Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Collins v. *Locke from the Supreme Court of the Colony of Victoria, delivered 26th July* 1879.

Present:

Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

The action in which this appeal has been brought arises out of a contract entered into between certain persons carrying on the business of stevedores in the port of Melbourne for regulating and distributing among them the stevedoring of ships in that port.

By the deed, which contains the agreement, the four parties to it, viz., the firm of George Washington Robbins and Francis Robbins, Collins (the Defendant in the action and the present Appellant), Alfred John Johnson, and Locke (the Plaintiff, and the Respondent in this appeal), covenanted with each other, first, that "as be-"tween the parties" Messrs. Robbins should "be "absolutely entitled to the business of stevedoring "all ships which should arrive in the port of "Melbourne consigned to the firm of Dalgety, "Blackwood, & Co.," and that each of the other parties (using the words above cited as to each) should be absolutely entitled to the business of stevedoring all ships which should arrive in the port consigned to certain other firms, viz., the Defendant to those consigned to J. H. White & Co., Johnson to those consigned to McFarlane & Co., and the Plaintiff to those consigned to Holmes, White, & Co., R. Towns & Co., and King, Meng, & Co., and that the parties should

be absolutely entitled for their own use to the profits arising from such stevedoring respectively. This first covenant concludes as follows :—" And " neither of them the said several parties hereto " shall not,* nor will, save as herein-after expressly " provided, undertake or be in any way concerned " in or interfere in the stevedoring, either in whole " or in part, of any ship or vessel consigned to " any of the said persons or firms herein-before " particularly mentioned otherwise than according " to the provision in that behalf herein-before " contained."

The second and third clauses of the deed are in the following terms,—

" 2. That if any or either of the said firms herein-before named shall refuse to allow the stevedoring of any ship or ships consigned to them to be done by the party who, under the last preceding clause shall be entitled thereto, but shall require any other or others of the said parties hereto to do the stevedoring thereof, then and in such case such party so required shall and will give an equivalent to the person who shall lose the stevedoring of such ship or ships, such equivalent to be determined, in case of disagreement between the parties, by two disinterested persons, to be nominated by Mr. James Allison Crane, and an umpire to be named by such arbitrators, in case they disagree.

" 3. That the stevedoring of all ships not consigned to any of the herein-before mentioned firms shall be taken and stevedored in the following order; that is to say, the first ship to arrive after the date hereof to be stevedored by the said John Kindlan Collins, the second by the said Francis Robbins. the third by the said George Washington Robbins, and the fourth by the said Alfred Joseph Johnson, and so on in such order

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* *Sic.*

during the continuance of these presents, it being expressly agreed that the said James Locke shall not be entitled to the stevedoring of any ships or vessels save those consigned to ths said firms of Holmes White & Co., R. Towns & Co., and King, Meng, & Co.

The above clauses disclose the object and nature of the contract, but questions arose on other clauses of the deed.

The fifth clause provides that if any of the firms mentioned in the first clause should cease to carry on business, or if the number of ships consigned to any of them should be materially diminished, a readjustment should be made of the distribution of the ships, and in case any firm should cease to carry on business, the party losing such firm should be entitled to make a selection of another firm in Melbourne, subject to arbitration in case of disagreement.

The 9th clause is a covenant for the payment of 1,000*l.* as liquidated damages for the breach of any of the covenants, and the 10th contains a provision for the submission of disputes to arbitrators, the terms of which will be more fully referred to hereafter.

R. Towns & Co., one of the firms assigned to the Plaintiff, was dissolved, and a new firm, Stewart, Couch, & Co., succeeded to its business, and was selected by the Plaintiff under the clause of the agreement above referred to.

The declaration, after setting out the deed, alleged three breaches. The first and second have been abandoned by the Plaintiff's Counsel, and the action is thus reduced to the last breach. The averments which precede that breach allege that the Plaintiff had selected Stewart, Couch, & Co. in the place of R. Towns & Co., that certain ships arrived in Melbourne consigned to Stewart, Couch, & Co., and that although that firm did not refuse to allow the stevedoring of

these ships to be done by the Plaintiff, yet the Defendant did the stevedoring of them, whereby the Plaintiff lost the profit which would otherwise have accrued to him.

On the first plea nothing arises. The second denies the breaches. The third sets out the arbitration clause, and avers that no arbitrators had been appointed, nor awards made. The fourth sets out the deed at length, and avers that there was no consideration for it, save as appears by the deed; the object of the plea being to raise the question that the deed was void as being in restraint of trade. The fifth denies that the Plaintiff selected Stewart, Couch, & Co. in place of R. Towns & Co.; and the last plea avers that the other parties to the deed did not agree to such selection.

The Plaintiff demurred to the third and fourth pleas, and took issue on the others.

The particulars in the action mentioned three ships, the "Jason," "Clara," and "Eastern Monarch," as having been stevedored by the Defendant in breach of the agreement, but it has been admitted that the action is not maintainable in respect of the "Jason."

The evidence given at the trial was short and meagre. The following are the facts appearing upon it, so far as they are material to the points remaining to be decided upon this Appeal.

The "Clara" arrived at Melbourne consigned to Stewart, Couch, & Co. No question arises upon the unloading, which was done by the Plaintiff. The "Clara" then passed out of the hands of Stewart, Couch, & Co. into those of Poole, Picken, & Co., who employed the Defendant to stevedore her for the outward voyage, which he did.

The "Eastern Monarch" also arrived at Melbourne consigned to Stewart, Couch, & Co. The Defendant both loaded and unloaded her. Ste-

wart, Couch, & Co. had nothing to do with the stevedores. This ship also passed into the hands of other merchants, viz., Bright and J. H. White, who employed the Defendant to load her. It does not appear who were the persons who employed him to unload the ship.

A verdict was found for the Plaintiff, with the following damages, viz., 125*l.* for the "Clara" and 155*l.* for the "Eastern Monarch." A rule Nisi was obtained to set aside the verdict and enter it for the Defendant, on the ground that the third plea was proved, or to reduce the damages to 20*l.*, on the ground that under the terms of the agreement the Plaintiff was only entitled to recover the profit of unloading the "Eastern Monarch."

The other points referred to in the rule relate to the breaches which are now abandoned.

The Supreme Court, after argument, discharged the above rule, and has also given judgment for the Plaintiff upon the demurrers to the third and fourth plea.

There was really no issue in fact taken upon the third plea, and no verdict could properly be entered upon it. The question on it is raised by the demurrer.

The point as to the reduction of the damages depends upon what may be held to be the right construction of the agreement. It was contended on this point by the Defendant that the agreement was confined to the work done for ships whilst in the hands of those who were the consignees on their arrival in the port; but this would not seem to have been the intention of the parties, to be gathered from the general tenor and the particular language of the agreement. The ships allotted to each of the parties are "those which shall arrive in the port of "Melbourne consigned to particular firms. This language is apparently used to describe the

class or set of ships to which each party is to be absolutely entitled until their next departure from the port.

The agreement, particularly with reference to Clause 3, seems to be an attempt to make provision for distributing the stevedoring business of all ships arriving in the port amongst the parties to the deed, and one mode adopted for ascertaining the set or class of ships to which each is to be entitled is by reference to the firms to which ships are on arrival consigned. It is of course quite usual, and is shown to be so by the evidence given in the case, that ships should be chartered or loaded by others than the original consignees; and if the Defendant's construction of the agreement were correct, it would follow that the parties would have provided only for the unloading of ships upon which there is comparatively little profit, and would, in many, if not in most cases, have left out of their agreement the larger and more profitable business of loading them with the outward cargoes.

Their Lordships, therefore, agree with the Judges of the Supreme Court in the construction they have placed upon the agreement on this point, and think that so much of the rule as prayed for a reduction of damages was rightly discharged. They may, however, observe here that the Plaintiff, who insists on the construction which enables him, if the action is otherwise maintainable, to retain the full amount of damages awarded by the Jury, cannot escape from the effect of this construction upon the question of the validity of the agreement with reference to the objection that it is void as being in restraint of trade.

That question arises on the demurrer to the fourth plea.

The objects which this agreement has in view are to parcel out the stevedoring business of the

port amongst the parties to it, and so to prevent competition at least amongst themselves, and also, it may be, to keep up the price to be paid for the work. Their Lordships are not prepared to say that an agreement, having these objects, is invalid if carried into effect by proper means, that is, by provisions reasonably necessary for the purpose, though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade.

The questions for consideration appears to them upon the authorities to be, whether and how far the prohibitions of this deed, having regard to its objects, are reasonable.

The numerous cases which have been decided on this subject are collected in the notes to Mitchel *v.* Reynolds, in the first volume of Smith's Leading Cases. It may be gathered from them that agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable. The Courts are not disposed to measure the adequacy of the consideration, if a real and *bonâ fide* consideration exists, and the modern decisions have mostly turned on the question of the reasonableness of the restraint in relation to the objects of the contract. It was said by Lord Ellenborough, in delivering the judgment of the Court in Gale *v.* Reed, 8 East, 86, "The restraint on one side "meant to be enforced should in reason be co-"extensive only with the benefits meant to be "enjoyed on the other." He went on to say, "As the carrying the restraint further would be "arbitrary and useless between the parties, a "construction which would have that effect "must be reluctantly resorted to," and for that reason a construction which would not have this effect was given to the particular agreement in that case.

In the case of Horner *v.* Graves, 7 Bing., 743, Tindal, C. J., in delivering the judgment of the Court, said,—"We do not see how a better test "can be applied to the question, whether reason- "able or not, than by considering whether the "restraint is such only as to afford a fair pro- "tection 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 un- "reasonable."

The law as to the reasonableness of the restraint in contracts of this kind was very fully considered in the judgment of the Court of Exchequer in the case of Mallan and others *v.* May, 11 M. and W., 653. There by a deed under which the Defendant became assistant to the Plaintiffs in their business of surgeon dentists, he covenanted that he would not carry on that business in London, "or in any of the towns or "places in England or Scotland where the "Plaintiffs might have been practising before "the expiration of the Defendant's service." The declaration contained two breaches; the first for practising in London, the second for practising in another place where the Plaintiffs had practised. The Court adopted the principle of the decision in Horner *v.* Graves, and holding the contract to be divisible, decided that the prohibition against practising in London was reasonable and good, but that the covenant against practising in other towns and places went beyond what the protection of any interests of the Plaintiffs required, and was, therefore, an unreasonable restriction. The Court accordingly gave judgment for the Plaintiffs on the first breach, and for the Defendant on the second. The principles

on which this case was decided were upheld by the Exchequer Chamber in Price *v.* Green, 16 M. and W., 346.

Applying the rule to be collected from the authorities, it appears to their Lordships that the provision contained in the second clause of the deed, viz., that if either of the named persons should refuse to allow the stevedoring of any ship to be done by the party entitled to it under the first clause, and should require one of the other parties to do it, such party so required should give an equivalent to the party who lost the stevedoring, to be determined by arbitrators, is not unreasonable, since it provides in a fair and reasonable way for each party obtaining the benefit of the stevedoring of the ships to which by the contract he was to be entitled. Each party might in turn derive benefit from this clause, and one of the four firms would always get the profit of the ship stevedored, though the work might be done by another of them. As regards the merchant, also, he can have his ship stevedored by the party whom he may require to do it, at least there is no prohibition against his having it so done.

But the operation of the covenant at the end of the first clause, upon which the third breach in the action is founded, is productive of wholly different results. That covenant is only modified by Clause 2 as regards the original consignees, and therefore in the case of ships passing out of the hands of the named firms to which they were consigned on arrival, and being chartered or loaded by other merchants (which is the present case), the effect of the covenant is, that as to such ships, if the merchants loading them should not choose to employ the party to the agreement who, as between themselves, was entitled to do the stevedoring, all the parties to the agreement are deprived of the work, in the words of Mr. Justice Fellows such ships are " so to speak

"tabooed to them all." The covenant in such cases restrains three of the four parties to the agreement from exercising their trade, without giving any profit or benefit to compensate for the restriction to either of the four, whilst the combination they have thus entered into is obviously detrimental to the public, by depriving the merchants of the power of employing any of these parties, who are probably the chief stevedores of the port, to load their ships, unless in each case they employ the one of the four to whom the ship, as between themselves, has been allotted, however great and well founded their objections may be to employ him. Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed.

Yet a construction of the clause producing the above mentioned consequences is that on which the Plaintiff insists, and on which he is compelled to rely to sustain his only remaining breach. He is not in a position to maintain his action upon the second clause of the agreement, because Stewart, Couch, & Co. did not refuse to employ him to do the work, and even if he could have brought his case within that clause, he must have failed in this action, because, as was rightly held by the Court below in dealing with the second breach, the action will not lie under Clause 2 until the amount of the equivalent to be paid has been ascertained in the manner required by that clause.

The part of the agreement which is open to objection, though differing in its circumstances and in the degree of the restraint which it imposes on the freedom of trade, is not distinguishable in its nature from that which was

held to be void in Hilton *v.* Eckersley (6 E. and B. 47. In error, Id. 67); whilst it cannot be justified on the ground upon which Mr. Justice Erle (who differed from the majority of the Court) thought the contract in that case might be supported, viz., that it might be necessary for the protection of the lawful interests of the parties. The object of the contracting parties in that case was to protect their interests as masters against combinations of workmen by an agreement to conduct their works, or wholly or partially to suspend them for a time, as the majority should resolve; and the learned judge thought that this object justified the mutual restraint of trade which they imposed on each other.

Upon the construction, therefore, which the Plaintiff has placed upon the covenant in question, and which upon the whole their Lordships are of opinion is correct, they think, for the reasons above stated, that it creates an unreasonable restraint upon the parties in their trade, and ought not to receive the aid of the Courts to enforce it. They have already said that this objection does not apply to Clause 2 of the deed, and they consequently think that judgment on the demurrer to the fourth plea should be entered for the Defendant as to the first and third breaches, but for the Plaintiff as to the second breach.

The remaining question is that raised by the demurrer to the third plea, though, after the opinion which their Lordships have just expressed, the decision of it is only material as regards costs.

The question so raised is, whether the general arbitration clause (Clause 11) affords an answer to the action, there having been no arbitration and no award under it.

Since the case of Scott *v.* Avery, in the House of Lords (5 H. L., 511), the contention that such

a clause is bad as an attempt to oust the Courts of jurisdiction may be passed by. The questions to be considered in the case of such clauses are, whether an arbitration or award is necessary before a complete cause of action arises, or is made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one. That question must be determined in each case by the construction of the particular contract, and the intention of the parties to be collected from its language. The provision in the second clause of this contract falls, as their Lordships have already said, within the first mentioned category, because the equivalent to be given in lieu of the profit would not be payable until the amount of it had been ascertained in the manner prescribed. But the 11th clause, according to the intention to be collected from the whole deed, appears to them, though by no means with clearness, to be a collateral and independent agreement. It extends to all doubts, differences, and disputes which should arise touching the agreement, and stipulates that all matters in difference should be submitted to arbitrators.

The learned Counsel for the Defendant strongly relied on the part of the clause which is in these words,—"And the award of the arbitrators shall "be conclusive, and any of the parties shall not "be entitled to commence or maintain any action "at law or suit in equity in respect of the matters "so submitted as aforesaid, except for the amount "or amounts by the said award determined to be "paid by any one or more of the said parties to "the other or others of them, or otherwise in "accordance with the terms and conditions of the "said award, as to the acts or deeds to be made, "done, executed, and performed."

This passage, no doubt, contains negative words, but there is ambiguity in the words "in "respect of the matters so submitted as afore-

" said," as to whether they were meant to apply to all matters which were to be submitted to arbitrators under the clause, or to the matters which, after they arose, had been specifically submitted in the manner prescribed. Looking out of this clause, it is material to consider Clause 9, which is as follows,—" That in case " of any breach or non-performance by any of " the parties hereto, of any or either of the " covenants or agreements herein-before con- " tained, such party so committing such breach, " or not performing such covenant or agreement, " shall and will well and truly pay unto each of " the other parties hereto respectively, their or " his executors, administrators, or assigns, the " sum of one thousand pounds, as and for liqui- " dated damages for such breach or non-per- " formance, but without prejudice nevertheless " to the right of any of the said parties hereto " to enforce the specific performance of the " covenants and agreements herein-before con- " tained, or any or either of them."

It may be inferred from this clause that the parties contemplated that an action might be brought for these damages, and with reference to the proviso to the clause, that they intended to reserve the right to bring a suit for specific performance. Their Lordships are, therefore, disposed to think that the negative words in the arbitration clause were only intended to apply to matters actually submitted to arbitration. They will not, therefore, disturb the judgment of the Court below on this point.

The other points mentioned by the Appellant's Counsel were disposed of during the argument.

In the result, their Lordships are of opinion that the rule Nisi, so far as it prays to enter the verdict for the Defendant on the first and second breaches, should be made absolute, and as to the

rest should be discharged; that the judgment for the Plaintiff on the demurrer to the third plea should be affirmed; and that the judgment for the Plaintiff on the demurrer to the fourth plea should be reversed as to the 1st and 3rd breaches, and judgment entered as to these breaches for the Defendant, and they will humbly advise Her Majesty accordingly.

The Appellant having succeeded only on the point of the partial invalidity of the agreement, in respect to which both parties are equally in fault, their Lordships will make no order as to the costs of this Appeal.

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