[735] HORNER *v.* GRAVES. June 13, 1831.

[See *Hichcock* v. *Coker*, 1837, 6 Ad. & E. 444; *Archer* v. *Marsh*, 1837, 6 Ad. & E. 967. Applied, *Mallan* v. *May*, 1843, 11 Mee. & W. 665; *Tallis* v. *Tallis*, 1853, 1 El. & Bl. 411.; *Collins* v. *Locke*, 1879, 4 App. Cas. 686. See *Davies* v. *Davies*, 1887, 36 Ch. D. 364. Applied, *Rogers* v. *Maddocks*, [1892] 3 Ch. 355. Considered, *Nordenfelt* v. *Maxim Nordenfelt Guns and Amunition Company*, [1894] A. C. 542. Applied, *Underwood* v. *Barker*, [1899] 1 Ch. 311. Referred to, *Haynes* v. *Dornan*, [1899] 2 Ch. 30. Applied, *Townsend* v. *Jarman*, [1900] 2 Ch. 702; *Dowden* v. *Pook*, [1904] 1 K. B. 54. Referred to, *Leetham* v. *Johnstone-White*, [1907] 1 Ch. 326; *Russell* v. *Amalgamated Society of Carpenters*, [1910] 1 K. B. 520.]

An agreement that Defendant, a moderately skilful dentist, would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the Plaintiff, determinable at three months' notice, Held, unreasonable and void.

The declaration stated, that theretofore, to wit, on the 17th of April 1828, in the county of York, by certain articles of agreement under seal then and there made, between the Plaintiff, therein described as of the city of York, surgeon-dentist, of the one part, and the Defendant of the other part, which articles of agreement, sealed with the seal of the Defendant, the Plaintiff brought into Court, the Defendant, for himself, his heirs, executors, and administrators, did covenant, promise, and agree to and with the Plaintiff, his executors and administrators, that he, the Defendant, should and would well and faithfully serve him, the Plaintiff, as his assistant in the business or profession of a surgeon-dentist, for the term of five years, from the 20th day of October then next, according to the terms and conditions thereinafter expressed; and the Plaintiff, in consideration of such service, and of the covenants and agreements on the part of the Defendant, his executors and administrators, thereinafter contained, for himself, his heirs, executors, and administrators, did covenant, promise, and agree, to and with the Defendant, his executors and administrators, that he, the Plaintiff, his heirs, executors, and administrators, should and would well and truly pay or cause to be paid unto the Defendant, his executors or administrators, the salaries or yearly sums following, that is to say, for the first year of the said term of five years the sum of 120l., for the second year the sum of 140l., for the third year the sum of 160l., for the fourth the sum of 180l., and for the fifth and last year the sum of 200l., to be paid half-yearly at the expiration of each successive half year during the said term: and also that he, **[736]** the Plaintiff, should and would, during the said term of five years, teach and instruct the Defendant in the business or profession of a surgeon-dentist, according to the best of his skill and knowledge. And the Defendant did, by the said articles of agreement, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the Plaintiff, his executors and administrators, that he, the Defendant, should and would, for and during the said term of five years, from the said 20th day of October thence next ensuing, and fully to be complete and ended, faithfully and diligently serve him, the Plaintiff, as his assistant in the business or profession of a surgeon-dentist, and would not depart from the service of the Plaintiff without giving three calendar months' previous notice in writing to the Plaintiff of such his intention: and that the Defendant should not nor would, at the expiration or other sooner determination of the said term, (provided the Plaintiff were then living, and practising in the said profession or business of a surgeon-dentist,) exercise or practise the profession or business of a surgeon-dentist at or within 100 miles of the said city of York, without the previous consent in writing of the

Plaintiff, under the penalty of 1000l. to be forfeited and paid by the Defendant, his executors or administrators, and to be recoverable in any of his Majesty's Courts of Record at Westminster, as and for liquidated damages: that it should and might be lawful for the Plaintiff, at any time during the said term of five years, to discharge and dismiss the Defendant from his service, by giving to the Defendant three calendar months' previous notice in writing for that purpose: as by the articles of agreement, reference being thereunto had, would amongst other things more fully and at large appear: that afterwards, to wit, on, &c. at, &c. the Defendant entered and was received into the service of the Plaintiff under the said articles of agreement, and continued therein for a long space of [737] time, and until, afterwards, to wit, on the 3d day of May 1830, the said term was determined by the said parties. That after the determination of the said term, to wit, on, &c., and on divers other days and times between that day and the day of exhibiting that bill, in the county aforesaid, the Defendant did exercise the profession or business of a surgeon-dentist within 100 miles of the city of York, without the previous consent in writing of the Plaintiff, although he, the Plaintiff, was, during all that time, living and practising in the said profession or business of a surgeon-dentist, to wit, at, &c. Whereby an action had accrued to the Plaintiff, to demand and have of and from the Defendant the said sum of 1000l. above demanded. Yet, &c.

The Defendant pleaded that it was not his deed.

Upon the trial of the cause before Littledale J., last York assizes, it was proposed to resist the Plaintiff's claim on two grounds:

First, that the agreement was void, the distance prescribed by the Plaintiff being unreasonable.

Secondly, that even if the agreement were not void, the sum stated in it was a penalty, and not liquidated damages; and, therefore, the Plaintiff was only entitled to recover such damage as he could prove.

The learned Judge was of opinion, that under the plea, non est factum, those questions could not be enquired into. He could only try on that plea whether the Defendant had signed the agreement or not, of which fact there could be no doubt; and the jury were directed to find a verdict for the Plaintiff, which they accordingly did; debt 1000l., damages 1s.

Wilde Serjt. moved for a new trial, on the ground that evidence ought to have been received as to the amount of damages, for the reason suggested at the trial; and in arrest of judgment, that the agreement between the parties was void, as imposing an unreasonable re-[738]-straint on the Defendant. (The judgment having been confined to this latter point, the argument on the other is omitted here.)

Russell Serjt. shewed cause. An agreement is illegal and void, if it be generally in restraint of trade: but an agreement for a partial restraint of trade is valid, provided there be a sufficient consideration, and it be an honest and upright contract. This was so settled in *Mitchel* v. *Reynolds* (1 P. Williams, 181); and is said by Lord Kenyon, in *Davis* v. *Mason* (5 T. R. 118), to have been at rest ever since that case. The restraint here, though extensive, has its limits, beyond which it was easy for the Plaintiff to practise his profession; and the consideration—instruction and communication of the Defendant's skill—is ample. In *Young* v. *Timmins* (1 Crompt. & Jar. 331), which may be cited on the other side, the agreement was clearly bad and illegal, as tending to leave the party at the entire mercy of his employers, and giving them the power of reducing him to a state of idleness. And *Wickens* v. *Evans* (3 Young. & Jar. 318), which may also be cited, will rather assist the Plaintiff than make against him. But the case of *Mitchel* v. *Reynolds*, as abstracted in 2 Wms. Saunders, 166, n. is decisive in favour of the Plaintiff; as also the judgment of Best J. in *Homer* v. *Ashford* (3 Bingh. 326), where he says, "The law will not permit any one to restrain a person from doing what the public welfare and his own interest require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen that individual interest, and general convenience, [739] render engagements not to carry on trade, or to act in a profession, in a particular place, proper." *Davis* v. *Mason* (5 T. R. 118) is also in point. There, in consideration that A. would take B. as an assistant in his business as a surgeon, for so long time as it should please A., B. agreed not to practise on his own account for

fourteen years within ten miles of the place where A. lived, and gave a bond for that purpose: that bond was held good in law. In *Hayward* v. *Young* (2 Chitty, 407), it was held that a bond by an apothecary not to set up business within twenty miles was not illegal as in restraint of trade. In *Bunn* v. *Guy* (4 East, 190), a contract entered into by a practising attorney, to relinquish his business, and recommend his clients to two other attornies, for a valuable consideration, and that he would not himself practise in such business within London, and 150 miles from thence, was holden to be valid in law. And though the Master of the Rolls, in *Bozon* v. *Farlow* (Meriv. 472), mentions that the Lord Chancellor had doubted of the propriety and legality of some of the conditions in *Bunn* v. *Guy*, and perhaps would not have decreed a specific performance, yet he says that it was ultimately determined that the conditions were not illegal.

Wilde and Jones Serjts. in support of the rule. The restraint here is most unreasonable, and the consideration inadequate. The salary allowed by the Plaintiff to the Defendant shews that he was already an able practitioner when he entered into the Plaintiff's service, and not dependent on the Plaintiff for instruction. And the agreement is mischievous to the Defendant and to the public, without being productive of any corresponding advantage to the Plaintiff. The Defendant is estopped **[740]** to practise over a circle the diameter of which is 200 miles, containing nine whole counties, and parts of eight more. If the Plaintiff were to labour night as well as day it would be physically impossible for him to draw all the teeth of such a district. If he leaves home, York is without the benefit of his skill; if he remains at York, patients may die at Lancaster. This is not like a case of trade which a man may conduct by his agents: but the health of the public is endangered, without the possibility of any advantage to the Plaintiff. The agreement, therefore, is unreasonable and void. Hall J. said of a similar agreement (2 H. 5, fol. 5), "A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre Common ley, et per Dieu si le plaintiff fuit icy, il irra all prison tanq; il ust fait fine au Roy." And Parker C. J., in *Mitchel* v. *Reynolds*, said he thought the occasion excused the vehemence of Hall J.

Cur adv. vult.

TINDAL C. J. Two questions arise upon the deed on which this action is brought, and which is set forth upon the face of the declaration: the first, whether the deed is void, as being in restraint of trade; the second, supposing the deed to be a valid deed, whether the sum therein mentioned to be payable upon breach of the covenant, is a penalty only, or is to be considered as the liquidated amount of damages to be recovered by the Plaintiff.

The deed purports to be an agreement under seal between the Plaintiff and Defendant, whereby the Defendant covenants with the Plaintiff that he, the Defendant, would faithfully serve the Plaintiff as an assistant in the business and profession of a surgeon-dentist for five years. And the said Plaintiff, in consideration of such service, and of the covenants of Defendant, did **[741]** covenant with the Defendant to pay him the yearly salaries therein mentioned, and to instruct him in the business or profession of a surgeon-dentist; and the Defendant covenanted that he would, during the said term of five years, faithfully and diligently serve the Plaintiff as his assistant, and would not depart from his service without giving him three calendar months' notice in writing of such his intention; "and that the said Defendant should not nor would, at the expiration or other sooner determination of the said term, (provided the said Plaintiff were then living, and practising in the said business or profession, &c.) exercise and practise the said business or profession at or within the distance of 100 miles of the city of York, without the previous consent in writing of the said Plaintiff, under the penalty of 1000l. to be forfeited and paid by Defendant, his executors and administrators, and to be recovered in any of his Majesty's Courts of Record at Westminster as and for liquidated damages." The deed then contained a clause by which the Plaintiff might determine the service by giving three months' notice in writing.

The first question is, whether this agreement is void in law.

The law upon this subject has been laid down with so much authority and precision by Parker C. J., in giving the judgment of the Court of B. R. in the case of *Mitchel* v. *Reynolds* (1 P. Wms. 181), which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of

that case to the present. Now, the rule laid down by the Court in that case is, "That voluntary restraints, by agreement between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration; but particular restraints [742] of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract," that is, so as it is a reasonable restraint only, "are good."

The present case does not fall within the first class of contracts, as it certainly does not amount to a general restraint of the Defendant from carrying on his trade or business; he may do so beyond the distance of 100 miles from the city of York, and he may do so within that distance after the Plaintiff has ceased to practise. But the question is, whether this contract, which is in particular and partial restraint of trade only, and is made upon some consideration, is made upon a good and sufficient consideration, and is in itself a reasonable restraint of the Defendant's carrying on that trade in which the Plaintiff had agreed to receive the Defendant as his assistant.

Now, as to the consideration, it must be confessed it is very small, compared with the restraint under which the Defendant consents to place himself. The Plaintiff takes the Defendant as his assistant for five years, at a salary of 120l. for the first year, to be afterwards increased, with a power to dismiss him at any time by a three months' notice. The Defendant covenants not to exercise or practise the profession within 100 miles of the city of York, if the Plaintiff continues to carry on his business of a surgeon-dentist, under the penalty of 1000l. The Defendant, in order to be capable of being employed by the Plaintiff as an assistant in a profession requiring skill and experience, and at a considerable salary, must have been a person having some skill and experience, which he had before acquired. At the time of entering into this contract he was at liberty to set up his trade, and endeavour to gain his livelihood, within the city of York. But under the present contract, after being employed by the Plaintiff for three months only, and receiving in consequence no more than the sum of [743] 30l., he was liable to be prevented from carrying on his business, and earning his livelihood, within the large space comprehended within a circle drawn with a distance of 100 miles from the city of York. Surely this appears a very slender and inadequate consideration for such a sacrifice.

But the greater question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.

In the case above referred to, Lord Chief Justice Parker says, "A restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;" which are rather instances and examples, than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the particular case. In that case the plaintiff had assigned to the defendant the lease of a house in the parish of A. for five years, and the defendant entered into a bond conditioned that he would not exercise the trade of a baker within that parish during that term: and the restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade.

No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond [744] which, excessive. In *Davis* v. *Mason* (5 T. R. 118), where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the Plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to shew them reasonable, but in the eye of the law: and upon the bare inspection of this deed it

must strike the mind of every man that a circle round York, traced with the distance of 100 miles, encloses a much larger space than can be necessary for the Plaintiff's protection.

The nature of the occupation, which is one that requires the personal presence of the practiser and the patient together at the same place, shews at once that the Plaintiff has shut out the Defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the Defendant should not gain his livelihood; nor, on the other, why the public should not receive the benefit of his skill and industry through so wide a space. The contract appears still further unreasonable on this ground,—as it is to hold good during the whole time the Plaintiff continues to carry on his business, wherever he may be; so that if the Plaintiff removed from York, to places where the practice at [745] York by the Defendant could not injure him, still the restriction continues.

We therefore think that the contract is one which contains a restraint of the Defendant to carry on his trade, far larger than is necessary for the protection of the Plaintiff in the enjoyment of his trade; and, consequently, that the covenant creating such restraint cannot form the subject of an action.

The opinion we have formed on this point makes it unnecessary that we should discuss the other ground of objection. Indeed, that objection would only go to an assessment of damages by a suggestion of breaches on the present record.

Upon the whole, we think the judgment upon this record should be arrested.

Rule absolute.