit society that no member should call at any shop where a dispute had arisen, and which provided for a reference of such disputes to the executive council.[2]

In Collins *v.* Locke,[3] it appeared that the stevedores of a certain port had entered into an agreement that each should do the stevedoring for certain ferries, and neither should interfere with the custom assigned to the others; and should any of the ferries be succeeded by others, the successor's custom should belong to the party to whom the predecessor had been assigned. It was further provided that if such successor should refuse to employ such party, none of the others should do any stevedoring for him. These provisions, taken together, were held to be so far an interference with the legal rights of the parties to be affected as to render the entire agreement illegal.

In Farrer *v.* Close,[4] an information had been presented against an officer of a friendly society, charging him with having misappropriated certain funds of the society. Most of the rules of the society were legitimate rules of a friendly society; but rule 18, § 6, was: "Any officer being discharged from

[1] Carew *v.* Rutherford, 106 Mass. 1.

[2] Hornby *v.* Close, L. R. 2 Q. B. 153.

[3] 4 L. R. App. Cas. 674; 48 L. J. P. C. 68; 41 L. T. (N. S.) 292.

[4] L. R. 4 Q. B. 602.

employment for holding office, if he sign the vacant book each day, shall be paid at the rate of wages he was receiving when discharged, such renumeration to continue till he receive employment." § 7. "Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council shall be entitled to the sum of 15*s.* per week." § 9. "Any member refusing work from private objections, unless he can show sufficient reason to a committee of a majority of the members at the next branch meeting, shall be suspended from donation until after he has been employed." Rule 25 reads: "In the event of an application to the executive committee from their trades for assistance, the general society shall obtain information respecting the same, and on the executive committee being satisfied as to the genuineness of the case, shall grant such assistance as the state of the funds warrants, or the case may, in their opinion, deserve." Rule 31, § 1. "There shall be equalization every twelve months (ending with the last meeting night in December) of that portion of the funds of the society which has not been personally investigated, such equalization to be in proportion to the number of members in each branch." It was stated in evidence by one of the members: "In case of sickness 12*s.* per week is allowed; when drawn out of shop, or turned off from being member of society, full wages, or 15*s.*, is allowed. In case of long strike at a particular place, and funds exhausted, the members will not contribute, except annually to an equalization fund. We have monthly reports. Strikes are reported. Members of our society will not be allowed to go to places where there are strikes, if we can prevent them. If he were out of work at Bradford, rather than a man should go to Keighley (if a strike was on), we would grant money to send him a thousand miles another way. We can pay this money at our discretion. We would send men to Halifax or Leeds, pay their railway fares, and keep them on, if it should be a case satisfactory to the branch. The executive council can give money to strikes on any trade. Any sensible man can see from our monthly reports where there are strikes, and where to avoid. If I am on strike, or we draw men out, and money is paid to me or them by the

society, all such payments are trade privileges, and justified by the rules. Our society has nothing to do with ordering work to be done by the piece."

Upon this evidence a majority of the Court of Queen's Bench decided that the rules, in practice, are applied so as to render the funds of the society available for the purpose of supporting strikes, by allowing sums of money to workmen wanting employment, in order to prevent them from seeking work in districts where men are on strike, as also giving assistance to their branch associations in whose districts strikes are going on; that none of these purposes are those of a friendly society or of a trade-union, and are illegal as being in restraint of trade, according to Hornby *v.* Close.[1]

Chief-Justice Cockburn, delivering the opinion, said: "It is not necessary to discuss the policy of the law, which holds contracts which are in restraint of trade to be illegal, or to pronounce any opinion on the expediency of affording to trade-unions the full protection which the statute in question affords to friendly societies. Trades-unions have of late found many able defenders; but it must not be forgotten that, while some strikes may be perfectly justifiable to enforce honest and just demands, others may resorted to in order to extort unreasonable exactions or enforce tyrannical rules, and that the only corrective against such attempts is to be found in the freedom of the labor market, which it is the purpose of these combinations to prevent. It is, however, for the Legislature to deal with any proposed alteration of the law. We have only to deal with the case before us according to previous decisions."

§ 66. **Combinations among Capitalists to fix the Rate of Wages.** — Without impropriety, we may consider in this connection the extent to which employers of labor may legally determine among themselves the wage-rate which shall prevail in the conduct of their business. It may be stated at the outset that in the dispensation of "even-handed justice" courts have applied the same general principle to them as to organized bodies of working-men; and organizations of employers to protect their common interest, secure cheapness of produc-

[1] L. R. 2 Q. B. 153.

tion, and obtain employees at wages fixed by themselves, are valid where the means to be adopted to accomplish these ends are not objectionable, or destructive of the legal rights of others. A man should be left free to bring his capital into the market on such terms as best serves his own interest; and if one may do this, any number should certainly be accorded the right to come to a common understanding on the subject, provided always the consummation of their object will not necessarily lead to public injury, or the oppression and ruin of private parties. Therefore, if employers meet and agree to pay no more than a certain amount of wages, there is at any rate no law to compel them to pay more; and if the rate fixed by them be not accepted by operatives, the former may suspend business, and retain their investments in a state of inactivity. This principle was applied in a case where master shoemakers had agreed among themselves not to employ any journeymen who would not consent to work at reduced wages. It appeared, however, that their object was to re-establish rates which had prevailed a few months before, but from which they had been compelled to depart by a combination among the journeymen.[1]

But while the court in this case gave effect to the general principles above announced, it went aside to make some declarations which cannot be considered sound as statements of the law, and certainly were not pertinent or germane to the question then before it. But there is undoubtedly a point which capitalists cannot transcend in providing for the aggrandizement of its owners, by the suppression of the wage-rate. Just where the line between a reasonable and an unreasonable restriction upon capitalists entering into a combination to fix a wage-rate should be drawn, it is impossible to definitely state. When the ends to be attained are proper, and the means of attainment legal, they may provide for and enforce penalties among themselves; but courts will not recognize any arbitrary test as to what is a reasonable and proper object.

Any combination, however, which in addition to the imposition of a pecuniary penalty seeks to put an end to the industry or operations of a member against his will, will be declared

[1] Commonwealth *v.* Carlisle, Brightly (Pa.) 36.

illegal to that extent. Accordingly, where a combination was formed of eighteen master manufacturers, constituting all in a certain district, and its members agreed to carry on their trade as the majority might direct, and might be compelled to shut up their manufactories and dismiss their hands, even though to do so would be against the public interest and injurious to the interests of individual members, such agreement was held void.[1]

The court said: "This bond 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 principle. . . . 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 a 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 them; 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."

In Bradley *v.* Pearson[2] it appeared that defendants were members of a manufacturers' association, the by-laws of which provided that, when any hands employed by the members should be on strike, either for wages or disagreement, no member should employ them after receiving due notice thereof, and addressed a circular letter to the other members, giving the names of such employees, and requesting that they should not be employed until the trouble was settled. Plaintiff, one of the said employees, failed to get work for a month, and brought

[1] Hilton *v.* Eckersley, 6 E. & B. 47, 48.

[2] Pa. 24 A. 65.

an action against defendants for damages. It appeared that plaintiff and the other employees were members of a union, and that the union paid them while they were out of employment. It was held that a nonsuit was properly granted.

§ 67. **"Boycotting" illegal.** — "Bycotting," by whatever means, when resorted to by an association in pursuance of an agreement among its members, constitutes the offence of conspiracy.

In Crump *v.* Commonwealth[1] it was established in evidence that defendants and others, members of a typographical union, conspired to compel a copartnership to make their office a "union office," and not to employ any printer who did not belong to the said union. On refusal of the partners so to do, defendant and others, composing said union, determined to "boycott" them. They sent circulars to many of their customers, informing them that they had, with the aid of other labor organizations, "boycotted" them, and notifying those to whom they sent circulars that the names of all who should, after notification, continue to patronize the firm, would be published in the "Labor Herald," the organ of the union, as a "black list," and they in their turn "boycotted" until they, agreed to withdraw their patronage from the firm. The employees of the firm were denounced for months in the "Labor Herald," in order to excite public feeling against them, and to prevent them from obtaining even board and shelter. The names, not only of the partners, their employees and customers, but of the hotels, boarding-houses, public schools, railroads, and steamboats of the city were listed, and published under the standing head of "black list." The conspirators declared it to be their set purpose to crush the firm, and used every means, short of actual physical force, to compel their customers to cease patronizing them. It was held that a conviction for conspiracy was warranted.

[1] Va. 6 S. E. 620. See also Sherry *v.* Perkins, (Mass.) 17 N. E. 307; Casey *v.* Cincinnati Typographical Union No. 3, 45 Fed. Rep. 135; Moores *v.* Bricklayers' Union No. 1, 23 Wkly. Law Bul. 48; State *v.* Glidden, (Conn.) 8 A. 890; Old Dominion Steamship Co. *v.* McKenna, 30 F. 48.

But under a statute which provides that "it shall not be unlawful for any two or more persons to unite, combine, or bind themselves by oath, covenant, agreement, alliance, or otherwise to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person or persons or corporations," it was held that it was not unlawful for the members of an association to combine for the purpose of securing the control of the work connected with their trade, and to endeavor to effect such purpose by peaceable means; and equity would not enjoin such acts on the ground that they may be detrimental to trade, or injurious to individual business.[1]

But a combination of persons for the purpose of preventing and deterring a corporation from taking into its employ certain other persons, or for the purpose of intimidating and driving away from the employment of a corporation certain persons, is a conspiracy at common law, the subject-matter of the offence being the same here as in England; namely, an interference with the property rights of others, and a restraint upon the lawful prosecution of their industries, as well as an unlawful control over the use and employment by workmen of their labor for such time, person, and price as they choose.[2] A man not under a contract for labor, nor charged by his employment with a public duty, may work for whom he pleases, or quit work when he pleases. But under a contract, or owing a public duty, he must not strike until his contract ceases, or his public duty has been performed.

The decision of the Supreme Court of Minnesota in the case of Bohn Manufacturing Co. *v.* Hollis,[3] was announced late in

[1] Mayer *v.* Journeymen Stone-Cutters' Ass'n, (N. J.) 20 A. 492.

[2] State *v.* Stewart, (Vt.) 9 A. 559. See also Old Dominion Steamship Co. *v.* McKenna, 30 Fed. R. 48, where it was held that the procurement of workmen, who are employed upon terms as to wages which are just and satisfactory, to quit work in a body for the purpose of inflicting injury and damage upon the employer, by persons who are not in his employ, and until the employer shall accede to demands of such outside persons, which he is under no obligation to grant, constitutes in law a malicious and illegal interference with the employer's business, which is actionable.

[3] Reported in current N. W. Rep.

July, 1893. It is a part of the volume of decisions relating to trusts, trade-unions, and boycotts, from which at length the law will be crystallized in authorities and precedents. The facts briefly stated are, that the Northwestern Lumbermen's Association is constituted of retail lumber-dealers in Minnesota and adjoining States. One of its objects is the protection of its members from competition by wholesale dealers. Its by-laws provide that if a wholesale dealer sells lumber in a town where one of its members has a lumber-yard, ten per cent of the amount of the sale shall be paid to the local dealer. If the wholesaler refuses to pay the local retailer this sum, all the members of the association shall be notified, and they will refuse to purchase lumber supplies from the offending firm. The wholesaler competing with a local retailer will be boycotted by all the members of the association. Wholesale lumber-dealers may be "honorary members" of the association, and are bound by its rules.

The Bohn Manufacturing Company deals in lumber at wholesale, and is an "honorary member" of the retail dealers' association. It sold two bills of lumber at points where members of the retailers' association had lumber-yards. The secretary of the association is W. G. Hollis, who notified the Bohn Company to pay over ten per cent of its sales for the benefit of the local dealers with whose trade it had come in competition. The Bohn Company evaded compliance with the demand, and was notified by Secretary Hollis that he should send circulars to members of the retailers' association, informing them of the facts, under their by-laws. There was no threat of a boycott, but it was implied.

The Bohn Company procured an injunction to restrain Hollis from issuing the circular notice. A motion to dissolve the injunction was denied in the lower court, and an appeal was taken to the Supreme Court, from which the recent decision emanated.

In deciding the case, Associate-Justice William Mitchell said that it presented a phase of the question of what limitation should be placed on the lawful powers of associations and unions of a labor or commercial character, — that is, how far they can go. He said the question would occupy the

attention of the courts for a quarter of a century before all the issues of law should be definitely settled. His opinion was that, confined to proper limits, such organizations were not only lawful, but laudable. "Carried beyond those limits," he said, "they are liable to become dangerous agencies for wrong and oppression."

The decision held that the retailers' association was a business arrangement; that by becoming a member, the Bohn Company was bound by its rule; that one man could lawfully determine that he would not deal with another or work for him, and that what an individual lawfully could do, an association of individuals lawfully could do. The injunction was dissolved. But the decision was charged with a qualification on which its chief importance rests. It is as follows, stated in the syllabus: Any man, unless under contract obligation, or unless his employment charges him with some public duty, has a right to refuse to work for or deal with any man or class of men as he sees fit; and this right, which one man may exercise singly, any number may agree to exercise jointly.

CHAPTER VII.

COMBINATIONS AMONG BIDDERS.

§ 68. **General Rule.** — The rule of public policy under discussion is as much opposed to the suppression of competition and creation of monopoly in one form as another, and may be invoked as a defence against parties who have entered into an agreement that part of them shall refrain from bidding, or only bid colorably at a sale, or upon the letting of a contract, whether such sale or letting take place under governmental or private supervision.

§ 69. **Two Grounds of Attack.** — In such cases there are two grounds upon which the obnoxious agreement may be attacked: (1) That it is against public policy, as in restraint of trade; (2) that it is a fraudulent conspiracy against the party beneficially interested in obtaining the highest price in the case of a sale, and the lowest bid in the case of letting a contract, of which the nature of the case and the condition of the market will admit. These two grounds of attack are usually so closely connected that a separate consideration would be impracticable. But the rule of public policy has been, in many cases where private parties only were involved, given subordinate importance or entirely overlooked. This is perhaps due mainly to the fact that the same evidence required to prove a combination violative of the rule

against restraint of trade also establishes a fraud upon the vendor, and to the further fact that the party injured has both a legal and an equitable remedy for fraud.

§ 70. **Principle applicable to Auction Sales generally.** — It is a legal fraud for the buyer at an auction sale to corruptly prevent or dissuade others from bidding, or to combine with others not to bid, though most of the cases seem to have arisen in equity.[1] But the objection also lies that such agreements are contrary to public policy, and unenforceable on that ground. In Gardner *v.* Morse,[2] the court say: "It must be admitted that fairness in whatever is connected with auction sales should be encouraged. Vast amounts of property are, and must continue to be, disposed of at such sales. It is a mode of proceeding necessarily resorted to in the execution of the decrees and determinations of courts of justice. The object in all cases is to make the most of property that fairly can be made of it. It is the policy of the law, therefore, to secure such sales from every species of undue influence. To allow bidders to buy off each other, which is but a species of bribery, and so to combine to prevent a fair competition as that a sale may be rendered iniquitously fruitless, cannot be admissible. Whenever, therefore, it shall become apparent, in legal proceedings, that claims are set up, founded upon such practices, courts should set their faces against them." It has been held, contrary, it seems, to established principle, that an agreement between expectant purchasers of land offered at private sale to abstain from making offers in order to get the property at a low price, is not invalid.[3] But there is no doubt of the application of the principle to all public sales, whether of public or private property.[4]

[1] American note to Benj. on Sales, 444. See also Jackson *v.* Morter, 82 Pa. St. 291; Cocks *v.* Izard, 7 Wall. 559; Davlin *v.* Ward, 6 Johns. 194; Wilbur *v.* How, 8 Johns. 444; Thompson *v.* Davies, 13 Johns. 112; Gulick *v* Bailey, 10 N. J. L. 87; Slingluff *v.* Echel, 24 Pa. St. 472; Gardiner *v.* Morse, 25 Me. 140.

[2] 25 Me. 140, 143. See also Dunfree *v.* Moran, 57 Mo. 374; Wootan *v.* Hinkle, 20 Mo. 290; Hook *v.* Turner, 22 Mo. 333.

[3] Morrison *v.* Darling, 47 Vt. 67.

[4] See Brishane *v.* Adams, 3 N. Y. 129; Vantrus *v.* Hyatt, 5 Ind. 487; Corathers *v.* Harris, 23 W. Va. 177; Cain *v.* Fox, 23 W. Va. 635.

§ 71. **Strict Application of Rule to Judicial Sales.** — And there is no doubt of the propriety of a strict application of this rule of public policy to judicial sales. The law will not tolerate any influences likely to prevent competition at a judicial sale, and it accords to every debtor a chance for a fair sale and full price; and if he fails to get these in consequence of the wrongful interference of another party who has purchased the property at a price greatly disproportioned to its value, equity will step in and enforce redress, either by setting aside the proceedings under the sale, or by holding the purchaser to account.[1] Anything which prevents free competition at such sales will be discountenanced by the courts.[2] A sale at auction is a sale to the best bidder; its object a fair price. It means competition. Any agreement, therefore, to stifle competition, is a fraud upon the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other, — policy alone forbidding that the last-mentioned should be enforced, but both policy and justice uniting to condemn the former. If this be the rule with regard to auctions instituted by private individuals, *a fortiori* should it be as to those public auctions instituted by law for great public purposes, such as execution sales, where the object is to secure the creditor, if possible, the satisfaction of his debt, and at the same time to obtain for the debtor a fair price for his property. Men may, from the very worst of motives, both towards the creditor and debtor, abstain from bidding, without incurring any legal censure. They have a right to abstain from action: they may act or not, at their pleasure; but if they do act, they must do it fairly. They cannot claim to themselves any benefit from a sale, the first principle of which they have violated, fair competition being the first essence of an auc-

[1] Cocks *v.* Izard, 7 Wall. 559; Morris *v.* Woodworth, 25 N. J. Eq. 32.

[2] Webster *v.* French, 11 Ill. 254. See also Curtis *v.* Aspinwall, 114 Mass. 187; Veazie *v.* Williams, 8 How. 134; Thornett *v.* Haines, 15 M. & W. 367; Bexwell *v.* Christie, Cowper, 396; 2 Kent Comm. (6th ed.) 538, 539; Brotherlive *v.* Squires, 48 Pa. St. 68.

tion sale. Puffing or by-bidding is a fraud on the vendee. So, on the other hand, an agreement not to bid, for the purpose of paralyzing competition, is a fraud upon the vendor, and vitiates the sale, — at least so far that no party to such agreement can claim any benefit from it.[1]

§ 72. **Illustrations of the Rule.** — Within this rule of public policy have been held to fall the following agreements: Where a judgment creditor in assigning his judgment promised the assignee not to bid at a foreclosure sale, to be held under a mortgage which was a prior lien upon the debtor's land;[2] where an insolvent debtor, whose lands were about to be sold by commissioners to pay liens upon them, agreed with a company to use his best efforts at the sale to depreciate the price in order to enable the company to buy the lands at a price which was grossly inadequate;[3] where parties agreed that one of them should bid off land sold at public partition sale for their joint benefit;[4] where several creditors agreed not to bid against each other at an execution sale, held for the benefit of themselves and other creditors, and employed a third person to bid in the property for them, the profits to be divided in the proportion that the debt of each bore to the aggregate, excluding the other creditors;[5] where an execution creditor promised persons about to bid at a sale under execution, that, if they would not bid thereat, he would sell

[1] Smith *v.* Greenlee, 2 Dev. (N. C.) 126. See, generally, Ingram *v.* Ingram, 4 Jones (N. C.) L. 188; Arnold *v.* McCord, 16 Ind. 177; White Crow *v.* White Wings, 3 Kans. 276, 279; Dudley *v.* Odom, 5 So. Car. (N. S.) 131; Weld *v.* Lancaster, 56 Me. 453, 455; Merchants' Ins. Co. *v.* Addison, 9 Rob. (La.) 486; Fleming *v.* Hutchinson, 36 Iowa, 523.

[2] Brackett *v.* Wyman, 48 N. Y. 667.

[3] Horn *v.* Star Foundry Co., 23 W. Va. 522.

[4] Wooton *v.* Hinkle, 20 Mo. 290, distinguishing Loomis *v.* The National Fire Ins. Co., 11 Paige (N. Y.) 431. See also Switzer *v.* Skiles, 3 Gilm. (Ill.) 529; Lawnin *v.* Bradley, 13 Mo. App. 363; Wheeler *v.* Wheeler, 5 Lans. (N. Y.) 355.

[5] Hawley *v.* Cramer, 4 Cow. (N. Y.) 717, 731, 732, 733. See also Doolin *v.* Ward, 6 Johns. (N. Y.) 194; Jones *v.* Caswell, 3 Johns. Cas. 32; Troup *v.* Wood, 4 Johns. Ch. (N. Y.) 254; Jewett *v.* Bowman, 29 N. J. Eq. (2 Stew.) 174; Bradley *v.* Kingsley, 43 N. Y. 534; Haynes *v.* Crutchfield, 7 Ala. 189, 197.

them such parts of the land as they might want, at a low price;[1] where a mortgagee, at a sale under his mortgages, which were second and fourth, to prevent the third mortgagee, who was present, from bidding on and buying the property, if necessary, to save his security, promised to pay him his claim if he would desist from bidding;[2] where the agreement of the parties was that land offered at a judicial sale should be run up to a certain price, and should then be bid in by one of them, in his own name, and that he should then convey a portion of it to the other on the same terms as he himself should obtain it;[3] where one, not a party to the suit, agreed with a judgment creditor to pay him the amount of his judgment if he would not bid against him at the sale of the debtor's property, to satisfy an execution in favor of another creditor.[4] By analogy, the principle is applicable to agreements for the prevention of competition, as in the case of a Dutch auction, where the biddings were all downward; as where land is sold at tax sale to him who will pay the taxes for the smallest quantity of the land; or where contracts for public supplies or work is let to the lowest bidder. The courts of New York have uniformly inculcated an elevated morality on this subject. Thus, where certain articles were to be sold by auction at the Navy Yard at Brooklyn, and par-

[1] Mills *v.* Rogers, 2 Litt. (Ky.) 217. See also Troup *v.* Wood, 4 Johns. Ch. 228. See Penn's Admr. *v.* Tolleson, 20 Ark. 652; Woodruff *v.* Berry, 40 Ark. 251; 23 Am. Law Reg. (N. S.) 276; Paige *v.* Hammond, 26 Vt. 375.

[2] Morris *v.* Woodward, 25 N. J. Eq. (10 C. E. Gr.) 32, citing Fuller *v.* Abrams, 3 Brod. & Bing. 116; Martin *v.* Ranlett, 5 Rich, (Law.) 542; Smith *v.* Greenlee, 2 Dev. (N. C.) 126. To same effect Hamilton *v.* Hamilton, 2 Rich. Eq. (So. Car.) 355.

[3] Hook *v.* Turner, 22 Mo. 333.

[4] Slinghuff *v.* Eckel, 24 Pa. St. 472; Abbey *v.* Dewey, 25 Pa. St. 413. So where A, B, and C, creditors of D, A, and B, having executions, agreed that, at the sale of D's property, A should pay C so much, and bid off D's personalty to the amount of his execution, and that C should bid on the realty to the amount of B's execution, and dispose of the same, and, after satisfying his own demands against D, refund the sum paid by A, if there be a sufficient surplus, the agreement was held void, and it was further held that A could not recover the surplus. Thompson *v.* Davies, 13 Johns. (N. Y.) 111. See Howell *v.* Mills, 53 N. Y. 322.

ties, being desirous to purchase, agreed that the plaintiff should not bid against defendant, who should purchase the articles, and afterwards divide equally, it was held the contract was against public policy;[1] and where a contract for making a road being set up at auction, the parties agreed that if either bid it off it should be divided between them, and one bid it off and refused to give the other a share, the court held the contract *nudum pactum*, and a fraud on the vendor.[2] So it was decided upon well-settled principles that an agreement which tended to prevent competition at a sale under execution was contrary to public policy, and void.[3] Spencer, J., in delivering the opinion of the court, said: "It has been urged that the plaintiff was not bound to bid on the second execution, and was therefore at liberty to enter into this agreement. That is not the test of the principle. In none of the cases cited was the party bound to bid; but being at liberty to bid, he suffered himself to be bought off in a way which might prevent a fair competition. The abstaining from bidding upon concert and by agreement, under the promise of a benefit for thus abstaining, is the very evil the law intends to repress. A public auction is open to every one; but there must be no combination among persons competent to bid, silencing such bidders, for the tendency to sacrifice the debtor's property is inevitable." The New York doctrine has been followed in all its rigor in New Jersey,[4] North Carolina,[5] and Alabama.[6] All the cases upon this subject will be found to agree in this: that where either the intention, the effect, or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and when discovered will be stamped with marks of disapproval in any court of law or equity.

§ 73. **What may be shown to defeat the Operation of the Rule.** — But there are occasional instances in which the value of the property sold is so great that but few persons in the

[1] Doolin *v.* Ward, 6 Johns. 194.
[2] Wilbur *v.* How, 8 Johns. 444.
[3] Thompson *v.* Davies, 13 Johns. 112.
[4] Gulick *v.* Ward, 5 Halst. 87.
[5] King *v.* Winants, 71 N. C. 469.
[6] Carrington *v.* Caller, 2 Stew. (Ala.) 175.

neighborhood are possessed of the means requisite for its purchase, and in which competition would be diminished rather than increased by prohibiting the aggregation of capital. Other instances frequently occur, in which two or more persons may lawfully unite in making a purchase. In other words, it does not necessarily follow, because one person bids for himself and others, or because two or more persons join their capital for the purpose of making a purchase at such sale, that there has been an unlawful or fraudulent combination; and the Supreme Court of Ohio [1] has relaxed the rule somewhat by allowing it to be shown that the agreement for partnership was not intended to influence, and did not, in fact, influence, the bid of either party.

This test for determining the validity of such contracts was offered by Eakin, J., in Woodruff *v.* Berry.[2] "Not whether two or more agreed that one should bid for the common benefit, but was the association for an honest and just purpose, free from fraud, without any artifice, concealment, or practice to suppress competition on the part of others, and for the purpose of enabling two members to do jointly what they could not so well do separately? If so, it should certainly be upheld."

Although combinations among buyers to prevent competition and "chill the sale," as it is called, are unlawful, yet it is self-evident that associations of persons enabling one to buy for all for the purpose of division when no one person would probably buy the whole, are not illegal, since the natural effect would be to enhance the price, and not depress it.[3] It may also be shown that the sale or letting of the contract was not influenced by such agreement.[4]

[1] Breslin *v.* Brown, 24 Ohio St. 565. See also Freeman on Executions, sec. 297; Phippen *v.* Stickney, 3 Metcalf, 384; McMinn's Legatees *v.* Phipps, 3 Sneed, 196; Wicker *v.* Hoppock, 6 Wallace, 97, for the circumstances under which agreements for partnership among bidders may be entered into.

[2] 40 Ark. 251, 272. See also Story on Contracts, sec. 548, and authorities cited.

[3] Phippin *v.* Stickney, 3 Met. 387; Smith *v.* Greenlie, 2 Dev. 126; Kearney *v.* Taylor, 15 How. 521.

[4] Flanders *v.* Wood, 83 Tex. 277; 18 S. W. 572.

§ 74. **Government Contracts and Sales.** — It is often necessary, in the administration of Federal and State, as well as county and city, governments, to have constructed public works and improvements of various kinds, and secure other unofficial services. It is just to all the citizens that they should have a fair and equal opportunity to secure contracts for the same, and expedient that the public, considered as an entirety, should have the benefit of competition in securing the performance of public work, furnishing supplies, at sale of public property, etc. No more effective method of attaining these ends can be devised than by opening such matters to competitive bids upon public notice. This being the case, it is self evident that any secret combination, whatever its form, the effect of which is to abate honest rivalry or prevent fair competition, should be condemned as violative of public policy, and that no one should be allowed to predicate an enforceable right upon such an agreement.[1]

§ 75. **Same. — Partnership Arrangements invalid.** — Courts will not allow the interests of the public in the letting of contracts for public work to be defeated by any subterfuge or mere form, such as the ostensible formation of a partnership between the bidders; for no enforceable right can be predicated upon an agreement of partnership, the effect of which is to stifle or diminish competitive bidding on public works, and to perpetrate a fraud on public officers. In Hunter *v.* Pfeiffer,[2] the court say: "Upon all such partnerships the law

[1] Hunter *v.* Pfeiffer, 108 Ind. 197; 9 N. E. 124; Atcheson *v.* Mallon, 43 N. Y. 147; (3 Am. R. 678); Woodworth *v.* Bennett, 43 N. Y. 273 (3 Am. R. 706); Gibbs *v.* Smith, 115 Mass. 592; Hannah *v.* Fife, 27 Mich. 172; Greenhood Pub. Pol. 178, 179, and notes; Woodruff *v.* Berry, 40 Ark. 251; Boyle *v.* Adams, (Minn.) 52 N. W. 860; Ray *v.* Mackin, 100 Ill. 246; James *v.* Fulcrod, 5 Tex. 513; Allen *v.* Stephanes, 18 Tex. 658; Carrington *v.* Caller, 2 Stew. (Ala.) 175; King *v.* Winants, 71 N. C. 469.

[2] 108 Ind. 197, 200; 9 N. E. 124. Where two persons agreed not to bid against each other for a government contract, to be given to the lowest bidder, and to share the profits of the contract when given to one of them, such contract was held void, as against public policy. King *v.* Winants, 71 N. C. 469.

That no lawful contract of partnership can result from such an agreement, see Armstrong *v.* Armstrong, 3 Mylne & Keen, 45.

sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of profits anticipated or accrued. The statute under which free turnpikes or gravel roads are constructed, requires contracts for their construction to be let to the lowest and best bidder, and that all bids shall be sealed when filed. If the courts should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is presented, the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the Legislature in requiring such contracts to be let to the lowest and best bidder. The partnership contemplated by this agreement was a secret arrangement, unknown to the officers who had the public interest under their protection. It was intended that the officers should believe they were contracting with Pfeiffer alone, while he and those who were accepted as sureties on his bond intended among themselves a secret partnership wholly unknown to the board of commissioners. Persons who engage in forming partnerships of the character disclosed, must rely for a division of the resulting profits upon those sentiments of honor which are supposed to prevail among all who form combinations which are condemned by the policy of the law." On the same principle, and partly on account of the provisions of an ordinance prohibiting such secret understanding, it was held that a secret partnership formed by two persons, whereby they were to be equally interested in a contract for work obtained by one of them from the department of public works of New York city, was contrary to public policy, and void.[1]

[1] Kelly *v.* Devlin, 58 How. (N. Y.) Pr. 487. Any agreement or combination among parties petitioning for the improvement of a street, by which a few individuals, desirous of causing the improvement to be made, procure the signatures of others to the petition by paying, or agreeing to pay, a consideration therefor, either directly or indirectly, is a fraud on the law, and contrary to public policy; and in an action on such an agreement, for those whose names were thus procured to say that they were not opposed to the improvement "in itself considered," but that they did not feel pecuniarily able to bear the expense, and that they

§ 76. **Principle applied to Contract with Abutting Lot Owners.** — The defence that a secret agreement between rival bidders is contrary to public policy, as in restraint of trade, is available as well where the work is to be done for owners of lots abutting upon a street, and payment for the same is chargeable against them, as where done upon a proposition submitted by public officers, and payment is to be made out of the public treasury. The case of Ray *v.* Mackin[1] was an application of the rule of public policy to an agreement of this kind. It appeared that the property owners along a certain street in the city of Chicago, having in contemplation the paving of the street, were negotiating with a paving contractor on that subject, and some of the owners had signed a contract with such contractor for the doing of the work. Pending these negotiations, a second and rival paving contractor sought to obtain the contract for himself, soliciting the owners for that purpose. Finally, the rival contractors compromised their respective interests in the matter, by the withdrawal of the one first mentioned, and the agreement on his part to aid in securing the contract for his rival, the latter agreeing to pay to the former a certain sum out of the profits expected to be realized for the work. This arrangement was consummated to the extent that the one who was to have the contract under the arrangement between the two rival contractors, did secure it from the property owners. That was brought about in this way: the contractor who withdrew from the contest to obtain the contract for the doing of the work, urged those of the owners who had signed the agreement with him to transfer their names to the other contract, and at a meeting of a committee of the property owners to consider and determine upon the matter, he wrote out a bid for the work for himself, and a lower bid for the other contractor, according to the arrangement beforehand. In an action to recover upon the agreement made by the contractor who secured the contract to do the work, to pay to the other

accepted the agreement in good faith, and without fraud, will not render the agreement valid, or enable them to enforce it. Maguire *v.* Smock, 42 Ind. 1.

[1] 100 Ill. 246.

a certain sum out of the profits of the job, it was held, that the agreement sued upon, taken in connection with its consideration, was against public policy, and a fraud upon the persons who were to pay for the improvement of the street, and therefore formed no valid foundation for the action.

§ 77. **Application of Rule to letting Contract to collect Taxes.** — Where, as is often provided by statute, municipal officers are given power to delegate the duty of collecting delinquent taxes to the lowest responsible bidder for the job, any agreement between rival bidders to thwart the economical purpose of the statute will be condemned by the courts upon an attempt being made to enforce such agreement. Thus, where two persons, each sending in distinct proposals, agreed that if the collection should be awarded to either, both should share equally in the profits, and contribute equally to the losses, it was held the contract was against public policy.[1] The court said: "It is not necessary for the determination of this case to inquire whether the effect of the agreement between the parties was, in fact, detrimental to the town. . . . The object and policy of the statute was to be achieved only by exciting the rivalry and competition of men seeking this privilege. This competition was to be excited by calling by advertisement for sealed and secret proposals. Each bidder, ignorant of what his rival was about to offer, would be under stimulus to make a bid at the best rate to the town which his judgment would sanction as of profit to himself. Where an agreement is made between bidders to share in the acceptance of the offer of either, it is apparent that the competition must materially slacken. Each of those parties had intended to make a proposal on his own account, and it was after each knew of the other's intention that the agreement between them was proposed and entered into. Until it can be truthfully said that men's actions will not be affected by a consideration of their self-interest, it cannot be maintained that the parties to this agreement were likely, after it was formed, to be as strong competitors as they were before. Such is the natural effect of agreements of this nature; and it is for this reason, and not

[1] Atcheson *v.* Mallon, 43 N. Y. 147.

on account of the natural results upon the public or upon third persons of particular contracts, that they are held void. It is because men, with these agreements in their hands, and relying upon them for their gain, do not act towards the public and third persons as they would without them, under the stimulus of competing oppposition."

§ 78. **Application of Rule to Sales of Public Property.** — The same reasons may be urged against any agreement to stifle competition at sales of property of the State or general government as when made by order of court or otherwise on behalf of individuals; and it is well settled that an agreement by which one person, under promise of benefit, agrees with another to withdraw an offer or bid for property of the State, offered for sale, so as to enable the latter, by the removal of competition, to buy it cheaper than he otherwise could, is void, as being against public policy. It is immaterial whether the property is offered at public auction or by inviting bids or proposals for its purchase at private sale.

In a leading case, illustrative of this proposition, the court said: "The allegations of the complaint are that the State auditor, as land commissioner, had offered for sale the pine timber on certain lands of the State; that plaintiff had made the commissioner an offer to purchase the same at private sale, which offer the commissioner had taken under consideration; that before the commissioner had determined to accept the offer, the defendant agreed with plaintiff that if he would withdraw his offer, and permit him (defendant) to purchase the timber, he would pay plaintiff five hundred dollars; that plaintiff agreed to this, and withdrew his offer, and thereupon the defendant became the purchaser of the timber at private sale, to his great gain and profit. Judgment is demanded for the five hundred dollars. It is rather difficult to spell out of this any sufficient consideration for the promise to pay this money; but if there is, it must be because the agreement removed competition in the way of offers of proposals for the purchase of public property offered for sale, and thus enabled the defendant to buy it for less price than he otherwise could have done. If so, the agreement was one that operated against

the interests of the public, and was therefore void, as against public policy. If the sale had been at public auction, and a like agreement had been made to buy off and prevent competition, there could have been no doubt of its illegality. But the fact that the sale was, as alleged, private, can make no difference in a case like the present. The effect and result of such an agreement is the same in either case." [1]

So where an association was formed to purchase land at the public sales of the United States at the minimum price fixed by law, with a view to reselling them at a profit, the agreement among the members was held void and unenforceable.[2]

§ 79. **The Purpose and Effect of Controlling Importance.** — The all-important inquiry in determining whether a given agreement between rival bidders or contractors is amenable to the objection that it is against public policy is whether its purpose, effect, or necessary tendency is to stifle competition and injure the public. This inquiry being answered in the negative, the contract will be held valid and enforceable.

In Flanders *v.* Wood [3] three architects had each submitted plans and specifications to the county court of Wilbarger County in Texas for a court-house. The architects agreed among themselves to abstain from further advocacy and to divide the proceeds, should the plan of any one of them be received. This was decided not against public policy, nor to prevent rivalry, and the agreement between the rival architects was enforced. The court said: "The question in this case is, Did the contract have the effect, or was it the intention thereby, to stifle competition, as claimed? The contract shows that each of the three parties thereto had put in plans and specifications for the court-house, to be accepted or rejected by the county commissioners' court; that there was competition between the plans offered; that it was unknown whose plans would be accepted; that they would all retire from further contest in order to attend to their more urgent business, and let the plans alone compete; and that whichever of the plans

[1] Boyle *v.* Adams, (Minn.) 52 N. W. 860.
[2] Carrington *v.* Caller, 2 Stew. (Ala.) 175.
[3] 83 Tex. 277.

should be accepted, all should share equally in the remuneration. The bids or price of plans was not to be changed, nor was any one to be withdrawn. . . .

"It is contended that the provision in the agreement that the parties should retire from further contest indicates the illegality of the contract. It does not appear how such an agreement could affect the county, whose officers had at the time the offers of the architects before them, which the agreement in nowise interfered with. The competition was between the plans themselves; the agreement was not to withdraw any of them, but to leave them in competition as they were. The county was not to be injured or put at any disadvantage. The architects alone were affected. The withdrawal of their advocacy of their respective plans is all that could have been contemplated, — not the plans, or any of them. This was not illegal. . . . The evidence shows that the commissioners made their selection from the plans of these and other architects who had submitted other plans and specifications, preferring those of defendant among them all. There is nothing in the evidence to show that the competition was in the least influenced by the agreement."

So where a premium was offered for the best manufacture of cloth, and there were several competitors, who, after the cloth was made and submitted, agreed to share the bounty, it was held that the agreement did not affect the competition.[1] Whalen *v.* Brennan[2] is an important late case illustrative of the proposition that a necessary detriment to the public interest to result from carrying out the agreement must appear to render it illegal within the general principle. The facts established in evidence were as follows. In response to an advertisement by a city for bids for laying curbing, Whalen filed a sealed proposal to do the work with a certain kind of stone at a certain price, accompanying his bid with a certified check as a guaranty that he would make the contract. Brennan filed two proposals, with certified checks, — one to do the work with the same kind of stone, at a higher price than Whalen, and the other to do it with another kind of stone, at

[1] Briggs *v.* Tillotson, 8 Johns. 304.

[2] Neb., 51 N. W. 759.

a less price. Each bid was made without the knowledge of the other party. Before the city granted the contract, Brennan and Whalen made a contract by which the former agreed not to press his claim for the contract, and to quietly use his influence in favor of the latter, who agreed to make certain concessions. The proposals were not withdrawn, and there was nothing to show that Brennan made any direct communication to the city authorities to induce them to accept Whalen's bid; but it did appear that he used his influence with outside persons, who he believed would have influence with the authorities, but it did not appear that they exerted their influence. The city awarded the contract to Whalen. It was held that the contract between Brennan and Whalen was not void as against public policy, as it did not appear that its intent, effect, or necessary tendency was to stifle competition.

§ 80. **Combination of Interests may be formed after the Submission of Bids.** — The authorities just noticed support another proposition scarcely distinguishable in meaning from that advanced in the next preceding section. It is that in the absence of any fraudulent practices by the parties upon those charged with the duty of letting the contract or making the sale, the former may enter into any arrangement they see proper with reference to performing the contract and dividing the profits, provided that as a result of such agreement no bids are affected, withheld, or withdrawn.[1]

But the provision of a statute having in view the responsibility of bidders for public work has an important bearing in such cases; and an agreement whereby A is to enter into and perform a contract with the State for the construction of a swamp-land State road, and to give B, who, at the public letting of the work, under the statute, had been the lowest bidder, as a bonus for being allowed to take his place in the contract, a portion of the swamp-lands to be secured from the State for the performance of the work, is void, as being against public policy. The provision of the statute that contracts to

[1] See Breslin *v.* Brown, 24 Ohio St. 565; 15 Am. R. 627; Whalen *v.* Brennan, Neb., 51 N. W. 759; Flanders *v.* Wood, 83 Tex. 277; Briggs *v.* Tillotson, 8 Johns. 304.

construct such roads shall "in all cases be let to the lowest responsible bidder," does not admit of the substitution of another person as contractor in place of such bidder; and any contract based upon such illegal substitution is void.[1]

§ 81. **Burden of Proof.** — The same rules of evidence apply whether the sale be judicial or ordinary, and whether the government, or a subdivision of the State, or only private parties, be affected. In all such cases the rule is, that the consideration of bidders being admitted, it devolves upon him seeking to enforce the agreement to show that it was for the joint prosecution of a legitimate business enterprise, and not a mere device to shut off or reduce competition. In Woodruff *v.* Berry,[2] which involved a contract to do work for the State,

[1] Hannah *v.* Fife, 27 Mich. 172. In this case the court, *per* Christiancy, J., say: "It seems to me clear that the tendency of all such contracts between bidders as that here in question, if recognized as valid by the courts, must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the Legislature in requiring such contracts to be let to the lowest responsible bidder; that such must be the natural tendency of allowing the commissioner to recognize any bargain or agreement between the bidders after the bids were opened, transferring to another the right of the lowest bidder to the contract bid for, and the substitution of the one for the other, as contractor with the State. It is this tendency, rather than the fact of actual fraud in the particular transaction, which is generally recognized as rendering contracts void, as against public policy. Mills *v.* Mills, 40 N. Y. 543; Tool Co. *v.* Norris, 2 Wallace, 45; People *v.* Township of Overyssel, 11 Mich. 222; O'Hera *v.* Carpenter, 23 Mich. 410. And we think the contract sued upon must be held void upon this ground. "And, besides this general view, we think the contract must be held void upon another analogous but somewhat narrower ground. The mischievous tendency of the contract is sufficiently strong and manifest to warrant us in holding that the power of the commissioner to let these swamp-land road contracts must not be recognized as extending beyond the plain provision of the statutes, which require that 'such contracts shall in all cases be let to the lowest responsible bidder;' and that, if this language could otherwise possibly admit of a construction which would allow the substitution of another person as the contractor, we cannot so extend it, when the manifest tendency would be to defeat the object of the statute itself, by encouraging the very evils it was intended to prevent."

[2] 40 Ark. 251, 268.

this rule and its applicability to the case at bar was thus expressed by the court: "Now, they depose that they had no design to get an advantage of the State, or to suppress bidding; by which we suppose they mean bidding by persons outside of the combination, — for certainly it could never have been contemplated that these dormant partners should be at liberty to put in independent bids of their own, if they chose. That would have been an act of bad faith to the partnership. Yet they show no other motive for combining except the motive, so obvious that it will be inferred, of getting rid of the competition of each other, by the surrender of each to the other of a portion of the work and anticipated profits. We cannot presume they united for want of means to undertake the entire job, for they had each proposed to do it singly and alone.

"Again, the burden of proof was upon the plaintiff to show that the State had received no detriment by their combination. They do indeed swear that the prices at which the contract was awarded to Woodruff were fair. But this is too general. It ought to have appeared that those prices did not greatly exceed the average of what they were willing to undertake the work for singly. Finally, it should have been shown that the natural and necessary tendency of the combination was not to reduce the number of bidders."

CHAPTER VIII.

APPLICATION OF RULE TO SUPPRESSION OF COMPETITION IN PUBLIC SERVICE.

§ 82. **Rule strictly applied.** — Another class of contracts, against which the rule of public policy is often successfully invoked, pertains to those duties of a public character due by corporations and individuals, such duties resulting from grants of franchises from the State or from the nature of their employment. No agreement can be fraught with more serious import to the material interests of the community than one whereby a monopoly, with all the power for evil the term implies, is created among those upon whom the State has conferred important privileges of a public nature, and upon whom the public are dependent for common service, whether in the form of transportation or other necessities and conveniences. Such agreements are viewed with great jealousy by the courts, and the rule of public policy is rigidly applied to them.

§ 83. **Difficulty in distinguishing between Public and Private Duties.** — The authorities afford no satisfactory definition of a public as contradistinguished from a private service or duty. In view of the uncertainty in this respect, it is only

practicable to consider the nature of the employment of a party as to whether it is public or private, as a floating element which is liable to join the other facts and circumstances of each case at any moment, and thereby influence the conclusion. This condition was largely brought about by the decision of the Supreme Court of the United States in the case of Munn *v.* Illinois,[1] which, together with other cases involving like interests, became known as the "Granger cases." In that case it was decided that the State of Illinois could prescribe maximum rates of storage in warehouses used for storage of grain in bulk by various owners, in such manner that the identity of different lots or parcels could not be preserved, on the ground that the exercise of State regulation was necessary to the safety and protection of the public.

This decision has since been followed, and the power of the Legislature to regulate rates and charges has been declared to extend to warehousemen generally, and to wharfingers, ferriers, water and gas companies. But the subject of police regulations is foreign to the present subject, except as far as the question of what is and what not a public business, and hence calling for a strict application of the rule against agree-

[1] 94 U. S. 113. In this case Waite, C. J., in delivering the opinion of the court, said: "In England from time immemorial, and in this country from its first colonization, it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold. Looking to the common law, whence came the right which the Constitution protects, we find that when private property is affected with a public interest it ceases to be *juris privati* only. This was said by Lord Chief Justice Hale more than two hundred years ago, . . . and has been accepted without objection as an essential element in the law of property ever since. Property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he thus creates. He may withdraw his grant by discontinuing its use; but so long as he maintains the use, he must submit to the control." See also People *v.* Budd, 117 N. Y. 1; 22 N. E. 670.

ments by those engaged therein restrictive of competition is involved.

The right of the State to regulate the mode in which railroad corporations shall transact their business is too well established to require argument in its support. The speed at which they may run their trains, the manner of crossing or running upon highways and turnpikes used for public travel, the protection of persons and property carried upon them or passing upon highways or other railroads crossed by them, and the compensation they may demand and receive for services, are among the matters which government may regulate and control, although the power to alter and amend the charters of such corporations has not been reserved. Such legislation within proper bounds violates no contract, takes away no property, and interferes with no vested right.[1]

Unless protected by their charters, or unless the interference

[1] Spelling, Priv. Corp sec 1077 *et seq.*, citing Chicago etc. R. R. Co. *v.* Iowa, 94 U. S. 155; Laurel Fork etc. R. R. C. *v.* West Va. Transp. Co., 25 W. Va. 324. See Farmers' Loan & Trust Co. *v.* Stone, 20 Fed. Rep. 270. See also State *v.* Hudson River R. R. Co., 3 Keyes, 196; Jones *v.* Galena R R. Co., 16 Iowa, 6; Indianapolis R. R. Co. *v.* Marshall, 27 Id. 300; *In re* Annan, 2 N. Y. S. 275; N. C. & St. L. R. Co. *v.* State, 9 S. Ct. 28; Penn. R. R. Co. *v.* Riblet, 66 Pa St. 164; Dow *v.* Birdleman, 49 Ark. 325; 5 S. W. 297; Buffalo, E. S R. Co. *v.* Buffalo St. Ry. Co., 111 N. Y. 132; Little Rock & F. S. R. C. *v.* Hanniford, 49 Ark. 291; 5 S. W. 291; Waldron *v.* Rensselaer etc. R. R. Co., 8 Barb. 390; Veazie *v* Mayo, 45 Me. 560; Kansas Pac. R. R. Co. *v.* Mower, 16 Kan. 573; Tripp *v.* P. R. Co., 66 Mich. 1; C. M. & St P. Ry. Co. *v.* Becker, 33 F. 849, Madison etc. R. R. Co. *v.* Whiteneck, 8 Ind. 217; Horn *v.* Chicago etc. R. R. Co., 38 Wis. 463; Pittsburg etc. R. R. Co. *v.* Southwest Pa. R R. Co., 77 Pa St. 173; Mobile & Ohio R. R. Co. *v.* State, 51 Miss. 137; Penn. Co. *v.* Wentz, 37 Ohio, 333; Lyman *v.* Boston, etc., R. R. Co., 4 Cush. 288; Hoyt *v.* Chicago etc. R. R. Co., 93 Ill. 601. In Sharp *v.* Whiteside, 19 Fed. Rep. 156, it was held that the mere imposition of a tax upon property, and the designation of such property as public in the tax law (in this case a public park), did not change the character of its ownership so as to deprive its owner of the right to grant exclusive rights to its enjoyment. The court said: "It is said that the State has imposed a tax on public parks, and that this is a legislative Act, declaring the character and use of the park to the public. The taxation of the park indicates rather that the State considers it private property. It is not usual that public property, or property set apart for public uses, is taxed, and it does not seem that the

amounts to a regulation of foreign or interstate commerce, they are subject to legislative control, their employment being public, and affecting public interests.[1]

And where protection from a legislative regulation is claimed under charter, these are construed in favor of the public and against the company.[2]

§ 84. **Of the Public Character of Franchises.** — Perhaps the most unsettled and complicated of all questions are those related to the exercise of franchises of public character by private corporations, and the extent of the right of State supervision and control with respect to the public interest in the business transacted by them. In determining whether a corporation itself be public or private, the true criterion is whether the objects, uses, and purposes for which the corporation was organized were solely for public benefit and convenience or for private emolument, and whether the public can participate in them by right, or only by permission.[3] The

imposition of the burden of a tax on the property should be construed as setting apart the property to public use. It would be strange if a citizen of the State were required by the State to pay a tax for the privilege of having his property placed beyond his control. On the contrary, it would seem that this taxation indicates that the State believed that the owner ought to pay a tax for the privilege of using her private property to raise money by charging the people for its use. So far from considering it an appropriation of her property to a public use, by which the public is benefited, and through which it acquires such rights and equities as may be enforced by the courts, it is declared a privilege to allow the public to use it by the payment of a fee for admission thereto, for which the owner should be taxed. The benefit is to the owner, and not to the public. Complainant is taxed for the privilege of charging his customers for his services; but that does not make his a public business. There is little question, probably, but that the public necessities may require, under the proper conditions, that private property may be taken for the use of the public for purposes of recreation and pleasure; but the courts cannot undertake so to appropriate it without legislative authority."

[1] Chicago etc. R. R. Co. *v.* Iowa, 94 U. S. 155; Laurel Fork etc. R. R. Co. *v.* West Va. Transp. Co., 25 W. Va. 324. See Farmers' Loan & Trust Co. *v.* Stone, 20 Fed. Rep. 270.

[2] Camden, etc., R. R. Co. *v.* Briggs, 22 N. J. (2 Zab.) 623. See McAunich *v.* Miss. etc. R. R. Co., 20 Iowa, 338.

[3] Spelling, Priv. Corp., sec. 13: Ala. etc. R. R. Co. *v.* Kidd, 29 Ala. 221; Sweat *v.* Boston, 3 Clifford, 339.

property of a railroad corporation is in the hands of individuals who exercise control and management for their own benefit, while the public derives a benefit and has an interest regulated and guarded by the State. The status of railroad and turnpike companies is well defined by Ruffin, C. J., in Raleigh & G. R. R. R. Co. *v.* Davis.[1] "As to the corporation, it is a franchise like a ferry or any other. As to the public, it is a highway, and in the strictest sense *publici juris*. The land needed for its construction is taken by the public for the public use, and not merely for the private advantage of individuals. It is only vested in the company for the purposes of the Act, that is, to make the road." Water companies incorporated to supply cities or districts, and gas companies, are *quasi* public corporations whose primary objects are mainly private in the same sense with railroad companies.[2]

§ 85. **Public Necessity as a Test.** — When otherwise not amenable to objection under the rule of public policy, there is no rule founded upon the public character of a business against the combination of interests or granting of exclusive rights and enforcing the same, unless the resulting suppression of competition affects detrimentally the supply of some common necessity, as contradistinguished from an amusement or recreation. The leading case making this important distinction was that of Sharp *v.* Whiteside.[3] In this case it appeared that the owner of what is known as the Point of Lookout Mountain, a favorite resort, on account of the extended view therefrom, who was also the owner of a chartered turnpike which was a regular toll road leading up the mountain nearly to the Point, inclosed her ground as a park, and charged an entrance fee from visitors. Subsequently she entered into a contract with a certain party, by the terms of which he was to carry all passengers over her turnpike instead of over another route leading to the Point, and was

[1] 2 Dev. & Batt. 451.

[2] Society, etc. *v.* Butler, 12 N. J. Eq. 498. A valuable explanation of the distinction between a public and a private corporation may be found in the City of Louisville *v.* University of Louisville, 15 B. Mon. 642.

[3] 19 Fed. Rep. 156.

to have the exclusive privilege of bringing or conveying persons into the park. Complainant, who was engaged principally in the business of carrying visitors to and from the park, sought to enjoin the owner from refusing admission thereto to such parties carried there by him as might tender the usual admission fee. It was held, that the fact that the park had long been a popular resort for sightseers, that an admission fee was charged, and that a tax was imposed by the State on the owner for the privilege of keeping a park, did not render the use to which the property was devoted a public use, or change the character of the property, and that the court could not invade the rights of the owner and enjoin her from carrying out the terms of her contract. Held, further, that if she had attempted to interfere with any of the rights of complainant in the use of the chartered turnpike, such interference would not have been tolerated.

Key, J., delivering the opinion, said: "The control which courts may have over railroads and business incidental to and necessary for their conduct and operation, such as warehousing in our great railroad centres, is based upon public necessity. Railroads do nearly all the business of interior transportation. The public is compelled to use them exclusively. There is scarcely anything to compete with them where they operate. Hence, discriminations or extortion cannot be tolerated in their management. If they refuse like facilities to their shippers, or discriminate in rates or otherwise, courts may compel them to be just. . . . There is no such ground for jurisdiction in the case under consideration. There is no necessity, public or other, for the people to visit Lookout Point. That is a mere matter of taste, pleasure, curiosity. Commerce, the public weal, social order, the public health or comfort, have nothing to do with it. Already the courts have gone 'to the verge of law' in the direction asked for here, and it is apprehended that no authoritative case can be found which will carry us as far as we are now asked to go."

§ 86. **When Dedication to or Condemnation for Public Use necessary.** — Assuming, then, as is but reasonable and just,

that the business, however much it may conduce to pleasure, must appertain to the supplying necessities rather than mere esthetical or sensual gratification, it follows that the public, as an organized community, have no claim to enter upon private premises, however attractive and inviting, and that the owner of such premises may enter into whatever contracts, giving an exclusive right so to enter to a few or to many, as he sees fit or finds profitable, in the absence of a dedication to or condemnation for public use and enjoyment. On this point also the language of Judge Key, in the case noticed in the last preceding section, is instructive: "Now, take the case in hand. Miss Whiteside, as the owner of the Point and park, or her privies in estate, at one time might have excluded all persons from entering upon either. It, to say the least, has been private property. No legislative Act has declared a public use in it. If such use had been impressed upon it, it has been done by her. Holding the absolute title, she could control it as she liked, so long as she did not use it to the injury of others. She could have donated it to public use generally and absolutely, or to such limited use as she might prescribe, or she could have preserved its private character. As her private property, she had the right to enclose it; after its enclosure she had the right to admit as many or as few within the enclosure as she pleased. Because she saw fit to admit some persons upon payment of a given fee, gave to others no right to be admitted on the tender of a like fee. They were in no worse or different position than before any admissions were made. No loss had been sustained by them; no consideration had passed from them. Nothing can be found on which to predicate an equity in their favor. The fact that people may have been admitted to such an extent as to make the business of carrying passengers to the Point profitable to complainant raises no equity in its favor. It was brought about by no use of his property, or expenditure of his money. Respondent has as much right to require him to contribute such portion of profits as might be deemed equitable, which she has enabled him to make by the allowance of great numbers to go to the Point, as he has to demand of her the use of her property

that his business might prosper. Neither he nor the public has any greater right to the property than she has given them. There is no greater obligation on her part to contribute to the public use, gratification, or pleasure than rests upon others. She holds her property subject to her control just as others hold theirs, until it is applied to the public use by an act of the sovereign power through methods known by the law, or until she appropriates it by her voluntary act to the use of the public. A court cannot appropriate it to such purpose against her consent. She can determine who shall be admitted within her premises, and who shall be refused admission. Of course this remark has no reference to officers of the law armed with process.

"There is no explicit allegation that she does not allow complainant to take his conveyance over the turnpike. The contrary is to be inferred from the language used, and is established by the record. The gravamen of the averments is that she is the owner of the Point and park, as well as turnpike, and that the use she makes of the park and Point is a discrimination in favor of one concern travelling the pike against another. Her turnpike is authorized by legislative authority, and is a public road, on which discriminations could not be tolerated. But because the owner of the pike may have other property, under a totally distinct title from that of the pike, and of different character, and applied to and appropriated for a different use, there is nothing in law or equity which compels the owner to subordinate the uses of the one to the purposes of the other. They are held as independently as though the title of each were in different persons. The law, the courts, cannot control the operations of private business. In a free government the people must be left to the control of their own business. Competition must be allowed, union and co-operation of interests must be permitted, so long as the law is not violated, or private injuries done.

"Complainant has engaged in a business in which he serves the public. He charges, as we will suppose, one customer three dollars for the use of a carriage and team, and another five dollars, and another still nothing for precisely

the same service. Is there any law that will authorize the courts to control his action in thus discriminating? The pleadings show that another turnpike, St. Elmo, runs up Lookout Mountain (which may be travelled as well as respondent's in reaching the Point), and then complainant tells us in his bill that he is willing to carry all vehicles and horses over respondent's pike if she will admit his passengers to the Point. Now, what rule of law or equity would allow complainant to discriminate against St. Elmo pike, and in favor of respondent's, when it becomes his interest to do so, and yet not allow respondent to discriminate against complainant and in favor of Owen & Co. in the way of admission to the park and Point, when she may think it to her interest to do so." [1]

§ 87. **The mere Magnitude or Extent of the Business no Criterion.** — A business does not necessarily become *publici juris*, subject to State surveillance, and hence to a rigid application of the rule that all restrictive contracts by its owner pertaining to it with others engaged in like business are *prima facie* void, by reason of the fact that it is prosecuted on an extensive scale. This was well explained in Ladd *v.* Southern Cotton Press Co.,[2] the court saying: "If the magnitude of a particular business is such, and the persons affected by it so numerous, that the interest of society demands that the rules and principles applicable to public employments should be applied to it, this would have to be done by the Legislature (if not restrained from doing so by the Constitution) before a demand for such a use could be enforced by the courts.

"If the right to regulate property and the character of its employment is, by reason of its extent and number of persons interested in or affected by the manner or circumstances of its use, as counsel for appellant forcibly declares, 'of the very essence of government,' the exercise of this right or power pertains to the legislative, and not the judicial department.

"Evidently appellant does not intend to assert the appellee, by combination with others engaged in like business, acquired a monopoly or 'virtual monopoly' of the character declared

[1] 19 Fed. Rep. 156.

[2] 53 Tex. 172.

by the constitution of the State to be 'contrary to the genius of a free government,' and never to be allowed (Art. 1, § 26). But the import of his proposition, as we understand it, is that appellee and others engaged in the same business, though this business was a legitimate and lawful one, had, without any exclusive right to conduct it, by combination virtually acquired the exclusive control of the business in the city and port of Galveston, which enabled them 'to exact fictitious charges and charges without consideration,' and thereby to collect 'toll on nearly all the chief commodity of the State,' and that by reason of this fact the property and service employed in such business became affected with a public interest. But, conceding the premises, the conclusion sought to be deduced seem to us to be a *non sequitur*.

"It will readily be admitted that in many instances combinations may be made by parties engaged in a particular trade, or by those who, at the time, have the control of the market for some article of prime necessity, to make most unconceivable exactions for their services, or demand a most extortionate price for their commodities. But certainly this does not change the nature of the employment in which they are engaged, or authorize the court to say, when the business of the parties is strictly private, that it has become public."

§ 88. **The Question of what a Public and what a Private Use further considered. — Statutory Provisions.** — Only two propositions, and these of very general scope, can be deduced from the authorities on the pertinent questions of what is a public and what a private use of property, and what are public privileges rather than private rights. First, certain privileges in the nature of franchises, and certain employments, are considered public, and call for a strict application of the rule of public policy in the absence of a statutory declaration on the subject; second, since the decision in Munn *v.* Illinois,[1] the courts have refused to recognize any limitation upon the power of legislatures to attach to a business a public interest, and regulate its prosecution by laws enacted with a view to the public welfare. The present state of the law on the subject,

[1] 94 U. S. 112.

and the effect of statutory enactments, were ably expounded by the Supreme Court of Texas, in Ladd *v.* Southern Cotton Press Co.[1] The court, after stating the facts and defining the issues, proceeded: "Did appellee, by becoming incorporated by the Legislature for the purpose of carrying on a warehouse and compress business, submit its property and services to the public use? We are cited to no authority tending to support this proposition, and we are unable to perceive any principle or reason upon which it can be maintained. The position shows that appellee is a mere private corporation, with no privilege or franchise beyond that of carrying on in a corporate capacity the business in which it is engaged. It is by reason of the nature and character of the business, and not from the fact that it is carried on by an individual or corporation, that the law holds that the property or services of the owner have been submitted to public use.

"The business of warehousing and compressing cotton is free to every one who wishes to engage in it. No grant or franchise need be obtained from the State to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public.[2] Nor is it claimed to have been made so by statute, and we know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici*, merely by reason of its extent. . . . If the combination is illegal, the parties to it will subject themselves to such penalties as the law imposes; and if the injury to society to be apprehended from such combinations is of a character demanding it, the Legislature may, by adequate provision, regulate, or prohibit persons from engaging in them. Nor do we say that there may not be instances where, by combination, or even without it, some particular business, by reason of

[1] 53 Tex. 172. The doctrine of this case was indorsed in Seeligson *v.* Taylor Compress Co., 56 Tex. 219, where it was held that where a company which carries on the business of warehouseman as an adjunct to its main business of compressing cotton, charges an increased rate for cotton which is removed uncompressed, such a charge is not in restraint of trade.

[2] Citing Coggs *v.* Barnard, 2 Ld. Ray. 75; 2 Pars. on Contr. 139; Story on Bailm. sec. 442.

its extent and magnitude and the great number of persons affected by it, though strictly *privati juris* under the common law and previous statutes, may be declared *publici juris* by the Legislature. This seems in effect what was held by the Supreme Court of the United States to have been done by the Legislature of Illinois. But as this is not the character of this case, we are not called upon to express an authoritative opinion on the point. It is sufficient for us to say that in the absence of legislation to that effect, a party who had not subjected his property and services to public use by the character of the business in which he is engaged, does not do so by reason of combination with others in like business, though he is enabled thereby to exact from those who may employ him unreasonable and extortionate charges for the services rendered. Whether payments made under such circumstances may not be held to have been paid under duress, is another question to be considered hereafter. Nor can it justly be held that the mere extent and magnitude of the business changes a private charge for services into a toll to be regulated by law. Nor if so, that the court may, in the absence of legislation upon the subject, substitute its judgment as to the proper amount of such toll for the contract of the parties.

"But although none of the grounds urged by the appellant in support of his proposition, 'that appellees had submitted its property and services to the public use,' taken severally and of themselves, warrant his conclusion, a fair consideration of the argument of his counsel requires us to consider the effect, not only of each of the positions, standing alone, upon the business of the appellee, but also their effect in the aggregate, in connection with all the facts and circumstances connected with or relating to the business in which appellee was engaged, and the manner in which it was conducted and carried on.

"In doing this it must be conceded, as alleged in appellant's petition, that appellee and those engaged in the same business at the port of Galveston, with the exception of one small establishment capable of doing but a limited amount of business, had combined and fixed the charges complained of; that the business in which appellee and his confederates were engaged was necessary to the public, in reference to the transit

of cotton from the producer to the manufacturer and consumer; that the charges complained of were a common charge against all comers and upon every bail of cotton, and was also a charge demanded and enforced without consideration, a compliance with which was, under the circumstances, essential to the business life of, and the only escape from business ruin by, all who follow the business of brokerage in cotton in the city of Galveston.

"Now, giving the fullest scope and import to these and other allegations made in the petition, how is it shown that the appellee's business is of a character with which the courts of the country have the right to interfere; or from what source, we ask, do they derive their authority to regulate the conditions and terms upon which it shall be conducted? It is not contended by appellant that, as ordinarily conducted, the business of receiving, storing, compressing, and delivering cotton is not *privati juris*, or that those engaged in it have the right to fix the rates and conditions upon which it shall be conducted. But the argument seems to be, that, in view of the necessities of the trade, its magnitude and effect upon the interests of the people throughout the State, as well as those engaged in the business of appellant, it has become of like public interest as other occupations and trades which the law pronounces and holds to be *juris publici*. The conclusion sought to be maintained rests upon the hypothesis that whenever it is made to appear that any particular business is of so general public interest as that which the law holds to be *juris publici*, the courts have the power to so declare and hold it. The case of Munn *v.* Illinois[1] seems to be the authority mainly relied upon to support this position. We cannot regard this case as authority for such a doctrine. It was brought to enforce the statute law of the State. The conclusion to be drawn from it is, as we think, that the Legislature may declare a particular business *publici juris*, if the facts and circumstances under which it is conducted justifies and the good of society requires it, but not that the court may so treat it in advance of legislative recognition or declaration."

[1] 94 U. S. 113.

§ 89. **Constitutional Provisions.** — The prevention of extortion through combinations to suppress competition has been in several States attempted by means of constitutional prohibitions directed principally against discriminations in fares and freights, and in a few States against consolidation of parallel and competing lines of railway.[1] Such constitutional

[1] No provision is to be found in any of the constitutions of the several States, having special reference to the government of railroad corporations, before that of Illinois, which was ratified by a vote of the people on the 2d of July, 1870. Sec. 12 of art. 11 of that constitution is as follows: —

"Railways heretofore constructed or that may hereafter be constructed in this State are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the General Assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads of this State."

During the same year an amendment to the constitution of Michigan was adopted, in these words: —

"Sec. 1. The Legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this State; and shall prohibit running contracts between such railroad companies, whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad."

The constitution of West Virginia, adopted in 1872, contained (sec. 9, art. 11) an exact copy of sec. 12, art. 11, of the constitution of Illinois, with an addition of these words: —

"And providing for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passenger tariffs, and for the protection of the just rights of the public, and shall enforce such laws by the adequate penalties."

In 1873 a new constitution was adopted in the State of Pennsylvania. Secs. 1 and 3 of art. 17 are as follows: —

"Sec. 1. All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers. Any association or corporation organized for the purpose shall have the right to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States. Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and shall receive and transport each the other's passengers, tonnage, and cars, loaded and empty, without delay or discrimination.

"Sec. 3. All individuals, associations, and corporations shall have

provisions are usually construed as mere declarations of common law principles, and few of them go beyond what the courts both of England and the United States have declared to be the law in their absence. A leading case, giving construction to such provisions, is that of Atchison, Topeka, & Santa Fé Railroad Co. *v.* Denver & New Orleans R. Co.[1] The case was presented by counsel in two aspects: (1) In view of the requirements of the constitution of Colorado alone; and (2) in view of the constitutional and common law obligations of railroad companies in Colorado as common carriers. Chief Justice Waite, after stating facts, in the course of a lengthy opinion said: "We will first consider the requirements of the constitution; and here it may be premised that § 6 of art. 15 imposes no greater obligations upon the company than the common law would have imposed without it. Every com-

equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the State, or coming from or going to any other State. Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges of transportation of persons and property of the same class in the same direction to any more distant station; but excursion tickets may be issued at special rates."

Since that time new constitutions have been adopted in Alabama, Arkansas, California, Colorado, Georgia, Louisiana, Missouri, Nebraska, and Texas. In Georgia, sec. 2, art. 4, authority was given the Legislature to regulate fares and freights and to prevent unjust discriminations; and in Nebraska, sec. 4, art. 11, the provision in the constitution of Illinois was substantially followed; but in Alabama, sec. 21, art. 13, Arkansas, sec. 1, art. 17, California, sec. 17, art. 12, and Texas, sec. 1, art. 10, the whole of sec. 1, art. 12 of that of Pennsylvania is included, without any material change of phraseology. In Colorado, however, while all the rest of that section is adopted, these words are omitted: "and shall receive and transport each other's passengers, tonnage, and cars, loaded and empty, without delay or discrimination." And so, while the first sentence of sec. 3, art. 12, is included, in language almost identical, the last sentence, which provides that passengers and property shall be delivered at all stations at charges not exceeding the charges to a more distant station, is left out, and the following inserted in its place: "and no railroad company, nor any lessee, manager, or employee thereof shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

[1] 110 U. S. 667; reversing 15 Fed. Rep. 650.

mon carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. The constitution has taken from the Legislature the power of abolishing this rule as applied to railroad companies." A provision declaring the right of all railroad companies to cross, intersect, and connect with their tracks those of every other railroad company refers to a mechanical union, and does not permit of, much less does it compel, a combination of business which, when made for the purpose of increasing or maintaining rates, is usually held to be contrary to public policy even at common law.[1] Legislation regarding the duties of connected roads because of their connection is to be found in many of the States, and it began in a very early day in the history of railroad construction. As long ago as 1842, a general statute upon the subject was passed in Maine,[2] a tribunal was established for determining upon the "terms of the connection" and "the rates at which passengers and merchandise coming from one shall be transported over the other," in case the companies themselves failed to agree. Other States have made different provisions, and as railroads have increased in number, and their connections have become more and more complicated, statutory regulations have been more frequently adopted, and abound with greater particularity in matters of detail. Much litigation has grown out of controversies between connected roads as to their respective rights, but no case can be found in which, without legislative regulation, a simple connection of tracks has been held to establish any contract or business relation between the companies. This question received thorough consideration, and was decided in accordance with the proposition just stated in Denver & New Orleans R. R. Co. *v.* Atchison, Topeka, &c. R. R. Co.,[3] where a provision of the Colorado constitution that "every railroad company shall have the right, with its road, to intersect, connect with, or

[1] The subject of traffic arrangements in connection with the doctrine of *ultra vires* as applied to railroads and other common carriers fully considered *infra*, Chap. X.

[2] Stats. Maine, 1842, c. 9; and in 1854, c. 93.

[3] 110 U. S. 667; reversing 15 Fed. Rep. 650.

cross other railroads" was construed. In delivering the opinion of the Supreme Court, Chief Justice Waite said: "Railroad companies are created to serve the public as carriers for hire, and their obligations to the public are such as the law attaches to that service. The only exclusively constitutional question in the case is, therefore, whether the right of one railroad company to connect its road with that of another company, which has been made part of the fundamental law of the State, implies more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. The claim on the part of the Denver & New Orleans Co. is that the right to connect the roads includes the right of business intercourse between the two companies, such as is customary on roads forming a continuous line, and that if the companies fail or refuse to agree upon the terms of their intercourse, a court of equity may, in the absence of statutory regulations, determine what the terms shall be. Such appears to have been the opinion of the Circuit Court, and accordingly, in its decree, a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves. There is here no question as to how or where the physical connection of the roads shall be made, for that has already been done at the place, and in the way decided upon by the Denver & New Orleans Co. for itself, and the Atchison, Topeka, & Santa Fé Co. does not ask to have it changed. The point in dispute upon this branch of the case, therefore, is whether, under the constitution of Colorado, the Denver & New Orleans Co. has a constitutional right, which a court of chancery can enforce by a decree for specific performance, to form the same business connection, and the same traffic arrangement, with the Atchison, Topeka, & Santa Fé Co. as that company grants to or makes with any competing company operating a connected road. . . . A railroad company is prohibited, both by the common law and by the

constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but as a general rule, remedies for injustice of that kind can be obtained from the Legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

§ 90. **Contracts not to adopt and use Modern Improvements.** — Agreements between common carriers, whether by land or water, whereby a company covenants not to use such inventions and appliances as are discovered and invented from time to time, and are adapted to cheapening, hastening, and rendering safer the transportation of freight and passengers, are against the most obvious public policy; but when entered into with the object of giving one of the parties possessing such conveniences and inventions a monopoly or advantage in volume of business, or when it enables such other party to demand and receive an enhanced price for transportation, it is void, upon the additional ground that it is restrictive of trade in matters of public interest.[1]

§ 91. **Grants of Exclusive Privilege to Owners of Public Business.** — The question whether the exception to the general

[1] Wiggins Ferry Co. *v.* Chicago & Alton Railroad Co., 5 Mo. App. 347. See also Peoria etc. R. R. Co. *v.* Coal etc. Co., 68 Ill. 489; Hartford

rule allowed in the case of a sale of property or transfer of an easement between individuals for the purpose of establishing or conducting a business in which the public have not a peculiar interest, holds good by analogy when the contracting parties are conducting a public business, is one upon which there is some conflict of authority. The earlier cases were those in which exclusive rights of way had been granted by railroads to telegraph companies. In two cases[1] such agreements were held not against the rule of public policy, and therefore valid. The reasoning in support of this view was ably presented in Western Union Tel. Co. *v.* Alantic, &c. Tel. Co.,[2] where Judge Drummond said: "In the argument on the part of the defendants, various objections have been taken to the continuance of the injunction, and to the enforcement of the rights of the plaintiff under the contract made with the Ohio & Mississippi Railroad Co. It is said that such a restriction as was contained in the contract for the construction of the telegraph line of the plaintiff, to prevent other lines from being established on the roadway, was in violation of public policy, and therefore inoperative. If the effect of this clause in the contract was to prevent to any considerable extent the construction of competing lines of telegraph between important points, and thus prevent that kind of communication, there might be something in the objection; but it is to be recollected that there are numerous lines of railway between Cincinnati and St. Louis, which are the two important points of communication, and between which the Ohio & Mississippi Railway offers a very direct line of road.

"And then, while it is true that it is more convenient to

etc. R. R. Co. *v.* Railroad Co., 3 Robt. 411; Shrewsbury etc. Ry. Co. *v.* Railway Co., 21 Eng. L. & Eq., 319-329.

[1] Western Union Telegraph Co. *v.* Chicago etc. R. R. Co., 86 Ill. 246; Western Union Telegraph Co. *v.* Atlantic etc. Telegraph Co., 7 Biss. 367. A like conclusion was reached in Canadian Pac. Ry. Co. *v.* Western Union Telegraph Co., 17 Can. S. C. R. 151, where a contract by which a railroad company leases for ninety-nine years to a telegraph company the exclusive right to construct and operate a telegraph line along its road was held not in restraint of trade, nor against public policy.

[2] 7 Biss. 367.

construct telegraph lines on railways than on the common highways of the country, or through fields or woodland, still it is quite possible to construct them otherwise than upon a line of railroad. A telegraph line, for instance, could be constructed immediately adjoining the roadway of the Ohio & Mississippi Co., but outside its boundaries.

"And besides, if it were indispensable that another telegraph line should be constructed upon the Ohio & Mississippi Railway, the right of property which the railway company or the Western Union Telegraph Co. might have, and with which the other telegraph company would interfere in the construction of its line, might be acquired as stated hereafter by proceedings from condemnation under the laws of the State.

"For these reasons, therefore, this restriction in the contract cannot be said to be so contrary to public policy as to render that part of the contract between the Western Union Telegraph Co. and the Ohio & Mississippi Railroad Co. inoperative."

But the great preponderance of authority is to the effect that the rule extends to all such contracts; and they have so direct a tendency to create monopoly that they are to be condemned, and enforcement refused. The reasoning against the validity of such agreements between railroad and telegraph companies was ably advanced in Western Union Telegraph Co. *v.* American Telegraph Co.[1] by Justice Crawford: "It is well known," said he, "that rapid intercommunication between different points by wire and rail has created a wonderful revolution in commercial operations. Producers, consumers, manufacturers, merchants, buyers, sellers, all are brought in close proximity, and daily intelligence is given of the world's transactions. Trade is encouraged, industrial enterprise stimulated, and business in all its various branches builds itself upon knowledge. In war the value of rapid communication

[1] 65 Ga. 160; 38 Am. Rep. 781. See also Western Union Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 23 Fed. Rep. 12; Baltimore & Ohio Telegraph Co. *v.* Western Union Telegraph Co., 24 Rep. 319; Western Union Telegraph Co. *v.* Burlington & Southwestern Ry. Co., 3 McCrary, C. Ct. 130; Western Union Telegraph Co. *v.* Atlantic & Pac. Tel. Co., 5 Nev. 103.

of intelligence is almost incalculable; in peace, it is scarcely less so. Shall the means, then, by which it is transmitted, be monopolized by a contract between two artificial beings, invisible, intangible, and existing only in contemplation of law? When such exclusive rights exist, or such monopolies are established, the same should be done by a 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 that they thereby enable the plaintiff in error 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.

"What we have said on the second ground is sufficient to show that our opinion upon the third is that such contracts are *ultra vires*. The fourth ground is, that if the right to exercise such power is admitted to be in the railroad companies, and can be by contract transferred to this company, then the State's right of eminent domain is gone. This appears to us to be so clear a statement of the inevitable consequences of such a construction that it is unanswerable. The exercise of the power of eminent domain, granted to railroad companies for certain specified uses, for the benefit of the general public, was never for a moment considered to imply the right on their part by contract to convey this property, thus condemned to the public use, to another company for its exclusive interests, and in antagonism of the public interest. Their right to make a contract with the Western Union Telegraph Co. to establish its line of wire upon their right of way is undoubted; but when they go beyond that, and undertake to prohibit and exclude all other lines therefrom, then they seek to add an unlimited franchise to one which is itself limited; and this they are powerless to do."

But the Supreme Court of the United States appears to have adopted the view of the Illinois court in the first case, the only difference being that a sleeping-car company, instead of a telegraph company, was the grantee of the exclusive right; and in Chicago, St. Louis, & New Orleans Railroad Co. *v.* Pull-

man Southern Car Co.,[1] held that a stipulation in a contract that a sleeping-car company shall have the exclusive right, for fifteen years, to furnish drawing-room and sleeping-cars for a railroad company's use, did not render the contract void as being in restraint of trade or against public policy. The reasoning in support of this conclusion was to the effect that such stipulation did not disable the sleeping-car company from furnishing cars to a rival railroad, and that the law will imply, from the terms of the contract, that it must furnish the railroad company in question, not only adequate and safe cars, but sufficient in number for the use of the public travelling on the latter's road.

§ 92. **Rule applied to Grant of Exclusive Right to Pipe-Line Co.** — In West Virginia Transportation Co. *v.* Ohio River Pipe-Line Co.,[2] an oil transportation company had entered into an agreement with the landowner, whereby the landowner, for the valuable consideration granted to the company 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 through and under a tract of land containing two thousand acres, which agreement was signed, sealed, and delivered by the landowner.

It was held, (1) That, by the construction of this instrument, it operated first as a grant of right of way for such tubing for the transportation of oil through said tracts of land; and (2) it was intended to operate as a covenant, whereby the landowner agreed that he would not himself transport oil from or through this tract of land, nor grant rights of way to any other person or company to lay tubes for the transportation of oil through said tract of land, whether the oil was produced on said tract of land or not.

Such agreement was held valid and binding on the landowner and his assigns to the extent that it operated as a grant of right of way for such tubing through said tract of land, but not so far as it was intended to operate as a covenant that the landowner would not himself transport oil from or through said tract of land, nor grant rights of way to any other person

[1] 139 U. S. 79.

[2] 22 W. Va. 600.

or company to lay tubes for the transportation of oil through said tract of land whether the oil was produced upon it or not. This agreement was held inoperative, null, and void, as contrary to public policy, being an attempt to impose an unreasonable restraint upon trade. The reasoning advanced in support of the decision was in substance that while as a general rule any trade or business may legally have imposed on it by contract a partial restraint as to the extent of territory over which it is permitted to extend, yet in other sorts of business the restraint would not be valid if it were attempted by the contract to extend it beyond the bounds of a single town; and there are some sorts of business which the law will not allow to be restricted at all by contract.

It was further insisted that whenever the Legislature by statute law has authorized any person or corporation to condemn the lands of others in order to carry on its business, the courts will regard this as a legislative declaration that this character of business is such that the public has so great and direct an interest in it that the courts must hold it as contrary to public policy to permit any restriction of it by private contract.

Green, J., in the course of an elaborate opinion, citing authorities, said: "It is an attempt to restrain trade of a particular form, which from its character is recognized by statute as such a business as cannot 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."

The sacredness of this right of eminent domain had an important bearing in all the cases involving grants to telegraph companies by railroad companies of exclusive rights; and it was dwelt upon in the Georgia case previously noticed, the court saying: "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 such compensation. It is to be remembered that this controversy does not arise upon any effort to displace the lines of wire established by the Western Union Telegraph Co., nor in any way to interfere with the free use and enjoyment thereof, but arises upon an interference, as is claimed, with its exclusive right to occupy the entire right of way of each of these companies. So that the question of compensation cannot arise, unless, indeed, it is to be given for a right supposed to exist under an illegal contract; that is, that no other telegraph company, except by its consent, shall ever use or occupy any part of the right of way of these several railroad companies. This being so, the Act of 1873 does not impair the obligation of any contract made by the plaintiff in error with these companies, although it so provides the mode by which an unused and unoccupied portion of their roadways may be condemned."[1]

§ 93. **Illustrations of the Principle.** — It is not proposed to enter into a disquisition upon the general duties of public servants, or even to discuss *in extenso* their powers and duties pertaining to exacting and earning compensation, and the State's power to regulate and compel uniformity of rates. But since particular agreements, when entered into either between two or more carriers, or between carriers and individuals dependent upon them for service, whereby a discriminating rate for transportation is stipulated, would, if given

[1] Western Union Telegraph Co. *v.* American Telegraph Co., 65 Ga. 160.

effect and enforcement, tend directly to the destruction of commercial freedom, and the equality which it is the policy of the law to secure to every member of the community in the matter of transportation, such contracts may very appropriately be given consideration in this connection. Statutory provisions are found in perhaps a majority of the States on the subject; but even at common law a contract by one engaged in a business impressed with a public character, by which under-discrimination is made in favor of the covenantee is void.[1]

Many judicial applications of this rule are to be found. Agreements by railroad companies to give the exclusive use of their lines or cars to certain express companies, to the exclusion of other express companies, are void.[2]

So is a contract between two railroad companies, by the terms of which one is to charge one rate for freight or passengers going over its line to a point beyond it, if by the other line of the other party, but more if, by other lines, the object being to secure the entire business to the covenantee company.[3]

The same rule applies to all agreements by which particular shippers are given exclusive rights, or are served on more favorable terms, than others. They are void; as when a railroad company agrees to give such rates to certain parties for the transportation of logs as will reduce the cost of shipment to ten per cent per hundred pounds less than to any other person or persons.[4] So is an agreement by a railroad com-

[1] See Greenhood on Public Policy, p. 629, where the various classes of common carriers are catalogued, and numerous authorities cited.

[2] Sanford *v.* Railroad Co., 24 Pa. St. 378; New England Express Co. *v.* Maine Central R. Co., 57 Me. 188.

[3] Denver & N. O. R. R. Co. *v.* Atchison, Topeka & S. F. R. R. Co., 15 Fed. Rep. 650; s. c. 4 McCrary, 325. This case was reversed in 110 U. S. 667, but not on this point. See also Twells *v.* R. R. Co., 3 Am. Law Reg. N. S. 728; s. c. 21 Leg. Int. 180; Sharp *v.* Whiteside, 19 Fed. Rep. 156, 162. Compare Bennett *v.* Dutton, 10 N. H. 481; Jencks *v.* Coleman, 2 Summ. 221; The Eclipse Tow-boat Co. *v.* R. R. Co., 24 La. Ann. 1, and South Sea etc. Co. *v.* L. & S. W. etc. R. R. Co., 2 Nev. & McN. R. & C. Cas. 341.

[4] Messenger *v.* The Pennsylvania R. R. Co., 37 N. J. L. (8 Vr.) 531;

pany to deliver all grain shipped over its line to a particular elevator, there being others along its line.[1] And an agreement that the railroad company should send no stock or receive any stock from any other stock-yard which the latter might have for shipment at a specified city, was held void.[2] Where the agreement was that a particular omnibus owner should have the exclusive privilege of driving its vehicles into the company's station-yards, for the purpose of taking up and leaving passengers, enforcement of the agreement was refused.[3] The same conclusion was reached where the agreement was on the part of a canal company that it should allow an individual shipper a drawback, but not allow it to any one else competing with him in the business.[4]

In Scott *v.* Smith,[5] a combination among the posting masters to raise the rates of posting was held to be illegal. Where several common carriers formed an association, the object of which was to get rid of competition among themselves, and fixed upon a uniform charge for carriage, and provided in the agreement that each member should pay a fine for carrying at a less rate, it was held that the agreement was void, and that the fine could not be recovered.[6]

§ 94. **Application of the Rule to Contracts pertaining to Transportation by Water.** — The transportation of persons and property, whether on the high seas or upon inland waters, is a matter peculiarly affecting public interests, and may well be considered an essential adjunct of civilization; and contracts between persons and companies engaged in that busi-

Garton *v.* B. & E. R. Co., 6 C. B. N. S. 638. Compare Toledo, W. & W. R. Co. *v.* Elliott, 76 Ill. 67.

[1] Chicago & N. W. R. R. Co. *v.* People, 56 Ill. 365.

[2] McCoy *v.* C. J. & St. L. & C. R. Co., 13 Fed. Rep. 3; McCoy *v.* Marietta & Cincinnati R. R. Co., 7 W. L. Bull. (Ohio), 295; Vincent *v.* C. & A. R. R. Co., 49 Ill. 33, 44.

[3] Marriot *v.* L. & S. W. R. R. Co., 1 C. B. N. S. 499, 3 Jur. 493.

[4] Stewart *v.* Lehigh Valley R. R. Co., 38 N. J. L. 505, 520.

[5] 4 Pat. App. (Scotch) 17.

[6] Sayre *v.* Louisville Benev. Ass'n, 7 Duv. (Ky.) 143. In this case stress was laid upon the fact that the rate was fixed without reference to the question whether it was reasonable or not.

ness, the direct effect or tendency of which is to suppress or restrict competition therein, are looked upon with disfavor, and unless clearly shown to be beneficial to the parties, and at the same time without detriment to the public will be condemned by the courts.

Pools between carriers by water are as objectionable as those formed between railroad companies; and when it is apparent from its terms or the annexed incidents that the object is to raise rates or maintain them above those which but for the agreement would prevail, it will be condemned as monopolistic, whatever its form and ostensible object. Accordingly, where the proprietors of five lines of boats engaged in the transportation of persons and freight combined, and stipulated that they should all charge certain prices, the net earnings of all to be divided according to certain fixed proportions, the agreement was held void.[1]

The public considerations which control in this class of cases were well explained in the case of Anderson *v.* Jett,[2] where it was held that an agreement between owners of two rival steamboats on the Kentucky River that, in order to prevent rivalry, and consequent reduction of charges, the net profits of each should be shared in a certain proportion, each bearing its own expenses, and that if the owners of either boat should sell with a view of going out of the trade, notice should be given to the owners of the other boat, and the owners so selling should not enter the trade again within one year, was void, as against public policy, and the owners so selling might start a new boat within the year.

Bennett, J., in delivering the opinion, said: "It is to be observed that the respective owners of these boats entered into no partnership in business. The property rights and responsibilities of the owner or owners of each boat remained as before the arrangement was entered into. Neither assumed any duty or obligation in reference to the other that he was not under before the agreement was entered into, except that of pooling the net profits earned by each, and dividing them

[1] Hooker *v.* Vandewater, 4 Denio (N. Y.) 349; Stanton *v.* Allen, 5 Denio (N. Y.) 434.

[2] Ky. 12 S. W. 670.

in certain proportions; but neither party was under any obligation to the other party to run his boat for as much as a single day. Neither party was under any obligation to the other to keep his boat well manned, or in good and clean condition. The only tie common to both was that of dividing the net profits of each boat. There was a strong stimulation to increase the net profits by means other than that of popular favor springing out of efficient steamboat facilities and close attention to the business of shipping for reasonable charges and courteous attention to passengers at reasonable fares. Also, under this agreement there was no incentive for each boat to run the trade, if one boat could, perchance, do all the business, though only 'after a sort.' It was to the interest of each for the other to lie up, thereby saving expenses and increasing the net profits; and another feature detrimental to the public interest consists in the fact that they were not only deprived of frequent means of shipment and passenger travel, but subjected to extortionate charges. Why so? Because there is no competition in the trade, nor likely to be any; for by this combination there lies another boat at the wharf, ready, according to the written obligation, to appear in the trade, and cut the prices of freights and passage below living prices, as long as such competition could hold out. It is the competition, or fear of competition, that makes these carriers efficient, attentive, polite, and reasonable in charges. Remove competition, or the fear of it, and they become extortionate, inattentive, impolite, and negligent. The writing sued on by appellant tends to inspire just such state of case. It is said that neither was bound to charge the same as the other. That is true; but either could extort with impunity, and the other would be an equal recipient of the fruits of the extortion. There would be no motive power — rivalry in trade — to circumvent the extortion. On the contrary, self-interest would prompt, not only the encouragement of the extortion, but an imitation of the nefarious example. It is true that their contract did not, in so many words, bind them to any given charges; but it made it to the interest of each, not only to charge, but to encourage and sustain the other in charges that would amount to confiscation. Why?

The facts alleged in the petition, doubtless stated as modestly as the draughtsman could, show that the combination was exceedingly profitable, and entirely unfriendly to free and untrammelled competition. The combination was more than that of a combination not to take freight or passengers at less than certain prices. In such case, the combiners have to furnish adequate means of transportation, and efficient and polite officers, and confine themselves as nearly as possible to the sum agreed upon, in order to secure the trade or a reasonable portion of it; but here, by reason of the agreement, there is no incentive to competition. Inefficient means of transportation, unskilled or inattentive officials, are no drawback to either boat. Its share of the profits come, notwithstanding. The coal merchant whose only means of transportation is by the Kentucky River may not be able to compete with his rivals in the business, if compelled to pay exorbitant freight charges; or, if such competition should not exist, the consumer of his coal would be taxed these charges. So with the merchants; and more pitiable than all the rest would be the condition of the agriculturist, whose only means of transportation would be by said river. 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 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 unfriendly to such thrift and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged, 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. For the foregoing reasons the agreement is against public policy, and is therefore void."

§ 95. **Application of Principle to Carrier by Sea.** — The rule under consideration has been applied to agreements between carriers upon the high seas. In a very broad sense, the success of commerce is promoted by the existence of competition in oceanic transportation, to the end that rates shall be as cheap as possible; and contracts between steamship owners or companies having the effect of giving control of it to one to the exclusion of others are clearly against public policy, and should be condemned by the courts. Accordingly, when an ocean steamship company agreed with another not to run between the continents of North and South America, the covenant was held void.[1]

§ 96. **Rule not affected by Character of Instrumentalities employed.** — The applicability of the rule is not affected by the fact that in the performance of the public duties inventions patented under Federal laws securing a monopoly therein to the owners are employed in whole or in part. Accordingly, where a telephone company, in order to secure the right to use the patent in a certain city, agreed with another telephone company owning the patent not to permit any telegraph company to use its instruments for collecting or distributing messages, the arrangement was held void.[2]

The court reasoned that the object of securing a patent was only to secure the patentee against piracy; and when the custom of the public is sought, and the right of eminent domain enjoyed, the duty to the public to deal equally with all, discriminating against none, results; and that since the contract before it sought to bar so efficient an adjunct to commerce as the telegraph from the enjoyment of the benefits of the invention, after the duty to deal with impartiality had been assumed under State laws, it was in conflict with the public interest, amounted to an express renunciation of its public duty, and was therefore void. In another case,

[1] Murray *v.* Vanderbilt, 39 Barb. 140.

[2] State *ex rel.* American Union Tel. Co. *v.* Bell Telephone Co., 36 Ohio St. 296. But see American Rapid Telegraph Co. *v.* Connecticut Telephone Co., 49 Conn. 352.

between the same parties,[1] the principles governing railroad companies and other common carriers were held to apply without doubt to telegraph and telephone companies; and where they have established their lines and adopted a uniform mode of serving the public, consistent with their chartered powers, they must deal alike with all persons similarly situated. The court remarked that if the defendant company had contented itself with erecting its lines and establishing its affairs at certain designated points, and had stationed its own agents at such points to receive and transmit messages, as is usual with telegraph companies, it could not have been compelled, at the request of any private person or corporation, to place instruments in private offices or residences, and establish private stations for the use of particular individuals or corporations. "But," said the court, "if it erects its main line along a certain street or streets under a power granted in its charter to use public highways for that purpose, and under a charter granting it the power to condemn land for the construction of a telephone line, and if it elects to serve the public by furnishing instruments to residents along such line for private use, and by making connections between such instruments and its main lines; above all, if it holds itself out to the public as prepared to furnish such instruments and make such connections for all who may apply,—then I should say that its duty to the public compels it to treat all residents along such line with absolute impartiality. It cannot grant such facilities or render such service to one citizen or corporation, and refuse like privileges to his next-door neighbor. The charter of the respondent was not granted for any such purpose, nor does it confer upon the corporation any such power to discriminate among its customers. According to the averments of the petition, the respondent has adopted the mode of transacting business within the city of St. Louis last above indicated. Instead of maintaining offices in charge of

[1] 10 Cent. L. J. 438; s. c. 11 Id. 359. In Louisville Transfer Co. *v.* American Dist. Tel. Co., 1 Ky. L. J. 144; s. c. 24 Alb. L. J. 283, it was expressly held that a telephone was a public servant, and as such bound to serve the general public on reasonable terms with impartiality. See State *v.* Nebraska Tel. Co., (Neb.) 22 N. W. 237.

its own agents for the reception and transmission of messages at certain designated points, it supplies instruments to residences, offices, and hotels contiguous to its main line, and makes all proper connections with such main line at uniform rates, and holds itself out to the world as prepared to supply all persons with such facilities for communication who reside or occupy offices contiguous to its established lines. Such being the established mode of transacting business adopted by the respondent, according to the averments of the bill, it follows, from the principles above stated, that in refusing to grant to the relator such facilities as it affords to other customers, it has violated an imperative public duty imposed upon it by law."

§ 97. **Cases not falling within the Rule.** — But since the public interest is the controlling consideration in this class of cases, the rule against restrictive contracts by public servants does not extend beyond or in conflict with public welfare. Therefore a court will not declare a contract between common carriers illegal merely because it gives monopoly where it does not appear that the public is injured, or that either party to the agreement has exercised any function exclusive of public rights. On this principle an arrangement between a canal company and a coal company, whereby the former agreed to give the latter all the facilities of navigation which the former could afford, not exceeding one half its whole capacity, was held valid, and binding on the parties.[1]

So where it is apparent that the public are benefited rather than injured by the compact, as where a public servant is thereby secured, which would otherwise be lost or inure to the benefit and increase the facilities of the covenantor without detriment to the public, the covenant is valid; as when a telephone company, in order to secure the right to use the patent in Connecticut, but not obtainable on any other terms, agreed with the patentee not to permit any telegraph com-

[1] Commonwealth *v.* Delaware & Hudson Canal Co., 43 Pa. St. 295. Of course the rule does not apply to consolidations of companies employed as common carriers effected under statutory authority. Benedict *v.* Western Union Telegraph Co., 9 Abb. N. Cas. (N. Y.) 214.

pany to use the telephones for collecting or distributing messages.[1]

On the same principle, a pro-rating arrangement between a railroad and a line of steamboats, by which a much-needed loan was secured, and in which there was a stipulation that the railroad company should accept passengers from the steamboat company at a reduced rate, which it should not give to any other steamboat company, was held valid.[2]

And there is no doubt that a common carrier may enter into valid contracts, giving special rates in consideration of securing business which could not be otherwise secured by any carrier, provided the agreement be based upon a valid consideration, and provided further that the benefit of the special rate be extended to the same class and quantity of freight, by whomsoever owned, so that there shall be no discrimination between persons or corporations similarly circumstanced.[3]

And an outright combination is to be carefully distinguished from sales of property employed in water transportation, where, in connection with the sale, the vendor covenants not again to engage in that business. In the latter case the field is left open to the competition of all the world except the covenantor; while in the former the object, and frequently the effect, is to discourage or suppress *all* competition.[4] But since it is the policy of the law rather to encourage than to suppress competition, neither the threats of the favored customer to build a rival line or to divert his custom to another line will constitute a valid consideration to support a discriminating contract.[5]

[1] American etc. Telegraph Co. *v* Connecticut Telephone Co., 49 Conn. 352. Compare State *ex rel.* American Union Tel. Co. *v.* Bell Telephone Co., 36 Ohio St. 296.

[2] Eclipse Towboat Co. *v.* Pontchartrain R. R. Co., 24 La. Ann. 1. To same effect are Southsea & Isle of Wight Steam Ferry Co. *v.* L. & S. W. Ry. Co., and the L. B. & S. C. Ry. Co., 2 Nev. & McN. 341. The same ruling, based on substantially the same facts, was made in Nicholson *v.* G. W. Ry. Co., 5 C. B. N. S. 366.

[3] Nicholson *v.* G. W. Ry. Co., 5 C. B. N. S. 366.

[4] *Supra*, § 31.

[5] Harris *v.* Cockermouth etc. Ry. Co., 3 C. B. N. S. 693; Baxendale *v.* G. W. Ry. Co., 5 C. B. N. S. 336, 351.

CHAPTER IX.

APPLICATION OF RULE TO MUNICIPAL GRANTS AND CONTRACTS.

§ 98. **Two Grounds of Objection.** — The rule of public policy which forbids individuals and private corporations from entering into contracts creating monopolies and suppressing competition has been frequently applied to contracts to which municipal corporations became parties. In addition to the monopolistic features of such grants or contracts, there usually exists the additional one that an *ultra vires* attempt has been made to delegate or abdicate legislative powers.

§ 99. **Principle applied to Grant of Exclusive Market Privilege.** — One of the earliest cases, and a leading American case, declaring a municipal grant of a monopoly void, was that of Gale *v.* Kalamazoo,[1] where an incorporated town attempted to

[1] 23 Mich. 343, citing D'Arcy *v.* Alleyn, 11 Rep. 84; Broom, Const. L. 238. See also Long *v.* Duluth, (Minn.) 51 N. W. 913; Brenham *v.* Water Co., 67 Tex. 542; Altgelt *v.* San Antonio, 81 Tex. 436. Compare Mayor etc. *v.* Houston City St. Ry. Co., (Tex.) 19 S. W. 127.

"A monopoly is described by Lord Coke to be an institution or allowance by the king by his grant, commission, or otherwise, to person or persons, bodies political or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom of liberty they had before, or hindered in their lawful trade." 7 Bacon's Abridgment, 22.

"A monopoly is a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever,

authorize the building of a market house by ordinance, conferring upon an individual a monopoly of the marketing for ten years, on condition that he built a market-house. The ordinance was held invalid, although it provided that the stalls should be leased at auction to the highest bidders. The contract created by the ordinance bound the authorities not to permit any other market-house, provided the one erected by the plaintiff should prove large enough to accommodate the public, and undertook that the authorities should restrain the ordinary marketing within defined bounds. Justice Cooley, delivering the opinion, said: "In each of these particulars this contract differs widely from one which should merely put the city in possession of a market-house, to be controlled and disposed of according as subsequent circumstances should appear to render desirable. Suppose — in order to illustrate the difference — that the village, after a year's experience, should be satisfied that market limits and a market-house were not desirable; that it was better that every person be allowed to sell where he could find customers, and to buy where he could procure what he needed, and that a manager or clerk of the market was unnecessary. In the one case the village

whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before." 2 Blackstone's Com., Book 4.

"A monopoly consists in the duty which is imposed on persons generally to forbear from all such acts as would defeat or thwart its purpose." Austin's Jurisprudence, 586.

"A monopoly is an exclusive privilege granted without consideration." Argument of M. H. Carpenter in Slaughter-house Cases, 16 Wall. 36.

"A monopoly is that which has been granted without consideration, as a monopoly of trade or the manufacture of any particular article to the exclusion of all competition. It is withdrawing that which is a common right from the community, and vesting it in one or more individuals to the exclusion of all others. Such monopolies are justly odious, as they operate not only injuriously to trade, but against the general prosperity of society. But the accommodation afforded to the public by the Charles River Bridge and the annuity paid to the college, constitute a valuable consideration for the privilege granted by the charter." McLean, J., in Charles River Bridge *v.* Warren Bridge, 11 Pet. 567.

Upon the question of who may attack a grant or ordinance alleged to be invalid because attempting to create a monopoly, see Altgelt *v.* San Antonio, 81 Tex. 436; New Orleans City & L. R. Co. *v.* City of New Orleans, (La.) 11 Southern Rep. 77.

might have upon its hands a building for which it had no need; but in the other, if this contract possesses any legal validity, it would have obligated itself for a term of years to continue a system which experience had demonstrated was not for the public good. Or suppose the subsequent growth of the village should demonstrate that the location chosen for the market-house was not the proper and suitable one, though the market itself was needed: in the one case, by the proper exercise of legislative authority, a new site might be chosen; but in the other, the village would not only have bound itself to continue a useless market, but would have precluded itself from the establishment of one which would accommodate the public needs.

"If a municipal corporation can preclude itself in this manner from establishing markets wherever they may be thought desirable, or from abolishing them when found undesirable, it must have the right also to agree that it will not open streets, or grade or pave such as are opened, or introduce water for the supply of its citizens, except from some specified source, or buy fire-engines of any other than some stipulated kind, or contract for any public work except with persons named; and if it might do these things, it is easy to perceive that it might not be long before the incorporation itself, instead of being a convenience to its citizens, would have been used in various ways to compel them to submit to innumerable inconveniences, and would itself constitute a public nuisance of the most serious and troublesome description. Individual citizens, looking only to the furtherance of their private interests, might, in various directions, engage it in permanent contracts, which, while ostensibly for the public benefit, should impose obligations precluding further improvements, and depriving the town prospectively of those advantages and conveniences which the municipality was created to supply, and without which it is worthless. For if the village might bind itself to one market-house for ten years, it might do so for all time to come; and if it might agree that improvements and conveniences of one class might be confined by contract to one quarter of the town, a reckless or improvident board might agree with a greedy or unscrupulous proprietor of town lots that all

improvements of every description should be so located or made as to conduce to his benefit, irrespective of the general good.

"It will not do to say of such a contract that it must be assumed to have been reasonable in view of the actual condition and wants of the village, and of its probable growth and future needs. What would be thought proper for the village this year might be found worse than useless the next, and no official prescience could determine with absolute or even tolerable certainty what changes a few years might work. Indeed, it is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic; and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government; and it is impossible that free government, with restrictions for the protection of individual or municipal rights, could long exist without its recognition.

"But there is at least one feature of the contract which would invalidate it, even if we were to be confined to a consideration of existing facts, and were at liberty to assume that the circumstances bearing upon its reasonableness would continue unchanged for the period of ten years. Not only was the marketing to be confined to one locality, but the plaintiff was to have an unlimited right to control the occupation of the market-house, through the power given him to determine the rents to be paid by lessees. This vested in him a practical monopoly of the public market; and though it is possible that he might exercise his rights impartially as between dealers, and with an eye to the public good, we cannot lose sight of the fact, so well stated in the old Case of Monopolies, that 'the end of all these monopolies is for the private gain' of those who hold them. They are founded in destruction of trade, and cannot be tolerated for a moment."

§ 100. **Power to create or enjoy a Monopoly not conferred by Implication.** — The Legislature may delegate to a municipal corporation the authority to confer, by contract, such exclusive privileges concerning matters properly pertaining to municipal affairs. But it is a well-settled principle of construction, applicable both to direct legislative grants and to those indirectly made through the action of the municipal corporations, that exclusive rights of this nature are not favored, and a statute which thus has the effect to impair the power of the Legislature for future action should be construed most strongly in favor of the State. If there is any ambiguity or reasonable doubt, arising from the terms used by the legislative or granting body, as to whether an exclusive franchise has been conferred, or authorized to be conferred, the doubt is to be resolved against the corporation or individual claiming such grant. Public policy does not permit an unnecessary inference of authority to make a contract inconsistent with the continuance of the sovereign power and duty to make such laws as the public welfare may require. It is of the essence of a contract creating a monopoly that it confers upon one or more the exclusive privilege of doing that which others in the absence of such contract would have an equal right to do. It must be an invasion of a common right. The great preponderance of authority on the question of what form of language in a statute or municipal ordinance will constitute monopoly or render the statute or ordinance invalid, by reason of a constitutional prohibition, is to the effect that such intent must be clearly expressed, and is not inferable from extrinsic circumstances, conditions, and acts. This principle has received recognition in many cases. It received a recent and learned exposition in the case of Long *v.* Duluth,[1]

[1] Minn. 51 N. W. 913. See also Nash *v.* Lowry, 37 Minn. 261, 263; 33 N. W. 787; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 443; Minturn *v.* Larne, 23 How. (U. S.) 435; Wright *v.* Nagle, 101 U. S. 791, 796; State *v.* Gas L. Co. 32 Am. Rep. 393; State *v.* Coke Co., 18 Ohio St. 262; Gas Co. *v.* Parkersburg, 30 W. Va. 435; 4 S. E. Rep. 650; Birmingham & Pratt Mines St. Ry. Co. *v.* Birmingham St. Ry. Co., 79 Ala. 465; Cooley, Const. Lim., p. 250 (6th edition), 2 Dill. Mun. Corp. 692, 695.

In Rushville *v.* Natural Gas Co., (Ind.) 28 N. E. 853, it was held that

where it was held that legislative authority to a municipal corporation to provide a system of water-works, to grant the right to a private corporation to establish such a system, and to supply the municipality with water, and to contract therefor, does not confer upon the municipality the power to grant

the mere fact that a city ordinance specifically and by name grants to a natural gas company the right to use its streets for laying pipes, etc., does not make the license exclusive, and therefore the grant of a monopoly.

In Vincennes *v.* Citizen's Gas Light Co. (Ind.) 31 N. E. 573, the facts were as follows: Defendant city, by ordinance, granted to plaintiff's assignors, for twenty-five years, the privilege of laying gas mains for supplying illuminating gas along certain of defendant's streets. The ordinance provided that defendant should maintain a certain number of lamp-posts; that it should maintain along such mains "such additional lamp-posts and lamps as the city council may from time to time direct, and on the erection of said lamps said city shall take from the gas-works . . . sufficient gas to keep said lamps lighted." For these the ordinance provided that the city should pay "at the rate of $3 per month for each and every lamp." The ordinance did not in express words fix any time during which the city was to take gas for lighting its street-lamps. Afterwards, when defendant ordered a large extension of the mains, plaintiff submitted a certain proposition regarding the use and payment of the lamps to be supplied by the extended mains, which proposition the committee on gas of defendant's council reported to the council with the recommendation that it be accepted, "with the stipulation that it be in force for no longer than the original contract." The council adopted this report. The arrangement by which gas was to be furnished to defendant was referred to as a "contract" in many other resolutions adopted by defendant's council in ordering extensions of the main, etc. Held, that by the ordinance the city contracted to pay for twenty-five years for the gas furnished by the lamps provided for therein and by those afterwards erected. No exclusive grant of the use of the streets was made by such ordinance. Nor was a monopoly of supplying defendant with gas for street lighting thereby given, there being nothing in the ordinance preventing defendant from taking gas from others. The arrangement provided by the ordinance being purely a business matter, there was no surrender by the council of any legislative power. A city has the power to contract for a supply of gas or water for a stated period of time extending beyond the term of office of the individual members of the council making such contract. Twenty-five years is not an unreasonable time for a city to bind itself to pay for a supply of light or water. There were several questions before the court to be disposed of. On the monopolistic feature of the contract the court say: "Neither does the

an exclusive franchise, so as to disable the municipal corporation, for the period of thirty years, from itself establishing water-works and a system of supply. Dickerson, J., in delivering the opinion, said: "The simple question, then, is whether the municipality became disabled from establishing water-

contract give the company a monopoly of supplying gas to the city for street lighting. The city agrees to take a certain quantity of gas for a specified period of time, leaving it the unrestricted right to either manufacture or purchase as much more as it desires. This is not the class of contracts which the law denounces as monopolistic. The making of contracts for the supply of light and water for a considerable time, at fixed prices, is ordinarily necessary and permissible. Citizens' Gas etc. Co. *v.* Town of Elwood, 114 Ind. 332, 16 N. E. Rep. 624. There is in the ordinance no agreement or provision preventing the city from taking gas from any other company. The contract entered into relates to the street-lamps mentioned in section 2, and such 'additional lamp-posts as the city council may from time to time direct.' The ordinance authorizes the city to compel the company to extend its mains and pipes, under certain conditions, and furnish lights for additional lamps, but we do not understand the contract as one which compels the city to take gas from this company for all additional lamps which might be needed to light the city. As we construe the contract, the city might have restricted the gas company to the lamps provided for in section 2, and contracted with some other company for all additional lamps, the liability of the city to pay for gas furnished for additional lamps being dependent upon contracts with the company subsequently made, by which it was agreed that the mains should be extended, and gas furnished upon the same terms and for the same period of time provided for in the original ordinance. If the ordinance contained a provision by which the city agreed to take gas from no other company, or prohibiting any other company from engaging in the business of making and selling gas, the case of Davenport *v.* Kleinschmidt, 6 Mont. 502, 13 Pac. Rep. 249, and cases collected in *Re* Union Ferry Co., 98 N. Y. 139–150, would be in point."

In North Baltimore Pass. Ry. Co. *v.* Mayor, (Md.) 23 A. 470, it was held that: An ordinance which grants to a street-railway company the right to use the tracks of another company on a certain street, but which declares that nothing therein shall be construed to grant any right to lay additional tracks on a certain bridge, owned by a city and a part of the said street, is not intended to secure to the company whose tracks are already on the bridge a monopoly of the right of way, but only to avoid incumbering the bridge with unnecessary tracks; and the fact that a temporary bridge is to be erected, while the other is being replaced, and that only those companies that are entitled to occupy the permanent bridge are licensed to lay tracks upon the temporary bridge, does not prevent a similar license from afterwards being given to other companies.

works for the use of the city and its people by reason of the contract made with the water company, and which, as we assume, in terms provided that the municipal corporation would abstain from doing so for the period of thirty years. In simpler form, the question is whether the village had power to grant an exclusive franchise, and thus to disable itself. The adjudications upon the subject show it to be no longer a matter of doubt that the Legislature, acting presumably for the public good, and with due regard for the future as well as present interests of the State, may grant exclusive franchises like that which are claimed to have been bestowed upon this water company; and when that has been done, and the grant accepted and acted upon, it becomes a contract by which the State is effectually bound, and its future governmental power is thereby impaired. . . . It is hardly necessary to advert in this connection to the fact that municipal corporations have only such powers as are conferred by the Legislature; and the same principle of strict construction which forbids that a direct grant of a franchise by the Legislature be construed as exclusive, is applicable in the construction of powers delegated to municipal corporations with respect to such matters. The authority conferred upon such governmental agencies of the State to grant exclusive franchises or privileges must be as explicit and free from doubt as would be required if the franchise were created directly by the Legislature. . . . Such general language (referring to that used in the statute) falls short of expressing an intention to confer the power to grant an exclusive franchise which shall, in effect, bind and restrict, not only the village, but the State, in the exercise of its governmental functions, for thirty, sixty, or one hundred years, or forever. It may be said that the power of contract would be useless, unless the privilege conferred may be exclusive; for otherwise private corporations or persons would not engage in an undertaking involving the necessity for very large expenditures of capital in works which might be rendered unprofitable, if not valueless, by the subsequent action of the municipal or State government. The argument is not without force. The cases cited above, and others, show that it has often been advanced in support of claims of exclusive privileges,

but it has rarely, if ever, prevailed. It suggests considerations of policy which may influence the legislatures to grant, or to authorize the granting of, exclusive privileges; but the principles in accordance with which legislative grants of this kind are to be construed, seem to be so clearly established that, generally, not much weight can be given to such an argument in determining the effect of particular legislative action." In Minturn *v.* Larne,[1] it was considered that a city charter, conferring the power to make such by-laws and ordinances as might be deemed proper for making (establishing) ferries, did not authorize the granting of an exclusive privilege. Fanning *v.* Gregoire[2] was the case of a legislative grant of a right to the plaintiff to operate a ferry for twenty years, and it was also declared that "no court or board of county commissioners shall authorize any person, unless as herein provided, to keep a ferry within the limits of the town of Dubuque." The city of Dubuque was subsequently created, and the city, in the exercise of its charter powers, granted to the defendant the privilege of operating a ferry. It was held that the earlier grant was not exclusive, and although "no court or board of county commissioners" could subsequently grant another franchise, the Legislature could do it, or empower the city of Dubuque to do so. In Gas-light Co. *v.* Middletown,[3] a legislative Act authorizing the town to cause its streets to be lighted with gas, and to enter into a contract with the plaintiff for that purpose, was held not to confer power to make an absolute contract for a term of years. The Legislature could not thus be deprived of its power to subsequently legislate upon the subject, and its repeal of the authority to light with gas was effectual to terminate the contract so made. The case of Lehigh Water Co.'s Appeal[4] presented these facts: The water company was incorporated in 1860 to supply the borough of Easton with water. In 1867 the borough was authorized to construct water-works, and to purchase the

[1] 23 How. (U. S.) 435. [2] 16 How. (U. S.) 524.

[3] 59 N. Y. 228. See also Water Co. *v.* City of Syracuse, 116 N. Y. 167; 22 N. E. 381.

[4] 102 Pa. St. 515.

works of any existing company. This authority, however, did not become effectual until 1881, when it was approved by popular vote. In the mean time the water company, as it was authorized to do, had availed itself, by acceptance, of the benefits of an Act of 1873, providing for the incorporation of water companies, and which declared that "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one, and no other company shall be incorporated for that purpose" until the corporation should have realized profits to a specified amount. It was held that the franchise was exclusive only as respects other companies, and that the borough was not prohibited from supplying water from works constructed by itself, even though that might impair the value of the franchise of the water company. In Stein *v.* Bienville Water-Supply Co.,[1] it was held that the granting of the exclusive privilege of supplying a city with water "from the Three Mile Creek" did not prevent a subsequent grant of a right to supply water from another source. It was considered, in Gas-light Co. *v.* City of Saginaw,[2] that under authority to a municipal corporation to cause its streets to be lighted, and to make reasonable regulations with reference thereto, the city was empowered to enter into a contract for the accomplishment of that end, but that it had not authority to thus confer an exclusive right to furnish gas for the period of thirty years.

§ 101. **Same Subject. — Conflicting Decisions in Texas.** — In Brenham *v.* Water Co.,[3] the court construed the contract to be an attempt to create a monopoly, although no expression of such an intent was contained in the contract. The decision was contrary to the prevailing views of courts, but it has been expressly approved by a later decision in the same State.[4]

In the first of these cases the court reasoned thus: "Taking all the laws into consideration, we cannot doubt the power of the city to make some contract through which the city might

[1] 34 Fed. Rep. 145.
[2] 28 Fed. Rep. 529.
[3] 67 Tex. 542.
[4] Altgelt *v.* San Antonio, 81 Tex. 436.

be furnished with water. It becomes necessary, for the proper determination of this case, to ascertain the character of the contract on which the rights of the parties depend. The subject-matter of the contract was one over which the city had control solely under the power confided to it as a municipal government, to be exercised for the public good, and not under any private corporate right or proprietorship. The first section of the ordinance professes to give and to grant a right and a privilege to the water company to supply the city and its inhabitants with water for the period of twenty-five years.

"Was it intended to make this right and privilege exclusive for that period of time? This must be ascertained from the language of the ordinance, the surroundings of the parties, and the purpose sought to be accomplished. The ordinance, in terms, professes to give and to grant a right to do certain things, and therefore to receive certain benefits for a quarter of a century; *i. e.*, to confer a claim to do certain things, and to receive a fixed compensation, which may be enforced for that period.

"It not only professes, in general terms, to confer such a right, but, as if to emphasize it, and to fully illustrate the character of right intended to be granted, it terms it a privilege. The word 'privilege,' as used in the ordinance, is evidently not used in the technical sense in which it is used in the civil law, or even under the common law, where used in the sense of 'priority,' but was intended to be given its ordinary significance, meaning a right peculiar to the person on whom conferred, not to be exercised by another or others.

"This right is to supply the city and its inhabitants with water, for their varied uses, for twenty-five years, at fixed prices in enumerated cases, and at such prices as the water company and inhabitants may agree upon in other cases. The word 'supplying' must be considered in its connection, with a view to ascertain whether it was used in its primary sense, intending thereby to give the water company the right and privilege to furnish to the city and its inhabitants what water might be needed, or necessary to be furnished through such a system."

§ 102. **Monopolies created by Statute.** — There is no doubt of the power of State legislatures, in the absence of constitutional prohibitions, to grant exclusive franchises and privileges for valuable considerations. Grants of exclusive monopolies and privileges may properly be classed under the head of exemptions, since they are in effect agreements not to exercise the power of legislation in the future in a particular manner, or for a certain purpose. Legal protection in the enjoyment of special privileges is at war with the very idea of equality, which lies at the foundation of a free government.[1] In the absence of constitutional prohibitions, however, the Legislature of a State may bind it by contracts exempting corporations or individuals from competition resulting from future grants of corporate franchises either perpetually or for a limited period. And by doing so it may forestall subsequent legislation, tending to impair the exclusive right.[2] But an intention to grant an exclusive right or privilege must clearly appear, and will never be implied, except from language which leaves no escape from the conclusion that such was the intention of the Legislature.[3]

[1] The constitution of Texas prohibits the granting of exclusive monopolies. See City of Brenham *v.* Brenham W. Co., (Tex.) 4 S. W. 143. So do the constitutions of several other States. See Des Moines St. R. Co. *v.* D. M. B. G. St. R. Co., (Ia.) 33 N. W. 910.

[2] Cit. W. Co. of B. *v.* B. H. Co., 55 Conn. 1; 10 A. 170; Coast Line R. R. Co. *v.* Savannah, 30 F. 646; St. T. W. W. Co. *v.* N. O. W. W. Co., 7 S. Ct. 405. Under an ordinance which grants the exclusive right to operate street railways in a city to a certain corporation for a term of years, such corporation has the right to prevent the operation of a competing line, not only on the streets already occupied by its own lines, but on any street; Adams, C. J., dissenting. Omaha, etc., R. R., Co. *v.* Cable etc. Co., 30 F. 324. "The charter in the present instance grants to the defendant the exclusive right of supplying the city and its inhabitants with gas for a term of twenty years. It operates, therefore, not only to confer a public franchise on the defendant, but also to restrict the public from supplying its necessities from any other source. This creates a monopoly in the defendant for the time the right is made exclusive." White, J., in State *v.* Gas Light Co., 32 Am. Rep. 393.

[3] Spelling, Priv. Corp. § 1040. See also Charles River Bridge *v.* Warren Bridge, 11 Pet. 535, 549; Shorter *v.* Smith, 9 Ga. 517; Piscataqua Bridge Co. *v.* New Hampshire Bridge Co., 7 N. H. 63; Turnpike Co. *v.* State, 3 Wall. 210; Bradley *v.* South Carolina Phosphate Co., 1

An exemption from future legislation, impairing the enjoyment of a monopoly, like an exemption from taxation, must be based upon a consideration or benefit of a public nature. And when the consideration has been given, or performed, and accepted by the State, the grant becomes irrevocable. There are cases in which it is held that grants of this character, if based on a benefit either already received or merely assumed by the grantee, are binding upon the State, notwithstanding provisions in the constitutions of the States to the effect that "no man or set of men are entitled to exclusive, separate emoluments, or privileges from the community, but in consideration of public services."

In these cases it is held that the requirement, that there shall

Hughes, 72; Monongahela B. Co. *v.* B. & P. Ry. Co., 114 Pa. 478; 7 A. 233; Stein *v.* Bienville W. S. Co., 34 F. 145; Tuckahoe Canal Co. *v.* Tuckahoe etc. R. R. Co., 11 Leigh, 42; Rockland W. Co. *v.* C. & R. W. Co., 14 Ill. 314.

In Mayor, etc. *v.* Houston City St. Ry. Co., (Tex.) 19 S. W. 127, it was shown that the charter of the city of Houston gives the city council the exclusive control and regulation of all streets, and of everything concerning street railways. The charter of the Houston City Street Railway Co. provides that all contracts between the mayor and aldermen of Houston and the company, or privileges or rights granted by the mayor and aldermen, shall be in all respects legal and binding on the contracting parties, and that the charter shall continue for fifty years. It was held that the city council of Houston was authorized to grant such company the right to use the city's streets for street-railway purposes for a period of thirty years. Such grant, having been duly accepted and acted on by the company, became a vested right, which, in the absence of a constitutional prohibition of the granting of such franchises by the Legislature, could not be subsequently impaired by the authorities of Houston. The duration of such grant, so long as it did not create a perpetuity, was a matter for the exclusive determination of the city council.

Marr, J., delivering the opinion, after stating the facts at length, said: "It may be observed at this point of the investigation that the franchise or privilege granted to the plaintiff by the city of Houston, though it extends to nearly all the streets of that city, is not of an exclusive character. The city, by the terms of the grant, is not prohibited from extending similar privileges to other railway companies. This view of a similar grant was directly announced by the Supreme Court in the case of Gulf City St. Ry. Co. *v.* Galveston City Ry. Co., 65 Tex. 502; and it was further held that, subject to the right of the railway company to an easement in the streets occupied for that purpose by its 'tracks,

be a "public service" is satisfied, and takes the case out of the operation of the constitutional provision by an assumption of the duty and obligation of supplying facilities or commodities to the community. If this view be correct, and the reasoning employed be considered sound, it would be difficult to find a case of this class of legislation to which the prohibition would apply. To adopt the language of the court in one of these cases, which is undoubtedly correct on that particular point, "for, the Legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive both as to the necessity of making the grant, and the amount of service to be rendered in consideration therefor; and the courts have no power

switches, and turn-outs,' the city's 'dominion over the streets remained unchanged and unimpaired, and was as full and complete, for all purposes,' as it was before the extension of the grant. Such, at least, is the effect of the decision there made, and it coincides with our own view of the question. The grant to the plaintiff, as extended by the city of Houston, is not, therefore, void, upon the ground that it confers an exclusive privilege, as it would have been under the constitution if it had in fact created a monopoly in favor of the plaintiff. City of Brenham *v.* Water Co., 67 Tex. 542; 4 S. W. Rep. 143. . . . In reference to the second proposition submited by the appellants, we hold that, as the common council had legislative authority to grant the franchise in question, its duration was a matter for their exclusive determination. Whether it should be extended for two, five, or thirty years was left to their wisdom and discretion. They could not, perhaps, abandon or transfer their ordinary control over the streets of a legislative character, so as to prevent the proper and legitimate exercise of this authority by their successors in office. But this, as we have seen, they did not do. Nor was it in the power of the common council to create a perpetuity. Subject to these limitations, however, the wisdom and reasonableness of the grant, and the length of time during which it should continue, were addressed solely to the good judgment of the members of the common council. 1 Dill. Mun. Corp. 95. There is no pretence in this case that the use of the streets by the plaintiff has become a nuisance or amounts to an injury to the public, so we need not go into that branch of the subject. City of Burlington *v.* Railway Co., 49 Iowa, 144. While sec. 71 of art. 10 of the State constitution is entirely prohibitory, and not permissive, still, it is a clear recognition of the right of any city to give its consent to the use of its streets by railway companies, and it contains no limitation of the length of time for which such consent may be given."

to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be." [1]

The qualifying clause has been left out of many State constitutions; but it would seem that the intention of the framers of a constitution containing it was to change the law as it had before existed, and by the words "public service" they meant some substantial benefit arising from special agreement, and not a mere abstract public accommodation or convenience, and that such intention should control its construction.[2]

§ 103. **Such Grants become Vested Rights.** — When the State, in the exercise of its sovereign power, has granted an exclusive franchise or privilege, the same becomes a vested right in the grantee until revoked by the Legislature in the exercise of reserved right, or during the period of enjoyment fixed in the statute; nor can such vested right be taken away by municipal ordinances, or its exclusive character destroyed by the grant from municipalities of like franchises or privileges to others.

Thus, in Louisville *v.* Wible,[3] it appeared that the city of Louisville made a contract with an individual, whereby it granted to him the exclusive right for five years to the use of its streets, alleys, public places, and commons, for the purpose of removing the bodies of all dead animals from its streets, alleys, etc., in consideration of his agreement to promptly remove such dead bodies, and properly inter them on his own premises before creating a nuisance, and to save harmless the city from any liability on account of any nuisance. Before the expiration of five years, the city, without any cause of complaint, capriciously tired of its contract, and proposed to sell to the highest bidder the privilege it had already granted to another for a valuable consideration. It was held that the city was properly enjoined from selling the privilege, since the charter gave the city power to make contracts of the character of the one in question.

[1] Gordon *v.* Winchester Building etc. Ass'n, 12 Bush (Ky.) 110, *per* Coffer, J.; Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683; Const. of Ky. 1799, art. 10, sec. 1.

[2] Spelling, Priv. Corp., sec. 1041.

[3] 84 Ky. 290. See also cases cited in the preceding section.

Bennett, J., delivering the opinion, said: "The State has never surrendered its power, sometimes called its police power, but more properly its sovereign power, by which it controls, through its municipalities and other agencies within certain limits, everything within its territorial limits relating to the welfare of its people. In the exercise of that power it creates and controls educational and charitable institutions, and provides for the establishment of public highways, canals, wharves, ferries, and also the public health, public morals, and public safety, and almost numberless other things. These powers she has and exercises in absolute right, except as limited by the Federal Constitution or by her fundamental law. She may also, in the exercise of her powers, grant 'exclusive separate public privileges in consideration of public services.' She may also grant special or private privileges to certain individuals, provided the rights of others are not affected by it. She has a right to confer upon cities and towns, as integral parts of the State, the exercise of such of these powers as may be deemed necessary, prudent, or expedient for their local welfare and comfort. She may also grant many exclusive privileges to persons and corporations; also relinquish many of her powers. She may also recall them at pleasure, except when the person to whom the grant is made proposes to render a public service in consideration thereof; or, in case of the grant of a special private privilege, the person to whom the grant is made proposes, in consideration thereof, to engage in some enterprise that he would not or could not have otherwise done, then such grants of privileges, public, and private, become contracts for a sufficient consideration, and cannot be impaired by any subsequent act of the State."

§ 104. **Whether Nature of Business important.** — In several cases a distinction has been drawn between the transaction of business pertaining to municipal government and the exercise of ordinary legislative power, and such distinction has in these cases been given decisive importance. Thus, in City of Valparaiso *v.* Gardner,[1] Judge Elliott uses the following language:

[1] 97 Ind. 1. See also City of Indianapolis *v.* Indianapolis etc. Co., 66 Ind. 396; Dill. Mun. Corp. (3d ed.) 473, 474.

"The important and controlling question which confronts us here is as to the power of the municipal corporation to enter into the contract described in the pleadings. We have no doubt that the corporation had authority to contract for a supply of water for a period of twenty years, and that the contract cannot be overthrown solely on the ground that it is a surrender of legislative power. There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for houses, for gas, for water, and the like, is neither a judicial nor a legislative power, but is a purely business power."

So in the Slaughter-House Cases,[1] it was said: "It is also sought to justify the Act in question on the same principle that exclusive grants for ferries, bridges, and turnpikes are sanctioned. But it can find no support there. Those grants are of franchises of a public character, appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges, and ferries for the convenience of the public; and if it chooses to devolve this duty to any extent or in any locality upon particular individuals or corporations, it may, of course, stipulate for such exclusive privileges, connected with the franchise, as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant with exclusive privileges of a right thus appertaining to the government is a very different thing from a grant with exclusive privileges of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual." But it would be difficult to point out any matters with which municipal authorities have primarily to deal that are not of a business nature, giving the term "business" its contextual meaning. Municipalities have no concern with private business, except where they may regulate it in the exercise of police powers; but in this they are State agencies.[2] All their

[1] 16 Wall. 36.

[2] Dill Mun. Corp., secs. 58, 60, 210, 975.

acts and duties outside of enacting and enforcing police regulations may be well said to appertain to "municipal business."

§ 105. **Duration of Exclusive Franchise.** — It would seem that the length of time for which a contract is to run, cannot create a monopoly where one does not arise by force of the stipulation in the contract. In City of Valparaiso *v.* Gardner,[1] the court say: "To say that a contract conferring exclusive rights for two years does not create a monopoly, but that one conferring such rights for ten or twenty years does, is to assert that the contract does not create the monopoly, but that the monopoly is brought into being by the passage of time. In this instance the monster is neither procreated nor conceived by the contracting parties, but is brought forth full-grown by some occult process of spontaneous generation. It would be somewhat difficult for any court to say when, at what auspicious or inauspicious moment, a valid contract suddenly became void as creating a monopoly.

"As applied to contracts entered into by municipal authorities, the correct rule seems to be that the contracts of such authorities are voidable whenever they seek to bind a municipality for such a length of time as that the same is unreasonable as applied to the particular contract; for then they exceed their legislative power to contract, which power does not include the right to restrict the legislative power of succeeding municipal authorities for all time to come. Such contracts are voidable, not void, and their voidability does not arise because they create a monopoly, — for they create none, — but because the municipal authorities have acted *ultra vires* in entering into them."

[1] 97 Ind. 1. To same effect, Vincennes *v.* Citizens' Gas Light Co., (Ind.) 31 N. E. 573.

"The Constitution forbids perpetuities and monopolies. An exclusive privilege to a city to erect waterworks is no monopoly. Granting the same exclusive privilege of a term of years to a private company does not render it a monopoly." City of Memphis *v.* Water Co., 5 Heisk. 495.

CHAPTER X.

APPLICATION OF PRINCIPLE TO PRIVATE CORPORATIONS.

§ 106. **The Rule involves Doctrine of Ultra Vires.** — The rule in its ordinary significance has been frequently applied to private corporations, in like manner as to individuals, with the difference that the reason upon which it is founded requires that corporations of a public or quasi-public character are allowed less latitude in making restrictive contracts than such corporations and persons engaged in business which is in all respects private.[1]

But closely connected with the rule of public policy under consideration, and often inseparable from it, is the doctrine of *ultra vires*. For illustration, the case of a corporation doing business as a common carrier may be instanced. Although a common carrier may, like one engaged in any other line of business, sell out his property and business, and bind himself not to engage in it again within such limits as the protection of his vendee shall require, yet while such common carrier continues in business, he or it cannot grant away the right to exercise the franchise with which he or it has been intrusted for the public benefit; nor when such carrier is a corporation can it agree not to exercise such franchises. Nor can the incidental power to contract, which belongs to every corporation, be construed to extend to the making of contracts, the performance of which would violate the well-established rule of public policy; and an employment of corporate powers

[1] See *supra*, §§ 82 *et seq.*

and franchises to violate the law of the land is itself a cause for forfeiture in an action prosecuted by the State.[1]

When the Legislature has granted to a corporation an exclusive right to supply gas or water to a municipal corporation, the right so granted is a franchise, and the grant a contract protected by the Constitution of the United States.[2]

The contractual relation with the State being admitted, it is self-evident that the responsibility of a due performance of the undertaking on the part of the corporation cannot be shifted or delegated without State consent.[3]

A corporation having undertaken the performance of certain duties specified in its charter, presumed to be of public benefit, cannot transfer either such duty or its own existence into another body. Neither can it enable another to act in its name, except as its agent.[4]

Unless, therefore, some positive statutory provision has authorized it and pointed out the manner in which it may be effected, any sale or transfer of its franchise by a corporation is *ultra vires* and void.[5]

[1] People *v.* North River S. R. Co., 121 N. Y. 696.

[2] New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. *v.* Citizen's Gas Co., Id. 683; New Orleans Water Works *v.* Rivers, Id. 674. When, however, such right is conferred by municipal authorities, it is a mere license. People *v.* Mut. Gas Light Co., 38 Mich. 154.

[3] Welsh *v.* O. D. Min. & Ry. Co., 56 Hun, 650; 10 N. Y. S. L. 74; People *v.* Stanford, 77 Cal. 360; 18 P. 85. But under the Indiana statute the charter of a gravel road company may be purchased and assigned so as to vest title in the purchaser. State *v.* Hare, 121 Ind. 308.

[4] The general doctrine is sustained by the following additional authorities: Balsey *v.* L. A. & T. H. R. R. Co., 119 Ill. 69; 8 N. E. 859; Singleton *v.* Southwestern R. R Co., 70 Ga. 464; So. Pac. R. R. Co. *v.* Esquibel, (N. M.) P. 109; Washington A. & G. R. R. Co. *v.* Brown, 17 Wall. 445; Macon & N. R. R. Co. *v.* Mayes, 49 Ga. 355; Lakin *v.* Willammette Val. etc. R. R. Co., 13 Or. 436; 11 P. 68; Ohio & M. R. R. Co. *v.* Dunbar, 20 Ill. 623; State *v.* Minn. Cent. R. R. Co., 36 Minn. 246; 30 N. W. 816; Nelson *v.* Vt. & C. R. R. Co., 26 Vt. 717.

[5] G. C. & S. F. R. R. Co. *v.* Morris, 67 Tex. 692; 4 S. W. 156; Fietsam *v.* Hay, 122 Ill. 293; 13 N. E. 501; People *v.* N. R. S. R. R. Co., 121 N. Y. 582; 5 R. & Corp. L. J. 52; Branch *v.* Jessup, 106 U. S. 468; Hall *v.* Sullivan R. R. Co., 22 L. R. 138; Ricketts *v.* C. O. R. R. Co., 33 W. Va. 433; 10 S. E. 801; So. Pac. R. R. Co. *v.* Esquibel, (N. M.)

In addition to the reason that such sale would be the violation of a compact, it is against public policy, the presumption being that those in whom the franchise was at first vested possess some peculiar qualifications for the exercise of the same for the public benefit.[1]

So where corporations form a trust, amounting in legal effect to a copartnership, their acts in entering into it are clearly contrary to public policy and *ultra vires*, and their charters are liable to forfeiture to the State in *quo warranto* proceedings.[2]

In England it is provided by statute that railway companies may "enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways."[3]

While this statute does not expressly authorize the formation of partnerships between railway companies, it gives ample opportunity for the making of net earnings the basis of calculating the share of each in the joint enterprise.[4]

§ 107. **English and American Views on the Question compared.** — This rule of public policy, aside from the doctrine of

20 P. 109; Shaw *v.* Norfolk County, 5 Gray, 162; Pollard *v.* Maddox, 28 Ala. 321. The fact that a railroad does not run in the same general direction does not necessarily prevent it from being a competing line within the meaning of a statute prohibiting leases and sales to any "parallel or competing railroad." East Line & R. R. Co. *v.* State, 75 Tex. 434; 12 S. W. 690.

[1] Spelling, Priv. Corp., sec. 131.

[2] Spelling, Priv. Corp., sec. 121.

[3] 8 & 9 Vict., ch. 20, sec. 87.

[4] Godefroi and Short, 396. The whole question of *ultra vires* as applied to contracts by private corporations is fully discussed in Spelling on Private Corporations, third subd. of chap. xxvii.: The Application of the Doctrine to Agreements: —

"A distinction should be taken between a contract of partnership and one whereby a corporation in a single transaction or in a series of transactions becomes jointly interested or liable with others. Such relation a corporation has common law power to hold in the transaction of its legitimate business, and may be joint plaintiff or defendant in actions arising therefrom. N. Y. & Sharon Canal Co. *v.* Fulton Bank, 7 Wend. 412; Olcott *v.* Tioga R. R. Co., 27 N. Y. 546; Maine Bank *v.* Ogden, 29 Ill. 248; Peckham *v.* North Parish of Haverhill, 16 Pick. 287; Stanley *v.* C. & C. R. R. Co., 18 Ohio St. 552."

ultra vires, seems to be unimportant, or at least to have been entirely ignored in dealing with private corporations owing public duties, in England. But the divergence of view is of no practical consequence. In both countries there is substantial harmony between the definitions of monopoly, the decisions of the two countries agreeing that contracts in restraint of trade are illegal. When corporations have entered into a combination or "trust," as that shown in People *v.* North River Refinery Co.,[1] there are two grounds upon which the corporations themselves are open to attack at suit of the State in *quo warranto:* 1. That they have attempted to grant away franchises conferred upon them in trust, the transfer being a breach of the implied condition that the particular grantees shall retain and execute the trust. 2. That in making the contract, the result of which is the creation of a monopoly, they are guilty of an abuse of their franchises in having employed them in the doing of an illegal act.

§ 108. **Public Injury need not be shown.** — An important rule, well established, is that in a proceeding against a corporation by *quo warranto* for having formed with others a monopoly in the shape of a "trust," no actual public injury need be proved, but will be presumed when an agreement is shown which, if carried out, will obviously result to the public detriment.

An attempt by several combining corporations to suppress competition may well be viewed in the light of an unlawful conspiracy in the name of the corporation, which is itself an

[1] 121 N. Y. 696. The agreement between the steamship companies upheld in Mogul S. S. Co. *v.* McGregor, 57 L. J. R. 541, would, upon American authority, have been held void, because prejudicial to public interest. If it had been shown in that case that the agreement created a monopoly, the decision would have been different upon English as well as upon American authority. As it was, the only issue was whether the entering into and carrying out the agreement was an abuse of a franchise, and the public interest in its exercise being ignored, the agreement was upheld. In this country a corporation vested with franchises of a public nature must exercise them, and cannot either delegate or abdicate except to the sovereignty which gave them the privileges and authority thus granted.

illegal act, warranting the State in resuming its charter, aside from any contemplated injury to economic interests.[1]

In an English case Chief Justice Campbell said: "I do not think that any averment is necessary as to what has been done under it, or as to any mischief which it has actually produced. We are to consider what may be done under it, and what mischief may thus arise."[2] But it is not necessarily unlawful for railroad companies to form traffic arrangements under which they may share proportionately in the profits of their joint operations, and thus avoid ruinous competition on the one hand, and insure their patron's uniformity of rates and stability of prices on the other. Such agreements, when not amounting to a delegation of corporate powers or the formation of copartnerships, were generally upheld by both State and Federal courts prior to the enactment of the interstate commerce law, and to a limited extent since. Accordingly, it was held that a contract between two railroad companies whose lines of road are parallel, by which certain naturally tributary territory is preserved to each, within which it shall prosecute the work of extending its branch lines, etc., without interference with or from the other, designed to prevent an unprofitable war of construction, is not contrary to public policy.[3] Public policy, as well as a positive legislative authority, sustain traffic arrangements in England. It is there held that an agreement between two railroads to divide profits in certain proportions, with a view of preventing competition, is valid, and in the public interest.[4]

[1] See Ward *v.* Farwell, 97 Ill. 593; Ins. Co. *v.* Needles, 113 U. S. 574; People *v.* Dispensary, 7 Lansing, 306; People *v.* Bristol, 23 Wend. 235; People *v.* Fishkill, 27 Barb. 445; State *v.* Railroad Co., 45 Wis. 590; Ches. & Ohio R. R. Co. *v.* Balt. & Ohio R. R. Co., 4 Gill. & J. 1.

[2] Hilton *v.* Eckersley, 6 El. & Bl. 47, 65, *per* Lord Campbell, C. J. See also Clancy *v.* Salt Co., 62 Barb. 406; Atcheson *v.* Milton, 43 N. Y. 149; Hooker *v.* Vanderwater, 4 Denio, 352; Stanton *v.* Allen, 5 Denio, 440; Matter of Jacobs, 98 N. Y. 110; Mugler *v.* Kansas, 123 U. S. 661.

[3] Ives *v.* Smith, 3 N. Y. S. 645.

[4] Shrewsbury etc. Ry. Co. *v.* London Ry. Co., 6 H. of L. Cas. 652. See also Wickens *v.* Evans, 3 Y. & J. 318, and cases cited. In a recent case Lord Coleridge held that an arrangement between vessel-owners to keep business to themselves and prevent competition was not

§ 109. **Delegation of Special Powers under Traffic Arrangements.** — Closely connected with a surrender of franchises under traffic arrangements by one corporation to another, and likewise contrary to public policy and violative of the implied conditions upon which they were granted, are agreements by which several corporations by mutual consent abdicate their ordinary corporate functions, and seek to confer the same upon a board of trustees, who become, under the articles of agreement, the repository of all the contracting powers of the several corporations.

Most of the cases up to a very recent date involved the

valid as long as no illegal means were resorted to. Mogul S. S. Co. *v.* McGregor, 57 L. J. R. 541.

Quo warranto will not lie against corporations for entering into such contracts when the right to enter into them is not abused and perverted to the creation of oppressive monopolies, if the corporate organizations are kept distinct. The law requires that the functions and duties of each corporation shall be performed by its duly constituted officers and agents, without interference by those of other corporations. These requirements being met, the stockholders certainly may legally consent that the net profits of each corporation shall constitute a common fund to be shared between the corporations. But in passing upon the validity of such agreements it is important to bear in mind that the franchises and other delegated powers of the corporations cannot be transferred without legislative sanction.

Where none of these objectionable features are made to appear, courts will be very reluctant to interfere with the agreement on the single ground that it constitutes the companies a copartnership. Spelling, Priv. Corp. sec. 973.

Where two railroad companies had agreed to build a road from certain cities to connect with each other at a given place, and that the charges for the transportation should be regulated by both companies, an injunction was granted to restrain one company from changing gauge so as to break up the connection. C. P. & I. R. R. Co. *v.* I. & B. R. R. Co., 5 McLean, 450. The court said: "It is further alleged that under the contract the respective companies by acting together in fixing the rates for the transportation of passengers and freight conveyed a part of their franchise of either company. The companies may agree, as individuals may agree, to certain rates of transportation which may be considered mutually advantageous. Neither company has parted with its corporate powers; each acts for itself and under its own powers in fixing rates of transportation, and they both agree that the charge shall be uniform throughout the line."

legality of associations into which several railroad companies had entered, and the latter day "trust" is but an adaptation of the railroad pool to manufacturing and trading corporations.[1]

"Corporations may make all necessary arrangements for cheaply and expeditiously developing or carrying on their particular business; but it is another thing to go beyond this, to enter into contracts, for instance, by which the exclusive control or the exclusive right of working the line is handed over to other parties. All such arrangements, whatever their form, however disguised, are *ultra vires* and void."[2]

Statutory authority for the consolidation of railroad corporations, and the transfer of franchises and special privileges, is now found in England and in many of the American States, but is not usually extended to other private corporations. Even with respect to the former, the authority cannot be employed except for legitimate purposes of economical corporate management. The companies will not be permitted to use the authority as a cloak for organizing oppressive combinations and monopolies.

§ 110. **Constitutional Prohibitions.** — In a few of the States there are constitutional and statutory prohibitions against pooling and traffic arrangements between parallel lines of railroad.

Thus, the Texas constitution provides that "No railroad . . . or managers of any railroad corporation shall consolidate the stock, property, and franchises of such corporation with, . . . or in any way control any railroad corporation owning or having under its control a parallel or competing line."[3] An agreement between several railroad companies, some of which own and control competing lines for the appointment of a common governing committee to fix rates, was held illegal, because contrary to the said provision.[4]

Much less will manufacturing corporations formed to provide commodities useful or necessary to the comfort or sus-

[1] Spelling, Priv. Corp., sec. 974.

[2] Green's Brice's *Ultra Vires*, 339.

[3] Art. 10, sec. 5, Const. Tex.

[4] Gulf, Colorado, & S. F. R. R. Co. *v.* State, 72 Tex. 404.

tenance of the masses of the people be permitted, without statutory authority, to delegate to a central organization, whether incorporated or not, the full control and management of the corporate affairs for the sole purpose of creating a monopoly. Such an arrangement is not more amenable to the objection that it is in contravention of public policy and void than that it is *ultra vires* and void. A *quo warranto* proceeding will lie against a corporation to forfeit its charter in such case.[1]

§ 111. **Extent of Power to grant Exclusive Privileges.** — Ordinary grants of exclusive rights and trading privileges have been already considered;[2] and it was shown that where no question of the relinquishment of public duties was involved, corporations as well as natural persons might make absolute grants of exclusive trading privileges, without a violation of any rule of public policy. But a different case is presented where such a grant involves an attempt to delegate or to relinquish the exercise of a franchise granted upon the consideration that it is to be held in trust by the grantees, and exercised for the public benefit. But there is a nice distinction between franchises and powers; and while a railroad corporation cannot enter into a contract suspending or delegating its public duty as a common carrier within the territory or over the line where such franchises are actually or presumptively to be exercised, yet it may, in the exercise of its common law powers to contract, enter into a binding agreement with another transportation company, giving the latter its exclusive patronage in the matter of forwarding freights and passengers beyond the line owned or controlled by the former. This distinction was clearly explained in the important case of Wiggins Ferry Co. *v.* Chicago & Alton Railroad Co.[3] Norton, J., delivering the opinion, said: "But it

[1] Spelling, Priv. Corp., sec. 974, citing authorities. See also People *v.* North River Sugar Ref. Co., 121 N. Y. 696.

[2] *Supra*, §§ 35, 36.

[3] 73 Mo. 389, 407, citing on this point Hutchinson on Carriers, 147, 151, 317; Paradine *v.* Jane, Aleyn Rep., 26, 27; Bowser *v.* Bliss, 7 Blackf., 344; Peltz *et al.* *v.* Eichele, 62 Mo. 171; Leake on Con., pp. 735, 736. The case of a corporation attempting to form a copartnership, and

is insisted that defendant, in securing them [the contracts in question], obligated itself to do what is forbidden by public policy, and what is in restraint of trade, by agreeing that it 'will always employ the said ferry to transport across said river all persons and property which may be taken across the said river either way to or from the Illinois shore, either for the purpose of being transported on said railroad or having been brought to the said river Mississippi, upon said railroad, so that said ferry company . . . shall have the profits of the transportation of all such passengers, persons, and property

delegating to it the corporate powers, is discussed in sec. 971 of the same work as follows: "In the absence of statutory authority, an agreement providing for the division of profits arising from the whole existing traffic of a given territory entered into between two or more corporations, whether the result is a partnership or not, would be illegal and void; not only because against public policy, but for the further reason that it is an unauthorized delegation of the powers of the corporation. But it is sometimes difficult to decide whether an agreement for a division of tolls, profits, and earnings is objectionable on the one or the other or both these grounds." These difficulties were exemplified in the case of the Shrewsbury Railway Company's Cases, where the agreement which had been entered into by the respective corporations gave rise to an enormous amount of litigation; citing 2 Mac. & G. 331; 20 L. J. Ch. 90. See Sussex R. R. Co. *v.* Morris & Essex R. R. Co., 4 C. E. Green, 13; Gould *v.* Head, 38 Fed. Rep. 886.

Although the adjudications in this country have been affected somewhat by the question whether the corporations only or third parties were affected by the agreement under consideration, yet the general rule is well established that corporations are incapable of forming copartnerships either among themselves or with individuals. Such power is not among those which they possess at common law, where the same objection would lie against their forming a copartnership as against their consolidating; citing Parsons on Part., p. 79; Story on Part., p. 29 n.; Pearce *v.* Mad. & S. R. R. Co., 21 Howe, 441; Marine Bank *v.* Ogden, 29 Ill. 248; Mallory *v.* Hannauer Oil Works, 2 Pick. (Tenn.) 598; 8 S. W. 396.

Where the rights of third parties are involved, the validity of the agreement, when made an *ultra vires* question, is determined upon the general principles applicable to the subject, and turns upon the question of good faith, the peculiar equities of the case, and other circumstances. Consequently there is apparent conflict of authority, but it is thought there is no real conflict on the general proposition.

In a case where it was considered that the circumstances warranted it in sustaining the objection to the validity of the agreement as unauthorized, the court said: "The second section of ch. 38 of the Revised Statutes

taken across said river either way by the said railroad company, and that no other than the Wiggins Ferry shall ever, at any time, be employed by the said party of the second part, or the assignee herein mentioned, to cross any passengers or freights coming or going on said road. Keeping in view the fact expressed in the contract, that one object in making it was to secure to plaintiff 'the ferrying business between the Illinois shore and the Mississippi shore opposite St. Louis of all passengers and freight carried, or to be carried,' by defendant, and that the above stipulations were inserted to carry out

provides that the business of every manufacturing corporation shall be managed and conducted by the president and directors thereof, and such other officers, agents, and factors as the company shall think proper to authorize for that purpose.

"It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equal, and each capable of binding the society by the act of its individual will. . . . The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties directly imposed upon a manufacturing corporation under the legislation of the Commonwealth." Whittenton Mills *v.* Upton, 10 Gray (Mass.), 582.

In a New York case the plea of *ultra vires* was not allowed to prevail against the partnership liability of a corporation. The court said: "Strictly, perhaps, corporations should be and are restricted from contracting partnerships with individuals or corporations, and as between the parties to the contract acting upon equal knowledge, a question of validity might be raised; but a corporation may contract with an individual in furtherance of the object of its creation, the effect of which contract may be to impose upon the company as respects the community the liabilities of a partner. I cannot think a corporation may shape its contracts relating to the business for which it was incorporated as to share jointly with an individual in the profits of such business, subtract its interest in the profits from the fund on which the creditors of the concern had a right to rely for the payment of the debts due to them, and when called upon by such creditors be permitted to escape liability altogether, on the ground that the profits were realized as the partner of an individual, which relation the corporation could not legally occupy." Catskill Bank *v.* Gray, 14 Barb. 471.

this object, and construing the contract in its entirety, giving to the words employed therein their usual signification, without twisting them from their natural meaning in the relation they bear to the object referred to, we are of opinion that defendant bound itself to give to plaintiff for ferrying over Mississippi River all passengers and freight brought by it to the Illinois shore opposite the city of St. Louis to be crossed over to said city, and all passengers and freight taken from St. Louis for carriage by defendant on its road northward."

After further discussing and settling the proper construction to be given the contract, he proceeded: "If, as argued by counsel for plaintiff, and conceded by counsel for defendant, the Chicago & Alton Railroad Co. was authorized by its charter to carry passengers and freight to St. Louis, and empowered to employ and use boats for that purpose, it was its duty to do so, and the public had a right to demand of defendant the performance of this duty in such manner as not to hamper trade, but so as to secure the transit over the river with facility and despatch of all persons and property which either trade or the public interest might demand. This much, and no more, the public had right to demand; and if it was met by the contract in question, it cannot be held to be in contravention of public interest, because the public would get under it all it had a right to. It was no concern of the public what particular ferry should be employed by the defendant as an instrumentality for the prompt passage over the river of all freight and passengers requiring such transit, provided the one employed was in all respects sufficient to accomplish such purpose without imposing any additional burdens on the shipper. The obligation of plaintiff required it to 'furnish and maintain wharf and steam ferry boats sufficient to do with promptness and despatch all the ferrying of passengers and freight requiring it.' What more than this could be demanded? What right of the public was disregarded by defendant agreeing always to employ a company which it had thus obligated?

"If, on the other hand, the southern terminus of defendant's road was on Bloody Island, it owed no duty to the public to carry freight or passengers beyond such terminus; and in

making the contract in question it neither abandoned nor violated any duty of the public, because it owed it none. While defendant could not be compelled to carry beyond the terminus of its line, it nevertheless might contract, if it chose to do it, for the carriage of freight beyond such terminus, and for this purpose make a valid contract with a connecting carrier; and if it elected to make such contract it would be bound by it.

"The only element of restraint of trade to be found in the obligation of defendant is that it will never employ any other ferry than the Wiggins Ferry to transport freight from the Illinois shore, opposite the city of St. Louis, or send to it from said city. This restriction is not general as to space, but only partial and special; and it is only when a contract is granted for general restraint of trade that it will be held illegal and void: but it is legal if the restraint be partial and reasonable. The space in which the restriction is to operate is limited to the Illinois shore opposite the city of St. Louis, and is only a partial restraint in that space, the restriction being not that defendant will not employ any ferry at all, but that it will only employ that of plaintiff. We cannot say, from anything appearing in the contract, that such limitation is unreasonable, and it is not, therefore, obnoxious to the rule."

CHAPTER XI.

WHERE CREATION OF MONOPOLY AND RESTRAINT THE POLICY OF THE LAW.

§ 112. **Contracts pertaining to Patent Rights.** — This unwritten rule of the common law, like other common law rules, may be repealed by statute aside from the established exceptions which courts have from time to time recognized; and, clearly, it can never be invoked against the expressed will of the Legislature. Accordingly, courts have, from the earliest statutes allowing patents to be granted to inventors, excepted restrictive contracts pertaining to them from the operation of the rule. A patent right is essentially monopolistic, and to contracts granting exclusive rights to use or vend patented articles the general rule does not apply, however extensive as to territory their scope, or unlimited as to time.[1] If the patent

[1] Good *v.* Daland, 121 N. Y. 1; Good *v.* Tucker & Carter Cordage Co., N. Y. 24 N. E. 15; Bowling *v.* Taylor, 40 F. 404; Morse Twist Drill & Machine Co. *v.* Morse, 103 Mass. 73; Printing etc. Co. *v.* Sampson, L. R. 19 Eq. Cas. 462; Jones *v.* Lees, 1 H. & N. 189; s. c. 2 Jur. (N. S.) 645.

Complainants, who were manufacturing under patents stays which consisted of a stiffening blade having a sheet of rubber on each side, and an outer layer of cloth over each sheet, and defendant, who was making two kinds of stays, — the "Bridgeport" and the "Self-Attaching," — both of which complainants claimed to be infringements on their patent, entered into an agreement by which complainants licensed defen-

be a valuable one, self-interest may be relied upon as a motive strong enough to induce the owner either to take himself, or to permit others to take, some steps towards introducing his invention into use. How far it will go, depends upon the owner; and his right to decide that question is not in the least circumscribed by the interests of the public in obtaining such machinery or invention, or a right to its use. He may keep such right himself, or make the machinery, or manufacture the patented article alone, or he may permit others to share such right with him, or he may allow them an exclusive right, and retain none himself. This all follows from and is founded upon the absolute and exclusive right which the owner of the patent has in the article patented. Having such right, he must plainly be permitted to sell to another the right itself, or to agree with him that he will permit none other than such person to use it. That person need not agree to make the patented article or to sell it. It is a question solely for the parties interested. This right is necessary in order that the owner of the patent shall have the largest measure of protection under it. Considerations which might obtain, if the agreement were in regard to other articles, cannot be of any weight in the decision of a question arising upon an agreement as to patented articles. The reason underlying this exception was made plain in the case of Jones *v.* Lees,[1] where the subject-matter of the contract was a patent for an improvement in slubbing-machines, of which the plaintiff was the owner. He assigned his interest to the defendant, who covenanted that for the term of fourteen years he would

dant to make the "Self-Attaching," provided he would not made the "Bridgeport" stay; and defendant agreed to make no stays consisting of a steel, a layer of gutta-percha, and two outer layers of fabric. By a supplemental agreement they confined themselves to the manufacture of the "Self-Attaching" by the defendant, and the "Ypsilanti No. 1" by complainants, the latter being a stay of the double layer kind; but it was agreed that complainants might put a cheaper double layer stay on the market, provided they would furnish defendant, at a certain price, the same quantity of such cheaper stay as should be sold by themselves. *Held*, that this contract was not in restraint of trade. Bowling *v.* Taylor, 40 F. 404.

[1] 1 H. & N. 189; S. C. 2 Jur. (N. S.) 645.

not make or sell any slubbing-machines without the invention applied to them. The covenant was held valid and enforceable, Bramwell, B., saying: "It is objected that the restraint extends to all England; but so does the privilege. The cases with respect to the sale of a good-will do not apply, because the trade, which is the subject-matter of the sale, is local, and therefore a prohibition against carrying it on beyond that locality would be useless; here, however, there is no limit to the place within which the license is to be exercised."

§ 113. **Such Contracts may put an End to Use and Sale of Patented Article.** — The public interest being completely subordinated to that of a patentee in the invention, the latter need not consult public convenience in deciding what he will do with his patent; he may transfer his entire right to another, and bind himself not to thereafter manufacture or sell it; and though no interest be transferred, it may be stipulated that neither party shall ever afterwards, or shall not for a stated period, make, or sell, or offer for sale the patented article. This view is well expressed in Good *v.* Daland,[1] where Peckham, J., delivering the opinion, said: "This is a peculiarity of a patented article. The owner does not possess his patent upon the condition that he shall make or vend the article patented, or allow others to do so for a fair and reasonable compensation. When he has once secured his patent, he may, if he choose, remain absolutely quiet, and not only neglect and refuse to make the patented article, but he may likewise refuse to permit any one else to do so, on any terms. . . . If an owner of a patent should choose to refuse to manufacture the article covered by his patent, could any one else claim such right? His simple neglect or refusal to manufacture would stand as a conclusive reason why it was not manufactured. An owner might sometimes make more money by not manufacturing than by doing so; but of that question he is the sole and absolute judge."

[1] 121 N. Y. 1; Good *v.* Tucker & Carter Cordage Company, (N. Y.) 24 N. E. 15; Printing etc. Company *v.* Sampson, L. R. 19 Eq. Cas. 462.

§ 114. **Agreements not to invent in Competition with Patent sold.** — So zealously are the proprietary rights of inventors and their assignees guarded, and so absolutely the interests of the public subrogated to such rights, that it may now be regarded the well-settled law that a patentee may bind himself, not only not to use or sell the patent transferred, and at no time aid, assist, or encourage in any manner any competition with the invention,[1] but he may enter into a valid covenant not to invent anything which will compete, even though there be room for improvement in the mechanism of the patent. Morse etc. Co. *v.* Morse[2] is a leading case, giving this liberal extension to the exception. In that case the plaintiffs sought to restrain the defendant from violating an agreement previously made between the parties. The defendant covenanted therein that he would convey to the plaintiffs two patents which had been issued to him for improvements made by him in "twist drills and collets;" also his machinery and tools; also his right of renewal and extension of the patents, his rights to letters patent for his machinery and inventions for making drills and collets, or parts thereof, or for any portions of, or principles or combinations used in, such machinery or inventions. He warranted his title to the patents and the property sold, and agreed to make all necessary assignments and conveyances. He also agreed to transfer to them all improvements, new modes of manufacture, inventions, and arrangements, relating to any of the premises and the general business of the company, that he might make or invent, and that he would use his best efforts for the perfecting of improvements in the business and manufacture, and for such alterations and combinations, as might tend to insure the success of the same and of the company; and he also covenanted to do no act that might injure the company or its business, and that he would at no time aid, assist, or encourage in any manner

[1] 103 Mass. 43.

[2] See also Ainsworth *v.* Bentley, 14 Wkly. Rep. 630; Presbury *v.* Fisher, 18 Mo. 50; Stiff *v.* Cassell, 2 Jur. N. S. 348; Ward *v.* Beeton, L. R. 19 Eq. 207; Brooke *v.* Chitty, 2 Cooper, *temp.* Cottenham, 216; Talcott *v.* Brackett, 5 Brad. (Ill.) 60; Garrison *v.* Nute, 87 Ill. 215.

any competition against the same. He agreed to serve as the superintendent of the company for three years, from July 1, 1864, perform such duties as should be assigned to him, and give his whole time and efforts for building up the business of the company. In consideration of these covenants, the company covenanted to pay him $5,000 in thirty days, and $5,000 more out of the net earnings and profits of the business, after paying certain dividends; and $1,500 per year for the term of three years, payable monthly. The defendant had obtained his patents and commenced manufacturing the articles; but, being unable to carry on the business successfully, he induced certain persons to unite with him in forming the company, and carrying on the business of manufacturing and selling the articles. They proceeded in the business, and this business was not intended to be, and was not, local in its character. They employed him for the three years, and agreed with him to continue in their service for another year. But in December, 1868, he resigned his office of superintendent; and though the plaintiffs continued to carry on their business and sell their twist drills and collets, the defendant transferred his stock in their company, and entered into the manufacture of other twist drills and collets in Newark, N. J., which he sold in the same markets, in competition with them, at reduced prices, and to the same persons who dealt with the defendant as the plaintiffs' superintendent, and endeavored to supply the market with these articles. The defendant demurred, on the alleged ground that his covenants were in restraint of trade, contrary to public policy, and void, and that therefore he had a legal right to disregard them. But the court held that the covenants were binding on the defendant, and that the demurrer was properly overruled.

It will be observed that in this case the contract was of a dual character: a sale of the patent, and also a contract for exclusive service. But in Printing etc. Co. *v.* Sampson,[1] the contract was simply a sale with covenants not to invent, except for the exclusive benefit of the vendee, nor to purchase other

[1] L. R. 19 Eq. Cas. 462.

inventions. Jessel, M. R., after discussing the nature of the inventions which were the subject of the agreement, continued: "The buyers were about to form a company to work the invention; that means, to produce tickets with numbers. That was to be their business. They were to produce and sell a commodity more cheaply than had been done before. It was an old commodity, an old product, but had not been produced in the same manner before. The object of the company, therefore, was to sell the old product at a lower price than the price at which it could be produced by the modes in use before this invention was patented, and thereby to obtain business. That is the object. Being about to establish that company, and being about to buy the invention, they found the invention not in the exclusive hands of the inventor, but in the hands of himself and his assigns, persons who had acquired by purchase some portion of his patent rights. . . . Now, the vendors in this case were of two classes. There were the class of inventors, and the class of purchaser of inventions; and it is quite reasonable that there being the latter class in the market, the purchasing body of persons should say to the vendors, 'You shall not buy up any of these inventions to set against me,' otherwise the same evil might arise from purchase as from fresh invention; the vendors, being in the trade, or undertaking the trade, or having turned their attention to the trade, might look out next day for a similar patent, that is, which produced the same result, and start in trade against the purchasers. It is, therefore, not unreasonable to provide that the vendors shall not even buy any patent, except upon the terms that it shall belong to the purchaser. That is the position of the parties.

"Now, it was said on the part of defendant that such a contract as that which I have mentioned, a contract by which an inventor agrees to sell what he may invent, or acquire a patent for before he has invented it, is against public policy, because it would discourage inventions; that if a man knows that he cannot obtain any pecuniary benefit from his invention, having already received the price for it, he will not invent, or if he does invent will keep it secret, and will not take out a patent. It must not be forgotten that you are not

to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, — that you are not lightly to interfere with this freedom of contract."

§ 115. **Extension of the Exception to Sale of Trade-mark.** — By analogy the principle applicable to sales of patent rights has been extended to sales of the right to use trade-marks, and violations of the purpose and intent of such covenants will be enjoined. Thus, where the proprietor of a medicine, called "Brewer's Lung Restorer," sold the exclusive right to manufacture and sell it, with his trade-mark, to the plaintiff, and agreed not to use or permit the use of his name on any preparation which could be recommended and sold for the same purpose, and subsequently offered for sale a preparation professing to be a cure for all diseases of the lungs and throat, and called "Brewer's Sarsaparilla Syrup," it was held that he should be enjoined from the use of his name thereon.[1]

In this case the court said: "But are the covenants of this contract in general restraint of trade? The stipulation which it is alleged is void for this cause is in these words: 'I agree never to use or permit my name to be used on any preparation which could be recommended and sold for the same purpose.' Defendant below had already stipulated and did sell all his interest, with trade-mark, etc., in the 'Lung Restorer,' to the defendants in error. Then in the stipulation above he agrees, further, 'never to use or permit his name to be used on any preparation which could be recommended and sold for the same purpose.' This stipulation does not forbid him to manufacture or sell such preparation as he may compound, but that he will not himself use his name, or permit his name to be used, on any such preparation. The only restraint the covenant imposes on him is that his name shall

[1] Brewer *v.* Lamar, 69 Ga. 656.

not appear by his consent on any such preparation. Can this stipulation be said to be in general restraint of trade, or is it not rather a partial restraint; and is it at all unreasonable? The absence of his name may limit the sales of any new preparation he may compound; the preparation may be wanting in the magic word; but for its absence he contracted, and received a consideration therefor. He may compound and sell a score of other nostrums to cure the diseases for which the Lung Restorer is fitted; the only inhibition is, he must not put on them the cabalistic word 'Brewer,' and thus violate the contract which he has entered into."

§ 116. **Exception not extended beyond the Necessary Protection of the Vendee.** — An examination of the authorities shows that the exception in the case of sales of patents is based upon the same reasoning as is advanced in favor of partial restraints in other restrictive contracts; namely, that the restraint is necessary for the protection of the vendee, in the enjoyment of the full benefits of his purchase, and that the exception is subject to the same limitation, and cannot be extended beyond such necessity. Accordingly, it was held that a combination of all the manufacturers in the United States of an implement necessary to agriculture, which absolutely regulated prices and controlled production, was not made legal because entered into by the owners of patents, which patents alone were the subject of the combination, where the combination was to extend for fifty years beyond the lifetime of any patent.[1] And in Berlin Machine Works *v.* Perry,[2] it was held that a covenant, in a contract for the sale of a patent-right, not to "manufacture, sell, or cause to be sold, any sand-papering machines of any description," not being incidental to the sale of the patent, nor necessary as a just and lawful protection to the business of manufacturing and selling thereunder, was void, as against public policy, though it affected only a single class of machines.

The court said: "The law undoubtedly is that the covenant under consideration, *prima facie* at least, is void, and will be

[1] Strait *v.* National Harrow Co., (Sup.) 18 N. Y. S. 224.

[2] 71 Wis. 495; 38 N. W. 82.

so held on demurrer, unless the party asserting its validity has averred facts in his complaint from which the court can say the restriction is not larger than is reasonably necessary for the protection of Mather in the enjoyment of the business and patents he purchased of the defendant. If it extends beyond that, it is unreasonable, and the covenant is void. In view of the averments of the complaint, we think the restriction does extend far beyond that limit. It would be a breach of the covenant were the defendant to manufacture, sell, or cause to be sold, any kind of sand-papering machines in Canada or Mexico, or at any point in the eastern hemisphere, although the complaint shows that the plaintiff's business, assigned to it by Mather, is confined to the United States. Again, should the plaintiff abandon its business, and should the manufacture and sale of machines under the patents thus sold by defendant to Mather cease entirely, it would still be a breach of the covenant were the defendant to manufacture and sell a sand-papering machine in any place, although it did not infringe any of such patents. Furthermore, the covenant does not limit the prohibition to such machines as would or might come in competition with Mather's business. The defendant might be able to invent a sand-papering machine applicable to uses to which those made by Mather and the plaintiff were not adapted. What reason can there be for restricting him from doing so, if he is not in competition with the business he sold to Mather? We perceive none. . . .

"An alleged rule to the effect that restrictions of the character under consideration, if made as incidental to the sale of patents and a business thereunder, are valid, no matter how general and unlimited such restrictions may be, is invoked to uphold this covenant. But the cases cited to sustain such a rule do not sustain it as broadly as claimed. They hold that such restriction is valid only when, in the judgment of the court, it is not unreasonable, due regard being had to the subject-matter of the covenant. Tested by that rule, we have seen that the restriction in this case is not a reasonable one, because not necessary to the protection of the covenantee. In other words, this restriction is not, in any correct sense of the term, incidental to the sale of patents and a business

thereunder, but reaches far beyond the point of just and lawful protection to such business. It is also urged that because the restriction affects only a single class of machines, and does not cover the trade of a machinist, it is not within the rule which vitiates contracts in restraint of trade. The position cannot be sustained. While the restriction relates only to sand-papering machines, the defendant is an inventor of such machines, and the covenant unreasonably and unnecessarily, prohibits him from pursuing his trade or profession. It is, therefore, within the rule that such covenants are void."

§ 117. **Exception where Restriction and Suppression the Established Policy. — The Liquor Traffic.** — The presumption usually applied to contracts in restraint of trade, that they are injurious to the public, has no force when the restraint is imposed upon a traffic which the whole course of legislation opposes as detrimental to the State's prosperity. Accordingly, an agreement never to carry on the liquor business in a State was held valid.[1]

So an agreement not to sell liquors on certain premises in smaller quantities than half-barrels is valid.[2] But such contracts, being only partial and reasonable restraints, are sustainable on general principles. Besides, as has been shown under a previous head, the rule has no application to conditions inserted in conveyances and leases.[3]

§ 118. **Same. — Nuisances.** — A distinction has also been taken between contracts, the primary object of which was to create a monopoly, and those entered into by the covenantor with a view to the accomplishment of the suppression of a nuisance.

In Grasselli *v.* Lowden,[4] the court say: "This contract, as appears from its recitals and the pleadings in the case, was entered into to compromise a suit by said Lowden, then pend-

[1] Harrison *v.* Lockhart, 25 Ind. 112.

[2] Cleveland *v.* Marine Bank, 17 Wis. 545; Laubenheimer *v.* Mann, Id. 542; Sutton *v.* Head, 86 Ky. 156; 5 S. W. 510.

[3] *Supra*, § 34.

[4] 11 Ohio St. 349.

ing in the Superior Court of Cincinnati, to recover damages resulting from a laboratory owned and operated by Grasselli at a specified locality in said city, in the immediate vicinity of said Lowden's residence, and also to prevent the institution by said Lowden of any further actions for the alleged nuisance for five years next thereafter, and bound the said Grasselli to discontinue the laboratory business upon the premises specified at the expiration of said five years, and to not suffer or permit it to be operated by others after that period. Lowden did not seek by said agreement to obtain a monopoly or prevent competition in a trade or employment prosecuted by him, but merely to protect himself in the full, free, and healthful enjoyment of his own residence. All the instances in which contracts in restraint of trade have been held illegal and void, so far as we can discover, are cases in which the restrictive stipulations had for their object the attainment of such monopoly or freedom from competition, and not cases like the present, where the only purpose of the covenantee was to protect himself and family in the healthful and comfortable enjoyment of their place of residence. It is difficult to see why public policy should not favor rather than condemn such a contract, where the partial restraint is not the primary object, but a mere incident of the agreement. And it would seem that the legal efficiency of such an agreement should be determined by the rules applicable to contracts generally, and not to contracts which are said to contravene public policy."

§ 119. **Same. — Under Embargo Laws.** — The rule that all contracts made in restraint of trade are void at common law is founded upon the principle that such contracts contravene the policy of the law; and this rule does not vitiate a contract in restraint of trade entered into at a time when it is the policy of the law to impose restrictions upon commerce; consequently, an embargo bond, made while embargo laws are in force, is binding as a common law bond.[1]

[1] Dixon *v.* United States, 1 Brock, 177, *per* Marshall, C. J.

CHAPTER XII.

MONOPOLIES IN THE FORM OF "TRUSTS."

§ 120. **Meaning of "Trust."** — A certain form of illegal combination to control the prices of commodities and services of common necessity has for some years been designated as a "trust." But it must often have occurred to the legal mind that in literal sense there can be no such thing created as a trust to accomplish an illegal object. That this is true, only requires a reference to the definition of a trust. Justice Story says: "A trust, in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly, or in part, to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits, or charges constitute the trusts, which courts of equity will compel the legal owner, as trustee, to perform in favor of the *cestui que trust*, or beneficiary. Three things are said to be indispensable to constitute a valid trust: first, sufficient words to raise it; secondly, a definite subject; and, thirdly, a certain or ascertained object." [1]

[1] Story's Eq. Jur., sec. 964. Lord Harkwicke gives this definition: "A trust is where there is such a confidence between parties that no action at law will lie, but is merely a case for the consideration of this court." Stuart *v.* Mellish, 2 Atk. 612. See Cruwys *v.* Colman, 9 Ves. 323.

The certain and ascertained object must of course be a legal object, otherwise the attempt to create a trust is abortive, and the agreement, or compact, is *nudum pactum.* Of course, where legislative authority for monopoly has been conferred, the monopoly is none the less legal because the property interests entering into it are held in trust. It is not proposed in this chapter to consider legislative grants of exclusive rights and privileges, as these have been elsewhere discussed,[1] but only such as are monopolistic without legal sanction. Where such authority has been given, as well as in the case of other restrictive contracts not within the rule of public policy, a trust may be created by a contract in order to successfully effectuate its objects, and will be enforced in equity as other trusts.

The term "trust," in its illegal and opprobrious sense, has come into general use, and describes one form or plan of monopoly.

§ 121. **The Term frequently misapplied.** — The term has often been applied indiscriminately without reason. The word "trust" as applied to an illegal combination, as in its ordinary use, implies a transfer in trust of property interests. Where there is combination merely, but no transfer in trust to an individual board or corporation, the word "trust" is inapplicable.

There is nothing peculiar in the application of the rule against restraint of trade to "trusts." They are simply peculiar and somewhat complicated forms of combination, which may or may not be in restraint of trade, and therefore illegal, according to their objects and tendencies, considered in view of the character of the articles which it is proposed to produce, or in which it is proposed to deal, the condition of the market, the necessities of the public, or that portion of it concerned, the territorial extent of its actual or proposed operations, and other circumstances.

§ 122. **Magnitude of Combinations in this Form.** — Of all the economic diseases giving rise to popular complaint, none is so

[1] *Supra*, Chap. IX.

grievous or directly impending as the congestion of the country's capital in the hands of the comparatively few. If this affliction, like a financial crisis or epidemic, had come upon the body politic suddenly, and might reasonably be expected to work out its baleful end, and die by its own limitations, or could be dealt with by the enactment and prompt enforcement of laws of the severity and simplicity characterizing those relating to quarantine and sanitation, public anxiety would be allayed the moment the government was known to be in the hands of those disposed to exert themselves to the uttermost for the public protection.

If all that has been spoken and written, sincerely and otherwise, in the last few years about monopoly and concentration of capital, and its power when combined to suppress competition and extort unjust profits, were collected and printed, it would amount to a considerable library, the perusal of which would, unfortunately, fail to aid in the provision of a fully adequate, immediately practical, and certain remedy.

From the days of the first Pharaoh the cry has been for more liberty; and most revolutions and reforms have been but protests against tyranny. Never, however, until the present era has it been so forcibly demonstrated that liberty, unchecked, itself evolves the most despotic and oppressive tyranny. Restraint upon the power to contract upon first suggestion would seem as much an abridgment of freedom as if bounds were set to the right of locomotion, without the imputation of criminality. And yet what is that commercial oppression called monopoly, and so much complained of, but the result of an unlimited exercise of the power to enter into contractual relations? It is plain that under our constitutional system there are no easy and adequate means by which all abuses of the privileges enjoyed by mere accumulations of capital for commercial and industrial purposes can be reached and remedied. True, much less serious and threatening tendencies have been corrected by amendments to the Constitution; but one of the fundamental ideas of a government based upon equality of rights before the law, and great individual liberty, is non-interference in purely economic matters. Sumptuary legislation is not favored by the people, unless it be

confined to such species of business as are in themselves demoralizing and vicious.

The peculiar results which have followed the unrestricted wielding of power inherent in the mere accumulation and possession of large wealth were not foreseen by the founders of this or other modern nations; nor is it probable that any checks upon the exercise of the power could have been provided, even if such checks had been deemed advisable.

Great inequality in both condition and productive capacity between the wealthy few and the less fortunate multitude is inseparable from an age of universal peace and industrial activity; and it must be admitted that while a republican form of government secures immunity from domination of one man, or a few, over the persons, lives, and liberties of individuals, it gives but little, if any, more protection from a power which controls the rewards of industry than more despotic governments.

But combinations between the possessors of aggregated wealth to get rid of competition, while they have latterly attracted serious attention and caused general alarm, have for several centuries been considered and held illegal, as in contravention of public policy, as known to both the Roman civil and the common law. Nor are monopolies in trade and production peculiarly a modern institution. Sir Edward Coke describes several which existed during the Elizabethan era, but there seems to have been enough empiricism still residing in the Crown to suppress them, despite the constantly augmenting liberty of the subject under Magna Charta, and parliamentary extensions made from time to time.

It would be a strange and deplorable outcome of the republican form of government, to which there is a strong present tendency, the world over, if the most extensive experiment should only succeed in demonstrating that the liberty which it vouchsafes to the citizen is self-destroying. But there is no denying the fact that in this nation, where the only recognized sovereign is law, and where the corner-stone of the entire superstructure is equality before that sovereign, there has come about a practical dependence by the great body of the people upon the will, caprice, and interest of the compara-

tively few, in the matter of procuring necessities and conveniences, and in fixing prices to be paid for the same.

As has been previously stated, contracts and combinations in general restraint of trade are illegal by the common law as administered both here and in England; and where a case was properly presented, courts have never hesitated to declare such compacts void, and unenforceable by one party against another or others. But the full extent of the right to make and execute restrictive contracts, and the proper limitations upon the right, in the absence of legislation on the subject, have ever been debatable and unsettled; and as commercial conditions have become varied and complicated the judicial idea of restraint of trade has become more and more indefinite and confused. And even if the law were plain, and a presentation by judges and law writers of its principles and limitations free from difficulties, yet the inadequacy of legal remedies to reach the necessities of the public, and protect those needing protection from the greed and rapacity of monopolies, and to prevent their creation and maintenance, is one of the accepted premises of the present situation.

The parties to a monopolistic agreement, whether in the form of a trust or in the ancient form, are bound together by the ties of a common and powerful interest which will be injured rather than promoted by litigation between themselves. The attendant circumstances must be rare indeed which will give an individual suitor, not a party to the agreement, a standing in a court of law or equity on the sole ground that such a combination has been entered into. But any public wrong done by a trust must be a wrong to the sovereignty; and any adequate remedy must be one devised and enforced by virtue of sovereign authority to enforce police regulations.

§ 123. **Private Corporations as Integers in "Trust" Arrangements.** — To the facts that the capital of corporations is usually represented by shares of stock having an ascertainable market value, and offering a permanent form of investment which requires only slight personal supervision and attention by the owner, and that the stock furnishes a certain and convenient basis for calculating the separate interests, is attrib-

utable the frequency with which corporations become the integers in these trust arrangements. And because of the unchangeable nature of corporations, and their freedom from accidents to unexpectedly terminate their existence, which are the inseparable comditions of life of a natural person, the trust itself frequently assumes the shape, if not the legal status, of a corporation. But when so formed, it need not, and generally does not, present any phases or features not found in other corporations engaged in the same department of trade or industry. This similarity to ordinary corporate methods has presented insuperable obstacles in many cases in which it was sought to reach and deal with them.[1] But the same legal objection lies against an outright transfer of franchises or delegation of corporate duties to trustees as where no trust relation is sought to be created, since in either case it is an abuse and abandonment of powers pertaining to the sovereignty intrusted to the incorporators for public benefit. It is too clear to require further consideration that corporate bodies cannot enter, as such, into trust arrangements.[2] And so far all plans for legally bringing and binding together for the suppression of competition between the corporations of the stockholders representing their individual interests by *inter se* agreements and with the trustees, have proved abortive, and such agreements when brought before the courts have been declared attempts to illegally use by indirection the corporate entities.

§ 124. **The Case of the Standard Oil Trust.** — The most important case of a successful prosecution in *quo warranto* against corporations held directly responsible for the acts of the individual stockholders acting in concert, was that of State *v.* Standard Oil Trust.[3]

[1] Spelling, Priv. Corp., sec. 117.

[2] For the general discussion of the doctrine of *ultra vires* in its relation to monopolistic agreements, see *supra*, Chap. X.

[3] Ohio, 30 N. E. 279, citing Salt Co. *v.* Guthrie, 35 Ohio St. 666; Emery *v.* Candle Co., 47 Ohio St. 320; 24 N. E. Rep. 660. "The word 'trust,'" says Mr. Cook, "was first used to mean an agreement between many stockholders in many corporations to place all their stock in the hands of trustees, and receive therefor trust certificates from the trustees.

The articles of agreement which the stockholders of the defendant executed jointly with numerous other persons and corporations, were so complicated, far reaching, and lengthy as to render their insertion here impracticable. Besides, it would require of the most experienced and keen-sighted lawyer protracted and thorough study of the many provisions, in order to comprehend the general autonomy of the "Standard Oil Trust" thus created. Any, having occasion to become familiar with its plan and outline, will find a full statement of the facts and the agreement set forth in the report of the case. Upon the legal point raised by the pleadings the court say: "Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined whether the act in question, though done by shareholders, —that is to say, by the persons uniting in one body, — was done simply as individuals, and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation, and affect the transaction of its business, in the same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because, the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then in one department of the law fraud would enjoy an immunity

The stockholders thereby consolidated their interests, and became trust certificate holders. The trustees own the stock, vote it, elect the officers of the various corporations, control the business, receive all the dividends on the stock, and use all their dividends to pay dividends on the trust certificates. The trustees are periodically elected by the trust certificate holders. The purpose of the 'trust' is to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, the American Cotton-Seed Oil Trust, and the Sugar Trust are examples of this method of combination." Cook, Stocks, sec. 503*a*. See also, Wait, Insolv. Corp., sec. 478.

awarded to it in no other. . . Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers, and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act. It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate

power, may be challenged as such by the State in a proceeding *quo warranto*.

"That the nature of the agreement is such as to preclude the defendant from becoming a party to it is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships, and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and, being enjoined by the terms of the agreement to endeavor to have 'the affairs' of the several companies managed in a manner most conducive to the interest of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit; nay, more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformably to the purpose for which it was created by the laws of its State. By this agreement — indirectly, it is true, but none the less effectually — the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York city, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining, and dealing in it and all its products throughout the country, and by which it might not merely control the production, but the price, at its pleasure. All such associations are contrary to the policy of our State, and void."

§ 125. **The Sugar Trust.** — In People *v.* North River Sugar Refining Co.,[1] the trust deed between the combining corporations and copartnerships provided that all the partnerships

[1] 121 N. Y. 696.

should be turned into corporations; that then all shares of stock of all corporations should be transferred to a board consisting of eleven persons as trustees, to be held by them and their successors strictly as joint tenants, subject to the purposes set forth in the deed, which purposes were, in general, to promote the interests of the parties; that the stockholders for whose benefit the deed was stated to be made should transfer the entire block of their shares to the eleven persons to thereafter stand in their shoes. Trust certificates should then be divided by the trustees among the several refining companies in due proportion to their respective plants, and the refineries were to divide the blocks of certificates among shareholders in proportion to the stock held by each prior to the transfer to the trust board of the combination. The directors or stockholders of the several corporations were afterwards to hold no direct relation with the corporation, but became and were to continue to be shareholders in the trust board. Each corporation was to pay over its profits to the trust board, and all the profits of all corporations were blended; and from the fund thus constituted a dividend was declared and distributed among the holders of the trust certificates. This dividend was not calculated or paid upon the aggregate stock of the corporations, but upon the trust certificates.

Necessary shares were transferred to such persons as the trustees desired to constitute directors, to be held by the directors subject to the provisions of the acts provided for by the deed, and to be transferred when so requested by the board. The corporate acts provided for by the deed had actually been performed by the corporations, including the defendant; the deed had, in fact, been put in execution, and a dividend had been declared upon the trust certificates issued on surrender of the shares of the defendant corporation, although its refinery was closed. It was held: 1. That these acts were the acts of defendant corporation, and not, as claimed, the mere individual acts of its stockholders, and that the corporation as such had entered into this combination; 2. That corporations have no authority to enter into any partnership arrangements such as is lawful between individuals; 3. That this combination is not of the latter character, but is inherently unlawful,

its tendency being to prevent general competition and to control prices, and was therefore detrimental to the public, and a legal monopoly; 4. That the corporation should therefore be dissolved, and its franchises forfeited. Justice Finch, delivering the opinion, said: "The defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in a respect so material and important as to justify a judgment of dissolution. We exact besides that in this State there can be no partnerships of separate and independent corporations, whether directly or indirectly, through the medium of trusts, and no substantial consolidations which avoid and disregard statutory provisions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute."

§ 126. **Another Form. — American Cotton-Seed Oil Trust. —** But a conveyance to a board of unincorporated trustees is by no means the only plan upon which trusts have been projected. The legal title has sometimes been conveyed to an unincorporated association in the nature of a joint stock company; in other cases, to a corporation formed by the combining corporations or individuals. The case of State *v.* American Cotton-Seed Oil Trust [1] brought to light an institution of the first description. Its *modus operandi* was thus described in the opinion of the court: "The petition alleges that the defendant association was formed about two years since in the city of New York, with a president, two vice-presidents, secretary, and treasurer; that the agreement under which the said concern was organized, together with its by-laws, is kept a profound secret; that the trust is a gigantic monopoly, formed for the purpose of acquiring and controlling the various cotton-seed oil-mills existing and operating in the different States of the South, for the purpose of depreciating the value and price of cotton-seed, and increasing the price of the products thereof, formed by process of manufacture; that the trust has within the past year acquired a majority of the stock in the several corporations organized and operating in this State, under

[1] 40 La. An. 8. See also People *v.* Chicago Gas Trust, 130 Ill. 268; State *v.* Distilling Co., 29 Neb. 700; 46 N. W. 155.

the laws thereof, for the purpose of purchasing cotton-seed, the manufacturing therefrom cotton-seed oil, soap, oil-cake, and other articles of commerce; that the trust acquired the majority of the stock in said corporations at a premium and advance thereon, and have elected directors, and are controlling and operating said cotton-oil mills, the property of said corporation, solely for the interest and benefit of said illegal association; that in making said exchanges the said trust illegally fabricated, manufactured, and issued certificates purporting to represent shares in the equity to the property held by the trustees of the American Oil Trust; that the trust monoply has succeeded in reducing cotton-seed from $14 per ton to $8 per ton, and in increasing seed products more than fifty per cent in price; that the trust has closed two mills in this State; that the trust, although a foreign association, carries on business in this State without having any place of business therein, or any known agent upon whom process may be served; that the trust has obtained no license or permit, has paid no taxes either to the State or city government, and is without right to carry on business in this State."

The court held that it was assuming corporate capacity without legal authority. Houston, J., after stating the facts as above, said: "The character of acts is determined by their nature as defined by law. If the law defines certain acts as corporation acts, persons will not be heard to say that they understand such acts not to be corporation acts, but simply acts to be legally done by commercial partners, by trustees, or by other voluntary unincorporated associations. The acts charged against the trust are set forth in the beginning of this opinion. If the trust has done all the things there charged, and it must be assumed that it has done them, in manner and form charged, has it acted within the State of Louisiana as a corporation? . . . It is alleged herein that the trust is composed of more than six persons; that they have a president, two vice-presidents, a secretary, and treasurer; that they act under the name of the American Oil Trust,—a name which raises the presumption of an entity distinct from themselves; that the persons who compose the trust have associated themselves for the purpose of control-

ling and running the cotton-oil mills of the Southern States, or, in other words, to carry on manufacturing business; that they have issued shares of stock which they have put on the market, or, in other words, that they claim to have a perpetual succession. It will be seen by a reference to the characteristics of a corporation, as set forth in the articles and sections of Louisiana law herein, cited in full, that the acts alleged against the Oil Trust constitute every act, except one, that may be done by a duly incorporated corporation. That one corporate act not alleged to have been done by the Oil Trust is the act of setting forth that the liability of the members is restricted to the amount subscribed or paid for stock. . . . A commercial partnership has no right to issue transferable stock, and set up a claim of perpetual succession. To do so would be to render itself liable to be proceeded against as acting as a corporation without being incorporated."

§ 127. **Same. — In Form of Corporation.** — Ricker *v.* American Loan & Trust Company[1] disclosed a trust in which a corporation acted as trustee for a car trust organized by other corporations. The arrangement was held to constitute a copartnership in the nature of a joint-stock company, and the trustee (the corporation) the legal owner of the copartnership property.

§ 128. **Various Forms assumed.** — It may be safely asserted that all the trusts which have attracted attention in the United States have assumed one of three forms of organization: 1. The conveyance of the property and business of several corporations or individuals to an incorporated board of trustees or ordinary stock corporation, and the acceptance from it of shares in the common concern in return for the shares of interest in the uniting corporations or establishments, at an agreed valuation or proportion. 2. A similar conveyance to an individual, or to several individuals, in trust, and a similar exchange and substitution of shares as in the

[1] 140 Mass. 346. See also Mills *v.* Barb, 29 Fed. Rep. 410, where the trust was also the result of a joint effort of several corporations engaged in manufacturing and furnishing cars to railroads.

first-mentioned plan, except that in the latter case the "trust" becomes a partnership, or common law joint-stock association, or ordinary trust. 3. A compact by several corporations or individuals engaged in a particular line of business, by the terms of which one or more of their number is to either lease at a given rental, or manage for a proportionate share of the profits, all the establishments, without decapitalization or substitution of shares of stock in the common concern for those of the constituent corporations.

The elements of a trust are scarcely perceptible in the third form of "combine," though its objects, whether given publicity or not, are almost invariably to control and affect the market abnormally in the interest of the contracting parties. Such being the case, there is no doubt of the illegality of the agreement as between the parties to it; but, as under the other forms, the illegality is available only as a defence as between them, and affords no relief to the public, who are the principal sufferers.

A fairly representative case, disclosing a "trust" in the third form, is that of Santa Clara Val. M. & L. Co. *v.* Hays.[1] It was an action to recover $10,000 for a breach of a contract entered into between plaintiff, a corporation, and defendants, who were engaged in the manufacturing of lumber near Felton, in the county of Santa Cruz, whereby the latter agreed to make and deliver to the former, during the lumber year of 1881, 2,000,000 feet of lumber at $11 per thousand feet. Defendants agreed not to manufacture any lumber to be sold, during said period, in the counties of Monterey, San Benito, Santa Cruz, or Santa Clara, except under the contract, and to pay plaintiff $20 per thousand feet for any lumber manufactured and sold to parties other than plaintiffs. Defendants failed to comply with the contract; hence the action. The court found that plaintiff was the owner of three saw-mills near Felton, and that various other parties were likewise owners of similar mills in the same vicinity;

[1] 76 Cal. 387; 18 Pac. R. 391. A very similar case was that of Clancy *v.* The Onondaga Fine Salt Co., 62 Barb. 395, the only difference being that in the latter case the result of the "combine" was the formation of a corporation.

that for the purpose of limiting the supply of lumber, and increasing the price thereof, a plan was devised by which plaintiff was to lease all the mills for the year 1881 where such lease could be obtained, and where that could not be done, to contract with the parties owning mills and not willing to lease, by contracts similar to the one entered into with defendants; that, during the year 1881, plaintiffs should shut down two of its own mills, and also as many of the mills by it leased as might seem necessary, in order to limit the supply of lumber in the four counties named; that this contemplated scheme was carried out, including the contract with defendants as a part thereof; that the sole and only object, purpose, and consideration upon the part of plaintiff in entering into these contracts was to form a combination among all the manufacturers of lumber at or near Felton, for the sole purpose of increasing the price of lumber, limiting the amount to be manufactured, and giving plaintiff the control of all lumber manufactures near Felton for the year 1881; and the direct effect of this that there was no wholesale market for lumber at Felton, and dealers would not purchase in any considerable quantity during 1881. The Supreme Court of California, affirming the decision of the lower court, held the contract void.

The plan is sometimes varied, to meet peculiar situations and requirements; but most of the combinations complained of by the public may be placed in one or the other of these classes.

§ 129. **The Question of Remedies.** — With this statement and these illustrations of the autonomy of the trust before us, we may consider the question of existing and possible remedies.

It is clear that the mere invalidity of the agreement between the combining parties is not a remedy available to the public. It is at best only a defence to be set up or not at pleasure, when specific performance is sought, or an action for damages for a breach is brought between those *in pari delicto*. When the combining integers in the trust are corporations, or the combination among indi-

viduals or firms results in the formation of a corporation, and the object of the combination is restraint of trade in the obnoxious sense, an action *quo warranto* will lie in any state under whose assumed authority any one or more of such integers was created, — as in the case of People *v.* The North River Sugar Refining Co., in New York; or against the resultant corporation into which the persons, firms, or corporations have entered, — as in the case of State *v.* The Standard Oil Co., in Ohio. But for several reasons, which will now be briefly stated, the remedy *quo warranto*, to forfeit franchises, prosecuted by State officers, while proving efficacious in isolated instances, cannot be relied upon to relieve the people from the evils of monopoly. Especially is this remark true with reference to the most dangerous and oppressive form, — the trust.

The first difficulty lies in the liberal rule of comity between the States with reference to the domicile of, and right to transact business extended to, corporations created by sister States, and the established rule of corporation law that however extensive the powers conferred by the charter, or claimed in articles under general law, such charter in the one case, and articles in connection with the general law in the other, is accepted as the sole criterion in deciding what powers may be exercised and property owned. "Fortunately," said Justice Barrett, delivering the opinion in the case of the North River Sugar Refining Case, "the law is able to protect itself against abuses of the privileges which it grants." Fortunately for the State of New York, on the facts of that case and the law as there adjudicated, the law was "able to protect itself." But, as has been seen, no two trusts are organized so as to affect the public alike, or to the same extent; nor are the laws of different jurisdictions the same, or construed alike. And a trust held to be legal in one State may have its agents in New York; and since the validity of a charter depends upon the law of the State of its creation, the acts of such agent, valid in themselves, could not be prevented or interfered with by the New York courts, unless they were *ultra vires* when compared with the charter. A second reason why this remedy has been and promises to continue

to be ineffectual to protect the public consists in the fact that whether or not it shall be instituted and prosecuted to judgment depends, in most of the States, upon the caprice or interest of a particular State officer. And even though the attorney-general of New York, for instance, be faithful, and willing to perform his full duty, yet by traversing the other forty-four States and five Territories, a satisfactory guaranty of immunity could be obtained in one of them, and there the charter would be obtained, and the principal place of business established. Under such charter and in the enjoyment of such immunity, and by reason of the liberal comity extended by the State of New York, there would be nothing to prevent the foreign corporation, though a monopolistic trust, from carrying on there its most important business, and thence extending its operations throughout the entire sisterhood of States. The same weakness and inadequacy would adhere to any new or more drastic form of legal procedure which individual States might devise.[1]

§ 130. **Temporary Cheapness and Improvement of Quality no Defence.** — In the case of State *v.* Standard Oil Trust,[2] much was said in favor of the objects of the Standard Oil Trust, and what it had accomplished. But the court remarked that it might be true that it had improved the quality and cheapened the cost of petroleum and its products to the consumer; but such was not one of the usual or general results of a monopoly; and it was the policy of the law to regard, not what might, but what usually does, happen. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended, and is well answered in Richardson *v.* Buhl.[3] After commenting on the tendency of the combination known as the "Diamond Match Co." to prevent fair competition and to

[1] The subject of Federal legislation fully considered in the next chapter.

[2] Ohio, 30 N. E. 279.

[3] 77 Mich. 632; 43 N. W. 1102.

control prices, Champlin, J., said: "It is no answer to say that this monopoly has in fact reduced the price of friction-matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree." Monopolies have always been regarded as contrary to the spirit and policy of the common law. The objections are stated in the "Case of Monopolies," D'Arcy *v.* Allein.[1] They are these: 1. That the price of the same commodity will be raised, for he who has the sole selling of any commodity may well make the price as he pleases. 2. The incident to a monopoly is that, after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the commonwealth. 3. It tends to the impoverishment of diverse artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary. The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers and the great body are merely employees, or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited, the monopoly had been created by letters patent. But the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same whether created by patent or by an extensive combination among those engaged in similar industries, controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the monopoly or trust.

A tobacco trust was formed in the following manner: all

[1] Coke, Pt. 11, 84*b*.

the warehousemen and dealers in a lage city entered into an agreement for pooling part of their receipts, by giving monthly certificates to pool trustees. Competition was expressly provided against by forbidding certain methods of doing business, and fixing a complete schedule of prices. It further provided for the creation of a large guaranty-fund from money so collected, each party being made liable to forfeit his interest therein, as well as to a heavy fine for breaking any of its stipulations. It was unlimited in duration, and withdrawal could take place only by unanimous consent. The agreement was held void.[1]

In this case the court, after discussing general principles and the scope of the agreement, said: "It purports to embrace all the persons engaged in a business of very great magnitude, in the largest market for such business in the United States. It is unlimited in duration, and manifestly intended to be perpetual. None can withdraw without unanimous consent, and the guaranty-fund is artfully contrived to operate as a constantly strengthening chain to hold the association together. It is not averred that the prices fixed are extortionate, but it is enough that they are absolutely removed beyond the operations of every natural cause of fluctuation. Though fixed at first for only a year, there is no telling how they might be fixed in succeeding years, when the guaranty-fund becomes sufficient of itself to force obedience to the mandates of the managers. In short, either this rule does not apply to persons engaged in this business at all, or this contract violates it. It is hard to imagine how it could go further than it does. Nor is it one of those agreements in which, for the purposes of our judgment here, the good can be separated from the bad. Judgment for plaintiffs would merely place money in the fund which is held as a guaranty for compliance with all and singular stipulations of the agreement. We are not asked, nor have we power, to control its application. We are requested to confer a sceptre to be wielded by an absolute monarch."

[1] Hoffman *v.* Brooks, Cin. Sup. Ct., 11 W. L. Bull. 258, distinguishing Skrainka *v.* Schrarringhausen, 8 Mo. App. 522; Kellogg *v.* Larking, 3 Chand. 133; Collins *v.* Locke, L. R. 4 App. Cas. 674.

CHAPTER XIII.

ANTI-MONOPOLY LEGISLATION.

§ 131. **State Statutes.** — Prohibitions in State constitutions against railroad pools and discriminations in rates for transportation have been previously noticed.[1] Statutes directed against restraints of trade generally have recently been passed in a few States. Such statutes are of little avail, except as declarations of the common law, and few, if any, decisions of courts have turned upon their substantive provisions.

§ 132. **General Discussion of Federal Legislation.** — Before proceeding to discuss what the general government has done or may do, it is indispensable to give attention to the constitutional limitations upon the powers of Congress.

Since the legislative powers of the States are limited only by certain express prohibitions, and by others implied, because conferred upon Congress, and therefore inconsistent with their exercise by the States, and since the powers of Congress are purely and solely such as are derivable from the Constitution, we must look to that instrument for the power of Congress to legislate against trusts and other forms of monopoly; and if not inferable therefrom, it does not exist. The expressions of that instrument under which the power can be claimed are the interstate commerce and general welfare clauses. Neither of these authorizes an invasion of the proper domain of State legislation; but either is sufficient to justify congressional enactment of both substantive and remedial statutes directed against evils which are confined to no State in parti-

[1] *Supra*, § 89.

cular, and which are not entirely circumscribed by State boundaries. Of this character and degree are unquestionably most of the trusts now attracting attention and causing complaint throughout the country. State lines are artificial and purely imaginary barriers against a sugar trust in New York, which supplies the people of all the States and several foreign countries. The same is true of all that numerous group of trusts which has sprung from the iron trade, not to catalogue hundreds of others. Assuming, then, that Congress possesses ample powers,[1] we have reached the practical and all-important question of how they can be effectively exercised with a proper regard for the vested contractual rights of citizens and the due freedom of commercial intercourse between them.

A futile attempt has been already made. But if the Fifty-first Congress had deliberately conspired to gain credit for striking a blow at the trusts under false pretences, it could not have succeeded better than by passing the erroneously prefixed *Anti*-Trust Bill approved July 2, 1890.[2] It did not

[1] See Late Corp. Church etc. *v.* United States, 136 U. S. 1; Sinking Fund Cases, 99 U. S. 700.

[2] 26 Stat. p. 209. The full text of the bill is as follows: —

"Sec. 1. 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, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 3. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in any Territory of the United States or the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States, or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal.

even frighten the trusts. It attempts to create and punish an offence not previously known to the laws of the United States, nor even to the common law, except when the act sought to be made an offence was the culmination of a conspiracy; and to do this by language so vague and general that the courts in each of the three cases presented under it to date found holes large enough to let through "coaches-and-fours."

The provisions conferring jurisdiction and prescribing how it shall be exercised, and upon what proceedings, are equally indefinite and unsatisfactory. To point out all the shortcomings and defects of the Act would require considerable circumlocution; but some of them ought to be specified. First, it is in its main features a criminal statute, and imposes only one fine for each offence, regardless of its magnitude or duration, so that the greater the evil, the less the fear of punishment, and the less grievous when inflicted. The Act does not say, as any criminal statute on the subject should, that even the small penalty of $5,000 shall be inflicted for each day's continuance of the offence, or that each day's maintenance of the trust after conviction shall constitute a separate offence. Second, there is no provision for restraining the maintenance and continuing to operate the trust, but

Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, *and it shall be the duty of the several District-Attorneys of the United States in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations.* Such proceedings may be by way of petition, setting forth the case, and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"Sec. 5. Whenever it shall appear to the court before which any proceedings under section 4 of this Act may be pending that the ends of justice require that other parties should be brought before the court, the

only to restrain persons from violating the provisions of the Act; that is, from entering into monopolistic agreements, or contracts in restraint of trade. Whatever the intention may have been, nothing is said about restraining the maintenance or continued operation of the trust or monopoly, or carrying out the restrictive contract after being made. It was possibly expected that when a number of manufacturers had come to a secret understanding, before reducing it to form and making the necessary transfers, they would go and lay all the facts before, and expose their designs to, the proper law officer of the government, in order to give him an opportunity to apply for an injunction before it was too late. This narrowness in the scope of the Act operates as a shield against prosecution for restrictive contracts and combinations entered into before its taking effect, so that the most oppressive and extensive combinations, those whose extortions and burdens had been most felt and complained of, were exempted from punishment or restraint in their operations. Thirdly,— but the most serious defect, and one which is inherent in every line and section of the Act, — is the failure to specify what acts and agree-

court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this Act and being in the course of transportation from one station to another or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold damages by him sustained and the costs of suit, including a reasonable attorney's fee.

"Sec. 8. That the word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

ments shall constitute restraint of trade, monopoly, trusts, etc. It is as if an Act should provide that any person guilty of long-continued idleness should be punished as a vagabond, without defining either "long-continued idleness" or vagabondage, these being terms unknown in a criminal sense to the laws of the Federal government.

It is worse than useless to rely exclusively upon criminal and penal statutes and prosecutions under them, nor is it worth while to legislate in glittering generalities, and leave the courts a task of construction and inference in order to arrive at their meaning.

The fatality of any legislation which does not circumstantially define what shall constitute restraint of trade, but leaves it to the courts to determine the question by reference to the common law, is this: There is no settled or accepted legal definition of restraint of trade at common law. The rule of public policy which must be violated by an agreement in restraint of trade is a variable and indefinable quantity. As an English judge once said: "It is an unbridled horse, which, when you have once mounted it, you know not whither it will go, or where it will land you." The Federal judges especially have assumed such liberal discretion in the interpretation of the rule as to indicate that there is in fact no rule, but that each decision should turn upon the exigencies, environment, and circumstances of the parties and the subject-matter. In other words, there is no pole-star to guide the judicial mind, but each judge evokes from his own breast a proper decree upon the facts as presented in each case. This proposition is fully sustained by the language of the court in the case of *In re* Greenhut (to be fully discussed presently). The court there decided that monopoly does not result from the acquisition and ownership of a large percentage, or even of all the property in the country employed in a particular line of business, even though the owners are, by such acquisition and ownership, able to and do enhance and maintain a higher rate than could otherwise be obtained of prices; and that this is true, even though the owners of the aggregation of property, in order to procure and hold the exclusive trade, offer to each purchaser of its products a rebate in rates, upon

condition that he trade exclusively with them. And it must be admitted that the authorities, we might indeed say the great preponderance of authority, sustain this position. If any further or stronger evidence of the irreconcilable conflict of opinion upon the question of what constitutes restraint of trade or monopoly were needed, it is to be found in the debates upon the Act of July, 1890, pending its final passage.

It is apparent, then, that the definition of restraint of trade or monopoly to be contained in the statute, must be more comprehensive than the common-law definitions of these terms; that is, it must declare some agreements to be illegally restrictive, and some acts to be monopolistic, which were not so at the common law, as interpreted and administered in recent times.

There should be vested in some tribunal or quasi-judicial body inquisitorial powers, and the right to send for persons and papers, and compel their production, as is exercised by national bank commissioners, and customs and internal revenue officers. The exercise of such powers would, no doubt, be bitterly opposed by those to be investigated, and whose business would thus become charged with a public interest; but the wrongs imputed to them may well be considered as done to society, and they should no more enjoy immunity from police surveillance than common carriers, telegraph companies, warehousemen, or importers and dealers in spirituous liquors.

It is not the first time in our history that it has become necessary for the government to deal arbitrarily and with unusual severity in order to secure the public safety and welfare. When it became necessary, in order to put an end to polygamy in Utah, to forfeit the Mormon Church property to the United States, Congress did not hesitate to enact, nor the courts to enforce, a statute for that purpose. And when it became apparent that the Pacific Railroads would default in the payment of interest upon their indebtedness guaranteed by the government, an Act was passed and upheld by the courts, compelling them to create a sinking fund in the treasury, and pay into it a percentage of their gross earnings, although the statute changed materially the terms of the

original charter and land grant. It is important in this connection to bear in mind that there is no constitutional prohibition against the impairment of contracts or taking of property for public use without compensation by the Federal government, though these are means to which there should be no resort except in cases of extreme urgency and necessity, and where other remedies and preventives are unavailing.

But harsh legislation against trusts is fully warranted as police regulation. The subordination of all private interests to the purposes of good government, subject only to the condition that the object to be accomplished shall be one in which the public has an interest, is no longer an open question. In its general bearing this principle is too well settled and uniformly recognized — underlying the adjudications by courts of all cases involving constitutional provisions — to require more than a mere statement. But whether justified upon the ground of being police regulation or general legislation for securing the welfare of society, or the regulation of interstate commerce, it is evident that Congress has the power to make all laws necessary to protect the great community of the Union from all forms of injustice and oppression as fully as it may provide for the abatement of nuisances and regulate the administration of justice. The number of persons affected by a statute professing to regulate matters of public concern seems to be immaterial. It is only required that it shall apply generally in its terms to all persons and property coming within its provisions. The State reserves, at all times and under all circumstances, the plenary power to prohibit all things hurtful to the comfort, safety, and welfare of society. It may be exercised to control the use of the property of corporations and individuals. Laws passed for the common good, and necessary for the protection of the public, cannot be said to impair any right or the obligation of any contract, or to do any injury, in the proper and legal sense of the term. And though it be conceded that Congress cannot appropriate private property without making due compensation, it would be repugnant, not only to reason, but to the spirit of the Constitution, to say that while Congress cannot do this, yet it has no power to prevent persons, whether

natural or artificial, from taking for private use, without adequate compensation, indirectly through conspiracy and secret combination, and by means of extortion, that which the government cannot itself take, except upon the return of its just value.

§ 133. **The Act of 1890 further considered. — Decisions. —** The first and only attempt on the part of Congress to legislate against trusts, was by the above-mentioned Act.

There have been few adjudications under this Act, but these go far to demonstrate its inherent weakness, and the difficulties which lie in the way of its enforcement.

United States *v.* Greenhut[1] was a criminal prosecution under the Act, and it was held that an indictment thereunder which failed to allege that defendants monopolized, or conspired to monopolize, trade and commerce among the several States or with foreign nations, fails to state an offence, even though it does allege that they did certain acts with intent to monopolize the traffic in distilled spirits among the several States, and that they have destroyed free competition in such traffic in one of the States, and increased the price of distilled spirits therein.

The facts sufficiently appear in the opinion by Nelson, District Judge, as follows: —

"This is an indictment under the second section of the Act of Congress approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.' The indictment sets forth that the defendants are the officers of the Distilling and Cattle Feeding Co., a corporation chartered by the laws of the State of Illinois, and having its principal place of business in Peoria, in that State; that, as such officers, they purchased or leased seventy-eight theretofore competing distilleries within the United States; and within certain dates specified, used, managed, controlled, and operated said distilleries, and manufactured sixty-six million gallons of distilled spirits, and sold the product within the United States, part of it in the district of Massachusetts, at prices fixed by them, the whole being seventy-five per cent of

[1] 50 Fed. Rep. 469.

all the distilled spirits manufactured and sold within the United States during the period; that all said acts (except the purchasing and leasing of the distilleries) were done with the intent to monopolize to the company the manufacture and sale of distilled spirits in Massachusetts, and among the several States, to increase the usual prices at which distilled spirits were sold, to prevent and counteract free competition in the sale of distilled spirits, and thereby to exact great sums of money from citizens of Massachusetts and of the several States, and from all others purchasing; that, in pursuance of such intent, the defendants, as such officers, agreed with D. T. Mills & Co. and other dealers in Massachusetts that if such dealers would buy all their supplies of distilled spirits from the company for six months, the company would give them a rebate of two cents a gallon on their purchases; that by means of the rebate agreements and by their control of the distilleries, and of the manufacture, sale, and prices of seventy-five per cent of all the distilled spirits manufactured and sold in the United States during the period named, the company, and the defendants as its officers, had made large sales of distilled spirits to D. T. Mills & Co. and other dealers in Massachusetts, at prices fixed by the defendants in excess of the usual prices at which such spirits were then sold in that State, such spirits having been manufactured in other States, and transported therefrom into Massachusetts, and had unlawfully monopolized to said company the manufacture and sale of distilled spirits, and had increased the usual prices at which distilled spirits were then sold in Massachusetts, and had prevented and counteracted the effect of free competition in the price of spirits in Massachusetts, and had exacted and procured great sums of money in said district from D. T. Mills & Co. and others. To this indictment the defendant Greenhut filed a motion to quash, and the other defendants demurred, upon the ground that the indictment is insufficient in law, and does not charge any offence created by any statute of the United States."

The court, after quoting section 2 of the Act, proceeds:

"An indictment framed under this section should contain a distinct averment in the words of the statute, or in equivalent

language, that, by means of the act charged, the defendants had monopolized, or had combined or conspired to monopolize, trade and commerce among the several States or with foreign nations. This indictment contains no such averment. It does not charge that the defendants entered into any unlawful combination or conspiracy. Nor does it contain any averment that they had monopolized trade or commerce among the several States or with foreign nations. It avers merely that by means of the acts alleged they had monopolized the manufacture and sale of distilled spirits, without stating that in so doing they had monopolized trade and commerce in distilled spirits among the several States or with foreign nations. It is true that the indictment charges that the defendants have done certain things with intent to monopolize the traffic in distilled spirits among the several States, and that they have increased the usual prices at which distilled spirits were sold in Massachusetts, and have prevented and counteracted the effect of free competition in such traffic in Massachusetts. But none of these things are singly made offences by the statute. The indictment in this particular is clearly insufficient, according to the elementary rules of criminal pleading, and charges no offence within the letter or spirit of the second section of the statute."

The Act received thorough consideration in the Circuit Court for the Western District of Ohio in 1892, in the case of Green.[1] This was a *habeas corpus* proceeding brought by Green, who had been indicted for violation of the provisions of the Act. The opinion by Jackson, Circuit Judge, is a very valuable exposition both of common law principles and of the scope, purposes, and proper construction of the Anti-trust statute.

The petitioner was discharged from arrest on the ground that the indictment did not allege any offence punishable under the statute. In reaching this conclusion, much of the law defining and governing the offence committed by creating a monopoly was discussed.

After disposing of the contention that the sufficiency of the

[1] 52 Fed. Rep. 104.

indictment could not be inquired into in this form of proceeding, the court continued: —

"In the consideration of this indictment it should be borne in mind that there are no common law offences against the United States; that the Federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes and offences cognizable under the authority of the United States are such, and only such, as are expressly designated by law; and that Congress must define these crimes, fix their punishment, and confer the jurisdiction to try them.[1]

"When Congress, under and in the exercise of powers conferred by the Constitution, adopts or creates common law offences, the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes, if they are not clearly defined in the Act creating them.[2] The Act of July 2, 1890, on which the present indictment is based, in declaring that contracts, combinations, and conspiracies in restraint of trade and commerce between the States and foreign countries were not only illegal, but should constitute criminal offences against the United States, goes a step beyond the common law, in this: that contracts in restraint of trade, while unlawful, were not misdemeanors or indictable at common law. It adopts the common law in making combinations and conspiracies in restraint of the designated trade and commerce criminal offences, and creates a new crime, in making contracts in restraint of trade misdemeanors, and indictable as such. But the Act does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade; and recourse must therefore be had to the common law for the proper definition of these general terms, and to ascertain whether the acts charged come within the statute. We regard it as well settled by the authorities that an indictment, following simply the language of the Act, would be wholly insufficient, for the reason that the words of the

[1] Citing United States *v.* Hudson, 7 Cranch, 32; United States *v.* Coolidge, 1 Wheat. 415; United States *v.* Britton, 108 U. S. 199–206; 2 Sup. Ct. Rep. 531.

[2] Citing United States *v.* Armstrong, 2 Court. 446; United States *v.* Coppersmith, 4 Fed. Rep. 198.

statute do not of themselves fully, directly, and clearly set forth all the elements necessary to constitute the offence intended to be punished.[1]

"Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although in the words of the statutes, but by the specific acts or particular facts which are alleged to have been actually done and committed by the accused. If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations, or conspiracies in restraint of trade and commerce among the several States, or a monopoly or attempt to monopolize any part of such trade or commerce, no amount of averments and allegations that the accused 'engaged in a combination,' or 'made contracts in restraint' of such trade or commerce, or 'monopolized' or 'attempted to monopolize' the same, will avail to sustain the indictment. Whether the accused is charged with an offence is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader, although asserted in the words of the statute: 'Every offence consists of certain acts done or omitted under certain circumstances; and in the indictment for the offence it is not sufficient to charge the accused generally with having committed the offence, but all the circumstances constituting the offence must be specially set forth.'[2]

"Do the particular facts set forth in the indictment constitute violation of the statute? In construing and applying the provisions of the Act to the specific offences charged, it must be assumed that Congress did not intend to make the enactment either retroactive or give it an *ex-post facto* operation and effect. No criminality can therefore be ascribed to the acts of the accused in respect to their recited combination on February 11, 1890, in restraint of trade and commerce in distillery products by means of the Distilling & Cattle Feeding

[1] Citing United States *v.* Cruikshank, 92 U. S. 542; United States *v.* Simmonds, 96 U. S. 360; United States *v.* Carll, 105 U. S. 611; United States *v.* Britton, 107 U. S. 655; 2 Sup. Ct. Rep. 512; United States *v.* Trumbull, 46 Fed. Rep. 755.

[2] Quoted from United States *v.* Cruikshank, 92 U. S. 542, 563.

Co., a corporation organized by them on that day under the laws of Illinois, and its acquisition and control prior to the passage of the Act of July 2, 1890, of seventy other distilleries, which enabled said company to manufacture and sell 70,000,000 gallons of said distillery products, said quantity being seventy-five per cent of all the distillery products manufactured and sold in the United States between the date or dates of acquiring said distilleries and the finding of the indictment. It is not alleged that this acquisition and control of the seventy other distilleries by the accused or by the Distilling & Cattle Feeding Co., by means of which this large production was secured, was in any respect unlawful; nor is it alleged, or even recited, that the parties from whom said seventy other distilleries were acquired, were by contract restrained from thereafter engaging in the distillery business, either generally or partially. From anything averred or recited to the contrary, it must be presumed, in this proceeding, that the defendants, or the Distilling & Cattle Feeding Co., in whose form and guise the accused is said to have acted, were in the rightful possession and control of the numerous distilleries employed by them in the manufacture of distilled products; and the quantity of such products, whether large or small, can in no way affect the right of disposition incident to lawful ownership. Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no juridisction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and con-

trol of property which the states of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several States or with foreign nations.

"Commerce among the States, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.'[1] In the application of this comprehensive definition, it is settled by the decisions of the Supreme Court that such commerce includes not only by actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one State to another. That such commerce begins, and the regulating power of Congress attaches, when the commodity or thing traded in commences its transportation from the State of its production or situs to some other State or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the State of its destination. When the commerce begins, is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State. At that time the power and regulating authority of the State ceases, and that of Congress attaches and continues, until it has reached another State, and become mingled with the general mass of property in the latter State. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer or transmission thereof to another State, constitutes

[1] Citing County of Mobile *v.* Kimball, 102 U. S. 691–702; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 208.

that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution, and consumption thereof in the latter State forms no part of interstate commerce.[1] In the latter case the Supreme Court pointed out the distinction between commerce and the subjects thereof, and held that the manufacture of distilled spirits, even though they were intended for export to other States, was not commerce falling within the regulating powers of Congress. . . . It is not very clear what Congress meant by the second section of the Act of July 2, 1890, in declaring it a misdemeanor to 'monopolize,' or 'attempt to monopolize,' any part of the trade or commerce among the States or with foreign nations.

"It is very certain that Congress could not, and did not, by this enactment attempt to prescribe limits to the acquisition, either by the private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offence was committed by such owner or owners. All persons, individually or in corporate organizations, carrying on business avocations and enterprises involving the purchase, sale, or exchange of articles, or the production and manufacture of commodities which form the subjects of commerce, will, in a popular sense, monopolize both State and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged, and developed. But the magnitude of a party's business, production, or manufacture, with the incidental and indirect powers thereby acquired,

[1] Citing Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1; Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; Coe *v.* Errol, 116 U. S. 517–520, 6 Sup. Ct. Rep. 475; Robbins *v.* Taxing Dist. 120 U. S. 497, 7 Sup. Ct. Rep. 592; and Kidd *v.* Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6.

and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production, or manufacture, is not the monopoly or attempt to monopolize which the statute condemns.

"A 'monopoly,' in the prohibited sense, involves the element of an exclusive privilege or grant which restrains others from the exercise of a right or liberty which they had before the monopoly was secured. In commercial law, it is the abuse of free commerce, by which one or more individuals have procured the advantage of selling alone or exclusively all of a particular kind of merchandise or commodity, to the detriment of the public. As defined by Blackstone,[1] and by Lord Coke,[2] it is a grant from the sovereign power of the State by commission, letters patent, or otherwise, to any person or corporation, by which the exclusive right of buying, selling, making, working, or using anything is given. When this section of the Act was under consideration in the Senate, distinguished members of its judiciary committee, and lawyers of great ability, explained what they understood the term 'monopoly' to mean; one of them saying: 'It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him.' Another senator defined the term in the language of Webster's Dictionary: 'To engross or obtain, by any means, the exclusive right, especially the right of trading, to any place, or with any country or district; as to monopolize the India or Levant trade.' It will be noticed that, in all the foregoing definitions of 'monopoly,' there is embraced two leading elements; viz., an exclusive right or privilege, on the one side, and a restriction or restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured. This being, as we think, the general meaning of the term, as employed in the second section of the statute, an 'attempt to monopolize' any part of the trade or commerce among the States must be an attempt to secure or acquire an exclusive right in such trade or commerce by means which prevent or restrain others from

[1] 4 Bl. Com. 159. [2] 3 Co. Inst. 181.

engaging therein. It was certainly not a 'monopoly,' in the legal sense of the term, for the accused or the Distilling & Cattle Feeding Co. to own seventy distilleries, and the products thereof, whether such products amounted to the whole or a large part of what was produced in the country. Their ownership and control of such products, as subjects of trade and commerce, is not what the statute condemns, but the monopoly or attempt to monopolize the interstate trade or commerce therein. In this acquisition and operation of the seventy distilleries, which enabled the accused or said Distilling & Cattle Feeding Co. to manufacture and control the sale of seventy-five per cent of the distillery products of the country, it does not appear, nor is it alleged, that the persons from whom said distilleries were acquired were placed under any restraint, by contract or otherwise, which prevented them from continuing or re-engaging in such business. All other persons who chose to engage therein were at liberty to do so. The effort to control the production and manufacture of distilling products, by the enlargement and extension of business, was not an attempt to monopolize trade and commerce in such products within the meaning of the statute, and may therefore be left out of further consideration.

"Was the arrangement with the Boston purchasers, as to making them a rebate upon the conditions stated, an attempt to monopolize any part of the trade and commerce among the States in distillery products? It is not alleged, nor is it to be inferred from anything that is set forth, that said purchasers bound themselves, or entered into any contractual obligations or understandings, to buy their distillery supplies exclusively from the distributing agents of said Distilling & Cattle Feeding Co. They were left at perfect liberty to purchase when, where, or from whom they pleased. No contractual or other restraint was placed upon them. Upon certain conditions, which it was entirely optional with them to comply with or disregard, a rebate was promised by the seller. Such an arrangement does not amount to a contract to purchase exclusively from said Distilling Co. or its distributing agents. But suppose it did, there was nothing in such an agreement unlawful, or in contravention of the

statute. The promise of a rebate, as an inducement for exclusive trading, certainly does not constitute an 'attempt to monopolize,' when the purchaser is left at liberty to buy where he pleases, and when all other sellers of the article are left unrestrained in offering the same, or greater, inducements. As to the remaining condition upon which the rebate was to be payable, the same observation may be made. The purchasers were placed under no contractual or other restraint in respect to the price at which they should sell. They were simply offered a rebate, as an inducement not to undersell the vendor's distributing agents, two of whom were located at Boston, Mass. The arrangement relied on, considered either in detail or as a whole, involved no 'attempt to monopolize any part of the trade or commerce among the States.' The rebate promised, upon condition of exclusive purchases and not underselling the vendor's distributing agents, was a legitimate method of inducing trade; but the means thus employed in no way operated to prevent or restrain others from offering the same, or greater, inducements. The condition as to not selling at lower prices than those of the distributing agents may have had a tendency to maintain prices, but that would not have been an attempt to monopolize trade. The inducements offered for the exclusive trade, and to sell at no lower prices than the price list of the distributing agents, was not prejudicial to the public. It was in no way contrary to public policy, or an unlawful restraint of trade, as will be seen from the authorities hereinafter referred to. But, aside from this, it is not shown that said arrangement necessarily involved or related to interstate traffic. It is not alleged that Webb & Harrison, the distributing agents from whom Hood and Kelly and Durkee made their purchases of alcohol, were located or made such sales in some other State than Massachusetts; nor that the alcohol itself was beyond the limits of that State when purchased. Neither is it shown that the exclusive purchases thereafter to be made, as one of the conditions on which the rebate was to be paid, could not have been made in the State of Massachusetts, it appearing from the face of the count that two of such distributing agents were located at Boston, in said State. Without dwelling further upon its

consideration, we are clearly of the opinion that this second count fails to charge any offence against the petitioner.

"What has been already said, applies largely to the third and fourth counts. The matter of the promised rebate upon the same conditions is set forth in the second count, which is charged to have been a contract in restraint of trade and commerce among the States, and between the State of Massachusetts and other States, does not constitute any offence against the United States, or in any way contravene the first section of the Act of July 2, 1890, because there was actually no contract which bound, or attempted to bind, the Massachusetts purchasers of alcohol, as to where or from whom they would make further purchases during the period stated, nor as to the price or prices at which they should sell. They were simply offered an inducement in respect to those matters, which they were at perfect liberty to comply with or decline. They were not restrained by any contractual obligation during the stipulated period. The agreement was wholly unilateral during that period. Upon compliance with the conditions as alleged in the fourth count, they were entitled to the rebate; but such compliance had no retroactive operation to create a valid and subsisting contract between the parties prior thereto, or during the period intervening between the date of the promise and the full compliance with the conditions on which the rebate was to be paid. During that period there was between the parties no contract in restraint of trade. But suppose the arrangement could by any possibility be construed into a contract between the parties from the date of the promise, or during the stipulated period, it could not be held to be a contract in restraint of trade. It is not deemed necessary to review the authorities upon the subject of contracts in restraint of trade, nor would it be at all profitable. It is well settled that contracts in general restraint of trade are contrary to public policy, and therefore unlawful. The arrangement under consideration cannot possibly be considered as one in general restraint of trade. Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness, and the existence of a consideration to support it. The question of its reasonableness depends on

the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured. No precise boundary can be laid down as to when, and under what circumstances, the restraint would be reasonable, and when it would be excessive.[1] In the present case, the arrangement treated as a contract was founded upon a valid consideration, and only secured to the vendors a reasonable protection in their business. It is not an unlawful contract in restraint of trade. The authorities fully support this conclusion."[2]

If anything more were needed to demonstrate the utter inutility of the Sherman Anti-Trust Act, it is found in the still later decision in the case of United States *v.* Nelson,[3] where it was decided that an agreement between a number of

[1] Citing Navigation Co. *v.* Windsor, 20 Wall. 64–68; Beal *v.* Chase, 31 Mich. 490; Ward *v.* Byrne, 5 Mees. & W. 549; Horner *v.* Graves, 7 Bing. 735; Mallan *v.* May, 11 Mees. & W. 667; Whittaker *v.* Howe, 3 Beav. 383; Hodge *v.* Sloan, 107 N. Y. 244, 17 N. E. Rep. 335.

[2] In addition to those referred to above, the court cited the following: Brown *v.* Rounsavell, 78 Ill. 589; Fowle *v.* Park, 131 U. S. 88, 9 Sup. Ct. Rep. 658; Chicago, etc., R. R. Co. *v.* Pullman South. Car Co., 139 U. S. 79, 11 Sup. Ct. Rep. 490; Mogul S. S. Co. *v.* McGregor, (1892) App. Cas., pt. 1, p. 25 (decided by the House of Lords in December, 1891), and said: "In this latter case there was a combination or association of ship-owners, who, being engaged in the trade with China, with a view of obtaining a monopoly of the homeward tea trade, and excluding the plaintiffs from competing with them for the same, and thereby keep up freight, offered to rebate or repay every sixth month, to such merchants and shippers in China as should have shipped their tea exclusively in vessels of the association, five per cent on all freight paid by them. The plaintiffs, as rival and competing ship-owners, were thereby excluded from this business, and sued for damages, and the question (almost identical with that under consideration) was presented whether the combination and arrangement adopted by the association to secure the exclusive transportation of tea trade was in any way unlawful. It was first passed upon, and held to be free from objection, by Lord Coleridge: 21 Q. B. Div. 554, 4 Ry. & Corp. Law J. 611. His decision was sustained on appeal (23 Q. B. Div. 598, 7 Ry. & Corp. Law J. 223), and was finally affirmed by the House of Lords. It would be highly instructive to quote at length from the opinions delivered in the House of Lords, if the limits of this opinion permitted. The reasoning and conclusions there reached fully sustain our conclusions in the present case."

[3] 52 Fed. Rep. 146.

lumber dealers to raise the price of lumber fifty cents per thousand feet in advance of the market price, cannot operate as a restraint upon trade within the meaning of the Act, unless such agreement involves an absorption of the entire traffic, and is entered into for the purpose of monopolizing trade in that commodity with the object of extortion.

Nelson, J., in passing upon the sufficiency of the indictment, expressed his views upon the proper construction of the statute, as follows: "The indictment intends to charge offences under the Act of Congress entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.' This statute declares contracts, combinations in the form of trusts or otherwise, and monopolies to restrain trade or commerce among the several States and foreign nations illegal, and makes them offences, and affixes the punishment. The indictment purports to charge the defendants with violating the law by entering into a contract, and unlawfully engaging in a combination in the form of a trust, and confederating together in a conspiracy in restraint of trade among the several States.

"There are twelve counts in the indictment. The first six counts charge the offence in the language of the statute, and the others set forth facts which are claimed to constitute the offence. The Federal courts by this Act are given jurisdiction to apply remedies in cases where interstate commerce is injuriously affected by combinations and contracts which the State courts had formerly applied to protect local interests. In order to administer the law, the court must determine what is an unreasonable and unlawful restraint of trade or commerce by contracts, trusts, and conspiracies, and whether a contract is injurious to the public. In all cases at common law, it must be made to appear that the acts complained of threatened the interests of the public; and this is true whether the remedy sought to be applied is by civil or criminal proceedings. It is urged by the district attorney that, the offence being statutory, the general rule in such cases, to wit, that it is sufficient to allege the offence in the language of the statute, will sustain the first six counts. I cannot agree to that. This is not a case where every fact necessary to constitute the

offence is charged, or necessarily implied, by following the words of the statute; and the words themselves fully and directly, without any uncertainty or ambiguity, set forth all of the elements necessary to constitute the offence; and it is not sufficient to follow only the language of the statute. Where the act becomes illegal and an offence only from the means used to effect it, as in this statute, the indictment must state, where it is practicable, so much as will show its illegality, and charge the accused with a substantial offence.[1] The charge must contain a statement of facts constituting the offence, and a certain description of it, which this indictment does not in either of the first six counts, and they cannot be sustained.

"Do the facts set forth in the last six counts describe an offence which the statute forbids? The first of these counts charges, in substance, that the defendants were each dealers in lumber in the United States, and each transacted business at numerous towns and cities in different States, and on September 7th, at the city of Minneapolis, they agreed together that they would raise the price of lumber fifty cents per thousand feet in advance of the market price of pine lumber, in the States of Wisconsin, Minnesota, Iowa, Illinois, and Missouri, and in pursuance of such agreement they did then and there raise the price of pine lumber fifty cents per thousand feet in each of said States in which they transacted business. How this advance in price by those parties in the several States mentioned could regulate thereby the price for all dealers is not set forth. It appears that the idea of the pleader was that a mutual agreement between several dealers that they would raise the price of the lumber owned or manufactured by themselves fifty cents per thousand feet above the market price necessarily advanced the price of all the pine lumber for sale in those States to that extent, and none could be purchased for a less price. While it may be true that some of the other dealers might attempt to induce purchasers to be governed by the price fixed in their locality by the parties to the agreement, and try to keep up prices, yet competition in the commodity would soon bring the price down, unless there were

[1] See United States *v.* Cruikshank, 92 U. S. 558.

fraudulent or coercive means resorted to for the purpose of restraining other dealers, and preventing them from exercising their own judgment as to prices.

"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. What has been said in regard to this count applies to the remaining five, in which wrongful combinations and conspiracies in restraint of trade are alleged, and a monopoly of the whole or a part of the trade and commerce in lumber in the several States mentioned."

§ 134. **Liability of Stockholders under Sherman Anti-Trust Act.** — The question of how far stockholders in a corporation are amenable under criminal statutes directed against contracts in restraint of trade, has sometimes arisen.

Courts have strictly discriminated between a corporation and those owning its stock in administering penal statutes. Thus, in the case of Green,[1] the court (Jackson, J.) said: "But there is another and fatal objection to all the counts of this indictment. All the acts and matters charged as criminal offences were, as shown upon the face of the indictment, the acts of the Distilling & Cattle Feeding Co., a corporation organized under the laws of Illinois. It is not alleged what relation the accused bore to said corporation; nor does it appear whether their connection therewith was other than that of mere stockholders, except as to the defendant Greenhut. By the eighth section of the statute, it is provided that the word 'person' or 'persons,' wherever used in that Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States,

[1] 52 Fed. Rep. 104, 119.

the laws of any of the Territories, the laws of any State, or the laws of any foreign country. If the acts charged constitute criminal offences, the Distilling & Cattle Feeding Co. is the 'person' who has committed the same. It would be unheard of in criminal jurisprudence to make its stockholders criminally responsible for the corporation's violation of the statute. That corporation can readily be reached and prosecuted by the government, either civilly or criminally, for what it may have done in contravention of the law, without requiring the courts, by strained construction of the statute, to extend its provisions and make them embrace all parties merely interested in such corporation. Except in conspiracy offences, there is no criminality by representation. We have not deemed it necessary or proper to attempt the difficult task of defining the cases to which the statute will apply. The enactment was manifestly aimed at the trust combinations and associations formed by individuals and corporations, which the State courts have in most instances declared illegal."[1]

[1] At the extra session, 1893, Senator White, of California, introduced Senate Bill No. 682, to repeal the so-called Anti-Trust Bill of 1890, and "to define, punish, and restrain acts, contracts, and combinations in restraint of trade and interstate commerce." It was read twice on August 23d, and referred to the Judiciary Committee. The Bill is both comprehensive and specific, and seems to reach all the necessities and exigencies of the situation. It defines monopoly, and provides punishment for continuing a monopoly after being perpetually enjoined, whether it was created before or after the taking effect of the act. It also directs the procedure for enjoining and punishing all forms of monopoly which affect interstate commerce.

CHAPTER XIV.

ACTIONS AND DEFENCES.

§ 135. **Extent of Inquiry in this Chapter.** — Not less important than the question whether a given contract is within the rule of public policy against restraint of trade is that directed to the respective rights of action and defence resulting to the parties who have entered into it. As to the direct enforcement of such contracts, the correct rule is that they cannot be enforced, either at law by recovery of damages for their violation, or in equity by injunction or decree of specific performance. Whether the consideration paid may be recovered, and whether a particular contract is divisible so that it is valid and enforceable in part, and the consideration recovered in part, and how, are different propositions, depending upon certain established legal and equitable principles applied with varying results to the facts and circumstances of each case.

§ 136. **Ordinary Principles applicable to Valid Restrictive Contracts.** — The first duty of a court when the specific enforcement of a contract or provision of a contract is objected to on the ground that it is void, because within the rule of public policy, is to determine that question; and having decided over the objection in favor of its validity, the court has no other peculiar task or duty before it in its construction and

enforcement, nor do any other or different rules govern the admissibility and effect of evidence, than prevail in cases of other contracts. This may now be considered the settled view, though a different rule was once recognized.[1]

§ 137. **Admissibility of Evidence to determine Validity of Contract.** — While a written contract, on its face in general restraint of trade, is presumptively void, yet parol evidence is admissible to show the situation of the parties, the nature of the subject-matter, and circumstances showing either that the restraint is in fact only partial, or if general, it is only such as is required for the protection of a party, and that its enforcement will be without public detriment. This is a general rule of evidence, and need not be further dwelt upon.

§ 138. **Incorporators not individually bound by Restrictive Contract of Corporation.** — The question sometimes arises as to whether the inhibition of such contracts extends to a corporation formed by covenantors. Thus in Moore & Handley etc. Co. *v.* Towers etc. Co.,[2] it was sought to enjoin the defendant, a corporation formed by persons who had previously entered into a contract with plaintiff, not to sell "Plough stacks and plough blades" within a certain territory. The court, while conceding that there are cases in which courts of equity will hold a corporation bound by the prior contracts of the individuals composing it, did not consider this a proper case for holding the corporation liable. The opinion of the court by McClelland, J., upon this point is of value, as pointing out salutary limitations in such cases. He said: "And in those cases where associates combine 'together to create a paper corporation, to cover a partnership or joint venture, and where the stockholders are partners in intention,' and have resorted to the fiction of a separate corporate entity to free themselves from individual obligations which had attached to them, with respect to the business they propose to carry on, prior to the organization of the company, courts of equity, when the ends of justice require it, will disregard and look beyond the fiction of corporate entity, and hold the corporation to a discharge of

[1] *Supra*, §§ 9, 10, 12.

[2] 87 Ala. 206.

the liabilities resting on its members; and this may be done, although some of the shareholders had not originally incurred the obligation sought to be enforced, provided they had notice of it before entering the corporation, and participated in the effort to avoid it.[1]

"The contract of Moore, Moore, & Handley sought to be enforced against the Moore & Handley Hardware Co. was not an undertaking between the promoters of the company and third parties, nor made on the faith of the corporation, nor intended to inure, in point of fact, to the benefit of the corporation. It is not of that class of contracts which courts enforce against corporations, on the ground that they were made in the corporate name by anticipation, and that the corporation received and accepted the benefits resulting from them.

"There is no allegation of fraud made against the corporation or its shareholders, and the implication of the fraudulent effect of the corporate action complained of is denied. It is not shown that this is a mere 'paper corporation,' to cover a joint venture, in which the corporators are partners in intention, and have resorted to this form for the purpose of evading and avoiding obligations which they had taken upon themselves as individuals, or for the purpose of evading the promise relied on here. If these things had appeared in the case, we should not hesitate to hold the corporation answerable for the individual obligation. But, in the absence of fraud, no authorities have gone the length of holding that any contract made with individuals, exclusively upon individual credit, will become the contract of any future corporation that may be formed for the more convenient management and use of the benefits of it."

§ 139. **Recovery on Contracts fully executed.** — While courts will not aid a party to a contract which is illegal, because in restraint of trade, to enforce it while unexecuted, it is otherwise where it has been fully executed, and nothing remains but to account for the funds or profits realized from its opera-

[1] Citing Davis Imp. W. I. W. W. Co. *v.* Davis W. I. W. Co., 20 Fed. Rep. 700; Beal *v.* Chase, 31 Mich. 490, 495, 532.

tion. Thus, where an illegal pooling between two railroad companies was fully executed, and the profits came to the hands of the receiver of one of the companies, it was held that, the contract having been executed, distribution should be made in accordance with its terms.[1] The court said: "The question now presented to me is not whether an unperformed and executory contract shall be enforced, nor whether damages shall be recovered against a party who refuses to operate under it. It is whether one party, who has received all the expected benefits to be derived from it, shall account for the fruits of its performance, which by its terms belong to another, and which, contrary to its terms, it retains. The contract, whether legal or not, was not binding on the complainant or the receiver; and if objected to in season, proper instruction would have been given in reference to its recognition and adoption. Failing to take proper steps to that end, the receiver was necessarily left at liberty to exercise his own judgment and discretion in reference to it. The contract itself was a customary one among railroads, and the receiver believed it to be reasonable and fair, and that it was expedient to continue it in force. This he has done, with the result already stated. Good faith required that the proceeds arising from its operation, and which by its terms belong to the petitioner, should be paid over to it, without regard to the questions now made as to the original validity of the contract. The receiver is accordingly directed to pay over to the petitioner the amount found to be due by the master, in accordance with the prayer of the petitioner." So it was held in Wisconsin, after a lard deal, in which the market had been successfully cornered, was at an end, so that nothing remained but to distribute the profits and account for the funds originally invested, an action would lie for these objects. In Wells *v.* McGeoch,[2] plaintiff and defendant had attempted to corner the market for lard, in Chicago. In settling their losses, defendant fraudulently overstated the amount of money furnished by him, and understated that furnished by plaintiff, who, relying on this state-

[1] Central Trust Co. *v.* Ohio Central R. R. Co., 23 Fed. Rep. 306. See also Wiggins Ferry Co. *v.* Chicago & Alton R. R. Co., 73 Mo. 389.

[2] 71 Wis. 196; 35 N. W. 769.

ment, made a large overpayment in settlement; and it was held that he could recover it from the defendant.

§ 140. **Creditors may recover upon Liquidation.** — In Pittsburgh Carbon Co. *v.* McMillin,[1] plaintiff, a manufacturer of carbon for electric lights, entered into a contract with a third person and other carbon companies, whereby the third person was made trustee for all the parties thereto for the management and control of the business of manufacturing and selling carbons. The several companies leased their factories to the trustee, and agreed to operate them under his direction, he to designate the kind of goods to be manufactured, fix the prices at which, and persons to whom, they should be sold. At the time the contract was made, plaintiff had an outstanding contract to furnish carbons to an electric light company, which contract was assigned to the trustee, who assumed the performance. In performance of the contract, the carbons were manufactured and delivered to the electric light company, billed in the name of the trustee. A receiver having been appointed for the combination, which was insolvent, the electric light company paid into court the money due on the carbons delivered to it by the trustee. Held, that the fact that the contract employing the trustee was illegal, as in restraint of trade, could not be relied on by the plaintiff in an action against the receiver to recover the amount thus paid into court, although plaintiff repudiated such contract after the delivery of the carbons. Andrew, J., delivering the opinion, said: "The plaintiff stands in the attitude of a party to an illegal contract, claiming a fund which, if the contract was valid, would clearly belong to the trust combination, and not to the plaintiff, as one of its members. The plaintiff has no standing to claim the fund in opposition to the clear import of the trust agreement, unless its repudiation of the contract in July, 1887, operated to make the plaintiff the vendor of the carbons delivered to the Brush Electric Light Co. during the time the plaintiff remained a party to the combination. The carbons, it is true, were delivered in performance of the plaintiff's agreement, made before the combination was formed.

[1] 119 N. Y. 46; s. c. 24 Abb. N. Cas. 96, 23 N. E. 530.

But the trustee assumed the performance by contract with the plaintiff, and the Brush Electric Light Co. accepted performance by him. To permit the plaintiff to treat the debt as a debt owing to it, and not to the trustee, would enable the plaintiff to escape from the operation of the rule which denies relief to a party to an illegal transaction. The plaintiff had a right to repudiate the contract of March 1st, 1887. Its stipulations could not have been enforced against the plaintiff. The plaintiff, notwithstanding the contract, could have sold its carbons to the Brush Electric Light Co. on its own account, and have received pay for them. But it did not do so. The agreement of March 1, 1887, was carried out in part. The carbons were manufactured by and for the trustee representing the combination, and were delivered to the purchaser as the property of the trust by the consent of the plaintiff, and the purchaser became the debtor of the trust, and not of the plaintiff. The repudiation of the trust agreement by the plaintiff after this transaction did not purge its previous participation of the illegal scheme. If the Brush Co. had not voluntarily paid the fund into court, it would be a grave question whether the plaintiff could have enforced a recovery against that company, although there was no adverse claimant.[1]

"But, as between the plaintiff and the receiver of the trust combination, the latter is, we think, clearly entitled to the fund. It is claimed that no action could have been maintained by the trustee, representing the trust combination, against the Bush Electric Light Co., to recover the purchase-price of the carbons, for the reason that the illegality of the combination would have constituted a good defence. Assuming this predicate, it is asserted that the receiver stands in the same position, and that his title is subject to the same infirmity as that of the combination which he represents. Without considering the assumption upon which this proposition is based, it is a sufficient answer to the proposition asserted that the receiver unites in himself the right of the trust combination, and also the right of the creditors, which he might be unable

[1] Citing Dewitt *v.* Brisbane, 16 N. Y. 508; Johnson *v.* Bush, 3 Barb. Ch. 207; Talmadge *v.* Pell, 7 N. Y. 328.

to assert as a representative of the combination merely. The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is, and that any defence which would have been good against the former, may be asserted against the latter. But there is a recognized exception, which permits a receiver of an insolvent individual or corporation, in the interest of creditors, to disaffirm dealings of the debtor in fraud of their rights.[1] Assuming that the trustee could not have recovered of the Brush Electric Light Co. for the reasons suggested, it would be a very strange application of the doctrine that no right of action can spring from an illegal transaction, which should deny to innocent creditors of the combination, or to the receiver who represents them, the right to have the debt collected, and applied in satisfaction of their claim. The just rule of the common law, that courts will not lend their aid to enforce illegal transactions at the instance of a party to the illegality, would be misapplied if permitted to be used to prevent the application of the fund in question to the payment of creditors of the combination."

§ 141. **Recovery upon Withdrawal from Agreement.** — The right to recover the consideration upon repentance and withdrawal from an illegal agreement depends, first, upon whether the right is resorted to in due time; and, secondly, whether the parties are *in pari delicto* in entering into it.

In Emory *v.* Ohio Candle Co.,[2] an association had been formed of a majority of the candle manufacturers in a given district, who agreed to pay into the treasury of the association a certain sum for every pound of candles sold by them. None of them was bound to operate his factory, but each was to receive at stated times a proportion of the profits of the pool, based on the amount of business done by him in the preceding years. The object and effect of the association was to decrease the production and increase the price of candles in the territory covered by it. Plaintiff withdrew from the associa-

[1] Citing Gillett *v.* Moody, 3 N. Y. 479; Porter *v.* Williams, 9 Id. 142; Curtis *v.* Levitt, 15 Id. 108.

[2] 47 Ohio St. 320; 24 N. E. 660.

tion before the expiration of the time it had agreed to remain therein, and brought suit to recover its share of the profits accruing immediately before its withdrawal. It was held that plaintiff could not recover.

The court said: "We are of the opinion that the suit cannot be maintained, for the reason that the objects of the association were contrary to public policy, and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is, in substance, a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. The committee represent the association, and a judgment against them is a judgment against it. If, as claimed by the defendants, a member could not withdraw from the association until the six years had expired, then the committee, as representing the association, had a defence on which they might have relied, had the objects of the association been perfectly legitimate. But should a court be called on to consider any defence, so long as the claim itself is based upon an agreement to which it can give no countenance? It must be observed that the withdrawal of the plaintiff was not at a time, nor under circumstances, that could give to it the merits of repentance. It had passed beyond where it might, by withdrawal, have secured the aid of a court in recovering what it had advanced in furtherance of an illegal object. Its suit is to recover its portion of the ill-gotten gains. The case of Norton *v.* Blinn[1] can have no application here, for this is a suit between parties to enforce the terms of the illegal agreement."

§ 142. **Same. — Judicial Notice of Illegality.** — So, in Richardson *v.* Buhl,[2] it was held that a contract whereby defendants agree to furnish complainant with money and credit to enable him to purchase stock in a corporation formed to prevent competition in the manufacture and sale of an article

[1] 39 Ohio St. 145. Also referring to Texas & P. R. R. Co. *v.* Southern Pac. R. R. Co., 6 Southern Reporter, 888, where Brooks *v.* Martin, 2 Wall. 70, is accurately distinguished, and shown to have no application.

[2] 77 Mich. 632; 43 N. W. 1102.

of necessity, being in furtherance of a monopoly, and growing out of transactions in connection therewith, is against public policy, and the court will, of its own motion, take notice of its illegality when called upon to adjust the rights of the parties under it. And in such case the court will neither enforce the contract while executory, nor relieve a party from loss by having performed it in part. The opinion contains an elaborate statement of the facts, and a complete recital of the transactions of the parties entering into the combination. Upon the point just noted, Sherwood, C. J., delivering the opinion, said: "No question is raised as to the validity of the contract between the parties, or upon its invalidity upon the ground of public policy, or for any other cause. It is treated by the parties on both sides as a valid instrument, to be construed and enforced by the court as such, and no unwillingness is expressed by either side to abide the correct construction when ascertained; but it is claimed by complainant that, if the construction is to be given to it contended for by defendants' counsel, equity and good faith have been violated to an extent requiring the exercise of the restraining power of a court of chancery to prevent the injury and wrong not intended by the defendants when the instrument was made, and which at that time was entirely unanticipated by complainant. But it must be recollected that the object to be accomplished by the re-organization of the enterprise was by all the parties the same; that the means to be resorted to in the accomplishment of the object desired, if successful, had no respect for equitable or just rights of any person under other and different circumstances; and that the complainant, as well as the defendants, were active participants in the business of the company and its proceeds, seeking the accomplishment of the same object, and participated largely in adopting the means to be employed for that purpose; and if such object and means were reprehensible or inequitable, are 'under the same condemnation,' and a court of equity will leave the parties, when such is the case, where it finds them, — outside the rules of courts of justice, *in pari delicto*, — and they must settle their own grievances and unlawful transactions. . . .

"When a contract is brought before us for construction and adjudication, its validity is necessarily involved, and it is usually the first point to which the attention of the court is challenged by counsel; but in this case, when, upon the argument, attention was called to this feature of the case, it was allowed to pass by counsel upon both sides without discussion. I have therefore expressed my views of the case as presented by the parties, and will now pass to the question which it is not needful for counsel to present in order to secure the action of this court in disposing of the same. I think no one can read the contract in question, and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Diamond Match Co. This action is openly and boldly avowed. Not only does this appear in its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on, but the testimony of General Alger himself avers it, and settles its character beyond question. The organization is a manufacturing company. The business in which it is engaged is making friction-matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business, and the manner of carrying it on.

"The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half-dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money, regardless of the wants or necessities of over sixty millions of people. The article thus completely

under their control, for the last fifty years 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. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Co. It was to aid that company in its purposes, and in carrying out its object, that the contract in this case was made between these parties, and which we are now asked to aid in enforcing.

"Monopoly in trade, or in any kind of business in this country, is odious to our form of government in carrying on a great public enterprise, or public work under government control, in the interest of the public. Its tendency is, however, 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, and is not allowed to exist under express provision in several of our State constitutions.

"Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and the policy of the law, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of the business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations, or individuals; and therefore public policy is, and ought to be, as well as public sentiment, against it.

"All 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 all courts.

"In my judgment, not only is the enterprise in which the Diamond Match Co. is engaged an unlawful one, but the contract in question in this case, being made to further its objects

and purposes, is void, upon the ground that it is against public policy."

§ 143. **No Recovery for Price of Articles sold under Illegal Agreement.** — A different question from recovery of a share of the results of an illegal transaction is presented where it is sought, while it remains unrepudiated and in course of execution, to recover for the price of articles sold and delivered under it. To allow such recovery is to enforce the contract. This was fully explained in Arnot *v.* Pittston & E. Coal Co.,[1] where the court said: "The plaintiff, however, contends that, notwithstanding the illegality of the stipulation of the Butler Colliery Co. 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 Co. of any specified quantity of coal, or even of all the coal which the Butler Co. 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 anything beyond making the sale to aid the illegal scheme of the vendee, he renders himself *particeps criminis*, and cannot recover for the price."

§ 144. **Criminal Consequences.** — While a conspiracy to "corner," or forestall, the market for commodities is none

[1] 68 N. Y. 568.

the less a common law offence now than formerly, yet modern criminal annals afford no instance of a successful prosecution for it, except one or two cases under an early New York statute.[1]

A learned exposition of the law bearing upon the criminal features of agreements made to forestall, or corner, produce markets is found in Raymond *v.* Leavitt,[2] where Campbell, J., delivering the opinion, said: "There is no doubt that modern ideas of trade have practically abrogated some common law doctrines which are supposed to unduly hamper commerce. At the common law there is no doubt such transactions as were here contemplated, although confined to a single person, were indictable misdemeanors under the law applicable to forestalling and engrossing. Some of our States have abolished the old statutes which were adopted on this subject, and which were sometimes regarded as embodying the whole law of such cases. Where this has been done, as in New York, the statutes have replaced them by restraints on combinations for that purpose, leaving individual action free. In England there have been several statutes narrowing or repealing all of the ancient statutes, and more recently covering the whole ground. But so long as the early statutes only were repealed, it was considered that enough remained of the common law to punish combinations to enhance values of commodities. And when this doctrine became narrowed, it seems to have been considered that such combinations to enhance the price of provisions remained under the ban."

In Rex *v.* Waddington,[3] it was held the common law was still in force to punish engrossing the necessaries of life or provisions by single persons. The chief difficulty was in determining whether hops came within that rule; and it was held that they did, and that the Legislature only could change the law. The defendant was heavily fined. The case has

[1] People *v.* Fisher, 14 Wend. 9. See also People *v.* Frequier, 1 Wheeler's Crim. Cas. 142; State *v.* Donaldson, 32 N. J. L. 151; People *v.* Melvin, 1 Yates Sel. Cas. 112; Rex *v.* Furguson, 2 Stark. 489; Masters Stevedores Ass'n *v.* Walsh, 1 Daly (N. Y.) 1.

[2] 46 Mich. 447, 450.

[3] 1 East. 143, 167.

been sharply criticised, as not in harmony with modern political economy; and it no doubt goes beyond what would be considered proper among us. It has never, as far as the researches of Mr. Bishop have gone, — and he seldom overlooks important cases, — been judicially disapproved, although statutes have been made to change the rule.[1] And he intimates that conspiracies for such purposes may perhaps be punished.

§ 145. **Penalties voluntarily paid not recoverable.** — While, as has been seen, an illegal contract may sometimes be repudiated, and the consideration recovered in an action brought in due time, yet it is held that where a party has gone so far in its execution as to pay a penalty provided for by its terms, he cannot maintain an action to recover the same. Thus, it was held that an association of manufacturers of wire-cloth, formed for the avowed purpose of regulating the price of the commodity, each of the members stipulating, under a heavy penalty, that he would not sell at less than a specified rate, was contrary to public policy and illegal; and one of the members of the association, who had paid the penalty for a violation of the stipulation, could not recover it back.[2]

[1] 1 Bish. Cr. L. 527, 528, and notes to 6th ed. See also 2 Bish. Cr. L. 202, 206, 216, 220, 230, 231.

In Rex *v.* Hilbers, 2 Chitty, 163, it was held that there must be a combination of more than one person before an information will be granted for enhancing the price of necessaries.

Mr. Russell gives it as his opinion that in our day single offenders would not be regarded as punishable, unless their offence relates to provisions. 1 Russ. 170. But where there is a conspiracy, the law has been given a much wider application, and the case of Rex *v.* De Berenger, 3 M. & S. 67, has obtained celebrity from the high rank of the offenders convicted (one of them at least, Lord Cochrane, unjustly) of conspiring to raise the price of stocks by false rumors.

[2] De Witt Wire-Cloth Co. *v.* New Jersey Wire-Cloth Co., 14 N. Y. S. 277.

The sale of the practice and goodwill of a physician within reasonable limits is the legitimate subject-matter of a contract, and carries with it the implied covenant, as in other sales, that the seller will not himself do anything to disturb or injure the buyer in the enjoyment of that which he has purchased. (Distinguishing 5 Allen, 345; and following 14 Allen,

§ 146. **Waiver by State.** — In People *v.* Stephens,[1] it was held that where a contracting board, having full power in behalf of the State to reject proposals in case they deem them disadvantageous to the State, and knowing all the facts, adjudged a proposal not excessive in price or disadvantageous,

211; 13 Gray, 356; 4 Exch. 776; 39 Conn. 326.) A resumption of his business by the seller may be enjoined, even though the contract does not in terms prohibit him (33 Beav. 327; 10 Jur. N. S. 1123). 1873, Dwight *v.* Hamilton, 113 Mass. 175.

A, a livery-stable keeper, sold for its value his stock partly to B, and partly to C, agreeing not to engage in business in the same stable for five years. *Held*, that the agreement was valid, although in restraint of trade, and was based on a good consideration, and that, C having left the business at the time A violated his agreement, and refusing to sue, B might sue alone and recover the whole sum named as liquidated damages in the agreement. Johnson *v.* Gwinn, 100 Ind. 466.

[1] People *v.* Stephens, 71 N. Y. 527. This case was an action by the State of New York to recover damages alleged to have been sustained by reason of an unlawful combination of contractors to prevent competition at a letting of contracts for canal repairs. It appeared that the bids were put in Dec. 28th, 1866; that, on the report of a committee of investigation appointed by the Legislature in 1867, the law of 1868, ch. 869, was passed, authorizing the attorney-general to bring actions to set aside the contracts, and to recover moneys paid thereunder in excess of the fair value of the work and materials in case the fraud was established. One such action was pending when the law of 1870, ch. 55, 3, 4, was passed, authorizing the canal board, on recommendation of the canal commissioners, to cancel any contract for canal repairs, the contractor whose contract was thus annulled to be entitled to receive money earned, etc. Meanwhile the contractors, with the assent of the State officers in charge of the canals, had proceeded with the performance of their contracts, and had been regularly paid for the work as therein prescribed; and in one case the contractor had, under a joint resolution of the Legislature, been required to proceed with the work under his contract. The defendant's contracts had not been annulled, but proceeded to completion, and they received the contract prices. *Held*, —

1. That the law of 1870 was intended as a final disposal of the whole matter, and as a waiver of any claim for fraud, and operated to validate the letting and to ratify the contracts, subject to the power therein conferred to annul them; and this intent and the State's action being binding on the courts and the State, the suit was not maintainable.

2. That the facts that, at the time of the discovery of the fraud, the contracts were partly performed, and that the State could not restore the contractors to their original positions, did not require that the State,

and accepted it, in the absence of any evidence that the board acted corruptly or *mala fide*, the State was bound by the contract, and could not maintain an action to recover damages for the illegal combination.

in order to obtain relief, should let them be completed, and then sue for damages. On such discovery, the State could repudiate the contracts, without waiving its right to recover damages. In the absence of any showing of bad faith, incompetency, or negligence on the part of the State, a continuance of the contracts after full knowledge of the fraud, under circumstances entitling the contractors to the stipulated compensation and a voluntary payment of the same, was a waiver of the fraud.

GENERAL INDEX.

GENERAL INDEX.

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