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Contracts in Restraint of Trade

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CONTRACTS IN RESTRAINT OF TRADE:

a. UNDER COMMON LAW
b. UNDER LAW OF OHIO
c. UNDER FEDERAL LAW
d. REMEDIES

By CHARLES P. PFARRER

The subject of "Contracts in Restraint of Trade" is broad in its scope. About the subject many confused ideas are held, largely because contracts of this nature have not been properly classified, or perhaps, because of a neglect to observe that the subject has two phases. One class of contracts in restraint of trade consists of such as tend, or are designed, to destroy or stifle competition, effect a monopoly, artificially maintain prices, or by other means hamper or obstruct the course of trade as it would be carried on if left to the control of the natural laws governing commercial intercourse.[1] The other class does not have for intention, the creation of monopolies, but merely prevents a person, natural or artificial, from employing his talents, industry or capital in a specific occupation or undertaking within general or specified limits for a general or specified period of time. It is to this latter class of such contracts that this thesis will be devoted. Those of the former will not be treated save in a referential manner and belong properly to the subjects of "Combinations", "Monopolies" and "Trusts".

Under the early common law of England, all contracts whereby a person bound himself to abstain from the exercise of a particular trade, business or vocation, were void, regardless of whether the restraint was general or special, as being against public policy. It might be of interest to note herein, that in those days a man could not lawfully exercise a trade to which he had not been fully apprenticed and one so admitted was obliged by statute to follow and exercise his trade under a penalty. Hence, to enforce such a contract was to deny the tradesman the right to earn his living, and require him to violate an express

1 See Black's L. Dict.

provision of law. This rule continued through successive decisions for two hundred years.[2]

As early as 1414 a shocked court stated that such contracts were of the nature "of immortal immortality". The case that provoked this statement (Y. B. 2 Hen. 5pl 26) was one in which an action was brought on a sealed obligation containing a provision that it should be void if the other party did not pursue his trade of dyer within the town where he had formerly carried on such business for a period of six months. The angered court said: "The condition is against the common law, and, per Dieu, if the plaintiff were here he should go to prison until he paid a fine to the king."[3]

The holdings in these early cases were, perhaps, the result of conditions that existed in primitive England. Practically every person who carried on a business, public in its nature, such as blacksmiths, bakers, carpenters, dyers, etc., was affected with a public interest and for that reason subject to public control. Owing to existing conditions such persons had practically a monopoly, and any contract which tended to strengthen this natural monopoly was void.

The early doctrine still obtains, as a general rule, when applied to contracts in restraint of trade unlimited as to both time and space. Agreements of this nature are usually declared void as against public policy.[4]

As in many other doctrines of the law, the doctrine relating to contracts in restraint of trade has undergone distinctive stages of change and development.

"Changes in the law of apprenticeship, as well as the expansion of commerce, eventually impressed the judicial mind with the necessity of remodeling the rule to meet the requirements of man."[5]

The fact that both public interest and private welfare many times make expedient engagements not to carry on a trade, or act in a particular capacity, in a limited space, for a period of time, proper, and even beneficial, soon impressed itself on the

2 6 R. C. L. 786.

3 Also Colgate v. Bacheler, Cro. Eliz. 872; Merrimum v. Cover 104 Va. 428.

4 Davies v. Davies, 36 Ch. Div. 359; Harris v. Thens, 149 Ala. 133; Wright v. Ryder, 36 Cal. 342; Cook v. Johnson, 47 Conn. 175; Hursen v. Gaven, 59 Ill. App. 66; Lange v. Werk, 2 Oh. St. 519; Rule Co. v. Fringeli, 57 Oh. St. 596; Taylor v. Saurman, 110 Pa. St. 3.

5 6 R. C. L. 786.

courts of the day. Thus impressed, the courts sought at first to meet such requirements by introducing into the law a distinction between sealed instruments and simple contracts. This distinction being without reason, and unfounded on principal, soon disappeared, and the more logical distinction between a general and limited restraint found favor with the courts. While the courts continued to treat contracts in general or total restraint of trade as void, they began to enforce contracts that were for a reasonable restraint.[6]

The case just cited marks the turn of the judicial trend of thought, and is well worth the serious consideration of the reader.

The later doctrine of the common law may be summed up as follows:

(a) Where the restraint was unlimited as to both time and space. Such an agreement is to be regarded as a total restraint of trade and void by reason of the rules previously stated.[7]

(b) Where the restraint was limited as to time but unlimited as to space. So also, where the restraint is limited as to time and is unlimited as to space, seems generally, to be void:[8] and

(c) Where the restraint was unlimited as to time but limited as to space. Even according to the early rule, it is no objection to an agreement reasonably limited in point of space that it is unlimited in point of time and may, therefore, continue during the lifetime of the party restrained.[9]

Now it may be seen that in both the first and second instances the agreement was void; in the third it was valid. These fixed rules were followed in England and in the United States until comparatively recently when a new view was introduced

6 Year Book, 2 Hen. folio 5 pl. 26; Mitchell v. Reynolds, 1 P. Mms. 181 (1711).

7 Machine Co. v. Cleaning Co., 74 S. 58; Wright v. Ryder, 36 Cal. 342; Holmes v. Martin, 10 Ga. 503; Beard v. Dennis, 6 Ind. 200; Lawrence v. Kidder, 10 Barb. 641; Rule Co. v. Fringeli, 57 Oh. St. 596.

8 Oliver v. Gilmore, 52 Fed. 562; Floding v. Floding, 137 Ga. 531; Union Co. v. Bonfield, 193 Ill. 420; Kachler v. Glaum, 169 Ill. A. 537; Tel. Co. v. Crane, 160 Mass. 50.

9 Smith v. Webb, 176 Ala. 596; Hdwe. Co. v. Hdwe. Co., 87 Ala. 206; Brown v. Cling, 101 Cal. 295; Swanson v. Kirby, 98 Ga. 586; O'Neal v. Hines, 145 Ind. 32; Grocery Co. v. Koll, 153 Ky. 446; Moorman v. Parkerson, 127 La. 835; Foss v. Roby, 195 Mass. 292; Dean v. Emerson, 102 Mass. 480; Doty v. Martin, 32 Mich. 462; Gordon v. Mansfield, 84 Mo. A. 367; Carll v. Snyder, 26 A. 977 (N. J. Ch.); Diamond Match Co. v. Roebner, 106 N. Y. 473; Grasselli v. Lowden, 11 Oh. St. 349; Turner v. Abbott, 116 Tenn. 718; Butler v. Burleson, 16 Vt. 176; English cases cited as controlling are: Catt v. Tourle, L. R. 4; Ward v. Byrne, 5 M. and W. 548.

making the validity of the agreement dependent upon the reasonableness of the restraint.

Before we proceed to give a partial summation of general rules wherein it is held that contracts in partial restraint of trade will be declared to be valid under the common law, it would be well to bring to mind the fact that contracts in restraint of trade must at all times be ancillary. A man cannot, for money alone, enter into a binding contract imposing restraint in any degree. Such a proposition would be entirely removed from the spirit of public policy and so shocking to the conscience of any courts as to make it impossible to stand as legal. This is not a new doctrine, nor is it one that is likely to ever be altered.

Under the more recent rule, then, covenants in partial restraint of trade, are generally upheld as valid when they are agreements (a) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (b) by a retiring partner not to compete with the firm; (c) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (d) by the buyer of property not to use the same in competition with the business retained by the seller; and (e) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary to th enjoyment by the buyer of the property, good will or interest in the partnership bought; or to the legitimate ends of the existing partnership; or to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or to protection from the danger of loss to the employer's business caused by unjust use on the part of the employee of the confidential knowledge acquired in such business.[10] It would be stating it too strongly to say that these five classes of contracts in res-

10 Under the first class come the cases of: Mitchel v. Reynolds, 1 P. Wms. 181; Fowle v. Park, 131 U. S. 88, 33 L. ed. 67; Nordenfett v. Guns and Ammunition Co. (1894) A. C. 535; Diamond Match Co. v. Roebner, 106 N. Y. 473; 60 N. Y. 473, 60 Am. Rep. 464; Beal v. Chase, 31 Mich. 490. In the second class are Tallis v. Tallis, 1 El. and Bl. 391; Lange v. Werk, 2 Oh. St. 519. In the third class are Troy Laundry Machine Co. v. Dolph, 138 U. S. 617; Matthews v. Associated Press, 136 N. Y. 333. In the fourth class are Strawboard Co. v. Paper Co., 54 U. S. App. 416; Hitchcock v. Anthony, 44 U. S. App. 439; Hodge v. Sloan, 107 N. Y. 244. While in the fifth class are cases of Homer v. Graves, 7 Bing. 735; Keeler v. Taylor, 53 Pa. 467.

traint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the decisions that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party.[11]

Due to our limited space we are forced to allow the foregoing to suffice as a resume of the common law doctrines on the subject of contracts in restraint of trade and devote our attention to the subject as determined by the law of Ohio.

The peculiar system of government in the United States has allowed the several states much breadth in determining their own views as to the construction of doctrines of law. In nations of Anglo-Saxon nature the Common Law, as we know it, has served as a background for judicial interpretation, and, while we have no national common law, each state has its own peculiar system, which in the absence of express statutory provision, may be resorted to, and which, for convenience, may be called the common law of that state, and which, so to speak, derives its origin from the common law as we know it.

Now, as we have seen, Ohio had for "precedent" the rulings of the courts under the old common law, and the doctrines later evolved in the decisions handed down on the subject of contracts in restraint of trade; so that, to a degree, we find the law partially settled before the state courts were called upon to decide matters of a like nature. We are, then, free to give the law of this state on the subject at hand without going into a lengthy discussion and meditating upon the chronological background of commercial development, out of which may, or may not, have been evolved a system of judicial interpretation on contracts in restraint of trade.

On general principles it may be said that the courts of Ohio, following the common law rulings, have always held that a contract in restraint of trade is always void if nothing else appears.[12]

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11 See Homer v. Graves, 7 Bing. 735.

12 Large v. Werk, 1 Oh. St. 519; Rule Co. v. Fringeli, 57 Oh. St. 596 and cases cited therein, also Carr v. Brewing Co., 17 O. D. (N. R.) 222; Schroeder v. Schultz, 16 O. C. C. (N. S.) 303.

The reason for this is apparent. If such a condition were allowed to exist, then monopolies would be in force regardless of the injury to the public resulting therefrom. To avoid such a condition the courts had to make a distinction and the first thought that seems to have come to the judicial mind, is, will a contract having for its purpose a restraint of trade, create a monopoly, with all its injurious and hazardous consequences, all to the injury of the public, who have a right to be protected against such a situation?[13] So that we find contracts in restraint of trade, though the restraint is partial only, are not looked upon with favor, and are enforced only in clear cases, where material damage to the plaintiff is apparent, and no irrevocable hardship will result to the defendant, and to the public.[14] Also, the courts have apparently decided that the test for determining whether a covenant is in restraint of trade or not, by that is meant in such restraint as to fall within the catagory of forbidden contracts, is the restraint reasonable, and is it incidental to, and in support of, a main contract, which is lawful, and is it founded upon a valuable consideration![15]

There is one case in particular that discusses the reasonableness of restraint and the test for determining such reason is whether the covenant imposes restraint to no greater degree than is sufficient to afford a fair protection to the interests of the party for whose benefit it is made, and not so large as to interfere with the interest of the public.[16] From the foregoing statement of the general principles handed down in decisions on such contracts, we can see that the public welfare of the individual, for whose benefit the contract is made, are the determinant elements in deciding the validity of the contracts.

It might be well to summarize the decisions of the courts on certain cases to gain a fairer idea as to what contracts really are in restraint of trade. For instance in the sale of a business.

We find, in the case of *Lufkin Rule Company v. Fringeli* (57 Oh, St. 596-, that an agreement not to engage in the same business, in this state, or in the United States, for twenty-five years,

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13 Distilling Co. v. Block, 5 O. N. P. (N. S.) 386; Lange v. Werk, 2 Oh. St. 519; Rule Co. v. Fringeli, 57 Oh. St. 596.

14 Schroeder v. Schulty, 16 O. C. C. (N. S.) 303.

15 For a complete discussion of the principles just mentioned see Lange v. Werk, Supra. This case has been cited as the controlling case in Ohio on the subject.

16 Pappas v. Zonars, 14 O. N. P. (N. S.) 199.

made for valuable consideration, by the seller of a business and its good will, tends to create a monopoly and is void. In this case we find the courts of Ohio again following the common law rules as laid down in our previous discussion.

As to the question of assignability of the contract in restraint of trade, the courts have had fewer occasions to pass on such cases. However it has been held in Ohio that a contract by the seller of a business not to compete, for a period of five years, may be enforced by a purchaser of the business and contract from such a buyer.[17]

A rather interesting case holds that one who has agreed not to start in the express and moving business within a certain territory, for five years, will not be enjoined from taking care of horses, and driving them for his father, who is engaged in said business within the forbidden territory, even though the evidence shows he has solicited an order for business for his father within the limits of said territory.[18] The reasoning of the court is rather apparent. It goes back to the old common law belief that a man should not be compelled to seek other channels for his livelihood other than those for whcih his training has fitted him. Without commenting particularly on the reasoning of the learned court, we cannot agree with a decision of this nature in this day of expanded commerce, in so far as the defendant in this case had apparently been instrumental in the solicitation of the father's business.

A case very similar in point to which we direct attention is that of *Cleaning Company v. Davis,* (I 7 O. C. D. 474) in which the facts were substantially these: "A" was the owner of a window cleaning business which he sold to "B" with the good will thereof, and agreed not to engage in such line of business in the same city for a period of ten years. The court held that "A" will be enjoined from starting a new business of like character in the said city; but he will not be enjoined from practicing such trade as an individual. In this case there was no allegation of soliciting business, and the decision seems sound in all respects.

The courts, as in other contracts, will not permit the evasion of responsibility by reason of subterfuge. Looking more to the

17 Morgan v. Perhamus, 36 Oh. St. 517; Anderson v. Joyce, 16 O. D. (N. P.) 320.

18 Schroeder v. Schultz, 16 O. C. C. (N. S.) 303.

substance than to the form, it has been held that where the vendee of the good will of a business organizes a corporation and transfers thereto all his right, title and interest in and to the property and good will of the old concern, the right which is by law transferred to him to prevent interference with former customers devolves upon the newly organized corporation and may be enforced by it; and, where the vendor of such good will thereafter organizes a corporation which engages in a similar business, such newly organized corporation will be bound by the same obligations, with reference to such interference, as those which devolved upon the vendor.[19] It frequently happens that the sale of a retail business, such as a restaurant, provokes much speculation as to whether a valid contract restraining the seller from soliciting business from the buyer is valid. Unfortunately the question has not been raised frequently enough to discuss at great length. However, it has been held that an agreement, on the sale of such a business, not to engage in a competitive business within a certain square for a period of six months is valid.[20] There is no apparent reason why the same tests, as enumerated previously, should not apply in cases of this nature.

It is now too well settled to need discussion of any length, that a retiring partner may bind himself to refrain from competing with the continuing partners in the same line of business as that from which he is retiring. As, for instance, the agreement of a retiring partner not to compete for five years in the same city, or wherever the continuing partners may establish agencies is reasonable and proper as to the city, and, being divisible, is void as to any other place.[21]

In contracts of this nature, the same rule of construction applies as to other contracts wherein part is good and part is bad. The good will be enforced, the bad will not. If there can be no division of the contract, all will fail.

As regards questions of agency the courts are loath to enforce such a contract unless it appears that irreparable damage will result to the plaintiff; and the restraint is one that will result in no injury to the public by reason of the loss of a laborer.

19 Mfg. Co. v. Mfg. Co., 16 O. N. P. (N. S.) 561; Affmd. 24 O. C. C. (N. S.) 556.

20 Stephens v. Paul, 23 O. N. P. (N. S.) 377.

21 Thomas v. Miles, 3 Oh. St. 274; Pappas v. Zonars, 14 O. N. P. (N. S.) 199.

Thus, a stipulation in a contract of employment binding the employee not to engage or be, in any way, in the same line of business for a period of years under the forfeiture of a sum of money characterized as "liquidated damages" will be held void, as in restraint of trade, where the circumstances show it to be unreasonable and unjust, as where it does not appear that any damage could ensue from a breach.[22] Another case on the same proposition of agency holds that one who sells articles manufactured solely by himself is subject to the statutory and common law inhibitions against restraint of trade, and will not be protected in an effort to fix prices and control sales and subsales, to wholesalers and retailers, because of the alleged necessity of such control in order to protect him in the retail business which he has retained.[23]

According to a well considered decision the business of writing fire insurance is not included under the provisions of the Valentine Anti-Trust law, and no recovery can be had thereunder on account of any agreement among fire insurance agents which precludes unrestricted competition.[24]

It happens at times that covenants restraining trade are found in real estate contracts, i. e., contracts concernnig realty. Such contracts are subject to the usual rules of construction concerning contracts of this nature. A covenant in restraint of trade embodied in a mortgage which is to run with the land and continue after the performance of the ordinary conditions of the mortgage, is unreasonable (and therefore void). But, a condition in a mortgage, given to a brewing company for a sum of money advanced by it to enable the mortgagor to build a saloon upon the mortgaged premises, that the mortgagor shall not, for a period of twelve years, sell upon the mortgaged premises any beer, ale or porter, except that manufactured by the mortgagee is founded upon a valuable consideration, and is not against public policy as in restraint of trade, and may be enforced by injunction to prevent the sale on the premises of any other brews than that of the mortgagee.[25]

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22 Menter v. Gray, 1 Hosea 95.
23 Freeman v. Miller, 9 O. N. P. (N. S.) 26.
24 Foster v. Onhenbauer, 14 O. N. P. (N. S.) 637.
25 Breweries Co. v. Zernik, 4 O. N. P. (N. S.) 193; Breweries Co. v. Demko, 9 O. C. C. (N. S.) 130; Breweries Co. v. Konst, 12 O. C. C. (N. S.) 577; Breweries Co. v. Kraval, 16 O. C. C. (N. S.) 292; Breweries Co. v. Kraval affmd. 82 Oh. St. 395.

That nuisances can be the subject of contracts to restrain seems well settled in Ohio. Thus, an action prosecuted in good faith for a nuisance was dismissed on consideration of the discontinuance of the objectionable trade at the end of five years. It was held that this contract was on sufficient consideration, and was reasonable and was not void as being in restraint of trade.[26]

Patents have had a peculiar position in the subject of law. The authorities have given the inventor the right to use his product to the exclusion of others, for a period of time, as is well known. But where it involves a restraint of trade he stands on no better ground than any other contracting party. Thus, a contract to construct a tank invented by the plaintiff, for which a patent is applied for and to preserve the secret, and not to construct any tank for anyone else, is not wholly void by reason of the latter clause, which is in restraint of trade. It will not be construed to mean for the life of the patent, but only for the time that protection by secrecy is necessary, viz., until the patent is granted, and will be void only beyond that time.[27]

In a contract for exclusive patronage the offer of a premium or reward to a customer in the way of profit sharing in one's business for exclusive patronage during a given future period is not in restraint of trade or public policy.[28]

But contracts which are professedly part of a "system" of contracts entered into by a manufacturer with vendees, whereby the said vendees are required to protect the fixed retail price, and to sell at retail only, and not to sell to other retail dealers, who have not entered into a like contract, are not enforceable, and an action for liquidated damages on account of the breach of such a contract will not lie.[29]

As to the area of restraint, the determination of the validity of the contract will depend entirely upon the reasonableness of the restraint imposed, and the interests of the public. This latter factor is the more important as bearing directly upon injurious effects of partial monopoly. The nature of the business must be considered, as well as the convenience of the consumers. Each case must be decided according to its peculiar circum-

26 Grasseli v. Lowden, 11 Oh. St. 349.
27 Gordon v. Deckenbach, 9 Dec. Rep. 324.
28 Refining Co. v. Runkle, 10 O. N. P. (N. S.) 596.
29 Freeman v. Miller, 9 O. N. P. (N. S.) 26.

stances. We can only state herein certain results reached by the courts.

Thus on the sale of a grocery business an agreement not to enter into the same business within four squares is valid.[30] The test as to the validity of a contract entered into by the seller of a business that he will not enter the same line of business for a given period, within a specified distance of the old stand, is that it must not be injurious to the public, or go beyond what is necessary to protect the purchaser in his purchase.[31] Contracts in general restraint of trade are void. Those in partial restraint may be valid if on valuable consideration and are reasonable and not oppressive, and a pleading on it must show these facts. A seal does not import sufficient consideration. A covenant on valuable consideration not to compete in business in Hamilton County, or in the United States, under a forfeiture of four thousand dollars ($4,000.00) as liquidated damages is divisable and void as to the United States, but might be good for Hamilton County and the sum named is liquidated damages and not a penalty.[32]

But where the business of the plaintiff is the selling of gasoline to customers all over the state, he may, on buying the business of the defendant, of the same kind, in one city, as part of the contract, lawfully stipulate, that the defendant shall not engage in the same business anywhere in the state for a period of five years, and injunction will lie to protect from breach.[33] At first blush the above statement would seem to be irreconcilable to the established law, but a perusal of the case will show that such protection is reasonable and necessary for the business of the purchaser.

In a case where the territory embraced in a covenant not to engage in business is a county, and the business conveyed is that of a jeweler, optician and watchmaker, and the limit as to time is so long as the purchaser is engaged in the same line in that locality, the covenant is not unreasonable nor oppressive nor against public policy.[34] Now the above case must not be construed to apply in all circumstances. If the population is great

30 Peterson v. Schmitd, 13 O. C. C. 205.
31 Anderso v. Joyce, 16 O. D. (N. P.) 320.
32 Large v. Werk, 1 Oh. St. 519; Rule Co. v. Fringeli, 57 Oh. St. 596.
33 Oil Co. v. Hall, 7 O. C. C. 240.
34 Ewing v. Davis, 2 O. C. C. (N. S.) 90.

and the public need large, then there is no doubt but that the result would be quite different.

All provisions as to the time of restraint must conform to the well settled rules of construction as to other provisions of contracts in restraint of trade. These are the same as have been repeated frequently in this paper. Further we have already discussed to a great extent the provisions of the judicial holdings as to time in the foregoing, so that, it is not necessary to repeat here. But it might be well to call the readers attention to a few cases bearing more or less directly on this point.

A note for two hundred dollars, payable in thirty days, with a condition that if the maker is not within two hundred miles of "this place", the note is not to be sued on for five years is not void as being in restraint of trade.[35] Indefiniteness, and want of limit as to time does not invalidate an agreement not to manufacture, if valid in other respects.[36] Also, a covenant not to compete in the window cleaning business for a period of ten years is valid.[37]

As regards the statutory provisions of this state with reference to Monopolies and Trusts, they do not apply especially to the subject discussed. The foregoing statements of law apply in absence of statutes. The distinction made at the beginning of the thesis must be borne in mind at all times. The Ohio provisions are known as the Valentine Anti-Trust laws.

A resume of the Ohio cases referred to in this paper will disclose the fact that Ohio has never permitted a contract to stand where the restraint imposed included an area as large as the state or larger. The reason for this seems to be that the state should never be deprived of a citizen's usefulness by reason of a contract that forbade the citizen to pursue his calling. It is highly probable that the courts would construe such a contract as being in general restraint of trade, and therefore void. Such a statement is broad in its scope and need not be accepted, however, it is the result of a close scrutiny of the reasons assigned in cases considered.

Chief Justice Minshall has also stated:

"It is to the interest of the Republic that there should

35 Chittenden v. Ewing, W. 721.
36 Gordon v. Deckenbach, 9 Dec. Rep. 324.
37 Cleaning Co. v. Davis, 27 O. C. D. 474.

> be, measurably, an equality in the fortunes of its citizens, and one of the best modes of accomplishing this, without the use of arbitrary means is by encouraging separate and independent employment and discouraging by law and its administration in the courts all tendencies to the concentration of property in the hands of the few—a condition in which there will be constant unrest and dissatisfaction among the masses, that can bode no good to the nation."[38]

The reasoning contained in the somewhat Utopian language of the learned justice seems self-evident. If, as we understand it, a "law is a rule of human conduct", certainly we must by the law protect and defend the masses. While it may be urged that this condition is not exactly germane to the issue or subject, it cannot be avoided. It is good law.

The rule in the Federal Courts is much the same as have been explained in our discussion of the Common Law rulings and the findings of the Courts of Ohio. While they have been unhampered by the confines of a state, the same general principles as to the reasonableness of the restraint govern. They also place the interests of the public paramount to the interests and protection of the individual for whose benefit the restraint is imposed. Thus where the restraint is imposed upon a public utility, the courts will decline to enforce such contracts though the restraint is partial only.[39]

While we consider the federal rule on this subject to be practically the same as the rules we have previously cited, it is best to note again that the federal courts, as such, are not limited by the boundaries of any state, but construe such contracts as affecting the nation. At all times the restraint imposed must be reasonable and necessary. The restraint must be ancillary to the main contract, "The question is, whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable."[40] This seems to be the pivot upon which the whole of judicial construction turns at this time. It is the criterion by which all contracts in restraint of trade are measured. The difficulty lies, not so much in comprehension, as in application of the rule. Each case must stand alone, each must be determined according to its own merits. There are many cases we might cite as upholding

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38 See Lufkin Rule Co. v. Fringeli, 57 Oh. St. 596.
39 See Gibbs v. Gas Co., 130 U. S. 396 and cases cited there.
40 See language of Chief Justice Fuller in the case of Gibbs v. Gas Co., supra.

this statement, but it would be, and is, unnecessary. The law is very well settled on this point. The above rules apply in the absence of any conflict with the "Sherman Anti-Trust Law", so called. While as a general rule this act of Congress, 1890, does not bear directly on the subject of contracts in restraint of trade, it would be well to note a few of its effects on the matter.

Primarily the act declares illegal, all contracts combinations, and conspiracies in restraint of trade or commerce among the several states or with foreign nations, and in the territories and the District of Columbia and denounces severe penalties, both civil and criminal, against any person who shall make or engage in such contracts or conspiracies, or who shall monopolize such trade or commerce or attempt or conspire with others to monopolize it.[41] Again we call the readers attention to the fact that all contracts in restraint of trade, even though reasonable, must be ancillary, and not primary. The distinction to be drawn is that in the purview of this act the restraint itself is the end sought. It has full sway in the territories and District of Columbia.[42] But elsewhere it is restricted to foreign and interstate commerce, such manufacturing and dealing as are carried on wholly within the limits of a single state being beyond the reach of the statute, being left to the regulation of the several states and to the operation of the rules of the common law. But contracts which operate as a restraint upon the soliciting of orders for and the sale of goods in one state, to be delivered from another are in restraint of interstate commerce.[43] The purpose of the statute is to permit interstate commerce to flow in its natural channels unobstructed by any combinations, contracts, or monopolies, and its prohibitions apply to any contract or combination which stifles, obstructs, or directly and substantially restricts such commerce or free competition therein. It is not necessary that the contract or combination should by its terms refer to interstate commerce, its actual purpose and effect being the test.[44] Nor, must the public be deprived of the advantages flowing from such free competition.[45] The interference with commerce, how-

[41] Act Congr. July 2, 1890. 26 Stat. 209.
[42] Tribolet v. U. S. (Ariz.) 95 Pac. 85.
[43] Addyston Pyse and Steel Co. v. U. S., 175 U. S. 211; Robinson v. Suburban Brick Co. 127 Fed. 804; Sugar Co. v. Sugar Co., 166 Fed. 254.
[44] Gibbs v. McNeely, 118 Fed. 120.
[45] United States v. MacAndrews et al., 149 Fed. 823.

ever, must be direct and substantial, not merely incidental or indirect, and a contract or combination is not illegal if its purpose and chief effect are to foster, develop, and expand legitimate business, though accidently it may tend to restrict or discourage competition.[46]

Nor does it apply to one who achieves a monopoly of any article or line of business in foreign or interstate commerce, without combination or conspiracy with others, but simply by their exercise of superior business acumen and foresight, by over-bidding competitors, or other legitimate means.[47]

Now contracts which were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal or as giving rise to an action for damages to one prejudiced, but were simply void and not enforceable. But the anti-trust act of Congress renders such contracts, as applied to interstate commerce, unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and also creates a right of civil action for damages in favor of persons injured thereby, and a remedy by injunction in favor of the public against the execution of such contracts and the maintenance of such trade restraints.[48]

Now as to the remedies for a breach of such a contract, injunction is not the exclusive remedy. It has been held that one may maintain an action to recover damages for alleged breach of a reasonable contract in restraint of trade, and also to enjoin further breach thereof.[49] On the other hand, the one against whom the restraint runs may maintain an action to recover the sale price of the business transferred, or to enforce any other provisions of a valid contract made in restraint of trade.[50]

It is of course apparent that no relief wlil ordinarily be granted to either party when both are in part delecto, and the contract is in unreasonable restraint of trade.[51] But even when the parties are in pari delecto the courts may interfere and grant relief to one of the parties from motives of public policy.[52]

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46 United States v. Joint Traffic Ass'n., 171 U. S. 505; Phillips v. Iola Cement Co., 125 Fed. 593; Lanyon v. Sand Co. 223 Ill. 616. See Chesapeake and Ohio Fuel Co. v. United States. 115 Fed. 610.

47 Davis v. Booth and Co., 131 Fed. 31; American Banana Co. v. United Fruit Co., 160 Fed. 184; United States v. Patterson, 55 Fed. 605.

48 United States v. Addyston Pipe and Steel Company, Supra.

49 See Lange v. Werk 1 Oh. St. 519; Buckhout v. Witwer, 157 Mich. 406.

50 Nicholson v. Ellis, 110 Md. 322.

51 Farrington v. Stucky, 165 Fed. 325; Flowers et al v. Lumber Co., 157 Ala. 505; Berger v. Armstrong, 41 Iowa 447.

52 Dunbar v. American Tel. etc. Co., 238 Ill. 456.