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[181] De Term. S. Hillarii, 1711. *B. R.*

Case 44.—Mitchel *versus* Reynolds. [1711.]

[Followed, *Master of Gunmakers, &c.* v. *Fell*, 1742, Willes, 388; *Davis* v. *Mason*, 1793, 5 T.R. 120. Referred to, *Gale* v. *Reed*, 1806, 8 East, 85. Followed, *Young* v. *Timmins*, 1831, 1 Tyr. 241; *Horner* v. *Graves*, 1831, 7 Bing. 741. Referred to, *Keppell* v. *Bailey*, 1834, 2 My. & K. 529; *Mallan* v. *May*, 1843, 11 M. & W. 665. Followed, *Wilkinson* v. *Wilkinson*, 1871, L. R. 12 Eq. 604; 40 L. J. Ch. 242; 24 L. T. 314; 19 W. R. 558. Referred to, *Gravely* v. *Barnard*, 1874, L. R. 18 Eq. 523; *Collins* v. *Locke*, 1879, 4 App. Cas. 686; *Rousillon* v. *Rousillon*, 1880, 14 Ch. D. 364. Examined, *Davies* v. *Davies*, 1887, 36 Ch. D. 386, 390, 397. Referred to, *Mogul S.S. Co.* v. *M'Gregor, Gow & Co.*, 1889, 23 Q. B. D. 627; *Clegg* v. *Hands*, 1890, 44 Ch. D. 509, *n.* Followed, *Nordenfelt* v. *Maxim-Nordenfelt Co.*, [1894] A. C. 535. See also Smith's L. C. 10th ed. vol. 1, p. 391.]

10 Mod. 27, 85, 130; Fort. 296.

Resolution of the court of B. R.

A bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good. (So *Davis* v. *Mason*, 5 T. R. 118.) *Secus* if it be on no reasonable consideration, or to restrain a man from trading at all.

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

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

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

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

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

1*st*, Give a general view of the cases relating to the restraint of trade.

2*dly*, Make some observations from them.

3*dly*, Shew the reasons of the differences which are to be found in these cases; and—

4*thly*, Apply the whole to the case at bar.

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

Involuntary restraints may be reduced under these heads:—

1*st*, Grants or charters from the crown.

2*dly*, Customs.(1)

3*dly*, By-laws.

Grants or charters from the crown may be—

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

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

3*dly*, A grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 Jac. 1, cap. 3, sect. 6,(2) to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.

Restraints by custom are of three sorts:—

1*st*, Such as are for the benefit of some particular persons, [184] who are alledged to use a trade for the advantage of a community, which are good. 8 Co. 125; Cro. Eliz. 803; 1 Leon. 142; Mich. 22 H. 6, 14; 2 Bulst. 195; 1 Roll. Abr. 561.

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

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

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

1*st*, To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty. Carter, 68, 114; 8 Co. 125.(3) But where there is no precedent custom, such by-law is void. 1 Roll. Abr. 364; Hob. 210; 1 Bulst. 11; 3 Keb. 808.(4) But the case in *Keble* is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

2*dly*, All by-laws made to cramp trade in general, are void. Moor, 576; 2 Inst. 47; 1 Bulst. 11.(5)

3*dly*. By-laws made to restrain trade, in order to the better government and regulation of it, are good, in some cases,(6) *viz.* if they are for the benefit of the place, and to avoid public inconveniences, nuisances, &c. Or for the advantage of the trade, and improvement of the commodity. Sid. 284; Raym. [185] 288; 2 Keb. 27, 873; and 5 Co. 62 *b*, which last is upon the by-law for bringing all broad-cloth to *Blackwell Hall*, there to be viewed and marked, and to pay a penny *per* piece for marking: this was held a reasonable by-law; and indeed it seems to be only a fixing of the market; for one end of all markets is, that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there.

In 2 Keb. 309, the case is upon a by-law for restraining silk-throwsters from using

more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties, are either—

1*st*, General, or

2*dly*, Particular, as to places or persons.

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

Particular restraints are either, 1*st*, without consideration, all which are void by what sort of contract soever created. 2 H. 5, 5; Moor, 115, 242; 2 Leon. 210; Cro. Eliz. 872; Noy, 98; Owen, 143; 2 Keb. 377; March, 191; Show. 2 (not well reported); 2 Saund. 156.

Or 2*dly*, Particular restraints are with consideration.

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

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

Vide March's Rep. 77, but more particularly *Allen's*, 67, where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

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

[187] 1*st*, That to obtain the sole exercise of any known trade throughout *England*, is a complete monopoly, and against the policy of the law.

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

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

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

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

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

7*thly*, That no man can contract not to use his trade at all.

8*thly*, That a particular retraint is not good without just reason and consideration.

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

1*st*, With respect to involuntary restraints, and—

[188] 2*dly*, With regard to such restraints as are voluntary.

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

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

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

for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is *lex loci*, and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented arts, no body can be said to have a right to that which was not in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry.

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

1*st*, Negatively.

2*dly*, Affirmatively.

1*st*, Negatively; the true reason of the disallowance of [189] these in any case, is never drawn from *Magna Charta*; for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his pleasure.

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

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

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

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

2*dly*, To omit the doing of something that is a duty. Palm. 172; Hob. 12, *Norton* v. *Sims*.

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

Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to re-[190]-move all temptations and inducements to those crimes; and therefore, as in 1 Inst. 206, a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer—

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

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

2*dly*, Affirmatively; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1*st*, the mischief which may arise from them, 1*st*, to the party, by the loss of his livelihood, and the subsistence of his family; 2*dly*, to the publick, by depriving it of an useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.

3*dly*, Because in a great many instances, they can be of no use to the obligee; which holds in all cases of general [191] restraint throughout *England*; for what does it signify to a tradesman in *London*, what another does at *Newcastle*? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The *Roman* law would not inforce such contracts by an action. See Puff. lib. 5, c. 2, sect. 3; 21 H. 7, 20.(7)

4*thly*, The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade; or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

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

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

Resp. I do not see why that should not be shewn by pleading; though certainly the law might be settled either way without prejudice; but as it now stands the rule is, that [192] wherever such contract *stat indifferenter*, and for ought appears, may be either good or bad, the law presumes it *prima facie* to be bad, and that for these reasons:—

1*st*, In favour of trade and honest industry.

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

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

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

As 1*st*, That all contracts, where there is a bare restraint of trade and no more, must be void; but this taking place only where the consideration is not shewn can be no reason why, in cases where the special matter appears so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will inforce these latter contracts, but not the former.

2*dly*, It answers the objection, that a bond does not [193] want a consideration, but is a perfect contract without it; for the law allows no action on a *nudum pactum*, but every contract must have a consideration, either expressed, as in *assumpsits*, or implied, as in *bonds* and *covenants*, but these latter, tho' they are perfect as to the form, yet may be void as to the matter; as in a covenant to stand seised, which is void without a consideration, tho' it be a compleat and perfect deed.

3*dly*, It shews why a contract not to trade in any part of *England*, tho' with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, tho' it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime.

4*thly*, This shews why promises in restraint of trade have been held good; for in those contracts, it is always necessary to shew the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shewn. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books in these cases; it at least excuses the vehemence of judge *Hall* in 2 H. 5, *fol. quinto*; for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare, that he would not follow it any more, &c., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work at it again, and afterwards, when the necessities of his family, and the cries of his children, send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think [194] this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, tho' not his manner of expressing it.(8) Surely it is not fit that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice.

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

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

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

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

1*st Object.* In a bond the whole penalty is to be recovered, but in *assumpsit* only the damages.

[195] *Resp.* This objection holds equally against all bonds whatsoever.

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

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

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

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

Resp. 1*st*, It is to be tried whether upon consideration of the circumstances the contract be good or not? and that is matter of law, not fit for a jury to determine.

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

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

[196] 1*st*, A bond is a more favourable contract for him than a promise; for the penalty is a re-purchase of his trade ascertained before hand,(9) and on payment thereof he shall have it again; he may rather chuse to be bound not to do it under a penalty, than not to do it at all.

2*dly*, However it be, it is his own act.

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

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

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

Resp. But this is no more to be presumed than false testimony, and in such a case, I should think the defendant might aver against it;(10) for tho' the rule be, that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise, as in the case of an usurious contract.

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

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

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

To conclude: In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.(11)

For these reasons we are of opinion, that the plaintiff ought to have judgment.(12)

(1) See *Mayor of Winton* v. *Wilks*, 1 Salk. 203; 3 Salk. 349; and 2 Ld. Ray. 1129, S. C.

(2) As to copyright, see St. 8 Anne, c. 19; 12 G. 3, c. 36; 15 G. 3, c. 43; 41 G. 3, c. 107; 54 G. 3, c. 156; and see 2 Evans's St. 616. As to property in prints, see 8 G. 2, c. 13; 7 G. 3, c. 38; 17 G. 3, c. 57;—in models, 38 G. 3, c. 71; 54 G. 3, c. 56;—and in patterns, 27 G. 3, c. 28; and 34 G. 3, c. 23.

(3) *Wolley* v. *Idle*, 4 Burr. 1915. *Bodwic* v. *Fennell*, 1 Wils. 233.

(4) Vide *Harrison* v. *Godman*, 1 Burr. 12. *Hesketh* v. *Braddock*, 3 Burr. 1856. *Adley* v. *Reeves*, 2 M. & S. 53.

(5) *Rex* v. *Cooper's Company*, 7 T. R. 543. *Rex* v. *Tappenden*, 3 East, 186.

(6) *Wannell* v. *Chamber of the City of London*, 1 Stra. 675. The *King* v. *Harrison*, 3 Burr. 1322. *Pierce* v. *Bartrum*, Cowp. 269. *Eagleton* v. *E. I. Company*, 3 Bos. & Pul. 63. *Rex* v. *Faversham*, 8 T. R. 352. And see *Adley* v. *Whitstable Company*, 17 Ves. 315.

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

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

(9) Sed vide *Hardy* v. *Martin*, 1 Bro. C. C. 419, note. S. C. 1 Cox, 26.

(10) *Collins* v. *Blantern*, 2 Wils. 347.

(11) The business of an attorney arising from the confidence which others repose in his personal skill and integrity, it seems doubtful whether a court of *equity* would decree specific performance of a contract for sale of it, *Bozon* v. *Farlow*, 1 Mer. 459, though it has been determined that an agreement by an attorney to relinquish his business, and recommend his clients to another, and not to practise himself within certain limits, is valid in *law*, *Bunn* v. *Guy*, 4 East, 190.

(12) So *Chesman* v. *Nainby*, 2 Stra. 739, and 3 Bro. P. C. 349, S. C. [2nd ed. 1 Bro. P. C. 324]. And see *Gale* v. *Reed*, 8 East, 80. *Barrett* v. *Blagrave*, 5 Ves. 555; 6 Ves. 104. *Shackle* v. *Baker*, 14 Ves. 468. *Cruttwell* v. *Lye*, 17 Ves. 335. *Kennedy* v. *Lee*, 3 Mer. 441. *Harrison* v. *Gardner*, 2 Mad. 198. *Baxter* v. *Conolly*, 1 Jac. & W. 576. *Williams* v. *Williams*, 2 Swan. 253. *Bryson* v. *Whitehead*, 1 Si. & Stu. 74.