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ought not to be enforced, because it would deprive the assignor of the means of livelihood, and would tend to a multiplication of actions for getting in the different parts of the property, which the assignor would be bound to assign from time to time. But in the present case we have not to draw the line between contracts which the Court will enforce and contracts which it will not. The cases where the contract is wholly executory on both sides differ materially from a case like the present, where the contract on one side has been performed. Wherever the boundary line is to be drawn I am satisfied that the present falls within the class of cases where the contract will be enforced. It is a contract relating to several subject-matters, one being all real and personal estate to which the mortgagor may become entitled under any will. I can see no reason for not specifically performing that contract as to any property that comes to the mortgagor under a will. He has received the consideration and ought to perform his part of the contract. Such a contract was enforced by Lord *Langdale* in *Bennett* v. *Cooper* (1), and though we are not bound by his decision I think it one which ought to be followed.

The Appellant very properly pressed upon us the case of *Official Receiver* v. *Tailby* (2), where the Court came to the conclusion (and it may be a right conclusion) that a contract to assign all book debts which should be owing to the mortgagor was too vague to be enforced. If the case had been in point we should have submitted to it. The Court seemed inclined to hold that the agreement included not only all debts entered in the assignor's books, but all debts which ought to be so entered, in which case it might be held that the uncertainty made the contract one which the Court could not enforce. There is no such difficulty here; the contract is quite different, and as I cannot find that the Court in that case laid down any principle, I do not think that it is any authority against our decision. The appeal, in my opinion, fails.

Solicitors: *Storey & Cowland*, agents for *Crick & Freeman, Maldon; Paterson, Snow, & Co.*, agents for *F. T. Veley, Chelmsford; Duffield & Bruty.*

(1) 9 Beav. 252. (2) 18 Q. B. D. 25.

M. W.

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C. A. 1887 KEKEWICH, J. *Feb.* 23, 24, 25; *March* 14. C. A. *Aug.* 1, 2, 5, 9.

[1886 D. 426.]

Restraint of Trade—Public Policy—"So far as the Law allows"—Reasonable Limits—Costs on Higher Scale.

On a dissolution of partnership the retiring partner, who received a large sum of money, covenanted "to retire from the partnership; and, so far as the law allows, from the business, and not to trade, act, or deal in any way so as directly or indirectly to affect the continuing partners." The business had been carried on at *Wolverhampton* and in *London*.

In an action by the survivor of the continuing partners and his assignees to restrain the retiring partner from carrying on a similar business in *Middlesex*:—

Held (reversing the decision of *Kekewich*, J.), that the covenant to retire from the business so far as the law allows was too vague for the Court to enforce.

By *Cotton*, L.J. (*Bowen* and *Fry*, L.JJ., giving no judicial opinion):—The old rule that the law does not allow an absolute covenant in restraint of trade is still binding, and the covenant was void on that ground also.

Held, also, that the covenant not to trade, act, or deal, so as to directly or indirectly affect the continuing partners was personal to the continuing partners, and could not be sued upon by their assignees.

And, *semble*, it was also too vague for the Court to enforce.

The changes in the doctrine of public policy and the authorities discussed.

Costs on the higher scale according to Order LXV., rule 9, allowed.

EDWARD ALBERT DAVIES, *Edward Davies*, and *James Davies*, under the style of "*Davies Brothers & Co.*," carried on the business of galvanized iron manufacturers or galvanizers at *Wolverhampton*, with a place of business in *London*. *Edward Davies* was the father of *E. A. Davies* and *James Davies*. Disputes arose between them, and an action was brought for dissolution. The action was compromised, and an agreement for dissolution, dated the 15th of July, 1884, was made, and was followed by a formal deed of dissolution. The deed, according to the evidence, was fully discussed beforehand, and the result of evidence as to the knowledge of the parties is stated in the judgment of Mr. Justice *Kekewich*. The deed was dated the 11th of October, 1884, and by it *James Davies* assigned to *E. A. Davies* and *E. Davies* all

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his share and interest in the property and goodwill of the partnership; *E. A. Davies* and *E. Davies* covenanted to pay to *James Davies* £10,500 at the times and in the manner therein mentioned: *E. Davies* released *James Davies* from a sum of £1600 or thereabouts then due from him; and *James Davies* covenanted, amongst other things, as follows:—

"The said *James Davies* to retire wholly and absolutely from the partnership, and, so far as the law allows, from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as to either directly or indirectly affect the said *E. Davies* and *E. A. Davies*."

It appeared from the evidence that this clause was taken from the original agreement for compromise; and that the parties intended to insert a more precise covenant in the formal deed; but that after some discussion, as they could not agree on the form of the covenant, they retained the clause as originally drawn.

The £10,500 had been paid except £1000, which had been retained in pursuance of other provisions in the deed of dissolution. *E. Davies* and *E. A. Davies* carried on the business until the death of *E. Davies* in 1885; and the business had since been transferred to a company called "*Davies Brothers & Co., Limited.*"

In 1885 *James Davies* entered into partnership with one *W. S. Codner*, who had formerly been an agent for *Davies Brothers & Co.*, and they issued a circular stating that they were "merchants and manufacturers of galvanized hollow ware tanks, &c., under the style of *Davies, Codner & Co.* Our Mr. *James Davies* was formerly managing partner of the firm of *Davies Brothers & Co., Crown Works, Wolverhampton.*" They also published advertisements to the same effect, and they had solicited orders from customers of the old firm. They were now carrying on their business at 380, *Old Street, Shoreditch.*

The limited company and *E. A. Davies* brought this action, claiming that the Defendant *James Davies* might be restrained from carrying on the business of a galvanizer or galvanized iron manufacturer in *Middlesex.*

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The Defendant alleged that he and his partner made goods of a certain description which were afterwards galvanized, but not by them; and denied that he carried on the business of a galvanizer or otherwise committed any breach of the covenant. He also pleaded that the covenant was void (1) as too vague and (2) as being in restraint of trade. He also alleged that subsequent negotiations between the parties amounted to acquiescence in his dealings; but, as appears from the judgment, the Court held that there had been a breach of the covenant, and that there had been no acquiescence.

The action came on for hearing before Mr. Justice *Kekewich* on the 23rd of February, 1887.

Warmington, Q.C., and *C. Walker*, for the Plaintiffs:—

General covenants in restraint of trade are bad, but limited covenants are good, and what are reasonable limits must depend on the circumstances of each case. Even if part of the covenant is bad the Court will maintain the valid and reject the invalid part of such a covenant: *Price* v. *Green* (1). *Horner* v. *Graves* (2) gives a clear rule as to the boundary. It cannot be illegal to covenant to observe the rules of law: *Avery* v. *Langford* (3); *Countess of Harrington* v. *Earl of Harrington* (4). As the means of communication increase, the area of restriction must be allowed to increase: *Archer* v. *Marsh* (5). The parties may now settle what they please if the public is not injured: *Wallis* v. *Day* (6); *Whittaker* v. *Howe* (7); *Leather Cloth Company* v. *Lorsont* (8). In *Rousillon* v. *Rousillon* (9) the covenant was unlimited as to space. *Mallan* v. *May* (10); *Pownall* v. *Graham* (11); *Rannie* v. *Irvine* (12).

Barber, Q.C., *Cock*, Q.C., and *Russell Roberts*, for the Defendant:—

(1.) This covenant is too vague to be enforced. (2.) It is void

(1) 16 M. & W. 346.
(2) 7 Bing. 735.
(3) Kay, 663.
(4) Law Rep. 5 H. L. 87.
(5) 6 A. & E. 959.
(6) 2 M. & W. 273.
(7) 3 Beav. 383.
(8) Law Rep. 9 Eq. 345.
(9) 14 Ch. D. 351.
(10) 11 M. & W. 653.
(11) 33 Beav. 242.
(12) 8 Scott, N. R. 674; 7 Man. & G. 969.

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as against the policy of the law. (3.) There has been no breach. (4.) The Plaintiffs have acquiesced in what the Defendants have done. On the first point, the clause has no clear meaning; "retire" may mean merely leave that partnership. An injunction is not granted unless the case is clear, and the Court will not add conditions: *Kerr* on Injunctions (1); *Churchward* v. *Reg.* (2); *Erskine* v. *Adeane* (3). In fact, the Court must say what this covenant means before it can grant any injunction. On the second point, the rule as to public policy was established in the middle ages, and no doubt latterly the tendency has rather been to consider whether the restriction is reasonable, but still the rule exists and is acted on: *Story's* Equity Jurisprudence (4); *Pollock* on Contracts (5); *Hitchcock* v. *Coker* (6). The restriction must still be partial; *Collins* v. *Locke* (7); *Allsopp* v. *Wheatcroft* (8). In no case has a general covenant like this been held good.

[KEKEWICH, J., referred to *Harms* v. *Parsons* (9).]

In *Price* v. *Green* (10) the limits were given.

Witnesses were then examined on both sides, especially as to alleged breaches and as to the acquiescence.

Russell Roberts, summed up:—

A covenant of this sort must be partial; being only reasonable is not enough. *Horner* v. *Graves* (11) is not against that: *Ward* v. *Byrne* (12). No doubt in some of the cases the interest of the public has been lost sight of and reasonability only has been considered, and in many cases the two principles were confused; but the principle of public policy still exists and must be acted upon: *Hinde* v. *Gray* (13), and *Tallis* v. *Tallis* (14).

[KEKEWICH, J., said he had no doubt that the covenant had been broken, and that there had not been acquiescence; but he had considerable doubts as to the law applicable to the case.]

(1) 2nd Ed. p. 392.
(2) 1 Q. B. D. 173, 195, 211.
(3) Law Rep. 8 Ch. 756, 763.
(4) § 292.
(5) 4th Ed. p. 311.
(6) 6 A. & E. 438, 457.
(7) 4 App. Cas. 674.
(8) Law Rep. 15 Eq. 59.
(9) 32 Beav. 328.
(10) 16 M. & W. 346.
(11) 7 Bing. 735.
(12) 5 M. & W. 548.
(13) 1 Man. & G. 195.
(14) 1 E. & B. 391.

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Warmington, in reply:—

The goodwill has been sold, and this is a necessary stipulation to protect the goodwill. The Defendant has sold it and now wants to retain it. In each case the Court must look at the position of the parties and decide what is a proper and reasonable restriction. Unless there is a limitation by metes and bounds it is better to leave it "as the law allows." "Affecting" is not a vague word, and relates merely to this business, and its object is clearly defined. All parties knew that the outgoing partner was not to solicit business from others, and such a covenant is quite reasonable if the goodwill is to be protected. The subject of public policy was considered in *Egerton* v. *Earl Brownlow* (1), but public policy changes, and what was thought wrong at one time may cease to be so thought, and old cases may be overruled. *Pilkington* v. *Scott* (2) shews the anxiety of the Court to give effect to such a covenant. *Ward* v. *Byrne* (3) was a stronger case. *Hinde* v. *Gray* (4) is not now law. *Tallis* v. *Tallis* (5) was much criticised in *Rousillon* v. *Rousillon* (6). *Elves* v. *Crofts* (7) is a most instructive case. In *Jacoby* v. *Whitmore* (8) such a covenant was enforced. *Mumford* v. *Gething* (9) shews that there is no strict rule as to space.

1887. Mar. 14. KEKEWICH, J.:—

Having had occasion not long ago to consult the authorities on covenants in restraint of trade, I found it difficult to state any rules with precision or, to use the language of Chief Justice *Parker*, "to reconcile the jarring opinions." Having now consulted them more at large and with the assistance of counsel's criticisms, I find my difficulty rather increased than diminished. It is the embarrassment of wealth, for the authorities are numerous, and include decisions of eminent Judges and opinions

(1) 4 H. L. C. 1.
(2) 15 M. & W. 657.
(3) 5 M. & W. 548.
(4) 1 Man. & G. 195.
(5) 1 E. & B. 391.
(6) 14 Ch. D. 351.
(7) 10 C. B. 241.
(8) 32 W. R. 18.
(9) 7 C. B. (N.S.) 305.

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of professors competent to speak. It is not for me to suggest how this embarrassment could have been avoided; still less is it for me to suggest how it can be remedied by a decision of the highest Court of Appeal, or if need be by legislation. I disavow any wish or intention to do more than find, if possible, a guide to the solution of the particular question before me.

All authorities, from first to last, concur in one thing—viz. that the doctrine on this subject is founded on "public policy;" and I cannot but regard the jarring opinions as exemplifying the well-known *dictum* of Mr. Justice *Burrough* in *Richardson* v. *Mellish* (1) that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you." Public policy does not admit of definition and is not easily explained. If that statement requires authority, turn to *Egerton* v. *Earl Brownlow* (2) and consult the arguments of counsel and the opinions of Judges covering the whole subject including, in some passages to which I will presently call attention, that part of it which concerns restraint of trade. One thing I take to be clear, and it is this—that public policy is a variable quantity; that it must vary and does vary with the habits, capacities, and opportunities of the public; that it cannot have been the same when Chief Justice *Tindal* decided *Horner* v. *Graves* (3) in 1831 as it was when Chief Justice *Parker* decided *Mitchel* v. *Reynolds* (4) in 1711; that it must have changed, and did change, between 1831 and 1869 when Vice-Chancellor *James* decided *Leather Cloth Company* v. *Lorsont* (5); and if there had not been a further change before Lord Justice *Fry* decided *Rousillon* v. *Rousillon* (6) in 1880, it must have occurred ere now.

There are many circumstances familiar to us all, and some of them connected with politics rather than with policy, which have materially altered the relative position of rivals in trade and of the public whom traders supply. Railways, electric telegraphs, and telephones, have all exercised an influence, and quite recently the parcels post, to say nothing of many other novelties, has introduced new elements into competition. I make these remarks,

(1) 2 Bing. 229, 252.
(2) 4 H. L. C. 1.
(3) 7 Bing. 735.
(4) 1 P. Wms. 181.
(5) Law Rep. 9 Eq. 35.
(6) 14 Ch. D. 351.

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because to my mind they go a long way to explain the difference between earlier and later decisions. Judges have been bound to recognise not merely the old decisions, but the principles on which they were founded, and yet, regarding public policy as the principle overriding all, they have struggled to adapt these older decisions to the changed circumstances of the day. There has, I think, been a steady though irregular progress from the stricter rules of the last century, and perhaps it has not yet reached its limit.

According to the old cases the rule was simple enough, and the reason of it was clear. We have the highest authority for saying that, according to *Mitchel* v. *Reynolds* (1), the general rule was that "all restraints of trade which the law so much favours, if nothing more appears, are bad." In other words the presumption of law was against them, because the law favoured the utmost competition in trade. There are frequent statements in the books, that in thus favouring trade the law desired to assist every man to earn his living by that trade for which he was apt; and possibly some Judges thought that this was required by public policy, but to my mind what is really meant by the law favouring trade is, that it was considered a matter of essential importance to encourage all men to trade in order that the public might gain advantage by their trading—in other words it was considered public policy to assist *England* to become a nation of traders.

From the first, exceptions to the rule were established. These exceptions are generally accepted as amounting to a doctrine judicially settled that a covenant in restraint of trade must in order to be supported comply with three conditions. They are not always stated in the same order, and I may therefore state them in the order most convenient to myself. They are these: (1) first, the covenant must be made on adequate consideration; (2) secondly, the restraint must be partial; and (3) thirdly, it must be reasonable. As regards the first it was laid down in *Hitchcock* v. *Coker* (2), which is recognised by Sir *G. Jessel* in *Gravely* v. *Barnard* (3) as settling the point, that the Court cannot inquire

(1) 1 P. Wms. 181.
(2) 6 A. & E. 438.
(3) Law Rep. 18 Eq. 518.

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into the adequacy of consideration moving a contract between two competent parties. A nominal, that is to say an unreal, consideration will not suffice, but provided there is real consideration the Court will not inquire further or pause to consider whether the object gained was at all commensurate with the price paid for it, or whether the covenantee really required the benefits for which he stipulated. *Hitchcock* v. *Coker* (1) was decided in 1837, and of itself shews a large departure from the original rules.

Notwithstanding that the two other conditions have, in conformity with many authorities, been above stated separately, I cannot but think that they are and have of late been treated as one. Indeed, I am not sure that some confusion has not arisen from their being treated otherwise. The partial character of supportable restraints of trade may be the most essential feature and evidence of their reasonableness, and may of itself constitute reasonableness, but I venture to think that it is in truth no more than this, and that, notwithstanding many *dicta* to the contrary, the authorities for the proposition that a covenant, in order to be supported, must be partial, are better understood if construed to mean that they must be reasonable. I therefore proceed to consider what is a reasonable restraint of trade.

With three exceptions, which I will presently notice, it has always been held that a covenant, in order to be reasonable, must be limited as regards space. I do not think that I am bound by any authority to hold that it must be limited as regards persons, and the practical objections to so holding at the present day are obviously greater than those to supporting the necessity of limit as regards space. *Collins* v. *Locke* (2) might be cited as against this, but in truth it can better be referred to the class of covenants good for partiality as regards space. A limit as regards persons may, however, be useful towards making a restraint reasonable, as for instance, not to solicit customers of a firm within, say, the *United Kingdom*, might render a restraint reasonable which would not be so otherwise. The limit of time is of little value. It enters into some cases, as, for instance, *Whittaker* v. *Howe* (3) and *Rousillon* v. *Rousillon* (4), to be presently mentioned, but it was

(1) 6 A. & E. 438.
(2) 4 App. Cas. 674.
(3) 3 Beav. 383.
(4) 14 Ch. D. 351.

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scarcely regarded there, and can seldom, if ever, be the basis of judgment. This is fully explained by Mr. Baron *Parke* in *Ward* v. *Byrne* (1), and also in a useful contribution to the learning on this subject which will be found in the notes to *Hunlocke* v. *Blacklowe* (2). There are some other possible limits which might be introduced to make a restraint reasonable, on which I need say no more than that, whenever that character can fairly be ascribed to them, they deserve favourable consideration. *Jones* v. *Lees* (3) is a case of this class (see the judgment of Mr. Baron *Bramwell* (4)). *Whittaker* v. *Howe* (5) is the first case in which a covenant unlimited as regards space was upheld. A different conclusion would at least have been as consistent with *Horner* v. *Graves* (6), which was intended to be followed, and, bearing in mind the doubt about this authority long ago suggested by a note to *Mitchel* v. *Reynolds*, in *Smith's* Leading Cases (7), and therefore long current in the profession, I should hesitate to treat it as a safe guide, though haply bound by it in a case precisely similar. The next case is *Leather Cloth Company* v. *Lorsont* (8), where Vice-Chancellor *James* upheld a covenant by the vendors of a process of manufacture with their vendees that they would not directly or indirectly carry on or allow to be carried on in any part of *Europe* (which, for the purposes of the case, may be read as meaning *Great Britain*) any company or manufactory having for its object the manufacture or sale of productions then manufactured in the business or manufactory of the covenantors, and would not communicate to any person the means or process of the manufactures so as to interfere with the vendees. This case is important, first, because it is a good example of the class of cases in which covenants in restraint of trade have been connected with the sale of a business or goodwill; and, secondly, because the Vice-Chancellor stated the principles guiding him in language different from that employed by any other Judge before him, and, I think, implying some departure from the ordinary explanation of the principles of public policy. He does

(1) 5 M. & W. 562.
(2) 2 Wms. Saund. 156.
(3) 1 H. & N. 189.
(4) Ibid. 194.
(5) 3 Beav. 383.
(6) 7 Bing. 735.
(7) 8th Ed. vol. i. p. 417,
(8) Law Rep. 9 Eq. 345.

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not say as much, but I think he intended to hold that nothing could be against public policy which was reasonable, and that nothing could be unreasonable which, according to the experience of mankind, was prudently required to secure to a purchaser the exclusive enjoyment and benefit of that which he had contracted to purchase, and for which he had paid the consideration stipulated by the vendor. He contrasts freedom of contract with freedom of trade, and shews that both are equally the favourites of public policy. The passages in his judgment to which I refer will be found on pages 354–5. The same contrast was strongly insisted on in the third case, *Rousillon* v. *Rousillon* (1), where Lord Justice *Fry* (then Mr. Justice *Fry*) sustained a covenant by the agent of a firm of champagne merchants not to establish himself or to associate himself with other persons or houses in the champagne trade for ten years in case he should leave their employment. Lord Justice *Fry* rested his judgment on the contrast just mentioned, and held to be sound a rule extracted from *Mallan* v. *May* (2), that a defendant alleging the invalidity of a contract on the ground that it is in restraint of trade, has cast on him the burden of shewing it to be clear that the protection extends beyond what the plaintiff's interests require. He further examined the alleged rule that a contract, if good, must be limited as to space, and held in the result that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances under which such prohibition has been unreasonable. This seems to me to accord with common sense, and, if so, it ought also to accord with sound law. I can well understand, notwithstanding *Whittaker* v. *Howe* (3), that the inhabitants of, say, *Cornwall* or *Cumberland* ought not to be deprived of the services of a local solicitor practising in, say, *Bodmin* or *Carlisle*, because he was formerly a clerk in the employ of a solicitor or a member of a firm of solicitors practising in, say, *London* or *Birmingham*. And, to take an illustration from a business which has been singularly fruitless in contributions to this branch of the law, it would be difficult, I think, to hold that the inhabitants of a country town, even within a moderate distance from

(1) 14 Ch. D. 351. (2) 11 M. & W. 653.
(3) 3 Beav. 383.

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London, should not enjoy the advantages of a resident banker because he happened to have been a partner in, or connected with, a bank established in the metropolis and not having branches in the provinces. On the other hand there are many trades which can be carried on by correspondence and by means of modern facilities of transit with such ease, and with such advantages both to trader and customer, that it would be difficult, if not impossible, to say what corner of the kingdom could not be well served from any other corner; and it is within the knowledge of all that many who from early associations or for some other reason prefer goods supplied at a particular place continue to deal with tradesmen there, notwithstanding that they have, from accident or chance, removed their home many miles away. Is there anything to prevent me from adopting the rule which is laid down by Lord Justice *Fry*, and which approves itself to my mind? True it is that in many cases the old rule is quoted and followed without a hint of disapproval, and the earlier authorities are treated as in full force and applicable to modern circumstances. An example of this class of cases is *Collins* v. *Locke* (1), already mentioned, which, being a decision of the Privy Council, is entitled to special respect, but though the judgment in that case was rested on *Horner* v. *Graves* (2), and other old authorities, it is explained to be based on consideration how the rule ought to be applied to a particular trade in a particular locality, or, in other words, how far the restraint in question could be treated as reasonable or otherwise, having regard to the protection required by the covenantees and the interests of the public. (See among other passages one on page 688.) In *Egerton* v. *Earl Brownlow* (3) the law was laid down as, having regard to the question under consideration, might be expected, in a broader manner. On page 87, Mr. Justice *Cresswell* states the rule to be that unreasonable contracts in restraint of trade violate the policy of the common law that trade shall not be restricted, and are therefore illegal. Mr. Baron *Parke's* remarks (4), are more favourable to strict adherence to the lines of the old cases, but Lord *St. Leonards* (5)

(1) 4 App. Cas. 674. (3) 4 H. L. C. 1.
(2) 7 Bing. 735. (4) Ibid. 123.
(5) 4 H. L. C. 238.

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dwells on the variable character of public policy, to which I have already called attention. I need not refer in detail to more of the authorities cited at the Bar, or to any of the additional authorities which I have myself consulted. The recent decisions in *America* as well as *England* are collected in Mr. *Frederick Pollock's* work on Contracts. He (1) states the doctrine of them as tending to be that the real question is in every case whether the restriction imposed is commensurate with the benefit conferred, and this is only another mode of expressing the test whether the contract is reasonable. The American doctrine which he states seems to be substantially the same. I have not thought it worth while to refer to the cases, but they will be found mentioned in *Story* on Equity Jurisprudence (2), and also in *Parsons* on Contracts (3). I prefer to any language used elsewhere that of Lord Justice *Fry* in the case above cited. In order to apply it to the particular case I must mention a few facts.

The plaintiff, *Edward Albert Davies*, and the defendant, *James Davies*, who are brothers, formerly carried on business in partnership with their father, *Edward Davies*, as galvanizers and galvanized iron manufacturers. For the present purpose it will be sufficient to say that they had a place of business at *Wolverhampton* and another in *London*, and that the Defendant was an active member of the firm. Disputes arose, and a Chancery suit ensued. That suit was compromised. As a part of such compromise *James Davies* retired from the firm, on the terms of his receiving a large sum in payment for his share of capital and goodwill and entering into a covenant, which was first expressed in an agreement of the 15th of July, 1884, and afterwards introduced into a deed of the 11th of October, 1884, in the following language: "The said *James Davies* to retire wholly and absolutely from the partnership, and, so far as the law allows, from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as to either directly or indirectly affect the said *Edward Davies* and *Edward Albert Davies*." The preparation of the deed occupied much time and led to much discussion, especially about this particular clause. Mr. *Willcock*,

(1) 4th Ed. p. 315. (2) § 292.
(3) 6th Ed. part 2, chap. 3, sect. 11.

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the solicitor of the Defendant, who was examined as a witness in this case, foresaw the difficulty of construing the clause and endeavoured to persuade the parties to agree to something more clear and definite, even at a sacrifice of some other stipulation. Unfortunately his advice was not taken, and the foreseen result has occurred.

I hold it to be the result of the evidence that in the autumn of 1884 and when the deed was executed, it was known to all concerned that *James Davies* intended to engage again in trade, and in a trade at least closely connected with that of the old firm. In fact, he was as early as this negotiating arrangements with *W. S. Codner* for the partnership into which they soon afterwards entered; but I am not sure that this was known, and I am sure that he was not known to be contemplating an immediate breach of the covenant into which he entered. The business of the Defendant and *W. S. Codner* has for some time past been, and is now, carried on at 380, *Old Street*, in the county of *Middlesex*, and now also I am told elsewhere within the metropolitan area, and it has been advertised by them to be that of galvanized iron and hollow-ware manufacturers and merchants, the Defendant taking particular credit for having been formerly managing-partner of the old firm at *Wolverhampton*. This firm of *Davies, Codner, & Co.* sells the same goods as were formerly sold by the old firm and are now sold by the plaintiff company, their successors in business. It was urged that, irrespective of the meaning of the covenant, the Defendant has not broken it because he has not galvanized any goods, that his manufacture has been restricted to goods not galvanized, and that what he covenanted not to do was not to carry on the business of a galvanizer. The complete, though not the only, answer is that in numerous circulars and trade-lists he has stated that his firm does manufacture galvanized articles, and that he cannot avoid this by proving that he employs others to galvanize articles ordered of him, or be heard to say that he advertises himself as a manufacturer, when he is not one in fact, only to attract customers.

If the Plaintiffs had failed to prove this breach I must have held them to have proved that the Defendant has so traded, acted, or dealt as to affect them (the Plaintiffs) in their business. It is

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proved that the Defendant's firm has solicited orders from customers of the old firm in the neighbourhood of *Croydon* and elsewhere, and the only excuse given is that these were customers formerly obtained by *W. S. Codner*, who was agent for other firms besides the old firm, and was also a merchant on his own account. Such an excuse is idle, and requires no answer. I have no doubt that if compelled to do it by the invalidity of the first part of the covenant, I might treat the second as divisible from it, and separately, so as to entitle the Plaintiffs to relief on the ground of this latter breach. It is not contested that the Plaintiff company are entitled to sue as assignees of the covenant, and to claim an injunction if it ought to have been granted to the original covenantees.

There remains, therefore, only the question whether the covenant is valid or not, and on this two points are raised—first, that it is too vague for a Court of law to enforce; and, secondly, that it is bad as in restraint of trade. There is another question—whether the Plaintiffs are debarred from any relief to which they might otherwise have been entitled by conduct which, for want of a better word, was styled in the argument "acquiescence." I will deal with this question first, but I need not do so at any length. It would require cogent evidence of acquiescence, amounting in law to a release of right, and founded, of course, on complete knowledge, to defeat the claims of Plaintiffs suing on a covenant dated the 11th of October, 1884, and enforced by a writ issued the 4th of March, 1886. There is no evidence of this character. I pass over the illness and death of the father, which may or may not have interfered with negotiations between the parties or the distinct assertion by the Plaintiffs of their claim. Suffice it to say that during part of the interval between the date of the deed and the issue of the writ, and when the Plaintiffs or their predecessors in title knew enough of the Defendant's intention to be on their guard, negotiations were pending for a friendly settlement on some such terms as that the Defendant's firm should be at liberty to sell, and should undertake to sell goods manufactured by the Plaintiffs. I see no occasion to pursue these negotiations. They broke down, and within a reasonable time this action was commenced.

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Is the covenant too vague? If it is, the vagueness is due to the introduction of the words "so far as the law allows." I have no doubt that the covenant must be read as obliging *James Davies* to retire absolutely from the old firm, and in this qualified manner from the trade or business of the old firm, and I have to consider whether the qualification has or has not an intelligible meaning. I cannot compliment the framers of this covenant on the introduction of a new form, nor have I been able to find any guide to its meaning by reference to similar language used in settlements of leaseholds, copyholds, or heirlooms, according to uses of freeholds. I see, however, no reason why I should not construe it as meaning "to the full extent that the doctrines of English law as interpreted by the High Court or the Court of Appeal, or, in the last resort, the House of Lords, will allow a man to contract himself out of the privilege of engaging in a particular trade or business." The phrase is not a happy one, and I do not commend it as a precedent, but I cannot say that it is so vague that I cannot construe it.

I have already stated how, in my opinion, the law stands. I am not called upon to say, and I certainly am not prepared to say, what are the reasonable limits, as regards space, of a covenant in restraint of such trade as is in question here. I have only to decide whether those reasonable limits include the place in which, according to the evidence, the Defendant has been and is carrying on a business similar to that of the Plaintiffs, and I have no doubt that they do. The injunction asked is against trade in the county of *Middlesex*, and I do not wish to intimate a doubt whether, having regard to the nature of the trade and the evidence in respect to the extent of the business of the old firm, this would be reasonable; but as a matter of form it ought to go to restrain the Defendant, &c., from carrying on the business of a galvanized iron manufacturer or galvanizer (I take these words from the deed) at 380, *Old Street*. This will not, of course, directly prohibit him from carrying on business elsewhere in the county of *Middlesex*, or within reasonable limits beyond it, but equally of course, he will be summarily restrained if after this he continues or commences to do so. I think he must also be restrained, because this is likewise reasonable, from trading,

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acting, or dealing in any way so as to either directly or indirectly affect the Plaintiff company in their business of galvanized iron manufacturers or galvanizers, and this part of the injunction will operate without limit as regards space. The Plaintiffs are also entitled to damages which must form the subject of inquiry.

The costs must of course follow the event. But a recent case called my attention, by no means for the first time, to Order LXV., rule 9, which empowers the Court on special grounds to award a successful party costs on the higher scale. The case which I have mentioned was a patent case, and I acceded to the plaintiff's suggestion, which was not opposed, perhaps without the reflection which it deserved. That case is, of course, beyond recall, and I would not recall it if I could. I refer to it partly for the purpose of stating that I should not necessarily grant such an application again in a similar case, and partly because it has, as I have mentioned, induced me to look again closely at the rule, which presents some practical difficulties. I am now dealing with a case which is certainly a special one as regards its nature and importance. It necessarily occupied a considerable time, many witnesses were called, and the oral evidence was of a special character. It involves large questions of the highest importance to the parties concerned, and is important also to others. It was presented to the Court in such a manner that I have been able to discuss the real questions in issue without wasting time on oral or documentary evidence touching matters not really in dispute, or for some other reason not immediately relevant. Without wishing or intending the slightest injustice to counsel, who have rendered me invaluable assistance, I think that this is in great measure due to the way in which the case was prepared for trial on both sides, the labour and responsibility falling mainly on the Plaintiffs, and it seems to me to be essentially a case to which Order LXV., rule 9, applies. I therefore propose to direct that the costs subsequent to the reply shall be taxed on the higher scale. I see no reason for extending the direction beyond that date. I will of course hear Mr. *Barber* if he has anything to say on this point, for I wish to make it as little as possible a matter of discretion, and if the case is taken to the Court of Appeal I hope that Court will think itself at liberty

to review my judgment on this point as well as others, and to lay down a rule for guidance in other like cases.

C. M.

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From this decision the Defendant appealed. The appeal came on for hearing on the 1st of August, 1887.

Barber, Q.C., and *Cock*, Q.C. (*Russell Roberts*, with them), for the Appellant:—

The covenants to retire so far as the law allows from the trade or business, and not to trade, act, or deal in any way so as to either directly or indirectly affect *E. Davies* or *E. A. Davies* are covenants without any limit of time or space, and therefore bad as a general restraint of trade: *Mitchel* v. *Reynolds* (1); *Story's* Equity Jurisprudence (2). In the reporter's note to *Avery* v. *Langford* (3) there is a list of cases in which a restriction as to trade was held to be good, from *Mitchel* v. *Reynolds* in 1711 down to *Tallis* v. *Tallis* (4) in 1853, and in a note to *Pollock* on Contracts (5) the list of cases is continued down to *Rousillon* v. *Rousillon* (6) in 1880. Out of all these cases there are only three in which there was no limit as to space, namely, *Wallis* v. *Day* (7), which was a case of master and servant, *Leather Cloth Company* v. *Lorsont* (8), which was the case of a trade secret, and *Rousillon* v. *Rousillon*, in which it was held that the true test was reasonableness, and that in the particular circumstances the restriction of the covenant was not greater than was required for the protection of the covenantee. But the question of reasonableness does not arise unless there is some limit of space or time. If the covenant is unlimited the general rule is still applicable, because such unlimited restrictions are against public policy; *Humlocke* v. *Blacklowe* (9); *Homer* v. *Ashford* (10); *Hitchcock* v. *Coker* (11); *Ward* v. *Byrne* (12); *Allsopp* v. *Wheatcroft* (13); *Collins* v. *Locke* (14); *Jones* v. *Lees* (15); *Pearson* v. *Pearson* (16).

(1) 1 P. Wms. 181.
(2) Ed. of 1839, vol. i., ch. 7, pl. 292.
(3) Kay, 663, 667.
(4) 1 E. & B. 391.
(5) 4th Ed. p. 316.
(6) 14 Ch. D. 351.
(7) 2 M. & W. 273.
(8) Law Rep. 9 Eq. 345.
(9) 2 Wms. Saund. 156.
(10) 3 Bing. 322, 326.
(11) 6 A. & E. 438.
(12) 5 M. & W. 548, 561.
(13) Law Rep. 15 Eq. 59.
(14) 4 App. Cas. 674.
(15) 1 H. & N. 189.
(16) 27 Ch. D. 145.

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In the present case the words "so far as the law allows" import no limit at all. They only make the covenant vague as well as wide. It is impossible for the Court to enforce such a covenant. It is not the duty of the Court to make a contract for the parties. They ought to express definitely what they mean, and then the Court can decide whether it is valid.

Warmington, Q.C., and *C. Walker*, for the Plaintiffs:—

Assuming that as a general rule unlimited covenants for restraint of trade are invalid, we contend that the covenant in the present case is one which the Court will enforce. In the first place it is given on an assignment of the goodwill of the business and for valuable consideration, and is in confirmation of the covenant for quiet enjoyment, which is implied in the assignment. When the rule against covenants in restraint of trade was established there was no such thing known as goodwill: and this covenant must be interpreted with reference to its special object and the present state of circumstances. The rule has been modified already to a certain extent by permitting covenants limited as to space. If unlimited restraint of trade is against public policy, it is equally against public policy that assignors of a goodwill should not have adequate protection.

This covenant is not unlimited. It is expressly limited by the words "so far as the law allows." The meaning of this phrase is "subject to such reasonable limits of time and space as the law imposes," that is, such limits as are reasonably required to protect the covenantee. The form of the covenant was taken from an executory agreement, and the Court will give effect to it as such according to the true intention of the parties. As it stands it is not too vague for the Court to enforce. When any breach of the covenant is complained of, a judge or jury will have no difficulty in deciding whether the alleged breach has been within the reasonable limit. In the present case it would probably be held to refer to any place where the firm had been carrying on the trade, and would be confined to the lifetime of the covenantee. Covenants in marriage settlements to settle property so long as the rules of law will allow have always been held good. Why should not this covenant be equally valid?

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The rule against covenants in restraint of trade being based on public policy must vary from time to time, and the state of society and the facilities of communication vary: *Egerton* v. *Earl Brownlow* (1). Notwithstanding some of the old cases, the principle by which the Court in modern times is guided is the reasonableness of the covenant, and that reasonableness has reference to what is necessary for the protection of the covenantee; and if a covenant unlimited as to space is shewn to be necessary for his protection the Court will consider it reasonable: *Homer* v. *Ashford* (2); *Mitchel* v. *Reynolds* (3); *Hitchcock* v. *Coker* (4); *Archer* v. *Marsh* (5); *Whittaker* v. *Howe* (6); *Leather Cloth Company* v. *Lorsont* (7); *Rousillon* v. *Rousillon* (8).

With respect to the latter part of the covenant, in which the covenantee agrees not to trade, act, or deal in any way so as to either directly or indirectly affect his former partners, it must be construed by reference to the subject-matter, namely, trade competition. The covenant may be severed and the Defendants may be restrained from exercising any trade so as "directly" to interfere with the Plaintiffs: *Pigot's Case* (9); *Mallan* v. *May* (10); *Price* v. *Green* (11); *Baines* v. *Geary* (12). There is nothing unreasonable in such a covenant for the protection of the assignor of a goodwill; and it may be sued on by the assignees of the covenantee: *Jacoby* v. *Whitmore* (13).

Barber, in reply:—

The last clause of the covenant is still more vague than the first. It is impossible to say what act "affects" the Plaintiffs. The Court could not enforce it, nor could any damages be assessed for the breach of it. It is, moreover, a personal covenant, and cannot be sued on by their assignees.

THE COURT, before giving judgment, offered to the counsel for the Respondents the opportunity of rearguing the question whether

(1) 4 H. L. C. 1.
(2) 3 Bing. 322.
(3) 1 P. Wms. 181.
(4) 6 A. & E. 438.
(5) Ibid. 959.
(6) 3 Beav. 383.
(7) Law Rep. 9 Eq. 345.
(8) 14 Ch. D. 351.
(9) 11 Rep. 26 b.
(10) 11 M. & W. 653.
(11) 16 M. & W. 346.
(12) 35 Ch. D. 154.
(13) 32 W. R. 18.

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an absolute unlimited covenant not to exercise a particular trade was necessarily invalid.

1887. Aug. 5. *Warmington*, Q.C. (*C. Walker* with him), for the Respondents:—

The rule that an absolute covenant in restraint of trade is necessarily invalid was based on public policy, and therefore must yield to changing circumstances. Since the decision in *Hitchcock* v. *Coker* (1) the rule has not been strictly adhered to, but a measure has been introduced by which to test the validity of the covenant, namely, the reasonableness of the covenant with respect to the necessary protection of the covenantor who has given valuable consideration. It is impossible that there should be a fixed rule as to distance, any more than as to time. An absolute covenant not to trade has been held to mean not to trade in *England*. When the rule was established *England* had no colonies, and such a covenant would operate as an absolute restriction of trade, but now it would have no such effect. There is nothing now against public policy in a man being restrained from a particular trade within *England* during the lives of the parties. He can trade in *Ireland* and the colonies. The limit of the lives of the parties is sufficient limitation. The sale of goodwills also has been of recent introduction. All this shews that reasonableness is now the only rule by which these covenants ought to be judged, and there is an increasing tendancy in modern decisions to adopt that view: *Ward* v. *Byrne* (2); *Whittaker* v. *Howe* (3); *Elves* v. *Crofts* (4); *Tallis* v. *Tallis* (5); *Leather Cloth Company* v. *Lorsont* (6); *Rousillon* v. *Rousillon* (7).

Cock, Q.C., for the Appellant, in reply:—

Whatever arguments may be adduced as to public policy in the changed condition of things in this country, it is clear that the old rule against absolute covenants in restraint of trade still remains in force. In *Collins* v. *Locke* (8) the rule is stated as still existing. So also in *Ward* v. *Byrne* (1), *Hinde* v. *Gray* (2), *Avery* v. *Langford* (3), and the cases there collected, *Archer* v. *Marsh* (4). *Whittaker* v. *Howe* (5) was decided under a misapprehension of the previous authorities. *Leather Cloth Company* v. *Lorsont* (6) was the first case in which a wider rule was suggested, but the words "natural and not unreasonable" used by Lord Justice *James* in that case are not found in any previous case. There is no authority for saying that a limit of time is sufficient, there must be a limit of distance. If there is such a limit, the Court will decide whether it is reasonable. If there is none at all, the covenant is void.

(1) 6 A. & E. 438.
(2) 5 M. & W. 548.
(3) 3 Beav. 383.
(4) 10 C. B. 241.
(5) 1 E. & B. 391.
(6) Law Rep. 9 Eq. 345.
(7) 14 Ch. D. 351.
(8) 4 App. Cas. 674.

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1887. Aug. 9. COTTON, L.J.:—

This is an appeal by the Defendant against a judgment of Mr. Justice *Kekewich*, which enforced by injunction a covenant contained in a deed which was executed by the Defendant shortly after he separated from his father and his half-brother, who is one of the Plaintiffs, on the dissolution of the partnership, the Defendant assigning to them all his interest in the business including the goodwill of the business. The other Plaintiff is the company which has bought from the co-Plaintiff, the half-brother of the Defendant.

It was argued that it was a question of considerable importance, and so I think it is; and there are many questions which arise as to whether we ought to enforce or can enforce a covenant like that which is contained in the present deed; I need not refer to anything else than the deed, and I simply take the covenant, which is in this form. It is a deed in which both parties covenant one with the other, and then there follow the covenants applicable to each. The particular covenant on which the Defendant is sued, and which is his covenant, is this:—"*James Davies* to retire wholly and absolutely from the partnership, and so far as the law allows from the trade or business thereof in all its branches, and not to trade, act, or deal in any way so as to either directly or indirectly affect the said *Edward Davies*" (that is his father) "and *Edward Albert Davies*" (that is his half-brother).

(1) 5 M. & W. 548.
(2) 1 Man. & G. 195.
(3) Kay, 663.
(4) 6 A. & E. 959.
(5) 3 Beav. 383.
(6) Law Rep. 9 Eq. 345, 354.

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Now, of course, there is no difficulty about the covenant to retire absolutely from the partnership; but what follows is the point on which the first question arises, and, as I understand, it is substantially the branch of the covenant in consequence of which Mr. Justice *Kekewich* granted the injunction. I should state that the partnership having been carrying on business partly in *London* and partly at *Wolverhampton* the Defendant shortly after the dissolution joined one who had been formerly connected in business with the partnership, and proposed to start a business somewhere in *London*. The injunction was to restrain him from carrying on business there; not defining what place would or would not be within the covenant, but to restrain him from carrying on business there, and also restraining him from acting in violation of the second branch of the covenant—the words being: "that he be restrained from carrying on the business of galvanized iron manufacturers at 380, *Old Street*, in the county of *Middlesex*, and also from trading, acting, or dealing in any way so as either directly or indirectly to affect the Plaintiff *Edward Albert Davies* or the company in such business."

I will deal first with the first portion of the covenant on which, as I understand, Mr. Justice *Kekewich* has acted, and I must say that there is an example here which ought not to be followed. Where parties have entered into an agreement to execute a deed to contain certain covenants they ought certainly to work out their agreement, and not to come to the Court simply to construe what was intended to be an executory agreement. For what we have here is this—the Court is not asked to order performance of this which was an agreement originally by directing a proper deed to be executed; but we have to decide a question of construction: to say what is the proper effect of this covenant, and for my part I should decline when the matter comes before us in this way to treat it as executory and to see how, and in what way, the Court would direct an agreement with these words in it to be construed. But that is not the ground on which I intend to decide this case. Is this covenant one which the law will allow? That is the point I intend to take. It is said that this is a contract to retire from the trade or business in all its branches if and so far as the law allows. Now, in my opinion, if that is the covenant, the law does not allow it; because if that is so, it is an absolute covenant to retire from this trade or business, that is to say it is an absolute restraint upon the Defendant during his lifetime from carrying on anywhere within *England* the business in which he was engaged. Mr. Justice *Kekewich* held that in consequence of the change of circumstances which now exist in *England*, the old rule, which was laid down from very early times, that covenants in restraint of trade are bad, was no longer to be considered as the law of the Court, and, after the discussion which has taken place, and with my view of this covenant, we must consider that question.

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Now that that was the old law is undoubted; and in the year books in *Henry* V.'s reign there was a case which laid down generally that covenants in restraint of trade are bad (1); that it is contrary to public policy and contrary to the interests of the public that any man should be restrained from carrying on an honest business for the best of his own advantage and for the best of the advantage of the public; that was originally so said, but undoubtedly to some extent that has been modified; and in the first instance it was modified in this way, that partial restraints might be good. Even when that was established, it was, first of all, said that the Court must, when it is asked to enforce such a covenant, see whether the consideration was sufficient. Now that is gone; because if there is valuable consideration then the Court will not consider, but will leave the parties to consider, whether that consideration is or is not sufficient. Then the Courts have done this. Where there has been a partial restraint only, the Court has gone into the consideration as to whether that is reasonable; namely whether it is reasonably required for the protection of the party with whom the covenant is entered into. Well, then, has it gone further than that? It is said that there are cases which have laid down that the only thing to be considered in judging whether these covenants can be enforced or not, and whether they are valid or not (for it is not only a question of equity) is to see whether they are reasonable.

Mr. *Warmington* contended that the reasonableness required had reference to what was reasonably necessary for the protection

(1) 2 Hen. 5, Term. Pasch. pl. 26.

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of the covenantee; and it is very probable that the first rule which I mentioned, that absolute covenants in restraint of trade are bad, was established on the ground that they are not reasonable; and in that sense it may be that what we have to consider is whether they are reasonable. But in my opinion if we look at the cases on which Mr. *Warmington* relied, there is this to be observed, that where there has been a limited restraint, and a limited restraint only, then the Court has considered, with reference to the validity of that covenant, whether though the restraint is limited, the restraint is reasonable; and of course that must come in even stating the rule as I have endeavoured to do, namely, that an absolute restraint is bad, but that a limited restraint may be good, provided the restraint is reasonable only, and such as was required for the protection of the person with whom the covenant is entered into. If one looks and sees what are the authorities which have been referred to by Mr. *Warmington* in argument, I think it will be found that they really are cases where the Judges, though admitting the general rule and sometimes doing so expressly, have considered, as regards a partial covenant which was before them, whether the case was one in which the restraint was reasonable.

I think the first case to which he referred was *Hitchcock* v. *Coker* (1). That case got rid of the rule of inquiring into the sufficiency of the consideration, but in other respects it deals with the question whether the particular restraint in that case was reasonable or not. That case was twice considered, once before the Divisional Court and then again in the Exchequer Chamber. There the covenant was of the most limited description because it purported to restrain the defendant from carrying on his business at *Taunton* or within three miles thereof. It was most limited as regards space, and therefore the observations of the Judges which are relied on must be considered with reference to that covenant, and not generally with reference to covenants which are not so limited. What Chief Justice *Tindal* says is this (2): "We cannot, therefore, hold the agreement in this case to be void, merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable

(1) 6 A. & E. 438. (2) 6 A. & E. 456.

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restriction." That I think introduced what I may here mention, that undoubtedly now, if a covenant is in any way limited, either sufficiently as regards space, or sufficiently as regards time, then it will not be considered as an absolute restraint of trade, but only a limited restraint, and then the question as to whether that limit is reasonable will come into consideration.

Now that case was decided in the year 1837, and to my mind it shewed no departure at all from the old rule unless it was a departure from the old principle of considering the sufficiency of the consideration.

I will not go through all the cases, but we find afterwards *Mallan* v. *May* (1), and there we have the rule laid down, as I understand it, most clearly by Baron *Parke*. What he says is this (2) (and this was in the year 1843): "The rule as laid down by Lord *Macclesfield* and Lord Chief Justice *Willes*, is, that total restraints of trade, which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad." That I think has been modified to this extent, that the presumption is not that such a covenant is bad, but it is rather for the Court to consider whether on the facts it is or is not bad. Then he proceeds, "But if the circumstances are set forth, that presumption may be excluded, and the Court are to judge of those circumstances, and determine whether the contract be valid or not." Then he quotes *Mitchel* v. *Reynolds* (3), and he quotes it undoubtedly not as his own opinion, but as expressing the rule that is laid down by earlier Judges—he does not in any way deal with it as a rule which is departed from, although there had been a very great alteration in the circumstances of the kingdom between the year 1843 and the time when *Mitchel* v. *Reynolds* was decided. Then Baron *Parke* goes on, and says this: "Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced." And that is what he was considering when he entered into the question as to

(1) 11 M. & W. 653. (2) 11 M. & W. 664.
(3) 1 P. Wms. 196.

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whether or not in that particular case the restriction was reasonable or not.

I have passed over several cases in which there have been these considerations, but all of them are cases where there was a partial restraint to be dealt with, and the Judges were applying their minds, not to the general rule, but to the rule as applicable to restraints so limited.

But then it is said, that not only are there these expressions of opinion, which I think in their application were misunderstood, but that there is authority which now leads to the conclusion that the old rule is gone, and is a thing of the past. Now what were those cases? I will take them in chronological order, because I think that is probably the best way of dealing with them. *Whittaker* v. *Howe* (1), before Lord *Langdale*, was first in date, and undoubtedly that was a strong case, because it was an absolute covenant to restrain a solicitor from practising within the kingdom for a period of twenty years. I doubt myself whether the time was not so large there that it ought not to be considered as a limited covenant. It was treated by Lord *Langdale* and considered by him as a covenant limited, and therefore it was open to him to consider whether the limit was a reasonable one. He held that it was, but that does not shew a departure from the general rule.

The next case is that before Lord Justice *James* when Vice-Chancellor: the *Leather Cloth Company* v. *Lorsont* (2). That undoubtedly was a strong case, having regard only to the expressions used by the learned Judge when he decided the case; but in fact what really was in contest there was a contract as to the divulging of a trade secret, and the covenant not to carry on the trade was only connected with and in order to give effect to the contract not to divulge the trade secret, and although he does make general observations in his judgment, yet in my opinion the case must be considered, so far as it is a decision, a decision only on a contract applicable to a trade secret, and not to a covenant generally in restraint or in prohibition of trade. I find that Vice-Chancellor *Wickens*, in *Allsopp* v. *Wheatcroft* (3), treats that case before Vice-Chancellor *James* as being

(1) 3 Beav. 383. (2) Law Rep. 9 Eq. 345. (3) Law Rep. 15 Eq. 59.

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the case of a trade secret, and not as an ordinary case of a covenant to restrain trade. What he says is this (1): "No doubt, in the case of the *Leather Cloth Company* v. *Lorsont* (2), Lord Justice (then Vice-Chancellor) *James* threw some doubt on the existence of a hard and fast rule which makes a covenant in restraint of trade invalid if unlimited in area; but there were expressions in the instrument in that case limiting the generality of the covenant, and it was in substance a case of a different class from this, since the restriction against trading was only a consequence of a clearly lawful restriction against divulging a trade secret. In this point of view it may probably be thought to bear some analogy to *Wallis* v. *Day* (3). Assenting, as I do, to everything that was said in *Leather Cloth Company* v. *Lorsont*, I can hardly treat it as authorizing me to depart from the recognised rule as to limitation of space in a case so different from it as the present is, and unless that rule be departed from the covenant here is clearly bad." There Vice-Chancellor *Wickens*, on whose opinion I lay great store, not only treats it as I do, but what is probably more important, he treats the old rule in the year 1872 as still subsisting, and as the law of the Court. I may observe here with reference to that observation of his that the covenant was limited, that it really was limited to the period during which certain patents, the right to obtain which throughout *Europe* was granted to the plaintiff, were to last; and it may be that it was limited in time, though not in space, in such a way as to make it a limited and not a general covenant. With the greatest respect to the late Lord Justice *James*, if he intended to express his opinion that the cases had authorized him to say that, on the ground of policy, the old rule had been departed from, I think he could not have sufficiently considered what that was to which the observations of the Judges, relied on by Mr. *Warmington*, were addressed—namely, not to the general question as to whether the absolute covenants were good, but to the question whether limited covenants were in the particular cases good. It is clear that Vice-Chancellor *Wickens* was not aware that the old rule had been departed from, and his view is

(1) Law Rep. 15 Eq. 64. (2) Law Rep. 9 Eq. 345.
(3) 2 M. & W. 273.

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confirmed by what was said in *Collins* v. *Locke* (1) by Sir *Montague Smith* when giving the decision of the Privy Council; because what he says is this: "Numerous cases which have been decided on this subject" (covenants in restraint of trade) "are collected in the notes to *Mitchel* v. *Reynolds* (2). It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration and are reasonable." He clearly, therefore, lays down the two things that are necessary: they must not be unlimited; and then, also, if they are limited, there is the further question to be considered, namely, whether, even having regard to the limit, they are reasonable; and in my opinion that old law, notwithstanding the opinion of Mr. Justice *Kekewich* of the change which has taken place in the country, still ought to be recognised and regarded by us as the law, and ought not to be departed from by us. If any one is to do it, it must not be this Court, but the House of Lords.

Then if that be so, and the covenant bears the construction which at one time was contended for by Mr. *Warmington*, in my opinion the covenant is bad, because the law does not allow an absolute covenant to give up trade. I need not go into the reasons why that is so, but there are plenty of reasons for it. No man ought to be prevented during his life from earning his livelihood by carrying on his trade; and the public ought not to be prevented from the benefit which they may get from a man who is skilled in a trade carrying on that trade.

There is one other case which I have omitted to mention in its regular order, but I was diverted from it by that case before Vice-Chancellor *Wickens* and the Privy Council case. I refer to the case which was decided by Lord Justice *Fry*. I think undoubtedly he used expressions which shewed that he took a somewhat wider view than I do of the law—a looser view perhaps I may say without disrespect. In that case of *Rousillon* v. *Rousillon* (3) there was the limit of time which might have made the covenant a limited one and not a general covenant in absolute restraint of trade; and if so, it comes within what I think is

(1) 4 App. Cas. 686. (2) 1 P. Wms. 181; S. C., 1 Sm. L. C. 6th Ed. p. 356.
(3) 14 Ch. D. 351.

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now the true rule, that where there is a limited covenant you have to consider how far, having regard to the particular circumstances of the case, the limit is a reasonable one. About that case I say no more after what I have said on the cases generally.

Then it was said here that this is not a general covenant but "so far as the law allows." What Mr. *Warmington* said in that part of his argument was: "It is a covenant not to carry on trade within such limits of time and space as the law will consider reasonable." Now construing it in that way, which I hardly think is the right construction, it is a covenant which the Court in my opinion ought not to enforce. If parties wish to ask the Court to assist them in restraining those with whom they are dealing from breaking a limited covenant against carrying on a trade they must, in my opinion, themselves fix the limits within which there is to be no carrying on of the trade, and then they do it at their peril. The law will determine whether that limit is a good one, or whether it is one which is so unreasonable that the covenant must fail. It is entirely different from the covenant to settle property in a certain line or family "so long as the rules of law and equity will allow." There are certain definite rules laid down as regards the limitation of property which will prevent it from being so settled as to exceed the rules against perpetuities, and those are definite fixed rules. There is no definite fixed rule as to the limits within which trade can be restrained. That must depend upon the circumstances of each case; and in my opinion it is wrong to make a covenant in this form, and wrong for the Court to enforce it, because one sees at once what difficulties will arise if an injunction is granted. Mr. Justice *Kekewich* has said that carrying on business at *Old Street* in the county of *Middlesex* is within reasonable limits, but he has not defined what else will be so, and are we again and again to have this question to arise on the covenant, where the parties have left the covenant entirely indefinite and have sought to get the Court, without risking the validity of their covenant, from time to time, to say whether a particular space and a particular time is within the limits? In my opinion if one looks at it in that, which is the modified form, the answer to it is this:

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there are no limits fixed by law which can be regarded as introduced into this covenant. A covenant in this form, indefinite as it is in my opinion, is one which neither a Court of Equity nor a Court of Law ought to enforce. The parties must make up their minds to say what they agree to as regards the limits of time or space within which there is to be no trading.

Then, one comes to the second branch of the covenant, on which Mr. Justice *Kekewich* to some extent acted, though, as I understand his judgment, he principally relied on that which I have been already discussing. This is the stipulation, "not to trade, act, or deal in any way so as to either directly or indirectly affect *Edward Davies* and *Edward Albert Davies*." Mr. *Barber* did not argue the point, because he thought it was covered by a previous decision of the Court of Appeal (1), but in my opinion there is one great objection to enforcing this covenant, that I do not think it is a covenant the benefit of which would pass with the goodwill to the purchasers, the company. The case to which he referred was a case where there was a contract not to trade within certain limits. That was evidently a covenant in order to protect the business and the goodwill of it, and therefore it was one which would pass with the goodwill to a purchaser of the goodwill; but there is no such absolute covenant here, and, to my mind, it is a covenant which points to the personal benefit of the father and of the half-brother rather than to any protection of the goodwill. So far as the parties intended the goodwill was defended by the previous covenant in restraint of trade, which in my opinion was an invalid covenant; and this could not be intended as an addition to that which in their minds was absolutely provided for, but as something which the son should covenant for the benefit of his father and half-brother personally, and not that which was to affect the trade which he had parted with to them. In my opinion, having regard to the great indefiniteness of this covenant, and to the fact that it is not one which the purchasers from the surviving son would be entitled to say passed to them with the goodwill, no relief ought to be granted on that branch of the covenant either. In my opinion therefore the action fails and ought to be dismissed.

(1) *Jacoby* v. *Whitmore*, 32 W. R. 18.

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BOWEN, L.J.:—

We are asked to enforce the covenant which the Lord Justice has read, which divides itself into three parts, the first part is an agreement that *James Davies* is to retire wholly and absolutely from the partnership; the second, that so far as the law allows he shall retire (I incorporate the words "he shall retire" from the previous section), or else that he shall undertake to retire (because it is immaterial to my argument which of these readings is adopted) from the trade or business thereof in all its branches; and the third part of the covenant provides that he is not to trade, act, or deal in any way so as to either directly or indirectly affect *Edward Davies* or *Edward Albert Davies*.

Now with regard to the first part, that he shall retire from the partnership, there is no question that that is both a covenant which may be made lawfully and that it has been performed in the present instance. The difficulty arises with regard to the two further parts of the covenant which I have endeavoured to divide; and I will take them separately. First, with regard to the provision that "so far as the law allows he shall retire, or undertake to retire, from the trade or business thereof in all its branches," at first sight that would appear—and I think it must be—equivalent to a covenant either to retire absolutely from the trade altogether, if the law allows such a covenant to be made, or, if the law does not allow such a covenant to be made, it must be a covenant to undertake to retire from the trade so far as the law permits of such an undertaking. If it is to be construed in the first of those two ways, a covenant absolutely to retire altogether from the trade or business, it seems to me to be against the Common Law, for this reason. The principle of the Common Law that covenants in restraint of trade which are unlimited altogether, whether in space or time, is that such covenants are void. They cannot be enforced. That was laid down as long ago as the Year Book of 2 Hen. 5, which was followed in the reign of *Elizabeth*, and which is alluded to in the *Ipswich Tailors' Case* (1). This is what the Court says in the *Ipswich Tailors' Case*: that at the Common Law no man could be prohibited from working in any lawful trade, for these reasons, that it is according to the wish of

(1) 11 Rep. 54a.

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the law that all should learn and practise lawful trades and sciences which are profitable to the commonwealth, and therefore the Common Law abhors all monopolies which prohibit any from working in any lawful trade. Then the Court proceeds to consider the case in 2 Hen. 5, and they say that for the same reason if a husbandman is bound that he shall not sow his land the bond is against the Common Law, and that the statute of *Elizabeth*, which prohibits every person from using or exercising crafts or occupations until they have been apprenticed, was enacted, not with the intent of preventing trade, but with the intent of encouraging education in trade. "Therefore," says the Court, "it appears that without an Act of Parliament none can be in any manner restrained from working in any lawful trade." That language, of course, must be taken with reference to the subject-matter, but still I use it as shewing that broadly the law sets its face, subject to exceptions which I shall have to consider, against restraints of trade. That is laid down in *Mitchel* v. *Reynolds* (1), a case which may be said to be the foundation of the recent decisions upon the point.

Now there may be limitations to be found in the covenants on the strength of which it is sought to escape from this general doctrine. There may be such limits in time, and it has also been the view of the Courts that a limit in time is not indispensable in order to enable the covenant to be enforced where there is some other limit to be found which makes the covenant reasonable and necessary for the protection of the party who seeks to protect himself, and those cases I need not discuss further. Then we come to another limit, which may be found, a limit in space—and as yet I think that there has been no decision that you may have a covenant unlimited in space altogether unless in the case of special limits which form the third class of limit—the limit which is to be found in the special character of the subject-matter which is sought to be protected. The last, or third kind of limit, is a kind of limit which I think Vice-Chancellor *James* thought he had found in the case of *Leather Cloth Company* v. *Lorsont* (2), though in that case also, as the Lord Justice has pointed out, there may also have been found a limitation in time.

(1) 1 P. Wms. 181. (2) Law Rep. 9 Eq. 345.

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Now we have been asked by Mr. *Warmington*, in an extremely able argument, first of all, to hold that limitation in space is not necessary if you can find that protection through an unlimited area of space is reasonably necessary for the security of the covenantee. But Mr. *Warmington* has not confined himself to that minor proposition: he has also gone further, and asked us to consider generally whether the state of circumstances, the change in the character of the business of the world, the extension of the means of intercourse between one part of the kingdom and another and one part of the world and another, has not shaken to its core the original doctrine that covenants unlimited altogether ought not to be enforced. It appears to me that if there is to be any change made in the principle of the Common Law, to which I have alluded, and which has remained unassailed for centuries, it would better come from the House of Lords than from ourselves; but if there is to be an exception engrafted on the rule, or the rule is to be modified with reference to the requirements of modern society, as to which I will for the moment express no opinion, it can only be if the case in question ranges itself under one of two heads: either that the covenant, in its unrestricted form, was one which was a benefit to the public, in which case it might be said that that would destroy the reason for insisting on the old rule, which was derived from the public policy of the kingdom; or, secondly, if it was reasonably necessary for the protection of the covenantee. In the present case it seems to me that we have got no materials upon which we can, without leaping in the dark, assume that the present covenant is a benefit to the public, for there is nothing, to my mind, which shews that the public would be benefited by allowing such a covenant as this in this case to be enforced, nor have we the materials for deciding that such a covenant is reasonably necessary even for the protection of the covenantee. It appears therefore to me that it is not necessary in the present case to consider or to decide whether what I have called the old doctrine of the Common Law, that covenants absolutely unlimited both in space and in time ought to be modified, having regard to the altered character of the commercial intercourse of the world. We ought to leave that to be discussed on an occasion when the facts really

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raise the point. For the same reason it appears to me that we are not bound in the present instance to decide even that an absence of limit as to space may be excused or may be excepted if it is reasonably necessary for the protection of the covenantee, because there is nothing here which shews that it was reasonably necessary for the protection of the covenantee. For that reason, without denying that I have an inclination to think that the rule of the Common Law is too much ingrained in our history to be changed at this moment, at all events except by the highest Court in the country, I do not decide it, because it seems to me the materials do not enable us to decide it. If, therefore, the part of the covenant which I am now discussing, which is that *James Davies* is to retire so far as the law allows from the trade or business in all its branches, is to be interpreted as meaning an absolute covenant, and we are asked to hold that the law will allow in such a case such a covenant to be made, I say there are no materials here to which we could attempt to apply the modification of the general principle which Mr. *Warmington* asks us to accept of the old rule of the Common Law.

But then if we are to read on the other hand this branch of the covenant as something short of that—if it only means that the covenant in restraint of trade is not to be unlimited, but that the limit is to be found by an appeal to the law, then it seems to me that the obvious answer is that that covenant is too vague for us to deal with. I think myself it would have been too vague even if it had remained in the nature of an executory contract to execute a deed in that shape. The parties would still be asking the law to do for them what they had not made up their minds about themselves. In fact they would be asking the law to make a contract instead of making a contract themselves. But in any view it seems to me that this is too vague. It is said that this is a covenant that *James Davies* will retire so far as the law allows, and that we are to ask the law what is to be the restraint imposed upon the generality of the covenant. The law is absolutely incapable of answering a question so put. It is perfectly true that in many contracts where you want a measure to be applied to a particular subject-matter, you leave the measure to be supplied by reason. There is many a contract for example which, instead

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of fixing the particular time for payment, provides that the time is to be fixed by what is reasonable in the trade or in the business. In those cases you introduce the consideration of what measure reason will apply, because the measure which reason will apply tends towards certainty, and therefore enables you to make up for the absence of distinctness on the part of the contract by reference to a standard which the parties had in their minds, though they did not express it on paper, namely, the standard of reason. But in the present case what we are in search of is some definition which would limit what otherwise is a pure negative. In such a case as that you cannot invoke reason to put a limit upon a mere negative. You cannot get a measure out of it at all, and whatever reason says about it you remain still in want of the definition which is necessary to make the covenant a restricted one. The most obvious proof of the truth of that proposition is to recall to one's mind this, that, supposing the law will allow certain restrictions, there may be twenty different restrictions, all of which might serve the purpose of the parties; all of which would be absolutely inconsistent with each other; all of which the law would allow. How are we to know which of those particular restrictions the parties intended to impose? They leave it absolutely uncertain, and for the best of all reasons, because they had not made up their own minds. Therefore to ask us to apply reason at this particular point, is to ask us to condescend upon some one of the twenty possible alternatives, though the parties themselves could not make up their minds which one they would take. A contract to do nothing that is unreasonable contains in itself no limitation, because there may be a hundred different reasonable courses, all of which are inconsistent with one another. The law of *England* allows a man to contract for his labour, or allows him to place himself in the service of a master, but it does not allow him to attach to his contract of service any servile incidents—any elements of servitude as distinguished from service. What sort of position would a contracting party place the Court in who made this sort of contract for himself, "I will undertake to serve you in every possible way which the law does not consider repugnant to the doctrine that servile incidents are not to be imposed upon a party?" That is too vague. It gives you no

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sort of measure of service. In the same way, contracts in restraint of marriage are void except in certain specified cases, where, for instance, a definite period is imposed for the sake of the health of one of the parties. How could a man contract that he never would marry subject always to such limitations as the law imposed? It would leave the contract absolutely vague. You would not know what he meant. For the same reason if you read this contract in the secondary sense, as an attempt to make a contract in partial restraint of trade, the answer is, we do not know what the parties mean. On that ground it seems to me that that part of the contract cannot be enforced.

Then we come, lastly, to the third branch of the covenant, that *James Davies* is "not to trade, act, or deal in any way so as to either directly or indirectly affect"—whom?—*Edward Davies* and *Edward Albert Davies*." I doubt myself if that contract is not in restraint of trade—if it is not an absolutely unrestricted covenant in restraint of trade in one view put upon it; and if so I think it is bad for the same reason as I said before with regard to the earlier branch of the covenant. But, to read it in a less offensive or less rigid way, suppose it to mean "not to trade, act, or deal in any way so as to affect *Edward Davies* and *Edward Albert Davies* in their business"; it is a covenant that seems to me to be personal to *Edward Davies* and *Edward Albert Davies*, and cannot be assigned. It is perfectly true that there is a class of covenant in restraint of trade which would affect established businesses which can be assigned. For instance, a covenant not to carry on business in a particular street or in a particular town, may pass by assignment to the assignee of the business, but if the contract in its nature, on its true construction, is a personal one, then it cannot be assigned. The rule of law is plain, you cannot assign the benefit of covenants which are purely personal. I think this a purely personal covenant, and it cannot, therefore, be assigned and cannot be enforced by the present Plaintiffs.

On these grounds it seems to me, with regret, that we must differ from Mr. Justice *Kekewich*. As I said before, as far as I am concerned, I leave undiscussed and unsettled the great question as to how far modern changes in commerce affect the old doctrine of the Common Law.

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FRY, L.J.:—

In this case we are called upon to enforce by way of injunction and by assessment of damages a covenant contained in an executed contract. We have not before us an agreement which is intended to be afterwards developed into a deed, but we have a solemn and formal deed executed between the parties which contains this covenant. We are told (and I have no doubt with perfect truth) that the history of it is this—that the formal covenant which we have to construe was part of an earlier executory and informal contract, and that the parties to it not being able to develop that contract satisfactorily between themselves inserted in the formal instrument the very words which they had used in the informal one. That does not enable us to construe the covenant in any manner other than as a formal and an executed contract.

The covenant consists of three parts. It is, first, that *James Davies* is to retire wholly and absolutely from the partnership. With regard to that, no question arises. Secondly, *James Davies* is to retire (for thus I read it) so far as the law allows, from the trade or business thereof (that is, of the partnership) in all its branches; and thirdly, *James Davies* is not to trade, act, or deal in any way so as to either directly or indirectly affect *Edward Davies* and *Edward Albert Davies*. I deal first with the second branch of that covenant—that *James Davies* will so far as the law allows retire from the trade and business of the partnership in all its branches. I think that covenant is too vague to be enforced. I think the object of the contracting parties was to leave the law to make the contract between them. I think that it is the function of the Courts of Law to interpret contracts; to say whether a contract is or is not reasonable, to say whether it is or is not void, but that it is not the duty of the Courts to make contracts between parties. Whether the words would be capable of development if the Court had directed an instrument to be executed to carry them into effect is a point upon which I need not express any decided opinion. I entertain the greatest doubt whether the Court could possibly be called upon to interpret such words. The reason why I come to the conclusion I have stated is this: that whatever else may be in doubt about contracts in

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restraint of trade this is plain and undisputed—that no contract in restraint of trade which is unreasonable, which is larger than is necessary to protect the interests of contracting parties, is good. Now, it appears to me that there may be a hundred forms of contract, each of which might be reasonable, and might therefore be good, but that the law cannot select which of those hundred is to be the contract between the parties. Let me assume for one moment (as is probably the case) that it is necessary in order to make this contract reasonable that there should be some limit in space. Is *Wales* to be left out, or the eastern counties, or the southern counties, or the northern counties? No human being can tell. That is a matter which ought to have been settled between the contracting parties. So, again, if a limit of time be necessary in order to make the contract reasonable, the Court cannot lay down what length of time is requisite. When the parties to the contract have settled all those matters between themselves, then the Court can attend to the suggestions of those who say that looking at all the particulars of the contract the contract is or is not unreasonable. I repeat that the substance of the document seems to me to throw upon the Court the making of the contract between the parties. For that reason I think it is too vague to be enforced.

I have come to the conclusion which I have stated without reference to the larger question which has been so much debated in the course of this argument, but which in my judgment does not require adjudication from us on the present occasion. Therefore, I shall not express any decided opinion upon it. I think, however, that it is not unreasonable that I should add, that the inclination of my mind is still in the direction in which it was when I decided the case of *Rousillon* v. *Rousillon* (1). I think that the law with regard to public policy is one of a very different description from the law which is laid down in absolute terms for all time. It would be strange, and I think it would be unreasonable, if a contract which might now be for the public benefit, were held to be void because in the reign of *Henry* V., or in the reign of *Elizabeth*, that contract was contrary to public policy. It is impossible to look at the history of the law and not to see that

(1) 14 Ch. D. 351.

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contracts which at one time were deemed—and I dare say justly deemed—to be contrary to public policy, at another time have been deemed to be consistent with public policy, and for the public benefit. A forcible illustration of that fact is furnished by the very case which is the foundation of this branch of the law, the case in 2 Hen. 5 (1), which excited the indignation of Mr. Justice *Hull*, in a manner which has made his name immortal in the books. As has been pointed out by Lord *St. Leonards*, the general principle that a contract in restraint of trade which is unreasonable is void, is still the law; but the particular conclusion at which the Judge arrived—that that particular contract was against public policy—is entirely at variance with modern decisions. What Lord *St. Leonards* said in *Egerton* v. *Earl Brownlow* (2) was this: "Angry as the learned Judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the Common Law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced, is just as good a condition now as any that was ever inserted in a contract, because a partial restraint, created in that way with a particular object, is now perfectly legal. Without any exclamation of the Judge, and without any danger of prison, any subject of this realm may sue upon such a condition as Mr. Justice *Hull* was so very indignant at in that particular case." The same observation applies to the case of *Mitchel* v. *Reynolds* (3) with more or less force, because although that case is certainly perfectly sound as regards its great principle, namely, that contracts in restraint of trade which are unnecessarily large are void, yet there can be no doubt that that decision has been more or less affected by the course of the law since. In that case it was considered that the adequacy of the consideration was a matter to be investigated by the Court. The Courts have since repudiated their capacity to investigate that point. The law as laid down in that case created a presumption of invalidity as against the contract. That burden of proof has since been shifted as soon as it has been shewn that the contract has

(1) 2 Hen. 5, Term. Pasch. pl. 26. (2) 4 H. L. C. 238.
(3) 1 P. Wms. 181, 193.

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been entered into for the protection of the interest of one of the contracting parties; and therefore I repeat, although that case in its broad features is still undoubtedly the law, the law has grown since that case. I may be wrong, but it appears to me that the ground on which in that case it was said that the condition must be partial in point of space was clearly expressed by the learned Judge when he said:—"It can never be useful to any man to restrain another from trading in all places; though it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime." The Judge who decided that case seems therefore to have thought that a total restraint could never be necessary for the protection of the parties. If he was wrong in that assumption it would be a matter for future inquiry how far the limit which he created or imposed on that ground is or is not binding on the Courts at the present day. I should not have made these observations had it not been that my learned Brethren have thought it desirable to express their views without giving any decision on this point.

[COTTON, L.J.:—I meant to decide the question.]

I desire not to decide it, but to say that I think the inquiry is still one which is open and worthy of great consideration—whenever it shall come up for decision before the Courts. What I mean to indicate is this: that I am not convinced that there is any other rule of limitation except that the contract shall not be unreasonably large. If it be more than reasonably large, then it tends to a monopoly without any corresponding good to the parties. If, on the other hand, it be not larger than is reasonable, it still seems to me that it would be remarkable that something else should be imposed on the contract, so that the contract would be required to be not only reasonable but something more. I rather incline to think that every reasonable contract ought to be enforced.

Then leaving these observations, which, after all, are only by the way in my decision, I come to the last branch of the contract, which is that *James Davies* is not to trade, act, or deal in any way so as to, either directly or indirectly, affect *Edward Davies* and *Edward Albert Davies*. In order to construe those words we must have regard to the position of things between the contracting

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parties. *James Davies* was a son, by the first marriage, of *Edward Davies*. *Edward Davies* was carrying on the business with his younger son, *Edward Albert Davies*. The assignment of the goodwill had (as was pointed out by Mr. *Warmington*) an implied covenant for quiet enjoyment of the goodwill. We have, therefore, before we arrive at this covenant, an implied covenant for quiet enjoyment of the goodwill; a covenant to retire from the business; a covenant to retire from every branch of the same business which the partnership carried on. Now the covenant for quiet enjoyment has not been sued upon; therefore we have not to consider it, except for the purpose of construction; but I am bound to give to this last covenant some real meaning in addition to all the previous covenants. I think, therefore, that it is something more than retiring from the business of the partnership, and not carrying on any branch of the same business. I think that, popularly speaking, it means this: that as long as the father and the half-brother are connected together, *James Davies* will not in any way annoy or interfere with them; but I think that it is a contract not relating to the business only, but relating to the two *Davieses* so long as they have any common interest. I think it is, therefore, one which does not pass with the business, and which cannot be broken after the death of *Edward Davies*.

But further than that, I desire to say that the contract appears to me to be couched in such vague terms, and doubtful words, that I think it can be enforced neither at Law nor in Equity. Mr. *Warmington*, who undoubtedly felt the difficulty in the way, asked us to separate the words "directly" and "indirectly," and to hold, if the covenant could not be enforced with regard to conduct having an indirect effect on the *Davieses*, that it might with regard to a direct effect. But that construction is not open in this case, because those words, "either directly or indirectly," are only an amplification, or explanation, of the affirmative words, "in any way." Therefore we have a contract not to trade in any way to affect the two *Davieses*; not to act in any way to affect them—not to deal in any way to affect them. I think that no such vague and general covenant, which is not even in terms confined to injurious affection, could be enforced.