

clear that the *onus* of showing that any contract is calculated to produce a monopoly, or enhance prices to an unreasonable extent, will lie on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties this *onus* will be no light one. Further, it must be remembered that the question whether a restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible.

It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similar combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful or something lawful by unlawful means. The right of the individual to carry on his trade or business in the manner he considers best in his own interest involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others (*Mogul Steamship Company v. M'Gregor*). . . .

Their Lordships affirmed the decision of the High Court of Australia.

Counsel for the Appellant—Sir R. Finlay, K.C.—Wise, K.C. (of the Colonial Bar)—A. Page. Agent—J. H. Galbraith, Solicitor.

Counsel for the Respondents—C. F. Mitchell, K.C. (of the Colonial Bar)—Atkin, K.C.—F. P. M. Schiller—A. C. Nesbitt. Agents Wadson & Malleston, Solicitors.

HOUSE OF LORDS.

Monday, July 28, 1913.

(Before the Lord Chancellor (Haldane) and Lords Dunedin, Shaw, and Moulton.)

MASON v. PROVIDENT CLOTHING AND SUPPLY COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Contract — Pacta illicita — Restraint of Trade — Reasonableness of the Restrictions Imposed.

Appellant had been engaged by the respondents under an agreement seriously curtailing his opportunities of earning his living. *Held* that inasmuch

as the agreement embodied restrictions which were not reasonable or necessary for the protection of the respondents' business it was void.

Their Lordships' considered judgment, from which the *facts* appear, was delivered as follows:—

LORD CHANCELLOR—This is an appeal from a judgment of the Court of Appeal reversing a judgment of a Divisional Court, which had set aside an order of the Judge of the Clerkenwell County Court. An action had been brought in that Court by the respondents, who claimed damages for past breaches, and an injunction to restrain the appellant from further breaches, of an agreement dated the 25th March 1908.

The respondents are a limited company whose objects are to carry on the business of a clothing and supply association in the United Kingdom and elsewhere, and to make arrangements with persons engaged in trade for concessions to any of the company's members of special privileges. Their method of business is known as the "check and credit system." Under this system they invite householders or other approved persons to become members by applying for a "check" or share of the company, the amount of which is payable by instalments. Local shopkeepers with whom the respondents have made arrangements supply goods to these shareholders on presentation of a "check" representing the share. The goods so supplied are charged by the shopkeepers to the respondents, who pay for them, obtaining a discount. The business is developed by means of canvassers employed by the respondents, and to each of these canvassers a district is assigned.

The appellant was engaged as a canvasser and executed the agreement in question. This was to the effect that he was employed as canvasser and collector on an engagement terminable on a two weeks' notice on either side. By clause 4 he entered into an engagement substantially in the same terms as clause 8, to the terms of which I shall presently allude, but limited to the period of his service.

Clause 8 relates to the time after his service has terminated, and is in these terms—"And in consideration of the premises the said William Milne Mason hereby agrees that he shall not within three years after the termination of his engagement and services with the company be in the employ of, or be engaged in any manner whatsoever, whether on his own account, or as partner with, or agent, or manager, or assistant for, any person or persons, firm or firms, company or companies, carrying on or engaged in the same or a similar business to that of 'The Provident Clothing and Supply Company Limited' carried on as aforesaid, or be engaged by, or assist or help (either directly or indirectly) any person or persons who shall be employed (whether for remuneration or not) by any person or persons, firm or firms, company or companies, carrying on the same or a similar business as aforesaid, or who shall be assisting or helping (either directly or indirectly) in the carrying on of the same or a similar business, or

assist or help anyone in the formation of such a business, society, or club as aforesaid within twenty-five miles of London aforesaid, where the company carry on business, or within twenty-five miles of any place where the said William Milne Mason shall have been employed by the company at any time during the continuance of this agreement. And if the said William Milne Mason shall be engaged as aforesaid he shall forfeit to the company the sum of twenty-five pounds by way of liquidated damages, and not as a penalty."

It is on this clause that the appellant was sued. If the clause was a valid one I think that the respondents were entitled to an injunction. For the words disclose what purports to be an agreement, and the mere fact that there is a special remedy provided by way of liquidated damages or penalty does not take away the *prima facie* right to enforce the agreement by injunction. Such cases as *National Provincial Bank v. Marshall* (40 Ch. Div. 112) and *General Accident Assurance Corporation v. Noel*, (1902, 1 Q.B. 377) illustrate the principle of construction in this class of agreement. But other points were taken for the appellant before the County Court Judge. It was said that the agreement was bad because it went further than was necessary for the protection of the respondents' business, and was therefore in undue restraint of trade. It was further said that the clause was bad for vagueness, and particularly because London was a place of description which was too indefinite, and, moreover, was described in the early part of the agreement as London in the county of Middlesex, a place that was non-existent. I do not think it necessary to discuss the question whether this description of London in the county of Middlesex invalidated the agreement. It may well be that the maxim *falsa demonstratio non nocet* applies to such a case. Nor do I propose to examine the argument as to general vagueness. It is true that the Divisional Court, which consisted of Pickford, J., and Avory, J., decided against the respondents on this point. They did not enter into the wider question whether the clause was altogether invalid as being in undue restraint of trade, because they thought that they were bound by a previous decision on the point of another Divisional Court. But this wider question goes to the root of the whole claim, and I desire to direct my observations to it.

The Court of Appeal, differing from the Divisional Court, appear to have thought not only that the clause was sufficiently intelligible to form the subject of an injunction, but that its validity was established by the finding of the County Court Judge that the appellant as a paid servant had been so trained by his employers, the respondents, that he had become, in the language of Buckley, L.J., "a particular sort of expert" who would if he engaged in a similar business be interfering with his employers' business

This is not the case of an agreement made to protect the sale of a goodwill, or to guard against the disclosure of special

trade secrets. The capacity of the servant must obviously, from the character of the business as I have described it, be due mainly to natural gifts as a canvasser, and only in a secondary degree to special training. If so, it is necessary to consider carefully the extent of the restraint imposed. Such agreements are frequently insisted on, but they are invalid if they go beyond what is necessary for the protection of the rights of the employer. Whether there are such rights must depend on the character of the business. Now the character of the respondents' business does not appear to me to be such as to entitle them to say that they had any right which justified them in excluding the appellant from exercising his talents, such as they were, altogether or within a wide area. Had they been content with asking him to bind himself not to canvas within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within these limits.

He appears, indeed, to have been, in point of fact, carrying on his canvassing for a similar business very near to his old place of employment, and it is probable that by a properly limited clause they could have restrained him from doing this. But the question is not whether they could have made a valid agreement, but whether the agreement actually made was valid. The County Court Judge has taken evidence which shows what the character of the work done for the respondents by the appellant was, and it is with reference to this work that the validity of the agreement must be tested. Now clause 8 is in very wide terms. I will assume in the respondents' favour, what I do not think it necessary to decide, that the 25 mile limit applies to every branch of this clause, so that there is no unrestricted area to which it applies. But even so, the appellant would have bound himself for three years not to be employed in the same or a similar business within 25 miles of London or of any place where he had been in the employment of the respondents during the currency of the agreement—an agreement, be it observed, which might not have lasted more than a fortnight. He further bound himself to abstain within the same limits of time and space from assisting, even without remuneration, anyone who was helping in connection with any such business.

Such a restraint on the liberty of a man to earn his living or exercise his calling is a serious one, and the Courts have always regarded such restrictions with jealousy. They have steadily refused to allow the question of their validity to be decided by a jury. Questions of this kind have always been reserved by the Courts as being for the Court itself, and to be decided in accordance with a definite legal test. Evidence cannot be given on the question of validity or of reasonableness, although evidence can be given as to the nature of the business and

of the employment, and, I think, also as to any practice which is usual among business men as regards the terms of the employment, not because this can determine the legal question of what is reasonable, but because what is usual is to some extent a guide in the consideration of the requirements of the particular business. On this point I agree with what was said by Fletcher Moulton, L.J., in his judgment in *Leng v. Andrews* (1909, 1 Ch. at p. 770), which seems to me quite consistent with what was laid down by Lindley, M.R., in *Haynes v. Doman* (1899, 2 Ch. at p. 24).

The test is now settled. The law is summed up in Lord Macnaghten's judgment in *Nordenfellt v. Maxim-Nordenfellt Guns and Ammunition Company* (1894 A.C. at p. 565). After pointing out, as Lord Watson had already done, that the standard of public policy must be the standard of the day, and that what was laid down as to public policy a long time ago may be of little use in settling what the actual standard is, he says—"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."

The respondents have to show that the restriction they have sought to impose goes no further than was reasonable for the protection of their business. But even assuming the construction most favourable to them, that which makes the words introducing the 25 miles limit apply to every branch of the restrictive language, I think that they fail to show this. I have examined the evidence as to the character of the business and the document which sets out particularly the duties of these canvassers. I can find nothing to lead me to think that the canvasser could become possessed of any special knowledge of the kind recognised as a trade secret. I doubt whether there were any secrets in this business. The success of the canvasser depended, as I have already said, mainly on his natural aptitude. No doubt he might acquire in the course of his employment lists of actual or possible customers in the district in which he had canvassed. I think that under a properly limited clause the employers would have been entitled to restrain him from canvassing such customers. But that is not the clause which the respondents in this case did frame. They have chosen to try to bind

the appellant to an extent which might be necessary for their protection if they had been carrying on a business of a different kind.

The reported cases afford instances of varying descriptions in which restriction over a wide area is necessary for the protection of the employer. But in the case of a business which is local, and which is carried on simply by canvassing, it is hardly possible for an employer to justify an area with a twenty-five mile radius, and I do not think that it has been justified here. It is, no doubt, as a general rule wise to leave adult persons to make their own agreements and take the consequences, but in the present class of case considerations of public policy come in and make it necessary for the Court to scrutinise agreements like the one before your Lordships jealously. The practice of putting into these agreements anything that is favourable to the employer is one which the Courts have to check, and the judges have to see that Lord Macnaghten's test is carefully observed. As I do not think that clause 8 complies with that test I am of opinion that it was void altogether. The order of the Court of Appeal should be reversed, and that of the Divisional Court restored.

LORD DUNEDIN—I have had the advantage of seeing the opinion which has just been delivered by my noble and learned friend on the Woolsack. I concur therein and I have nothing to add.

LORD SHAW—I agree. The case is not complex, but it has a far-reaching importance, and on this latter account I deal with it in a little detail.

The appellant on the 25th March 1908 entered into an agreement with the respondents which is called "An agreement for partial services as canvasser and collector." He was employed in this capacity, his remuneration being a commission upon the sums collected from customers. He engaged that he would not during the continuance of his employment serve any other person or firm engaged in a similar business, nor assist the servants of such a firm, nor help in the carrying on or formation of such a rival business, society, or club. This part of the agreement is section 4. There are also other obligations—for accounting for moneys received, for keeping books, and the like—and on the termination of his service, handing over these, with any balance due to his employers. The engagement was terminable on a fortnight's warning.

It is section 8 of this agreement which raises the question before your Lordships' House. A not unimportant article of the agreement also is the ninth, which provides that the respondents shall be at liberty to assign it, and their rights and powers under it, to any successors or assigns, direct or indirect, of their company. Such successors and assigns would therefore, it was argued, be also entitled to enforce these comprehensive restrictions against the appellant.

On the 16th May 1911 the respondents dismissed the appellant. As already mentioned

he was entitled to two weeks' notice, and this was given. Later in the year he entered the service of "The People's Supply Company." The evidence is very meagre, but it appears that the appellant's round of canvassing was among customers within a very limited area, and that his canvassing for his new employers was two miles away. It further appears that the respondents have—apart from London, which will be presently referred to—one hundred different branches in Great Britain, covering the greater part of the country. Twenty-five miles from every place would leave very little of the map. If, accordingly, under the agreement the appellant, or any other servant under a similar contract, had at any period of his service been employed in other quarters of the country for however short a time, these places, as well as London, and an area of 25 miles round each and all of them, would have come under the operation of the restrictive covenant and have been ground over which it was not permitted to him to take service in any capacity whatsoever with a company in the same line of business.

[His Lordship here remarked on the vagueness of the agreement and proceeded]—So vague is the injunction that I should share the difficulty and hesitation of Pickford, J., in putting any person under it. But I desire to decide the question before this House on another ground.

I will take it that the "London" of this contract is a known and defined area, and that therefore 25 miles round it is also known and defined. Within that area there are at least six millions of inhabitants, there is a large variety of businesses, and there are rivals in trade conducting business on the check and credit system. So extensive is the area that in London alone the respondents have fifteen different districts and employ about 1000 canvassers. If the judgment of the Court of Appeal stands, the appellant will accordingly be restrained from being in the employment of, or engaged in any manner whatsoever by, or helping directly or indirectly, any person who shall be employed with any person, firm, or company carrying on a business similar to that of the respondents. He may not, of course, also help in the starting of a rival business within the area. The restriction lasts for three years, and, as will be seen, is not confined to the appellant canvassing the customers of the old firm or in his old district, but he cannot throughout any part of this great and densely populated area take any engagement as a canvasser with their trade rivals, nor can he be employed by them in any other capacity whatsoever. He may not be a manager, a book-keeper, a clerk, a messenger, a typist, a caretaker. The restriction, even granted the limit in time and in area as already stated, is of a comprehensive and most extensive character. The question is whether this restriction is enforceable in a court of law.

Conflicting considerations are in such cases immediately presented to the mind. Here is a bargain, it is said, between two parties having full contracting power and

with their eyes open. It is not void or voidable under any of the familiar categories which justify rescission. Why then should the law decline to hold parties to it? On the other hand, it is said, here is a citizen who has come for a period of years under a restraint which is inconsistent with elementary freedom, namely, the freedom to earn his living as best he can. This is a freedom which it is not alone in his interest, but in the public interest, that the law should protect.

It is necessary in such cases to look, in the first place, at the nature of the contract itself. As to that, the diversities may be wide and the view of the law may be different as to the upholding or the scope of a covenant in restraint of personal or industrial freedom. If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to show that such a contract—in so far as it restrains the vendor from becoming a rival of a business whose goodwill he has sold and which he has bargained he shall not oppose—there may be elements showing that such a contract is enforceable, and, indeed, that a declinature by the law to enforce them would amount to a denial of justice. In such cases it may clearly appear that the express view of the bargain may have been the elimination from the sphere of rivalry of a powerful personality which by the very terms of the contract had been paid for disappearing into retirement, carrying his sheaves with him. In such cases a restraint is enforced by the law.

But, to use Lord Macnaghten's language in *Nordenfelt v. Maxim-Nordenfelt*, 1894, A.C. at p. 566, "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." And in my opinion there is much greater room for allowing, as between buyer and seller, a larger scope of freedom of contract and a correspondingly large restraint in freedom of trade than there is for allowing a restraint of the opportunity for labour in a contract between master and servant or an employer and an applicant for work.

In both cases which have been cited there are appeals to public interest. Yet the public interest in the one case may be on the side of freedom of contract, while on the other it is on the side of freedom of trade. The right to dispose for adequate consideration of a business which a person has built up and which has become solid, attractive, and valuable, by the exercise of his energy or ability, might become worthless unless accompanied by a substantial restraint of opposition on the part of the seller, and for the law to decline the validity of such a restraint would be to impose a great obstacle to the enjoyment of the fruits of labour, and so to destroy that incentive to industrial or commercial energy that the public interest might be grievously injured by such a restraint on freedom of contract.

But upon the other side the public interest

may strongly coincide with freedom of trade. That liberty might gravely be endangered or contravened by a restriction or impairment of the liberty of the subject to enter the ranks of business or to labour and work for and earn his living. The law can achieve a reconciliation and adjustment of these two elementary liberties—the right to bargain and the right to work. And it has in fact achieved this in such a manner that the public interest has been in both cases conserved.

For the rule evolved after much discussion may now be considered settled. The language of Tindall, C.J., in *Hitchcock v. Coker* (6 A. & E. 438, 454) can now no longer be questioned as being the law, 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.” This was adopted by Parke, B., in *Ward v. Byrne* (5 M. & W. 548), and is expressly founded upon by Lord Macnaghten in his analysis of the case law in *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Company* (1894, A.C. 565). I cannot refrain from again quoting Lord Macnaghten’s words—[*His Lordship here quoted the passage quoted by the Lord Chancellor*].

I have referred to the apparent antagonism between the right to bargain and the right to work. The extreme of the one destroys the other. But the public interest reconciles these two, and removes all antagonism by the application of a principle and a limit of general application. It may be that bargains have been entered into with the eyes open which restrict the field of liberty and of labour, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used so as to afford more than a reasonable protection to the covenantee. In every case in which it exceeds that protection the public interest, which is always upon the side of liberty, including the liberty to exercise one’s powers or to earn a livelihood, stands invaded, and can accordingly be invoked to justify the non-enforcement of the restraint. In such a case it may be “plainly and obviously clear that the plaintiff’s interest did not require the defendant’s exclusion or that the public interest would be sacrificed.” This is the language of Lord Campbell in *Tallis v. Tallis* (1 E. & B. 391). For myself I should not use the expression of an alternative, but I should prefer to say that when it is plainly and obviously clear that the plaintiff’s interest did not require the defendant’s exclusion, then from that moment it is established that the public interest would be sacrificed.

I desire expressly to adopt for myself a further proposition bearing upon this subject, and enunciated by Farwell, L.J., in *Leng v. Andrews* (1909, 1 Ch. 763). The case that was there being dealt with, as at present, was a case of restraint upon a servant seeking fresh employment. Referring to the passage cited from Lord Macnaghten,

he says (1909, 1 Ch. 773)—“That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public, who gain the advantage of his having had such admirable instruction.”

Upon this last point there was much argument at your Lordships’ Bar as to whether this case did not fall within the principle of *Haynes v. Doman* (*cit. sup.*). But *Haynes v. Doman* was a case, and was expressly so treated, of the divulging of trade secrets and of a servant entering into new employment carrying with him these trade secrets, with the constant risk of divulging them to rival manufacturers. Such cases are, in my opinion, widely distinguished from the other cases of an employee who by faithful and industrious exercise of his powers becomes mentally, or even manually, well equipped as a servant. The distinction between that case and the former is as wide as the psychological distinction between subjective and objective knowledge. But it is also as real. For in the former case the equipment of the workman becomes part of himself, and its use for his own maintenance and advancement could not, except in rare and peculiar instances, be forbidden. But in the other case the knowledge of trade secrets may be as real and objective as the possession of material goods, and the law would much more readily support a restraint of liberty which would or might be likely to induce the transfer of this to others with the danger of consequent loss. In all cases of restraint sought to be put upon an employee under a contract between master and servant this distinction should be borne in mind.

Judged by these principles, the case on its facts becomes very simple. In the first place, has it been shown that this restraint sought to be put upon the appellant was reasonable for the protection of the respondents? His period of service under the contract might have been only a fortnight, and the restraint placed upon his liberty to earn his accustomed livelihood—in all its comprehensiveness, as above mentioned, and for the same period of years—would have been the same. In respect of that fortnight’s employment his bargain would have been to debar himself from all manner of service in the same class of trade and for three years among a population of nearly six million souls. A very reasonable restriction of a canvasser in such circumstances as are here disclosed might no doubt have been that he should not canvass his old customers or in the limited locality of his former labour. This the law would naturally and properly enforce, and would look upon as a reasonable protection of the employer. But to extend it from that to the wide range which I have set forth appears to me to be a thing under the guise of a contract which is not protection for the employer, but a means of

coercing and punishing the workman and putting him under a tyrannous and therefore a legally indefensible restraint. No workman could have the freedom to dispose of his own labour or risk a movement towards his own advancement under what might turn out to be the cruel operation of such a clause. It is to be noted that the respondents have tendered no evidence whatsoever that the clause was necessary for their protection. Their secretary was examined, and on that head all that he said was "This is a breach of his agreement."

Finally an attempt was made to bring the case by analogy within the principle of the trade secret cases. It appears, however, plainly from the rules for canvassers which are printed that what is required is simply a fair share of intelligence and industry, with the accompaniment of a persuasive manner. If all these have been improved during the appellant's service with the respondents they may assist his success in life, but they do not afford any material for restraint by a court of law upon his liberty in pursuing his ordinary calling. In my opinion, further, courts of law should not be astute to disentangle such contracts and to grant injunctions or restraints which are not justified by their terms. There is no occasion for the framing in the present instance of a limited injunction, the contract not being in separate and clearly defined divisions. It stands as a whole, and in my opinion it is not enforceable by law.

LORD MOULTON—I concur. The law as to covenants in restraint of trade was so carefully and authoritatively formulated in this House in *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Company* that I do not think it necessary to discuss the numerous authorities cited in the course of the argument in order to ascertain what is the critical question which the Court ought to put to itself in such a case as this. It is as follows—Are the restrictions which the covenant imposes upon the freedom of action of the servant after he has left the service of the master greater than are reasonably necessary for the protection of the master in his business?

The first task of the Court therefore is to ascertain with due particularity the nature of the master's business and of the servant's employment therein. The facts are not in dispute. The business of the respondents consists in inducing persons to become so-called "members," *i.e.*, to subscribe for checks of various face values, say, for instance, of a value of £1. These checks are paid for gradually by instalments at certain due dates, but they are delivered to the member when a certain proportion of their face value has been paid by him, say, for instance, when 3s. has been paid on a £1 check. So soon as the check is received it is available for purchasing goods to its full face value, the company being answerable to the vendor for the price of the goods purchased and itself collecting the instalments payable by the member. A list of firms willing to sell goods on these terms is set out in a printed list given to the members, and is

therefore a matter as to which there is no secrecy, and the profits of the company are derived from the discounts given to them by the vendors of the goods.

The nature of the employment of the appellant in this business was solely to obtain members and collect their instalments. A small district in London was assigned to him, which he canvassed and in which he collected the payments due, and outside that small district he had no duties. His employment was therefore that of a local canvasser and debt collector and nothing more.

Such being the nature of the employment it would be reasonable for the employer to protect himself against the danger of his former servant canvassing or collecting for a rival firm in the district in which he had been employed. If he were permitted to do so before the expiry of a reasonably long interval he would be in a position to give to his new employer all the advantages of that personal knowledge of the inhabitants of the locality, and more especially of his former customers, which he had acquired in the service of the respondents and at their expense. Against such a contingency the master might reasonably protect himself, but I can see no further or other protection which he could reasonably demand. If the servant is employed by a rival firm in some district which neither includes that in which he formerly worked for the respondents, nor is immediately adjoining thereto, there is no personal knowledge which he has acquired in his former master's service which can be used to that master's prejudice. The respondents would be in no different position from that in which they would be if the appellant had acquired his experience in the service of some other company carrying on a like business.

These, then, being the limits of the protection which the master might reasonably insist on, I turn to the covenant in order to see whether it exceeds these limits. That covenant is admittedly difficult to construe, and, moreover, it is in my opinion vague by reason of the extraordinary generality of the language employed. But at all events it prohibits the appellant from entering into a similar employment within 25 miles "of London in the county of Middlesex" for a period of three years after leaving the respondents' service. Such an area must include something like six million persons—that is to say, that on a moderate estimate it is an area a thousand times as great as the district assigned to him when in the respondents' service. Considering the strictly local character of the employment, I have no hesitation in saying that I should be prepared to hold that such an area is very far greater than could be reasonably required for the protection of his former employers.

But this is but a small portion of the restrictions imposed by the covenant. It is very arguable that it prohibits him entering into the employ of anyone carrying on a similar business without any limitations of area. But assuming in favour of the respondents that we ought to give it the more limited construction which was evidently put upon it at the trial, and to which the

evidence was directed, it restrains him for three years from entering into the employ of any firm which carries on a similar business within 25 miles "of London in the county of Middlesex," wherever it be that his employment is located. To my mind the employment of the appellant is in respect of its local character analogous to a milk-walk, where the servant is employed in distributing his master's goods in a certain defined district and not otherwise, and the portion of the covenant with which I am now dealing would amount in the case of a man so employed to prohibiting him from entering into the service of any milk-distributing company that had a place of business within twenty-five miles of his former milk-walk no matter where it was that they proposed to employ him.

But even now we have not exhausted the extravagances of this restrictive covenant. Under it the appellant must not for a like period "be engaged by or assist or help (either directly or indirectly) any person or persons who shall be employed (whether for remuneration or not) by any person or persons, firm or firms, company or companies, carrying on the same or a similar business as aforesaid, or who shall be assisting or helping either directly or indirectly in the carrying on of the same or a similar business."

It is difficult to construe with any certainty words which are so intentionally wide and general. I doubt whether a covenant that is so intentionally unreasonable merits even the benefit of the general rule of construction that a court should, if possible, construe language so as to give a reasonable meaning to the document. But however we construe it, the covenant is out of all measure wider than anything that can reasonably be required for the protection of the respondents in their business, and therefore the covenant is void in law and will not be enforced by the Courts.

It was suggested in the argument that even if the covenant was, as a whole, too wide, the Court might enforce restrictions which it might consider reasonable (even though they were not expressed in the covenant), provided they were within its ambit. I do not doubt that the Court may, and in some cases will, enforce a part of a covenant in restraint of trade, even though, taken as a whole, the covenant exceeds what is reasonable. But, in my opinion, that ought only to be done in cases where the part so enforceable is clearly severable, and even so only in cases where the excess is of trivial importance, or merely technical, and not a part of the main purport and substance of the clause. It would, in my opinion, be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great dis-

advantage in view of the longer purse of his master. It is sad to think that in this present case this appellant, whose employment is a comparatively humble one, should have had to go through four Courts before he could free himself from such unreasonable restraints as this covenant imposes, and the hardship imposed by the exaction of unreasonable covenants by employers would be greatly increased if they could continue the practice with the expectation that, having exposed the servant to the anxiety and expense of litigation, they would in the end obtain everything which they could have obtained by acting reasonably. It is evident that those who drafted this covenant aimed at making it a penal rather than a protective covenant, and that they hoped by means of it to paralyse the earning capabilities of the man if and when he left their service, and were not thinking of what would be a reasonable protection to their business.

I am of opinion, therefore, that the appeal should be allowed and the action dismissed, with all such costs as by the rules of the Courts are payable in the case of a defendant who, as in the present case, appeals *in forma pauperis*.

Their Lordships allowed the appeal and dismissed the action.

Counsel for the Appellant—Rawlinson, K.C. — J. B. Matthews. Agents—Langhams, Solicitors.

Counsel for the Respondents — Danckwerts, K.C. — Waugh, K.C. — Newell. Agents—Jaques & Co., Solicitors — J. H. Richardson, Son, & Fox, Bradford.

HOUSE OF LORDS.

Monday, July 28, 1913.

(Before Lords Dunedin, Shaw, and Moulton.)

DAFF v. MIDLAND COLLIERY OWNERS' MUTUAL INDEMNITY COMPANY, LIMITED.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 5, sub-sec. 1—Contract of Insurance—Mutual Insurance Society—Subsistence of Claims after Termination of Membership.

Where membership of a mutual insurance society had been terminated upon the ground of alleged failure to pay a due call, *held* that, under the contract, the right to recover compensation for an accident, which had occurred in the past but involved a continuing liability, could not be forfeited, but upon the bankruptcy or liquidation of the late member, his right to recover from the insurer passed, in virtue of section 5 of the Workmen's Compensation Act 1906, to the injured workman.