COMMENT.

A recent case which involves the question of a contract in restraint of trade is that of Consumers' Oil Co. *v.* Nunnemaker, 41 N. E., 1048 (Ind.), in which the authorities upon this subject are collected. The plaintiff prayed for an injunction against the defendant to prevent him from pursuing his business of selling oil and gasoline upon the ground of a contract between the parties. From an order sustaining a demurrer to the complaint the plaintiff appealed to the Supreme Court of Indiana. The contract was in substance as follows: That the defendant entered into a written agreement with one Benham, who is described as trustee and manager, by which in consideration of three hundred dollars to him in hand paid, he sold, etc., to Benham or his assigns all his rights in his oil and gasoline business, together with good will and personal property connected therewith, and further contracted and agreed that he (the defendant) would not during the next five years ensuing engage in the business of selling or delivering gasoline in any way within the State of Indiana, the City of Indianapolis excepted. Benham assigned his rights to the plaintiff who brought this action upon the defendant's violation of his contract. Jordan, J., delivered the opinion of the Court.

* * * "It is settled that a contract in general restraint of trade is invalid, but one restraining a party from trading within reasonable limits, so as not to be injurious to the interests of the public, is valid, and may be enforced by an injunction upon a proper showing of facts. *Beard* v. *Dennis*, 6 Ind., 200; *Duffy* v. *Shockey*, 11 Ind., 70; *Spicer* v. *Hoop*, 51 Ind., 365; *Baker* v. *Fottmeyer*, 75 Ind., 451; *Beatty* v. *Coble* (at this term), 41 N. E., 390. The settled rule, as enunciated by the American and English decisions of the highest courts, seems to be that where in the particular case before the court, the restraint in controversy, as to territory, appears to be broader or larger than is necessary to the protection of the party seeking to enforce the restrictive contract, it is of no benefit to either party, but in that event becomes oppressive upon the party against whom the enforcement is sought, and, being oppressive, the law regards the restriction as unreasonable and injurious to the interests of the public. * * * "The law regards the good will of a particular trade or

business as a species of property, possessing a market value, and subject to sale or disposal. But it is also a well-established principle of law and public policy that, where a person is engaged in trading or other legitimate pursuits, he shall not be unreasonably fettered in the exercise of such business, and, when he sells or disposes of the good will incident thereto, the law will only sustain such a restraint as to his future engagement in such business or pursuit as will appear to be a reasonable space of interdicted territory, and what are such reasonable limits is a question of law for the court to determine, under all the facts and circumstances in each particular case. In support of the several general propositions herein asserted, see *Wiley* v. *Baumgarden*, 97 Ind., 66, and authorities there cited; *Lawrence* v. *Kidder*, 10 Barb., 641; *Hubbard* v. *Miller*, 27 Mich. 15; *Horner* v. *Graves*, 7 Bing., 735; *Navigation Co.* v. *Winsor*, 20 Wall., 64; *Taylor* v. *Blanchard*, 13 Allen, 370; *Dunlop* v. *Gregory*, 10 N. Y., 241; Greenh. Pub. Pol. c. 6, p. 683; 3 Am. & Eng. Enc. Law, 883, and authorities there cited; 22 Am. Law Rev., 873-889; *Mallan* v. *May*, 11 Mees. & W., 652. In the case of *Dunlop* v. *Gregory*, supra, the court of appeals of New York said: "Contracts, upon whatever consideration made, which go to the total restraint of trade anywhere in the State, are void. Such contracts are injurious to the public, and operate oppressively upon one party, without being beneficial to the other. * * * The contract, to be upheld, must appear from special circumstances to be reasonable and useful, and the restraint of the covenanter must not be larger than is necessary for the protection of the covenantee in the enjoyment of his trade or business." In the case of *Taylor* v. *Blanchard*, supra, it was held that an agreement not to set up, exercise, or carry on the trade or business of manufacturing or selling shoe cutters at any place within the Commonwealth of Massachusetts was void. In the case of *More* v. *Bonnet*, 40 Cal., 251, a stipulation not to engage in a business of a particular kind in the county or city of San Francisco or State of California was held to be void. In *Lawrence* v. *Kidder*, supra, a covenant not to conduct the business of manufacturing or trading in palm leaf beds or mattresses in the State of New York west of Albany was held to be invalid. In *Price* v. *Green*, 16 Mees. & W., 346, a contract not to carry on the perfume business within six hundred miles of London was adjudged void. In *Horner* v. *Graves*, supra, an agreement not to practice dentistry within a district two hundred miles in diameter was held to be void. In *Beal* v. *Chase*, 31 Mich., 490, where it appeared that the

obligor sold a printing establishment, and the business thereof, which extended over the entire State, a covenant not to engage in the same business in that State so long as the vendee should continue in the business at the place of sale, under the circumstances, was held to be reasonable and valid. In *Rousillon* v. *Rousillon*, reported in 14 Ch. Div., 351, the English Court of Chancery held that there is no "hard and fast" rule holding contracts of this character, unlimited as to space, void, but that the validity depends upon the reasonableness of the contract; and, where it appears that the broad restriction is reasonably necessary for the full protection of the contractee, it will be sustained. In a recent English decision in the appeal of *Nordenfelt* v. *Maxim, Nordenfelt, etc. Co.* [1894] App. Cas., 535, where a patentee and manufacturer of guns and ammunition for war purposes transferred his patent to a company, and covenanted with the latter not to engage in that business for a term of twenty-five years, it was held that, owing to the nature of the business, and the limited number of customers to whom sales might be made, confined mainly to governments of countries, the restraint imposed in that case was not larger than was necessary for the protection of the contractee, and not injuirous to the public interest."

Viewed in the light of these authorities the contract was decided to be in restraint of trade because if the plaintiff could buy out the defendant and thus restrain him he could proceed to buy out and restrain every other person in the State engaged in a similar business and eventually reduce the sale of oils to comparatively few and thus stifle legitimate competition. Public policy favors competition and is opposed to monopolies which tend to advance prices to the injury of the public in general (*Salt Co.* v. *Guthrie*, 35 Ohio St., 666; *People* v. *Chicago Gas Trust Co.*, 130 Ill., 268). This contract is not devisable so as to allow defendant to be enjoined as regards the City of Hammond in which he reengaged in business (*Beard* v. *Dennis*, supra; *Wiley* v. *Baumgarden*, supra), and so the restraint of trade under the circumstances being manifestly too large, the contract is in revolution of public policy and cannot be enforced.

The litigation over the famous Hocking Valley deal has come to an end with the final decision of the New York Court of Appeals on November 26th, 1895, in the case of *Belden* v. *Burke et al.* (42 Northeastern Rep., 261). As the outcome of the whole matter Burke and his associates emerge unscathed, and the proceeds of this highly lucrative transaction remain in

the hands of the shrewd operators who worked the road in 1881. The facts which form the basis of this suit are rather ancient history, and it is sufficient to recall simply their outline. In 1881 the Columbus, Hocking Valley and Toledo Railroad was created by consolidation of three smaller companies. The stock of the new road was owned entirely by Burke and four associates. In reorganizing the finances of the system a blanket mortgage was issued of $14,500,000, of which $6,500,000 was used to retire the old bonds of the three component roads, while the remaining $8,000,000 of bonds were put in the hands of Burke to be placed on the market. It is in regard to these latter bonds alone that the present controversy arose, and it is based on the covenant contained in these bonds that their proceeds should be applied to building the road, double tracking, and purchase of new equipment. Actually, however, these bonds were sold through Winslow, Lanier & Co., who were in the deal, and Burke took the proceeds and bought up the whole stock of the Hocking Valley Coal Company. The par value of this block of stock was only $1,500,000, and at the time it sold at considerably less than par, but this was all that the railroad company ever obtained in exchange for its $8,000,000 worth of bonds, and the balance remained unaccounted for in the hands of the five directors. Belden brought this action as holder of certain of these bonds which he had bought in open market, to enforce the covenant which is above described, because the Central Trust Company, trustee under the mortgage, refused to bring suit. Judge O'Brien has written a very clear and interesting opinion which sweeps away a great deal of the complication in which the case was enveloped. Of course, as Burke et al. were the sole owners of the company's stock in 1881, a bond holder in Belden's position would be obliged to show that he had been deceived to his actual injury to entitle him to equitable relief. The findings, however, showed that he had suffered no injury for the bonds had proved a paying investment, and beside this that he was not deceived; he was not a purchaser without notice, but had bought after full investigation and with knowledge of the whole transaction, and therefore must, in equity, be deemed to have acted upon and acquiesced in the condition of the security as he found it. This knowledge by the plaintiff, the lapse of time, and long acquiescense, combined with the absence of any actual loss, are the grounds for the refusal of the court to review the transactions between prior owners of such bonds and the railway which had the assent of every party in interest. On this ground the

court refused relief to Belden, thus reaching the same result as the decision of the general term below, but upon a wholly different ground. It is important to note that the court below ruled that Belden's rights were derived solely from Winslow, Lanier & Co., who of course had no right to object because they were parties to the original deal. Judge O'Brien, however, takes pains to say that this is incorrect in principle, and that the rights of a bondholder are not affected by the mere fact that he traces title back to parties who took part in the original transaction. "Subsequent purchasers in good faith and without notice," the court concludes, "are not precluded from relief on the ground that Winslow, Lanier & Co. took the bonds with notice of the actual transaction."