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COMMENT

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COMMENT.

The promoters of the gigantic monopolies and trusts which are daily becoming more numerous, in their zeal to stifle all competition sometimes overreach themselves and exact from the concerns which they absorb covenants which the courts refuse to enforce as being in unreasonable restraint of trade. An interesting illustration of this is seen in a recent case in New Jersey, *Trenton Potteries Co. v. Oliphant*, 39 Atl. Rep. 923. Five of the seven potteries in Trenton engaged in the production of sanitary ware, and making about seventy-five per cent of the entire output of the country, were bought up and united into the Trenton Potteries Co. From Oliphant & Co., one of the vendors, an agreement was taken by which they jointly and severally agreed not to engage, directly or indirectly for fifty years, in manufacturing pottery, except as agents or employees of the Trenton Potteries Co., anywhere within the United States, except Nevada and Arizona. A couple of years later the Bellmark Pottery Co., was incorporated by other parties, and four of the members of Oliphant & Co. took four-fifths of the stock and actively participated in its management—*i. e.*, were much more than mere stockholders. The Trenton Co. then sought to enforce the covenant, but the court in a learned opinion by Vice-Chancellor Grey refused to enjoin them.

The broad statement of the rule that contracts in general restraint of trade are void, and that contracts in partial restraint are valid, can no longer be maintained. The authority of *Mitchell v. Reynolds*, 1 P. Wms. 181—the leading case on this subject, decided in 1711—has never been questioned, although there has been some modification of its principles and variation in their application. Several cases in England have upheld covenants restraining the covenantor throughout the whole Kingdom and even in foreign parts, where the business extended over such an area, because under these circumstances the restraint was reasonably necessary for the protection of the covenantee: *Jones v. Lees*, 1 H. and N. 189; *Cloth Co. v. Lorsont*, L. R. 9 Eq. 645; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Maxim-Nordenfelt Case* [1893], 1 Ch. Div. 630; Lord Justice Fry, in *Rousillon v. Rousillon*, saying that the protection of the covenantee, and not the interests of the public which was the original basic principle of the rule, is the only test of the reasonableness of the contract. And in these days of enlarged business relations and connections often reaching out over almost the whole world, there seems no good reason why, when the restraint is co-extensive only with the interest to be protected and with the benefit meant to be conferred, the covenant should not be upheld. And with regard to partial restraints, the rule is, not that they are good, but that they may be good, and that they will be good

provided the restraint be reasonable. And to be reasonable it must be no greater than is reasonably necessary—*i. e.*, the excepted area must not have been chosen merely to avoid the disfavor of the law and to force the covenantors as far away as possible, in the attempt to actually prohibit competition, which appears to have been done in this case, as pottery cannot be manufactured in Nevada and Arizona, and the business when sold did not extend beyond the Mississippi. And its reasonableness must be tested by the extent of the business at the time of making the sale, and the covenant, and not by its future growth, when it may have extended over the whole country.

It may seem that this case goes against the leading American case of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, where the covenant was not to engage in the same business for ninety-nine years anywhere in the United States except Nevada and Montana, but in reality it does not hold *contra*, for in that case the court expressly refers to the fact that the business extended over the whole United States and follows the English cases in upholding the covenant. In *Lufkin Rule Co. v. Fringeli*, 49 N. E. Rep. 1030, a recent case in Ohio, the agreement was not to engage in the same business in the State of Ohio or the United States, the business being limited to certain sections of the country, and the court refused to enforce the covenant. It questions the soundness of the rule that the question of reasonableness is one wholly between the parties, and, following the economical school which opposes all monopolies and combinations restricting free competition as against public policy, declares that the interest of the public must now be considered more than ever before. But contracts in general restraint of trade, when the trade is general, no more tend to create monopolies, than contracts in partial restraint, where the trade is only local. In either case the community where the business extends, and there only, are deprived of the services of the covenantor, and that, for the reasonable protection of the covenantee, whose motive, unless malicious, in exacting the agreement cannot legally be inquired into, though he have the very purpose of preventing competition and controlling all the output.

There has been recently rendered in the Supreme Court of the United States, in *United States v. Wong Kim Ark*, 18 Sup. Ct., 457, a decision upon the old question of the citizenship of persons born within the limits of the United States of alien parents. It appears to be the first time that this question has been directly decided in this Court, although it has frequently been incidentally involved in previous cases; and the rule here laid down is apparently a ratification of the decisions heretofore reached in the various state and circuit courts. The individual whose citizenship was under discussion was of Chinese extraction, and claimed the rights of a citizen by reason of birth here. The Court deals with the question very exhaustively, and laying its foundation upon the assumption that the

common-law rule of England that "every child born in England of alien parents is a natural born subject, unless the child of a public minister of a foreign state, or an alien enemy," was in force in the colonies at the time of the Declaration of Independence, and prevailed in the United States thereafter, holds that this rule is but reenacted in the Civil Rights Act of 1866, and in the Fourteenth Amendment.

Although hopelessly in the minority, Chief-Justice Fuller, with whom Mr. Justice Harlan agrees, dissents from this opinion, and, upon what appears to be the better view, holds that the common law of England does not control the question under discussion. He very aptly shows that if the English rule governs, then all children born abroad of American citizens, since the enactment of the Fourteenth Amendment, become by such birth subjects of the country wherein they are born, and in order to become American citizens must be naturalized as any other alien. But the English rule emphatically denies the right to change one's allegiance; while the United States has always upheld the right of expatriation. Moreover, in this country, the alien must be permanently domiciled, while in Great Britain birth during mere temporary sojourn is sufficient to render the child a British subject.

But both by our treaty with China and by statute, the right of citizenship is forbidden to this applicant. To put upon the Fourteenth Amendment the construction urged by the majority of the Court is to "override both treaty and statute." The exercise of the right of deportation which we also have would under this construction cause the permanent separation of many families.

The Fourteenth Amendment was founded on the act of 1866, which contained the words, "and not subject to any foreign power." But these words were not necessary to shut out the children of public ministers of foreign states nor alien enemies, since by their birth they were not "subject to the jurisdiction thereof;" hence they must have been inserted to exclude the children born here of resident aliens.

Although it is but recently that electricity was first employed commercially, there have been numerous decisions firmly establishing the principle that telegraph and telephone companies can be compelled to furnish service, not only at a reasonable price, but also to all persons, without discrimination, who may make application for such service. This principle has not until recently however, been applied to companies furnishing electricity for lighting purposes, although there does not appear to be any good reason why they should stand in any different position from that occupied by the telegraph and telephone companies.

In the recently determined case of *Cincinnati, H. & D. R. Co., v. Village of Bowling Green*, 49 N. E. Rep. 121, an attempt was made by an incorporated village to compel, under a State statute, a railroad to

illuminate with certain electric lights its tracks lying within the limits of said village; and upon a contention by the railroad that they were, by being obliged to use a certain system of lamps and attachments, the exclusive right to maintain which had been granted to the electric lighting company there situated, thereby placed at the mercy of that company the court laid down the following rule, "An electric light company, owning an electric plant, and engaged in furnishing light to the inhabitants of a city or village, and in lighting the streets thereof, has so far devoted its property to a public use that it is bound to furnish light within such city or village impartially to all applicants, at a reasonable price." This conclusion seems eminently just, since gas companies, although furnishing light by another method, have repeatedly been held under obligations to furnish indiscriminately to all, and there certainly can be nothing in the medium itself upon which any freedom from such a duty could be based.

Revised Statutes §§5197, 5198, provide that national banks may take interest at the rate allowed by the laws of the State where the bank is located and no more, that knowingly taking a greater rate shall be deemed a forfeiture of the entire interest, which the note "carries with it, or which has been agreed to be paid thereon," and that in case the greater rate has been "paid," the payor may recover back in an action of debt commenced within two years, twice the amount so paid. In the case of *Brown v. Marion National Bank*, the Supreme Court construed these sections with reference to renewal notes, which included usurious interest. The Supreme Court of Kentucky held that interest included in a renewal note was "paid" and had thereby become new interest-bearing principal. But interest included in a renewal note or evidenced by a separate note is not paid within the meaning of the Act, says Justice Harlan, nor is the forfeiture thus waived, for a clear distinction is made between interest which a note "carries with it" and interest "paid," and if interest included in a renewal note were "paid," then the borrower could immediately sue the lender and recover back twice the amount of interest thus paid, when in fact he had not paid the debt nor any part of the interest, as such. The sum included in the renewal note, in excess of the sum originally loaned, is interest which that note "carries with it or which has been agreed to be paid," and not, as to any part of it, interest paid. "No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid." But where the interest has actually been paid, then it can not be set up by way of counter claim or set-off in an action on the note, but the remedy given by the statute—a separate suit—is the only remedy available. *Barnet v. National Bank*, 98 U. S. 555.