1894.

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HOUSE OF LORDS,

UDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

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Privy Council Appeals (including Appeals from Ecclesiastical Courts)	HERBERT COWELL,	*Barrister-at-Law.*

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intended or distress intended to be empowered, the action or distress is directly given, as in sects. 43, 44, and 45.

H. L. (E.) 1894 ARROW SHIPPING COMPANY v. TYNE IMPROVEMENT COMMISSIONERS. THE "CRYSTAL."

Order appealed from and decree of the Admiralty Division reversed, and judgment entered for the defendants below with costs here and below; cause remitted to the Admiralty Division.

Lords' Journals 22nd June 1894.

Solicitors for appellants: *Thomas Cooper & Co.*

Solicitors for respondents: *Maples, Teesdale & Co., for Lietch, Dodd, Bramwell, & Bell, Newcastle-on-Tyne.*

[HOUSE OF LORDS.]

THORSTEN NORDENFELT (PAUPER) . . APPELLANT;

AND

THE MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY, LIMITED . } RESPONDENTS.

H. L. (E.) 1894 *July* 31.

Restraint of Trade — Trader — Covenant in Restraint of Trade — General Restraint — Partial Restraint — Time — Space — Public Policy.

A patentee and manufacturer of guns and ammunition for purposes of war covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage except on behalf of the company either directly or indirectly in the business of a manufacturer of guns or ammunition:—

Held, affirming the decision of the Court of Appeal ([1893] 1 Ch. 630), that the covenant though unrestricted as to space was not, having regard to the nature of the business and the limited number of the customers (namely the Governments of this and other countries), wider than was necessary for the protection of the company, nor injurious to the public interests of this country; that it was therefore valid and might be enforced by injunction.

APPEAL from an order of the Court of Appeal (1). The question turned upon a covenant in restraint of trade, unrestricted as to space, made on the 12th of September 1888

(1) [1893] 1 Ch. 630.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY.

between the appellant and the respondent company, under the circumstances related in the judgment of Lord Herschell L.C. The covenant was in these words:—

"The said Thorsten Nordenfelt shall not, during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder or to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purposes of re-constitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same."

The appellant having afterwards entered into an agreement with other manufacturers of guns and ammunition, the respondent company brought an action against him to enforce the covenant by injunction.

Romer J. made an order declaring that the covenant was void as being unreasonable and beyond what was required for the protection of the company.

The Court of Appeal (Lindley, Bowen and A. L. Smith L.JJ.) were of opinion that the covenant was too wide in its application to any business which the company might carry on during twenty-five years, but was valid as regarded the gun and ammunition business, and varied the order of Romer J. by declaring "that the covenant is valid so far as it relates to the trade or business of a manufacturer of guns gun mountings or carriages, gunpowder explosives or ammunition (except explosives other than gunpowder or subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper)." And the Court granted an injunction and ordered an inquiry accordingly (1).

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY.

April 13, 16, 17. The appellant in person:—

The judgment of Bowen L.J. is inconsistent with the decision of the Court of Appeal in *Davies* v. *Davies* (2) and with *Tallis* v. *Tallis* (3) in which Lord Campbell C.J. expressly stated that though the restriction may be unlimited in respect of time, there must be some limit of space. The Court of Appeal has altered the law. It cannot be the law that a man should be prevented from earning his living in any part of the wide world. The true principle is that the restraint must not be wider than is necessary for the protection of the covenantee: *Rousillon* v. *Rousillon* (4); *Mills* v. *Dunham* (5). The present case does not come within any of the exceptions to the general principle against restraints of trade. The business was sold without reserve, and the covenant was not made in connection with the sale of the business and is thus doubly void, as there was no consideration, and the restraint is in effect a universal one, both as to time and space. Further, it would be against public policy to enforce the covenant; as the special knowledge acquired is no longer available for the service of the British Government. Besides, the respondents are sufficiently protected by their patents; and to enforce the covenant would be an indirect and illegitimate method of prolonging or extending those patents.

Sir *R. E. Webster* Q.C. and *W. F. Hamilton* for the respondents:—

The restraint is not greater than is required for the protection of the respondents, who were in a position to impose more stringent terms. It cannot be against public policy to prohibit the appellant from giving his advice or assistance to foreign Governments, and Bowen L.J. seemed to intimate that a stipulation that he should not advise the British Government might be illegal. The limits of such covenants must vary with the

(1) [1893] 1 Ch. 630.
(2) 36 Ch. D. 359.
(3) 1 E. & B. 391.
(4) 14 Ch. D. 351.
(5) [1891] 1 Ch. 576.

H. L. (E.) 1894 — NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY.

progress of trade and international intercourse, and also according to the character of the business. The case is practically one of a trade secret to which the law forbidding retraint of trade does not apply. The appellant is not prevented from earning his living. He may, for instance, make and sell sporting guns. The alleged absence or inadequacy of consideration is a matter which the Court cannot consider: *Gravely* v. *Barnard* (1).

[They also cited *Rousillon* v. *Rousillon* (2), *Mitchel* v. *Reynolds* (3), and *Tallis* v. *Tallis* (4), and the cases referred to in the Courts below.]

The appellant in reply:—

There is nothing in the nature of a trade secret, as any one could make one of the guns from a pattern. Many of the patents expire in a year or two, and the respondents are thus practically getting a large extension of these patents. The terms imposed are oppressive, especially as the company has sold its business at 100 per cent. profit.

The House took time for consideration.

July 31. LORD HERSCHELL L.C.:—

My Lords, the question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade.

The covenant in question was contained in an agreement of the 12th of September 1888, and was in these terms "(2.) The said Thorsten Nordenfelt shall not, during the term of 25 years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns gun-mountings or carriages, gunpowder explosives or ammunition or in any business competing or liable to compete in any way with that for the time being carried on by the company; provided that such restriction shall not apply to explosives other than gunpowder or

(1) Law Rep. 18 Eq. 518, 522.
(2) 14 Ch. D. 351, 363.
(3) 1 P. Wms. 181.
(4) 1 E. & B. 391.

H. L. (E.) 1894 — NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. — Lord Herschell, L.C.

to subaqueous or submarine boats or torpedoes or castings or forgings of steel or iron or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of £2000 a year, together with a commission upon the net profit of the company.

Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time the agreement was entered into.

The appellant had, prior to March 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th of March 1886 an agreement was made between the appellant and the Nordenfelt Guns and Ammunition Company by which the company was to purchase the goodwill of the appellant's business, and all the stock, plant, and patents connected therewith, he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company."

The agreement for purchase was duly carried into effect, and the price paid to the appellant, namely, £237,000 in cash, and £50,000 in paid-up shares of the company. In July 1888 negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Herschell, L.C.

transfer of their business and assets to a new company, to be called the Maxim-Nordenfelt Guns and Ammunition Company.

By an agreement for the amalgamation of the two companies, dated the 3rd of July 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thaine, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th of September 1888.

The respondents were incorporated on the 17th of July 1888, and on the 8th of August the agreement of the 3rd of July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, inter alia, not only the adoption of the agreement of the 3rd of July, but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns and Ammunition Company, the goodwill of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively."

This is of importance, because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the goodwill of the appellant's business, and was designed for the protection of the goodwill so sold, and he contended that this was an error, inasmuch as there was no sale by him of the goodwill on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him.

I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the goodwill was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in September 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Herschell, L.C.

the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company the object was, as I have shewn, stated to the world to be the acquisition of the goodwill of the Nordenfelt Company.

My Lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the goodwill of the appellant's business and with the object of protecting it.

The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported.

In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade and those where the restraint was only partial. The distinction was recognised and given effect to by Lord Macclesfield in his celebrated judgment in *Mitchel* v. *Reynolds* (1). That was a case of particular restraint, and the covenant was held good, the Chief Justice saying, "that wherever a sufficient consideration appears to make it a proper and a 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, namely, 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." And at a later part of the judgment, after dividing voluntary restraints by agreement into those which

(1) 1 P. Wms. 181.

are, first, general, or secondly, particular as to places or persons, he formulates with regard to the former the following proposition: "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." In the case of *Master, &c., of Gunmakers* v. *Fell* (1), Willes C.J. said the general rule was "that all restraints of trade, (which the law so much favours,) if nothing more appear, are bad . . . But to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the person restrained."

As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad.

In the case of *Horner* v. *Graves* (2), Tindal C.J. said: "The law upon this subject (i.e. restraint of trade) 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* (3), 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 agreements 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 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.'"

After stating that the case then before the Court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one.

It is true that in a later part of his judgment the following passage occurs: "In the case above referred to, Parker C.J.

(1) Willes, at p. 388. (2) 7 Bing. 735.
(3) 1 P. Wms. 181.

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." But I cannot, in view of the passage which I have quoted from the earlier part of his judgment, understand this as an indication of opinion on the part of Tindal C.J. that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by Parker C.J., nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner. I am confirmed in this view of Tindal C.J.'s opinion by his judgment in the subsequent case of *Hinde* v. *Gray* (1). In that case the defendant had entered into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach; judgment was given for the defendant, Tindal C.J. saying that it was "assigned on a covenant which according to the case of *Ward* v. *Byrne* (2) was void in law." This is, to my mind, only intelligible if *Ward* v. *Byrne* (2), which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void; unless it were so, I do not see how it could be regarded

(1) 1 Man. & G. 195. (2) 5 M. & W. 548.

as determining that the covenant in question in *Hinde* v. *Gray* (1) was void; or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are material distinctions between the circumstances of the two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the Court should not be regarded as governed by *Ward* v. *Byrne* (2); but Tindal C.J. did not proceed to inquire whether, under the particular circumstances appearing on the record in *Hinde* v. *Gray* (1), the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority.

I need not further refer to *Ward* v. *Byrne* (2), except to say, that although the learned judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to recognise that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made, unsuccessfully, to maintain that a covenant otherwise general might be regarded as a particular restraint, if limited in point of time: a contention for which some colour was afforded by the language used in earlier cases.

The views which I have expressed appear to me to have been entertained by that very learned lawyer Mr. John William Smith, as shewn by his notes to *Mitchel* v. *Reynolds* (3). He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law, the restraint must be, first, partial, secondly, upon an adequate, or, as the rule now seems to be, not on a mere colourable consideration, and there is a third requisite, namely, that it should be reasonable." This exposition of the law has, further, the very weighty sanction of Willes and Keating JJ., who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases.

(1) 1 Man. & G. 195. (2) 5 M. & W. 548.
(3) 1 P. Wms. 181.

In the year after the decision of *Hinde* v. *Gray* (1) the case of *Whittaker* v. *Howe* (2) came before Lord Langdale. Howe had covenanted not to practise as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced again practising in London, where he had previously carried on business. On an application for an interlocutory injunction, it was contended that the covenant was void. The Master of the Rolls refused to accede to this contention and granted the injunction. It was, of course, clear that a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favour at the hands of the Court. But the question was whether so extensive a covenant as that entered into could be supported. The case of *Mitchel* v. *Reynolds* (3) was cited in argument, but neither *Ward* v. *Byrne* (4) nor *Hinde* v. *Gray* (1) appear to have been brought to the notice of the Court. Lord Langdale expressed himself thus (*Whittaker* v. *Howe* (2)) "Agreeing with the Court of Common Pleas, that in such cases 'no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive,' having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord Kenyon said in *Davis* v. *Mason* (5), 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.'"

The learned judge distinctly indicated that he had not arrived at an irrevocable conclusion, for he added: "In the progress of the case it may become necessary to consider further the points which have been raised; but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is, to say the least, so far doubtful, that he ought not to be permitted to take the law into his own hands." It is not necessary to consider whether the decision can be supported, though it was regarded by Willes and Keating JJ. as questionable, and it is certainly difficult to see why,

(1) 1 Man. & G. 195. (3) 1 P. Wms. 181.
(2) 3 Beav. 383, 394. (4) 5 M. & W. 548.
(5) 5 T. R. 118.

if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in *Hinde* v. *Gray* (1) should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities I have already referred to.

There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only allude to two of these, in which the existence of the rule I have been considering has been questioned. In the case of the *Leather Cloth Company* v. *Lorsant* (2) James V.C. said: "I do not read the cases as having laid down that unrebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract."

And again, in *Rousillon* v. *Rousillon* (3), Fry J. thus expressed himself: "I have therefore, upon the authorities, to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule; and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable."

I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid.

The discussion on which I have been engaged is, it must be

(1) 1 Man. & G. 195. (2) Law Rep. 9 Eq. 345.
(3) 14 Ch. D. 351.

admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed conditions of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the two cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee.

When Lord Macclesfield emphasized the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shewn by-and-by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms: "Thirdly, because in a great many instances they can be of no use to the obligee; which holds in all cases of general 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 enforce such contracts by an action. (See Puffendorf, lib. 5, c. 2 s. 3. 21 H. 7, 20)." There are other passages in the judgment where this view is enforced.

There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the

covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases.

My Lords, it appears to me that a study of Lord Macclesfield's judgment will shew that if the conditions which prevail at the present day had existed in his time he would not have laid down a hard-and-fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact.

Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognised as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that whether the covenant be general or particular the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law.

I think that a covenant entered into in connection with the sale of the goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the goodwill of a business or calling. These were cases of partial restraint. But it seems to me that if there be occupations where a sale of the goodwill would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy

which countervail the disadvantage which would arise if the goodwill were in such cases rendered unsaleable.

I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner* v. *Graves* (1), in considering whether the agreement was reasonable. Tindal C.J. said: "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." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable.

I must, however, guard myself against being supposed to lay down that if this can be shewn the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest.

My Lords, I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shewn that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found amongst the Governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another.

So far I have dealt only with the covenant in relation to the

(1) 7 Bing. 735, 743.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Herschell, L.C.

United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the Courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant.

When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees.

I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed.

LORD WATSON:—

My Lords, the order appealed from directs that, for five-and-twenty years from and after the 17th of June 1888, the appellant shall, if and so long as the respondent company or any company taking a transfer of its business shall continue to carry on business during that period, be restrained from engaging, "either directly or indirectly, in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives or ammunition (except explosives other than gunpowder, or subaqueous boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper)." The prohibition is not confined to English, or even to British, soil; it extends to every part of the surface of the globe available for the purpose of carrying on the process of manufacture.

The order does nothing more than enforce, according to its terms, an undertaking given to the respondent company by the

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Watson.

appellant upon the occasion of their taking over, in the year 1888, from the Nordenfelt Company, the extensive business which had been established by the appellant, and had been transferred by him to the latter company in March 1886. At the bar of the House the appellant, for the first time, pleaded that the undertaking given by him to the respondent company was without adequate consideration, and could not warrant the injunction of which he complains. I have all along been satisfied, for the reasons explained by the Lord Chancellor, which I shall not repeat, that the plea is groundless, and that, for the purposes of this appeal, the appellant stands in the same position as if his undertaking had been given to the Nordenfelt Company in consideration of the full price which was paid to him by that company for the stock and goodwill of his business.

The main question discussed in the Courts below, and the only question which, in my opinion, it is necessary for your Lordships to decide, is raised by the appellant's contention that the personal restraint to which he has agreed to submit, being unlimited in space, is contrary to the recognised policy of English law, and is therefore incapable of being enforced by an English Court. The decisions, at common law and in equity, which bear more or less directly upon the question thus arising, are very numerous. They have been reviewed by the learned judges of the Appeal Court, who all arrived at the same conclusion by independent lines of reasoning, which are occasionally divergent. Some of the more important of those cases have been noticed by the Lord Chancellor, and will be criticized by my noble and learned friend, Lord Macnaghten. I have, as in duty bound, read and considered all the cases cited; but I do not propose to refer to them in detail. I shall simply endeavour to indicate the considerations which have led me to concur with your Lordships in affirming the order of the Court of Appeal.

With regard to the facts of this case, I have only to observe, that they are, from a legal point of view, exceptional. Their parallel is not to be found in any of the reported cases; but they are such as may naturally be expected to occur in the altered and daily altering conditions under which trade is conducted in modern times. The manufacturing department of the business,

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Watson.

which the appellant sold in 1886, was, and still is, carried on at extensive works in England and in Sweden. The business might be said to be local in that sense, but in that sense only. The area which it supplied was and is practically unlimited. The customers who buy the products, which the appellant agreed he should not manufacture, are necessarily a limited class, but they are to be found all over the world. They include, or, strictly speaking, consist of, Governments and potentates, great and small, civilized and savage, who for purposes offensive or defensive desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition.

It does not seem to admit of doubt that the general policy of the law is opposed to all restraints upon liberty of individual action which are injurious to the interests of the State or community. Nor is it doubtful that Courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade, when its enforcement would obviously or probably be attended with these injurious consequences. But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade.

I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced. Whether—when the circumstances of the case are such that a restraint unlimited in space becomes reasonably necessary in order to protect the

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Watson.

purchaser against any attempt by the seller to resume the business which he sold—a covenant imposing that restraint must be invalidated by the principle of public policy is the substance of the question which your Lordships have to consider in this appeal.

The earlier decisions, which were chiefly, if not exclusively, by the Courts of Common Law, contain abundant dicta, which, if literally followed, would sustain the plea upon which the appellant relies. These dicta broadly state the rule to be that a general restraint of trade, or, in other words, a restraint unlimited as to space, is void, because it is contrary to the commercial policy of England. The same proposition is frequently to be found in the later common law cases. To me it seems very natural that the law should have been laid down in these broad terms. The rule of policy, as originally understood and administered, struck at all restraints, whether partial or general. It was relaxed, by these decisions, in the case of partial restrictions, which were held to be reasonable. I feel that, had I occupied the seat of the learned judges who pronounced them, I should probably have used the same language which they employed with reference to unlimited restraints. They never imagined that any business could attain such wide dimensions that it could not be reasonably protected from the invasion of the seller except by subjecting him to a restraint unlimited in space. I am under the impression that, had they conceived the possibility of such a case occurring, the rule would have been expressed in somewhat different terms. I think that, as stated, it was meant to involve the assumption that there could be no such case.

A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Watson.

Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community.

No one of the noble and learned Lords before whom this appeal was heard has had the least difficulty in holding that the injunction granted was reasonably necessary in order to protect the respondent company's business from the aggressive acts threatened and commenced by the appellant. Nor, so far as I understand, have noble and learned Lords had any hesitation in coming to the conclusion, with the learned judges of the Appeal Court, that there is no existing rule of public policy which can be effectively pleaded in bar of the injunction. For my own part, I am very clearly of opinion that no violence is done to the canon laid down by the Common Law Courts in affirming that a restraint which is absolutely necessary in order to protect a transaction which the law permits in the interest of the public ought to be regarded as reasonable, and cannot, in deference to political ideas which are now obsolete, be regarded as in contravention of public policy. Were it necessary, I should be prepared to affirm that, in the year 1888, there was not, and that there does not now exist, any imperial rule of policy which requires that a restraint having that effect only shall be treated as a nullity, because it is unlimited in space, in circumstances such as occur in the present case. I venture to doubt whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered competition in the sale of arms of precision to tribes who may become her antagonists in warfare. I also doubt whether at any period of time an English Court would have allowed a foreigner to break his contract with an English subject in order to foster such competition.

When the series of cases, from the earliest to the present time, are carefully considered, I think they will be found to record the

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Watson.

history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other. In my opinion it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the Courts. I do not think that, between the Courts of Common Law and Equity, there has been much, if any, real difference of opinion. But I am bound to say that the language used by equity judges is on the whole more in consonance with the commercial policy of the country than some of the favourite dicta of the common law Courts. I purposely say some of those dicta, because I find in the opinions of many common law judges of the highest eminence a clear and liberal recognition of the wider views of policy, which have influenced your Lordships in the decision of this appeal.

The Lords Justices were agreed, and I understand that your Lordships are also agreed, as to the result of this case. A controversy has arisen as to the principle upon which that result ought to be reached. To my mind, it is not a matter of practical importance whether the admission of a restraint, unlimited in space, be regarded as a novel exception from the general rule which forbids all restraints, or as an extension of the exception upon that rule which has admitted limited restraints. I have no desire to interfere with anybody's freedom of choice between these alternatives. I am content to state that, in my opinion, the judgment which your Lordships are about to pronounce goes no farther than to adapt to new circumstances an old and sound exception to the general rule.

LORD ASHBOURNE :—

My Lords, I concur in the judgment moved by the Lord Chancellor.

The sole question is, whether the covenant referred to is void, or whether it is capable of being enforced against the appellant. I think it is quite clear that the covenant must be taken as entered into in connection with the sale of the goodwill of the appellant's business, and that it was entered into with the plain and bonâ fide object of protecting that business.

H. L. (E.) 1894 — NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. — Lord Ashbourne.

The appellant has argued that he is not bound by the covenant, and that it is void, as being opposed to public policy, and, being general, unrestricted as to area.

The cases that have been referred to are interesting and important as shewing the history, growth, and development of an important branch of our law. In considering them it is necessary to bear in mind the vast advances that have since the reign of Queen Elizabeth taken place in science, inventions, political institutions, commerce, and the intercourse of nations. Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy, rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas or narrowed by the municipal laws of any country. It is not surprising to note that our laws have been also expanded, and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live.

The appellant practically seeks to ignore the altered conditions of to-day, and to rely upon a rigid application of what he conceives to be the meaning of some decisions given in other generations, and this without taking note of the facts of the cases or of the conditions of the time when they occurred.

His argument practically is that his covenant is in general restraint of trade, and that if it be so—regardless of whether it is reasonable, whether it only affords a fair protection to his covenantees—it must be held to be void.

In the early times all agreements in restraint of trade were discountenanced; but by degrees, as the exigencies of an advancing civilization demanded, this was found to be too rigid, and our judges considered in each case what was reasonable and necessary to afford fair protection. This is apparent in the important judgment of Lord Macclesfield in *Mitchel* v. *Reynolds* (1). That was the case of a partial restraint of trade, and the judgment referred to the great distinction between a covenant in general restraint of trade and such a covenant as he was then dealing with. According to the then state of English life, it

(1) 1 P. Wms. 181.

H. L. (E.) 1894 — NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. — Lord Ashbourne.

would be hard to conceive that a covenant in general restraint of trade could ever be reasonable, and no imagination could then conceive that it could ever be needed for the fair protection of any one. It is easy to understand how a distinction for convenience came to be thus expressly noted between general and partial restraints of trade. Tindal C.J., in *Horner* v. *Graves* (1), points out, in reference to this judgment of Lord Macclesfield: "The Lord Chief Justice 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 a particular case."

Reference to this judgment of Lord Macclesfield and to this distinction between covenants in general and partial restraint of trade is found naturally in numerous cases. It appeared to afford a convenient nomenclature, and to be probably suited for some cases; but I respectfully concur with Tindal C.J. in the words already quoted, that these covenants were not "limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to a particular case."

I do not know that there is a single reported case, whose facts are clearly known, where a covenant in general restraint of trade, clearly reasonable in itself and only affording a fair protection to the parties, has been held to be void. One can readily see that such covenants might be extravagant and unnecessary, quite unreasonable, and not at all required for fair protection, and then the fact that they were general and not partial would be a distinction entitled to great weight. Thus I can well understand the existence of the distinction being kept alive and noted in so many cases, though this would not at all imply or require that the reasonableness of a covenant and the fact that it only afforded fair protection should ever be put aside or ignored.

In former days the arguments used shewed how different was the circumstances of those times. Discussions are to be found as to ten-mile limits, and fifty miles, and as to the distances of

(1) 7 Bing. 735.

one English town from another—then considerable topics, but now often trivial having regard to present means of locomotion. The cases shew a great variety of circumstances, different professions and trades, cases of apprenticeship and sales of goodwill. Each case has had to be considered on its own facts. It is really impossible to divide all cases into the two categories of covenants in general and partial restraint of trade requiring distinct treatment and needing different policies. However it is accomplished, the law must work in harmony with the requirements of the times and must advance and develop with the growth of our national life and institutions. Whether there ever was an effective and acknowledged rule, requiring all covenants in restraint of trade to be divided into two broad categories of general or partial restraint with the test of reasonableness openly and expressly applied to partial restraints, whilst it was ostensibly denied to general restraints, though in reality applied under the guise of an exception whenever the exigencies of life and business required it; or whether, assuming the rule to have been once known and recognised, it can now be accepted as applicable to the conditions of our present life; or whether all restraints upon trade have been always really governed by the one test, what is a fair protection and what is reasonable; are inquiries of interest on which legal minds may differ. I do not regard the distinctions of any practical importance, because, as in the present case, the inquiry as to the validity of all covenants in restraint of trade must, I am disposed to think, now ultimately turn upon whether they are reasonable, and whether they exceed what is necessary for the fair protection of the covenantees. There may be differences of opinion as to the history of covenants in restraint of trade, as to distinctions from time to time taken in nomenclature, but I believe in the result there is no real difference of opinion, and that all your Lordships hold the covenant in the present case to be good and valid for reasons which do not very seriously differ.

I do not pursue the controversy suggested by Bowen L.J. as to the judgments of Lord Langdale, James V.C., and Sir Edward Fry in the three cases so often referred to; but, as will appear from what I have already said, I would find much difficulty in

accepting all his criticisms, much as I respect his ability and research.

Lindley L.J. clearly in his judgment recognised the tendency of modern decisions, and said expressly the opinion "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee" was "the doctrine to which the modern authorities have been gradually approximating."

Having regard to the facts of the present case, to the nature of the business, to the class and number of customers, I think the covenant reasonable and not larger than the protection of the respondents required. I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of.

I concur in the suggested judgment.

LORD MACNAGHTEN:—

My Lords, the appellant, Thorsten Nordenfelt, a Swedish gentleman of much intelligence, as his able address to your Lordships proved, and of great skill in certain branches of mechanical science, had established in England and Sweden a valuable business in connection with the manufacture of quick-firing guns. His customers were comparatively few in number, but his trade was world-wide in extent. He had upon his books almost every monarch and almost every State of any note in the habitable globe. In 1886 Mr. Nordenfelt sold his business to a limited company which was formed for the purpose of purchasing it. At the same time and as part of the same transaction he entered into a restrictive covenant with the purchasers intended to protect the business in their hands. In 1888 the purchasers transferred their business to the respondents, a limited company established with the object of combining the Nordenfelt business with a similar business founded by a Mr. Maxim. The transfer was made with the concurrence of Mr. Nordenfelt. Without his concurrence and co-operation it is plain that it would not have

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

been made at all. On the occasion of the transfer, and as part of the arrangement, Mr. Nordenfelt entered into a restrictive covenant with the respondents. This covenant was in some respects wider, in others less wide, than the covenant with the original purchasers. But it was in lieu of, and in substitution for, that covenant, which of course would have been kept alive if Mr. Nordenfelt had declined to come into the new arrangement.

In these circumstances I think that the Court of Appeal were right in regarding the covenant which Mr. Nordenfelt entered into with the respondents as a covenant made upon the occasion of the sale of his business, and as depending for its validity upon the principles and considerations applicable to such a case.

The stipulation was that Mr. Nordenfelt should not, during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, "engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder explosives or ammunition"—so far the covenant has been held good; then come the words, "or in any business competing or liable to compete in any way with that for the time being carried on by the company." A proviso was added to the effect that such restriction should not apply to explosives other than gunpowder, or to subaqueous or submarine boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper. The latter part of the covenant, which extends to all competing businesses, may be disregarded. In view of the manifold objects of the company, as set out in their memorandum of association, it was held by the Court of Appeal to be void; and there is no appeal from that part of the decision. The proviso also, I think, may be put aside. It is one of the circumstances to be taken into consideration as bearing upon the question of the reasonableness of the agreement; but it is not, I think, essential to the validity of this covenant.

Mr. Nordenfelt admittedly has broken the earlier part of the covenant. His contention is that the whole covenant is void in law as being a covenant in restraint of trade unlimited in space. And the only point which your Lordships have to decide is

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

whether that part of the covenant which the appellant has broken is valid. For it cannot be disputed that the covenant is severable, and that part may be good though part be void.

The learned judges of the Court of Appeal have come to the conclusion that the earlier part of the covenant is valid. But though they all arrive at one and the same result, they approach the question from somewhat different points of view.

Lindley L.J. expressed his opinion that the doctrine "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee" was "the doctrine to which the modern authorities have been gradually approximating." But he could not, he said, "regard it as finally settled, nor, indeed, as quite correct." He thought it ignored "the law which forbids monopolies and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can." In the particular circumstances of the present case he considered that the earlier part of the covenant was not contrary to public policy. Apart from public policy, he thought it reasonable, not being wider than was "reasonably necessary for the protection of the interests of the covenantee."

The late Lord Bowen considered that it was the established common law doctrine,—a rule to be gathered from the books "with perfect ease," though certain equity judges had ignored the rule or misunderstood the law—that in the case of contracts in general restraint of trade the Courts had nothing to do with the reasonableness of the transaction. That was an inquiry which appertained only to partial restraints. Contracts in general restraint of trade he defined as "those by which a person restrains himself from all exercise of his trade in any part of England." "Scores of cases," he added, "have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common law judges." But then he thought that the rule, being a rule based on reason and policy, might admit of exceptions; and treating the present case as an exception, he, too, thought the agreement limited to the

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

first part of the covenant reasonable in itself and not contrary to public policy.

A. L. Smith L.J. came to the same conclusion, thinking that there was no hard-and-fast rule "that every covenant in restraint of trade is ipso facto void if it is unlimited as to space," and being apparently of opinion that the restraint in the present case, though unlimited in space, might yet be regarded as partial owing to the circumstance that certain trades, or branches of trade, in which the appellant had been engaged were reserved to him by the proviso attached to the covenant.

No doubt it is one thing to say that all exceptions to the general rule that the policy of the law is against restraints of trade are referable to one and the same principle, and that the only true test is, what is a reasonable restraint in the particular case. It is another thing to say that restraints of trade are divisible into two distinct categories—partial restraints and general restraints—that reasonableness is a test applicable to partial restraints and inapplicable to general restraints, but that the rule admits of exceptions; and that when you have found an exceptional case, you may apply to it the very same test which is applicable to partial restraints. There is a distinction certainly. But whether there is a substantial difference it is perhaps unnecessary to inquire. Assuming the rule to be that general restraints are void as being contrary to public policy, and not on any other ground, an exception must surely arise, if exceptions are admissible at all, as soon as you find that the particular case under consideration is not contrary to public policy, and so not opposed to the principle on which the rule is founded.

Thinking, as I do, that the distinction, if it exists, is of no practical importance, I should have been content with expressing my concurrence in the result at which the Court of Appeal have arrived, if it had not been for certain passages in the very able and elaborate judgment of the late Lord Bowen, from which I respectfully dissent.

Having laid down what he considers to be the common law rule, Lord Bowen proceeds to observe that "the first cloud upon the clear sky of the common law narrative comes in the equity

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

decision of Lord Langdale in *Whittaker* v. *Howe* (1841) (1),"—a decision to which he applies the word "inexplicable." "Everything," says Lord Bowen, "appears clear in the case except the judgment of the Court. The covenant was not a covenant in partial, but in general restraint of trade; and the restraint of trade being a general one, the Court had nothing to do with the reasonableness of the transaction; Lord Langdale, nevertheless, begins by stating that the question was whether the restraint intended to be imposed upon the defendant was reasonable; and he cites as a guide for himself the words of Tindal C.J. in *Horner* v. *Graves* (2)." Then, after pointing out that *Horner* v. *Graves* (2) was a case of limited restraint, Lord Bowen adds, "Lord Langdale thus appears to miss the whole point of the common law classification, and treats the matter before him in the wrong category." Dealing with the judgment of James V.C. in the *Leather Cloth Company* v. *Lorsont* (3), Lord Bowen says that his "language seems calculated in several passages to confuse, and not to throw light upon our conceptions of the established common law doctrine." "The Vice-Chancellor's expressions," he observes, "are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of Lord Langdale in *Whittaker* v. *Howe* (1)." Observations of a similar kind are made in reference to the judgment of Sir Edward Fry in *Rousillon* v. *Rousillon* (4).

My Lords, this appears to me to be a very grave censure—graver, I think, than Lord Bowen could have supposed or intended—because in such cases it was undoubtedly the duty of equity to follow the common law. The province of the Court was to give effect to common law rights. If the covenant was void at common law, a Court of Equity would have erred grievously in attempting to enforce it by injunction. If the question had been doubtful, it would have been the duty of the Court, at least in the time of Lord Langdale, to leave the parties to their common law rights, or to take the opinion of a Court of Common Law, as was done in the case of *Bunn* v. *Guy* (5),

(1) 3 Beav. 383, 394.
(2) 7 Bing. 735, 743.
(3) Law Rep. 9 Eq. 345.
(4) 14 Ch. D. 351.
(5) 4 East, 190.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

and by Lord Langdale himself in the case of *Nicholls* v. *Stretton* (1).

Criticism so unsparing seems to invite or provoke inquiry. One cannot do otherwise than test the ground at each step. I have read, I think, every reported case upon the subject, and I must say, with the utmost deference to Lord Bowen's opinion, that I cannot help thinking that Lord Langdale and James V.C. and Sir E. Fry have rightly apprehended the common law doctrine as it may be traced in the books, and as it is expounded by some of the leading authorities on the subject in modern times.

In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void (*Colgate* v. *Bacheler* (2)). In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases. "Where the restraint is general," says Lord Macclesfield, in *Mitchel* v. *Reynolds* (3), "not to exercise a trade throughout the kingdom," the restraint "must be void, being of no benefit to either party and only oppressive, as shall be shewn by-and-by." Later on he gives his reason. "What does it signify," he says, "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." "Any deed," says Best L.C.J., in

(1) 7 Beav. 42; 10 Q. B. 346. (2) Cro. Eliz. 872.
(3) 1 P. Wms. 181.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

Homer v. *Ashford* (1), "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."

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. But it is not to be supposed that that result was reached all at once. The law has changed much, even since *Mitchel* v. *Reynolds* (2). It has become simpler and broader too. It was laid down in *Mitchel* v. *Reynolds* (2) that the Court was to see that the restriction was made upon a good and adequate consideration, so as to be a proper and useful contract. But in time it was found that the parties themselves were better judges of that matter than the Court, and it was held to be sufficient if there was a legal consideration of value; though of course the quantum of consideration may enter into the question of the reasonableness of the contract. For a long time exceptions were very limited. As late as 1793 it was argued that a restriction which included a country town, and extended ten miles round it, was so wide as to be unreasonable. It was said, and apparently said with truth, that up to that time restrictions had been confined to the limits of a parish, or to some short distance, as half-a-mile. But Lord Kenyon, in his judgment, observed that he

(1) 3 Bing. at p. 326. (2) 1 P. Wms. 181.

did not see that the limits in question were necessarily unreasonable. "Nor do I know," he added, "how to draw the line": *Davis* v. *Mason* (1). The doctrine that the area of restriction should correspond with the area within which protection is required is an old doctrine. But it used to be laid down that the correspondence must be exact, and that it was incumbent on the plaintiff to shew that the restriction sought to be enforced was neither excessive nor contrary to public policy. Now the better opinion is that the Court ought not to hold the contract void unless the defendant "made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed" if the proposed restraint were upheld: *Tallis* v. *Tallis* (2).

To a certain extent, different considerations must apply in cases of apprenticeship and cases of that sort, on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment.

When the question is how far interference with the liberty of an individual in a particular trade offends against the interest of the public, there is not much difficulty in measuring the offence and coming to a judgment on the question. The difficulty is much greater when the question of public policy is considered at large and without direct reference to the interests of the individual under restraint. It is a principle of law and of public policy that trading should be encouraged and that trade should be free; but a fetter is placed on trade and trading is discouraged if a man who has built up a valuable business is not to be permitted to dispose of the fruits of his labours to the best advantage. It has been said that if the restraint be general "the whole of the public is restrained"—a phrase not, I think, particularly accurate, or perhaps particularly

(1) 5 T. R. 118. (2) 1 E. & B. 391, 412.

intelligible. It has been said that when a person is debarred from carrying on his trade within a certain limit of space he will carry it on elsewhere, and thus the public outside the area of restriction will gain an advantage which may be set off, as it were, against the disadvantage resulting to the public within the limited area. That is, perhaps, a just observation in a case of apprenticeship and cases of that sort; but it is, I think, rather a fanciful way of looking at the matter in the case of a sale of goodwill. Applied to that sort of case, it seems to me to be just one of those unrealities which tend to confuse this question. What has the public to hope in the way of future service from a man who sells his business meaning to trade no more? Is it likely that he will begin the struggle of life again working at his old trade or profession in some remote place where he has no interest and no connections? Is the possibility that he may do so a factor to be taken into consideration? Now, when all trades and businesses are open to everybody alike, it is not very easy to appreciate the injury to the public resulting from the withdrawal of one individual. When Lord Kenyon was pressed with an argument as to the injury to the public in Thetford that would result from denying them the services of a particular surgeon, he answered that the public were not likely to be injured by an agreement of this kind. "Every other person," he added, "is at liberty to practise as a surgeon in this town": *Davis* v. *Mason* (1). Then I cannot help thinking that there is a good deal of common sense in the way in which Lord Campbell looked at this question. A retired partner in the canvassing trade of a publishing business, being under a restrictive covenant, claimed the right to disseminate his publications within the area of restriction. He appealed to public policy. "It is clear," said Lord Campbell, "there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff": *Tallis* v. *Tallis* (2). That, of course, is not decisive in itself. It is an element for consideration of more or less weight according to circumstances.

(1) 5 T. R. 118. (2) 1 E. & B. 391, 413.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

But Lord Campbell's observation serves to bring into contrast the two principles which have to be adjusted in all these cases —freedom of trade and freedom of contract.

Sir Edward Fry's view was that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable. Lord Bowen cites this passage, and meets it with the following question: "Is it not a truer view that the Courts have never, as a rule, even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area?" That question seems to go to the root of the matter. May I venture to put it to the proof? Since the date of *Mitchel* v. *Reynolds* (1) how many cases have there been in which a general prohibition has come before a Court of Common Law for discussion or decision? So far as I can discover there are two, and two only—*Ward* v. *Byrne* (2) and *Hinde* v. *Gray* (3). In *Hinde* v. *Gray* (3) the point was disposed of during the argument, on the presiding judge observing that the particular covenant under consideration had been held invalid in *Ward* v. *Byrne* (2). That observation was repeated in the judgment, and nothing more was said. The covenant in question there was as little reasonable, though perhaps not quite so absurd, as the covenant in *Ward* v. *Byrne* (2). *Hinde* v. *Gray* (3), therefore, does not help one much. There remains the case of *Ward* v. *Byrne* (2). In that case an unlimited restraint was imposed on a coal merchant's clerk. When once he left his master's employment he was not for nine months to earn his daily bread anywhere as a coal merchant or a coal merchant's clerk, or in any capacity connected with the business of a coal merchant—an absurd and unreasonable stipulation, if ever there was one. The only wonder is, that when the case first came before the Court on an argument as to the construction of the covenant, the vice of the contract passed unnoticed. Afterwards there was a motion in arrest of judgment on the ground that the covenant was void. How was that application dealt with? Did the Court abstain from entering on the consideration of the particular circumstances? Why,

(1) 1 P. Wms. 181. (2) 5 M. & W. 548.
(3) 1 Man. & G. 195.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

the main, if not the only, ground of objection was the unreasonableness of such a restriction in the particular circumstances of the case. "This restriction," observes the Chief Baron, "extends to all parts of England, and to every species of engagement by which this person during that time could gain a livelihood by his trade. What protection could the plaintiff require to such an extent as this? Can it be supposed that the plaintiff's trade could be prejudiced by this man's entering into the service of a coal merchant in Scotland? The obligation which the defendant undertakes by his bond is that he shall neither be nor serve a coal merchant in any capacity for nine months. *That goes so far beyond what the plaintiff could require that it is an unreasonable restriction*: it is void on both grounds. It is against the principles and policy of the law as to any restraints on trade and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment; and it is beyond what is necessary for the protection of the plaintiff or what the justice of the case demands." Nothing can be plainer than the view of the Chief Baron: all restraints of trade, if there is nothing more, are regarded with disfavour by the law; this restraint is unnecessary and unreasonable. The judgment of Parke B. is, I think, substantially to the same effect; but it is so important that I shall reserve it for separate consideration presently. Gurney B. followed the same line of argument. "What is there," he asks, "in the trade of a coal merchant in London whose interests could be injured by any person setting up as a coal merchant or assisting another person in that trade at Exeter or York?" All these considerations, it will be observed, were wholly beside the point if there was in force a simple rule to the effect that the Court has nothing whatever to do with the reasonableness of the transaction in the case of general restraints.

There is no higher authority upon this subject in modern times than Tindal C.J. He had more to do with moulding the law on this head and bringing it into harmony with common sense than all the judges since Lord Macclesfield's time put together. You will hardly find any judgment in reference to restraint of trade delivered by any Court in England or America

during the last sixty years in which some passage is not cited from some judgment of Tindal C.J. In *Horner* v. *Graves* (1) Tindal C.J. delivered the considered judgment of the Court. In the course of it he had occasion to refer to the passage in *Mitchel* v. *Reynolds* (2), which is supposed to be the origin, or at least the earliest embodiment of the doctrine, that a different principle applies to general restraints and partial restraints. "Parker C.J.," he observes, "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.*" It is quite true that *Horner* v. *Graves* (1) was a case of partial restraint; but here we have Tindal C.J. dealing with the case of a general restraint as well as the case of a partial restraint. With both cases pointedly before him, and in reference to the one as well as to the other, he says that the only rule is, what is a reasonable restraint with reference to the particular case. I do not find that this passage has ever been questioned, nor is there in the books, so far as I can discover, any authority conflicting with it, except the judgment of Lord Bowen in the present case. It may, perhaps, be objected that passages are to be found in the judgments of Tindal C.J. as well as in the judgments of other judges, in which it is said that general restraints are void without adverting to any reason for their invalidity. That, no doubt, is so, and, indeed, in this very judgment there is such a passage. But is it not fair to conclude that Tindal C.J. thought general restraints bad, not because there was an arbitrary law to that effect—a hard-and-fast rule which judges had learned by rote, and the origin of which it was forbidden to explore—but because he took a general restraint to be an example, a typical example if you will, of an unreasonable contract? It does not seem to me to affect the question in the very least how often the dictum may be found repeated, if, on the one hand, it is not accompanied by any reason or explanation, and, on the other, it appears without any authoritative statement that the proposition had become a

(1) 7 Bing. 735. (2) 1 P. Wms. 181.

rule which was neither to be questioned nor explained. It is merely a dictum after all, because there is no reported case, except, perhaps, *Ward* v. *Bryne* (1), in which it could have had any bearing upon the decision. Certainly it is no wonder that judges of former times did not foresee that the discoveries of science and the practical results of those discoveries might in time prove general restraints in some cases to be perfectly reasonable. When that time came it was only a legitimate development—it was hardly even an extension—of the principle on which exceptions were first allowed to admit unlimited restraints into the class of allowable exceptions to the general rule.

I would now turn to the judgment of Parke B. in the case of *Ward* v. *Byrne* (1), which was decided in 1839, eight years after the decision in *Horner* v. *Graves* (2). The learned judge begins by stating the circumstances of the case, and the leading principle laid down in *Mitchel* v. *Reynolds* (3), that the public have an interest in every person carrying on his trade freely. Then he cites as a guide for himself the words of Tindal C.J., in a case of limited restraint, the very thing for which Lord Langdale is so much blamed. He could not, he said, express the rule more clearly than it had been done by Tindal C.J. in *Hitchcock* v. *Coker* (4), where he says: "We agree in the general principle adopted by the Court of Queen's Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." Oddly enough, that is a reproduction of the very passage which Lord Langdale selected as his guide; only he took it from *Horner* v. *Graves* (2) directly; Parke B. took it from the judgment on appeal in *Hitchcock* v. *Coker* (4). There it is attributed to Lord Denman, who does no more than quote the passage which Lord Langdale cites from *Horner* v. *Graves* (2). Then Parke B. observes, and he repeats the observation more than once, that there is no authority in favour of the position that there can be a general restriction limited only as to time.

(1) 5 M. & W. 548. (3) 1 P. Wms. 181.
(2) 7 Bing. 735. (4) 6 A. & E. 438.

He might, I think, have said with equal truth, that there was no case since *Mitchel* v. *Reynolds* (1) in which the question had come before the Court for consideration. In conclusion he says: "This case falls within *the rule laid down by Tindal C.J., viz., that this is a general prohibition from carrying on trade which is more extensive than the interests of the party with whom the contract is made can possibly require.* On that ground I think the judgment ought to be arrested." What did Parke B. mean there by the rule laid down by Tindal C.J.? There is no rule to be found laid down by Tindal C.J. in those words or to that effect except in the passage I have cited from *Horner* v. *Graves* (2). Parke B. may have been referring to *Horner* v. *Graves* (2), or he may have been referring to some opinion well known to him, though it is not to be found in any reported judgment. In either case that would be a strong confirmation of the argument I am endeavouring to present to your Lordships. But the argument seems to me to be irresistible if Parke B. thought that the rule as he expressed it, and as applied to a case of general prohibition, was fairly to be deduced from a similar rule laid down in a case of partial restraint.

With regard to Lord Langdale's judgment in *Whittaker* v. *Howe* (3), I have some difficulty in understanding what the objection to it is, even on the view which Lord Bowen takes in reference to partial and general restraints, unless his view was, as one passage in his judgment which has already been cited seems to indicate, that a restraint limited to England is to be considered as a general restraint nowadays when England is only part of the United Kingdom as much as it was when the three kingdoms were separate.

I cannot think that *Whittaker* v. *Howe* (3) requires much explanation. There is a homely proverb current in my part of the country which says you may not "sell the cow and sup the milk." That is just what Mr. Howe tried to do. He was a solicitor in large practice. He sold his business for a good round sum to two younger practitioners, and covenanted not to practise on his own account in England or Scotland. In order

(1) 1 P. Wms. 181. (2) 7 Bing. 735.
(3) 3 Beav. 383.

to hold the business together his name was kept in the firm and he remained in the office, drawing a handsome salary. Then there was a quarrel; and he carried off surreptitiously all the papers he could lay his hands on; he set up in the immediate neighbourhood; and he tried to steal the business he had sold. His defence was that a covenant so wide was against public policy. But it did not occur to him to return the price: that he kept in his pocket. Lord Langdale thought the public would not greatly suffer if Mr. Howe withdrew for a time from the ranks of an honourable profession. I cannot think he was very wrong. It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act: would the public find suitable compensation in the privilege of employing an unprincipled lawyer practising in violation of his solemn engagement? And it must be borne in mind that the firm remained, though one member retired into private life. Lord Langdale held, on the evidence before him, that the restraint was not unreasonable, although it extended to the whole of England and Scotland. Whether he was right or wrong in that view it is impossible to say without knowing what the evidence was. Undoubtedly some solicitors have correspondents in almost every business centre in the kingdom. At any rate, that particular point does not seem to have been contested in the argument, and it lay on the defendant to prove the area of restriction unreasonable. I venture to think that the decision in *Whittaker* v. *Howe* (1) was right. And, further, whether the restraint in that case ought to be regarded as general or as partial, I think the decision was in accord with the opinions of Tindal C.J. and Parke B. Nor can I, with all deference to Patteson J., understand how anybody could suppose that *Whittaker* v. *Howe* (1), in which the restraint was held to be reasonable, conflicts with *Ward* v. *Byrne* (2), where the restraint was plainly unreasonable and held to be so.

Now, in the present case it was hardly disputed that the restraint was reasonable, having regard to the interests of the parties at the time when the transaction was entered into. It

(1) 3 Beav. 383. (2) 5 M. & W. 548.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Macnaghten.

enabled Mr. Nordenfelt to obtain the full value of what he had to sell; without it the purchasers could not have been protected in the possession of what they wished to buy. Was it reasonable in the interests of the public? It can hardly be injurious to the public, that is, the British public, to prevent a person from carrying on a trade in weapons of war abroad. But apart from that special feature in the present case, how can the public be injured by the transfer of a business from one hand to another? If a business is profitable there will be no lack of persons ready to carry it on. In this particular case the purchasers brought in fresh capital, and had at least the opportunity of retaining Mr. Nordenfelt's services. But then it was said there is another way in which the public may be injured. Mr. Nordenfelt has "committed industrial suicide," and as he can no longer earn his living at the trade which he has made peculiarly his own, he may be brought to want and become a burden to the public. My Lords, this seems to me to be very far-fetched. Mr. Nordenfelt received over £200,000 for what he sold. He may have got rid of the money. I do not know how that is. But even so, I would answer the argument in the words of Tindal C.J.: "If the contract is a reasonable one at the time it is entered into we are not bound to look out for improbable and extravagant contingencies in order to make it void": *Rannie* v. *Irvine* (1).

My Lords, for the reasons I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by Tindal C.J.: What is a reasonable restraint with reference to the particular case? I think that the restraint in the present case is reasonable in every point of view, and therefore I agree that the appeal should be dismissed.

LORD MORRIS:—

My Lords, I entirely concur in the judgment and the reasons for it given by the Lord Chancellor. But I desire to express my opinion that, without going through the numerous cases which have been so exhaustively dealt with in the Court of Appeal and by your Lordships, the weight of authority up to the present time is with the proposition that general restraints

(1) 7 Man. & G. at p. 976.

H. L. (E.) 1894 NORDENFELT v. MAXIM NORDENFELT GUNS AND AMMUNITION COMPANY. Lord Morris.

of trade were necessarily void. It appears, however, to me that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered primâ facie void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself; but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time or space must always be a most important factor in the consideration of reasonableness though not per se a decisive test. If the consideration of reasonableness or of public interest is the rule, the appellant in my opinion has no case. The portion of his business which consisted of manufacturing guns and gunpowder explosives was one which would almost altogether be with Governments, foreign as well as at home, and wherever carried on would necessarily be in injurious competition with the respondents; nor does the substitution of a company for the appellant in the manufacture of guns and ammunition appear to me to injuriously affect the public interest.

Order appealed from affirmed and appeal dismissed.

Lords' Journals 31st July 1894.

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