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MEDICAL PARTNERSHIPS,

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MEDICAL PARTNERSHIPS, TRANSFERS, AND ASSISTANTSHIPS.

BY

WILLIAM BARNARD, M.A., LL.B.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,

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AND

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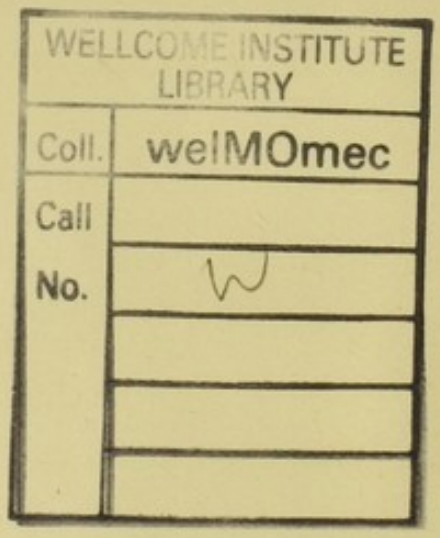

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PREFACE.

ANYONE who has had occasion to peruse many Medical Agreements—especially those relating to Partnerships—will have been struck by the diversity of the principles upon which they have been drawn. The reason is not far to seek. No text-book has hitherto dealt, or, indeed, attempted to deal, seriously with the subject, although it seems to demand special treatment. Each draftsman has been left to evolve for himself a scheme of partnership, unaided by any adequate experience of the requirements of the case, or by any knowledge of the customs which prevail in the profession.

It is hoped that this little Work may tend to establish more uniformity in these Agreements.

The Book is divided into two Parts. Part I.—for which Mr. Stocker is mainly responsible—gives the draft agreements in a form in which they may be most readily utilized. To such clauses as present any peculiar features are appended explanatory notes. Clauses which will be required only in exceptional circumstances,

and alternative clauses—given whenever they seem to be called for—are enclosed in square brackets.

The Chapters on the Agreements are preceded by a few remarks upon the value of medical partnerships and practices, without which the Work would hardly be complete.

Mr. Stocker's claim to speak with authority upon the subject is based upon many years' experience—as a medical agent—of the relations existing between medical men, and the perusal of a large number of medical partnership and transfer agreements, with special reference to the points where, in practice, they have proved weak or unworkable.

Part II. is entirely the work of Mr. Barnard. It contains the Partnership Act of 1890, with notes on such of the clauses as are especially likely to affect medical men in partnership; a Chapter on Goodwill and Restriction on Practice, with an Appendix of Cases bearing on the latter subject; and short Chapters on Introductions to Patients, and Assistants.

June, 1895.

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MEDICAL PARTNERSHIPS, TRANSFERS AND ASSISTANTSHIPS.

PART I.

The Agreements, and Practical Notes thereon.

CHAPTER I.

VALUE OF PRACTICES.

Before proceeding to discuss the forms of agreement, it is desirable to say a few words as to the mode of arriving at the value of a medical practice or partnership, and as to the capital which it is necessary for a purchaser to have at command in order to make a fair start.

The most important points to be taken into consideration in determining the value of a practice or partnership are the class and size of the practice, the rate of increase or decrease in the profits, the scope, the working expenses, opposition, transferability, length of introduction, locality, social surroundings, educational advantages, house, distance from London, and the vendor's reason for selling. Not a little also depends upon the state of the market at the time when the practice is offered for sale.

Speaking generally, and leaving out of account very small practices, the value of a practice may be said to range from half a year's purchase to two years' purchase, and of a partnership from one to three years' purchase.

The higher limit can of course only be obtained when the conditions are extremely favourable.

The value of a practice when no introduction in the

ordinary sense can be given—as in the case of the death of the incumbent—is usually from one-fourth to one-third less than it would be with a good introduction.

The above rates of purchase are to be based not upon the profits, but upon the average gross annual receipts for the three years ending either the 31st of December last past, or the date up to which the annual accounts of the practice are usually taken, or, sometimes, the date at which the sale is effected. If for any reason it is not possible to show receipts for *three* years, as when a practice has been held by the vendor for a short time only, or where no cash-book has been kept, the gross annual cash receipts must be estimated as nearly as possible from the bookings. It is better in such cases for the vendor to state a fixed price rather than so many years' purchase. The value of the poorer class of practice is often based upon the receipts of the last year only.

An important exception to the above general rule—and one not infrequently overlooked—is where there has during the three years in question been a considerable decrease or increase in the value of the appointments held, or where appointments have recently been obtained or lost. In such cases the income from appointments during the three years is entirely omitted, and the estimated gross annual value of the appointments held at the time of sale is added to the average gross annual receipts from the private practice. The value of an appointment does not in any way depend upon the length of time it has been held, and a recently-obtained appointment will be just as valuable from the point of view of the purchaser (if he obtain it) as one that has been held for years. On the other hand, a purchaser must not allow the purchase-money to be based in part upon receipts from appointments which are no longer held or have been considerably reduced in value.

The custom of basing the purchase-money upon the gross cash receipts is peculiar to the sale of medical practices and partnerships, and may at first sight appear arbitrary and unfair, but in reality it is not so.

For first, as regards earnings, it must be remembered that the value of a practice depends, not upon the intrinsic value of the services rendered, but upon the fees which the patients can afford and are willing to pay; and, if the earnings were to be taken as the basis, charges, not in themselves unreasonable might be entered against patients quite unable to pay them, and the value of such entries it would be almost impossible for a purchaser to gauge. Then, with respect to working expenses, it would be a matter of no little difficulty for a medical man to state them accurately; for the most part they are inextricably mixed up with his personal expenditure; his surgery is part of his house and he holds his stables probably under the same lease; his horses are used for private as well as professional purposes; he keeps an assistant and pays him a fixed salary, but he provides board and residence for him with his own family. Almost the only items which can be kept entirely distinct are drugs and surgery requisites.

Thus, it will be seen that this custom of basing the purchase-money upon the cash receipts is the best arrangement possible under the circumstances. Nevertheless, one must bear in mind that it is merely conventional and may be misleading. The cash receipts are not an infallible index of the value of a practice. Special efforts may have been made, in view of a sale or from some less reprehensible motive, to get in outstanding debts. In a practice which has begun to deteriorate, the cash receipts will not at first indicate any such deterioration; just as in a rapidly-increasing practice the receipts do not fully represent the increase. Again, though it may be hard to say exactly what the working expenses are, they may be obviously out of proportion to the income. Therefore, in determining the *rate* of purchase to be paid upon the conventional basis, due weight must be allowed to these considerations.

When a price is named for a practice or partnership, it

is to be understood as including goodwill (*a*) only, and, unless the contrary be expressly stated, nothing in the way of drugs, fittings, &c., is included.

We suggest that a medical man who wishes to dispose of his practice, or a share of it, should, as a first step to that end, employ an accountant with special experience of such work to make out a proper statement of what the annual receipts of the practice really are. It is rare to find that a statement made out by the vendor himself is quite accurate—however desirous he may be of making it so—and it is only fair to add that the error is as often in under-estimating as in over-estimating the income. For instance, contra accounts are frequently omitted; receipts, such as dividends or fees from resident patients, may be improperly included; the salaries from appointments may have been paid irregularly, and three or five quarters' payments included in one year, or the value of the same may have largely increased or decreased (*b*), and so on.

In any case it is most necessary to warn the *purchaser* that he should under no circumstances omit to have the accounts thoroughly investigated on his behalf. It may seem strange that we lay so much stress upon such an obvious precaution, but the fact is that it is constantly being neglected; too often with the result that, though the purchaser can point to no definite misrepresentation on the part of the vendor, he finds he has misapprehended the character of the investment.

It is by no means uncommon for a purchaser to under-estimate the amount of capital required for entering upon a practice or partnership, and, therefore, it may be well to point out that some considerable sum is requisite over and above the money paid by way of premium. The chief heads of such additional expenditure are:—(1) Horses,

---

(*a*) The word "goodwill" is here used in its wider and not in its strictly legal sense.

(*b*) See page 2.

carriages, harness, and stable utensils; (2) Drugs and surgery appliances; (3) Household furniture; and (4) In the case of any other than a "ready money" practice, enough to live upon for from three to twelve months, according to the amount of credit given (*c*). Roughly speaking, it may be laid down as a general rule that a purchaser (a married man starting *de novo* without furniture) should have at command in cash half as much again as he is investing in buying a practice or share.

(*c*) In some practices where long credit is given, a purchaser may not receive his normal income until the third year.

CHAPTER II.

FORM OF ARTICLES OF PARTNERSHIP BETWEEN TWO MEDICAL MEN.

THIS INDENTURE made the day of 189 BETWEEN A. B. of of the one part and C. D. of of the other part.

WHEREAS the said A. B. has for some time carried on the practice profession or business of a general medical practitioner in and around the of aforesaid AND WHEREAS the said A. B. has agreed to admit the said C. D. into partnership [in consideration of the payment to the said A. B. by the said C. D. of the sum of £ by way of premium].

NOW THIS INDENTURE WITNESSETH that in consideration of the mutual confidence of the said parties [and of the said sum of £ to the said A. B. paid by the said C. D. upon the execution of these presents (the receipt of which sum the said A. B. doth hereby acknowledge)] they the said A. B. and C. D. do hereby mutually covenant and agree to become and be partners in the practice profession or business of general medical practitioners (hereinafter called "the said practice") upon and subject to the terms conditions and stipulations expressed in the following Articles that is to say—

In a partnership the premium is usually paid in full before the commencement of the partnership. There are, apart from what is the custom, weighty objections to allowing any part of the purchase-money to be paid by instalments. For (1) the existence of a large debt from one partner to the other is likely to cause friction. (2) It is possible that the payment of such a debt would so hamper a junior that he would be unable to keep up a proper appearance, or promptly meet his tradesmen's bills, and so the credit or the character of the practice might suffer. The same objection holds in the case of a man purchasing with *borrowed* capital; and therefore it is pertinent for a vendor to make inquiry as to this. And (3) the junior partner has no share in the debts outstanding at the time he joins. He will not therefore for some time derive the full benefit of his share, or be able to defray any instalments of purchase-money out of it (*a*).

Duration of partnership.

1. The said A. B. and C. D. shall be partners in the said practice as from the day of 189 during their joint lives [*or* for the term of years] unless the partnership shall be previously determined under the provisions hereinafter contained.

In formulating a scheme of partnership in any profession or business, one of the chief objects to be kept in view is that the capital invested in such business or profession should remain intact and realizable in the event of dissolution by death or otherwise. Now in the case of a medical practice the capital is practically synonymous with the goodwill and professional connection, and it is therefore very undesirable to introduce any clause which may seriously affect the value of the goodwill or either partner's share in it, should it become necessary to liquidate the partnership.

Again, the commonest objection to a partnership is the risk of disagreements occurring between the partners, and the difficulty of getting out of it in such a case or in the event of other unforeseen emergencies arising. It should therefore be made practicable for either partner, at some sacrifice and with reasonable restrictions, to retire from the partnership should he wish it.

Bearing these two principles in mind, we strongly recommend that the term of partnership should be for the joint

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(*a*) See page 5.

lives of the partners, subject to either partner being free to sell out under clause 25.

This form of partnership has the advantage of combining the maximum of security with the minimum of restraint. A partner is practically certain of being able to realize his capital when he retires, or at least the greater part of it; on the other hand, he is able at *any time* after the first few years to retire from the partnership should circumstances render it desirable that he should do so—the only condition being that he should not continue to practise in the district.

In a medical partnership the option of dissolution at certain fixed dates (say seventh, fourteenth, or twenty-first years), with power to both partners to continue practising in the place, is sometimes proposed. The plan has indeed the advantage of enabling a man to terminate an obnoxious partnership without severing his connection with a place where he has many social ties and a valuable professional connection, but it is open to grave objections; it tends to strain the friendly relations of the partners; for instance, it would, in such a partnership, be obviously to the advantage of each to retain for himself as many patients as possible, and if at the end of seven years one partner had decidedly the stronger hold upon the practice, it would at once be to his interest to dissolve. Moreover, after such dissolution, or when the date was approaching, it would be impossible for either partner to sell his interest in the practice at anything like its proper value. So that, though at first sight it might appear that a man would be less tied, he would in reality be much more so than under the scheme which we have recommended, where he could leave at any time by giving six months' notice.

Of course, if *both* partners desire to dissolve, they can at any time do so without any mention of the power in the deed.

Name of firm.

2. The practice shall be carried on at or at such other place or places as may be agreed upon under the firm or style of B. and D.

Purchase of share of drugs, &c.

3. The stock of drugs drug bottles drug utensils surgery fittings surgery furniture and surgery appliances (but not including surgical instruments) [horses carriages harness stable utensils and provisions] belonging to the said A. B. for the purpose of the said practice at the

date of the commencement of the partnership shall be valued by a competent valuer [*or* shall be taken to be of the value of £]. The said C. D. shall within fourteen days from the commencement of the partnership pay to the said A. B. a sum equal to of the amount of such valuation and the said articles shall thereupon become the property of the partnership.

Generally, if the shares are equal, it is advisable for each partner to provide and keep his own horses. But, if the shares are unequal, the stable expenses should be a partnership affair, for the junior partner might have as much (probably more) ground to cover in doing his share of the work as the senior, in which case, if he provided his own horses, he would be at a much greater expense proportionately than the senior.

Capital.

4. The capital of the partnership shall be taken to mean and consist of the said stock and effects enumerated in the last article and such further stock and effects (except as is herein otherwise provided) as may from time to time be required for the efficient working of the practice to be purchased with the consent of both partners the cost thereof and also such sums of money as may be from time to time required for working the said practice to be borne and contributed by the partners in equal shares [*or* in the proportions in which they are to share in the profits as hereinafter mentioned].

Separate partners' working and other expenses.

5. Each partner shall provide for himself at his own cost all the surgical instruments which he may require [and such horses and carriages as he may need for the efficient working of the practice and shall bear and defray all expenses connected

therewith] and shall pay the wages of all his own servants and the rent rates and taxes of his private residence and all other his personal expenses [and each partner shall if required by the other keep at least one horse for the purpose of the practice].

It is usual for each partner to be required to provide his own surgical instruments.

Partnership working expenses.

6. The rent rates and taxes of any surgery used for the purposes of the practice (other than any part of either partner's private residence) [and of any stables and buildings at which the horses and carriages forming part of the capital of the partnership shall for the time being be kept] and all expenses of repairs and insurance and other expenses relating thereto and all expenses [of keeping such horses and carriages as aforesaid and] of providing drugs and other articles and effects required for the said practice and forming the capital of the partnership as hereinbefore defined and all salaries and expenses of assistants and servants connected with the practice and all other expenses and outgoings relating thereto shall except as herein is otherwise provided be paid out of the profits of the practice or if the same shall be deficient such deficiency shall be made up by the partners in equal shares [*or* in the shares in which they are entitled to the profits of the practice].

It may be that the only surgery of the partnership is at the senior partner's house. The partnership should then be charged with a portion of the rent so long as such arrangement continues. So also as regards stables.

Banking account.

7. An account shall be opened at the Bank at in the name of the partnership and within seven days from the commencement of the partnership the said A. B. shall pay in the sum of £ and the said C. D. shall pay in the sum of £ to such account. All moneys received on account of the partnership by either partner shall be paid in weekly or oftener to the said partnership account at the bank and all cheques drawn on account of the partnership shall be signed by both partners.

An alternative sometimes preferred, especially where partners live some miles apart, is that there should be no partnership banking account, but that the partners should meet monthly and account together for all receipts and payments and divide the balance in the hands of each.

It is as well to point out one great indirect advantage of paying *all* moneys received into a bank, namely, that when there is any question of selling the practice or any part thereof it is regarded by the purchaser as valuable independent evidence as to the gross receipts of the business upon which, as before stated, the premium is based. Such banking, moreover, is of great assistance in keeping the accounts of the practice, and makes the division of profits a simple matter.

Shares of profits.

8. The partners shall be entitled to the net profits of the practice in equal shares [*or* in the shares following that is to say the said A. B. to parts thereof and the said C. D. to parts thereof] and they shall bear in the same proportion the losses (if any) arising in the said practice.

Resident patients or pupils.

9. Each partner shall be at liberty to receive and take in his private house and for his own exclusive profit resident patients pupils or boarders provided that the care and attention required by such patients pupils or boarders in

no way interfere with his work in connection with the said practice.

Other business.

10. Both partners shall employ themselves diligently in the said practice and save as in the last preceding article provided neither partner shall engage in any other undertaking or business requiring his personal attention. And in the event of either partner holding or obtaining any appointment or making any profit by consultation whether directly in connection with the said practice or otherwise the salary or fees from any such appointment or profit from any such consultation shall be considered as part of the profits of the said practice. Neither partner shall accept any professional appointment or office payable by fees salary or otherwise without the consent of the other partner.

When a junior partner has paid the full value for his share it is not proper—at any rate permanently—to impose unfavourable conditions upon him as regards the division of the work of the practice. As a matter of course he will at the outset attend to the poorer patients, for they can be the most readily and advantageously transferred to him; further, if the senior partner be an old man, the junior may fairly be required to attend to all night calls. But to stipulate, for instance, that the junior shall do all the night work and all the dispensing for himself and his partner, and be solely responsible for keeping the books of the practice, would be to place him in the position of a mere assistant, and would only be reasonable if he had been admitted to partnership on exceptionally easy terms of purchase.

A senior partner is sometimes desirous of reserving to himself the emoluments of some appointment which he holds—as that of coroner or medical officer of health—but it is not reasonable or customary that he should do so. He will argue that, as he cannot depute his partner to do the work, the latter should not share the profit of such appointment; but he forgets that the work entailed by such appointment occupies time which might be devoted to the practice to the

advantage of the partnership, and that while he is engaged in the duties of the appointment his partner is probably doing work in connection with the practice from which he, the senior, will derive benefit.

Legacies or gifts.

11. Any legacy or gift not being in direct return for professional services rendered made to either partner exclusively shall belong to that partner and not be brought into the partnership account.

Residences.

12. Each of the partners shall reside in a private house suitable and convenient for the purposes of the practice [*or* A. B. shall continue to reside at the house known as and C. D. shall reside at the house known as and no alteration shall be made herein by either party without the consent of the other such consent not to be unreasonably withheld] and each partner shall keep up an appearance and demean himself generally in a manner becoming a medical practitioner.

Private debts and suretyship, &c.

13. Each partner shall at all times pay and discharge his private debts and liabilities and shall save the other and the partnership effects harmless from all debts and claims on his separate account and neither partner shall without the previous consent in writing of the other become bail surety or security for any person.

Negligence.

14. Each partner shall be liable personally to make good any loss occasioned to the partnership by any negligence or misconduct on his part.

Fees.

15. The fees to be charged to patients shall be at such rate as shall be agreed upon or on failure

to agree shall be at the same rate as heretofore charged by A. B.

Assistants and servants.

16. Such assistants and servants as may from time to time be needed for the efficient working of the practice shall be engaged and (except in the case of flagrant misconduct) be dismissed only with the consent of both partners.

Bona fides.

17. Each partner shall be just and faithful to the other in all accounts entries dealings and transactions relating to the said practice and shall not use the name of the partnership or deal with the property thereof for other purposes than those of the said practice.

Books of account.

18. Proper books of account shall be kept by the partners and entries immediately made therein of all their respective attendances upon patients earnings receipts payments and of medicine supplied to patients and all such other matters and things as are usually entered in books of account of a medical practice. Such books shall be kept in the surgery of the partnership [*or* in the surgery of each partner respectively] and each partner shall at all reasonable times have free access to examine and copy the same.

It is usual for the books of the partnership to be kept at the chief surgery, or at the senior partner's house.

Quarterly account.

19. On or within one week after the 1st day of January the 1st day of April the 1st day of July and the 1st day of October in every year (beginning with the 1st day of next) an account and balance sheet shall be made out of all moneys received or paid on account of the partnership

during the preceding period of three months and the partners shall account together for all such receipts and payments. And the balance of the partnership account at the bank shall after making provision for the outstanding liabilities of the partnership be divided between the partners in the shares which they are entitled to the profits of the partnership but so that a balance of £ at the least shall always be left in the said partnership account. Such quarterly accounts shall be liable to re-adjustment if necessary on taking the annual account.

General annual account.

20. On the day of 18 and on every subsequent day of general accounts shall be prepared [by a competent accountant] of the assets and liabilities of the partnership and of all dealings therein since the last annual account or from the commencement of the partnership as the case may be and of all things usually comprehended in accounts taken by persons engaged in a like profession or business and a just valuation shall be made of all items requiring valuation. Such general accounts shall be entered in duplicate books one to be kept by each partner and be signed in each book by both partners and when so signed the accounts shall be conclusive save that if any manifest error shall be discovered therein within three calendar months after such signature the same shall forthwith be rectified.

Guarantee of minimum amount of takings.

[21. C. D. having purchased a share of the said practice from A. B. on the faith of repre-

sentations made by A. B. that the gross receipts in respect of the said share so purchased will in the first year [*or* in each of the first years] of the partnership [on account of each year's work respectively] amount to not less than the sum of £ A. B. shall within three days from the termination of the first year of the partnership pay to C. D. such amount (if any) as together with the share of C. D. in the gross cash receipts in respect of the work of such year may be necessary to make up the said sum of £ . But A. B. shall be at liberty to recoup himself the amount so paid by him out of C. D.'s share of the fees booked or receivable for work done in that year as such fees shall from time to time be paid and received. And C. D. shall not be entitled to receive any further share of the fees for work done in that year unless and until the whole amount so paid by A. B. shall be recouped to him out of such fees. [Similarly at the end of the second and years respectively A. B. shall if necessary in like manner make up the share of C. D. to the sum of £ and shall have the like right to recoup himself out of the fees booked or receivable for the work of such years respectively and subsequently paid each year being taken separately.] This provision as to making up the share of C. D. shall be enforceable only against A. B. personally and not against his legal personal representatives or successors in the said practice.]

This will only be inserted in very special cases.

It often occurs that a purchaser of a share of a practice asks

for a guarantee that the income will not be less than a certain fixed sum, at any rate for the first two years. This ought not to be granted. But as it is occasionally conceded, a clause has been drafted to give effect to such a condition in the least objectionable form.

The only case in which we consider a guarantee should be given is when a vendor maintains that the receipts of his practice for the last three years do not fairly represent the present value of the practice owing to circumstances that have occurred, as, for instance, the recent death of an opponent, or where the prolonged absence or illness of the vendor has considerably affected the receipts without injuring the practice otherwise.

Power to determine partnership in the first year.

[22. If either partner shall desire to determine the partnership during the first year thereof he shall be at liberty so to do on giving months' notice in writing to the other of such his intention and in such case if A. B. be the partner giving the notice he shall on the date of the termination of such notice pay to C. D. the sum of £ and if C. D. give such notice A. B. shall at the time last mentioned pay to him the sum of £ for his share in the practice and shall at the same time pay to C. D. the value of his share in the capital of the partnership as hereinbefore defined. And in such case C. D. shall be subject to such restraint upon practising in or near aforesaid as is contained in Article 35 of these presents.]

Sometimes it is desired by both vendor and purchaser that within the first year of the partnership there should be the power with either partner of rescinding the partnership. There is no great objection to such a condition provided that the partner who gives notice to resume the *status quo* makes some considerable sacrifice. For instance if the notice is given by the vendor he should pay to the purchaser from 10 to 25% above the sum he received from him; whereas if it emanates from the purchaser the latter should receive back from 10 to 25% less than he paid. In either event the purchaser should of course be restrained from continuing to practise in the neighbourhood.

Option to purchase further share in the practice.

23. The said C. D. on giving to the said A. B. three calendar months' previous notice in writing expiring not before the termination of the year of the partnership shall have the option of purchasing a further share of the said practice for the sum of £ [*or* for a sum equal to of the average gross annual receipts of the entire practice for the last three years immediately preceding the expiration of such notice] to be paid in cash at the time of the purchase.

It is usual, where a purchaser has only bought a share less than one half, to allow him to buy up to one half after from two to ten years according to the circumstances. The purchase price is almost invariably fixed upon the original valuation; for instance, if he purchase at first one-third for 1,000*l.* (say this represents two years' purchase) he should have the option of buying up to one half at any time after the expiration of the third, fourth, or fifth year for 500*l.*; and not for two years' purchase based upon the average gross receipts of such further share for the three years immediately preceding such further purchase; the injustice of this latter alternative being that any increase in the receipts after the purchaser joins is likely to be attributable just as much to the new as to the old partner's exertions. The circumstances therefore should be very exceptional for the latter alternative to be adopted.

The incoming partner will naturally be anxious to have the right of increasing his share at the earliest possible date, whereas the vendor is usually desirous of deferring such increase as long as possible. The latter will often argue—not without reason—that it will be a long time before the new partner earns a half share of the income. A fair method of obviating this difficulty is to give the junior partner the option of increasing his share to one half at any time after a given number of years (in fact the time contended for by the senior), or *sooner* if at the end of any year it shall be found that he has during such year done as much work (as represented by the fees earned) as the senior partner has done.

Power to determine partnership on notice.

[24. Either partner may determine the partnership at the end of the or the th year thereof on giving not less than six calendar

months' previous notice in writing to the other of his intention in that behalf and at the expiration of such notice the partnership shall be determined accordingly and each partner shall be at liberty to continue to practise in aforesaid.]

This clause is objectionable for the reasons stated in the note on clause 1.

Power to sell share.

25. Either partner may on giving to the other six calendar months' previous notice in writing sell his share in the said practice [at any time after the day of 18]. The other partner shall during the pendency of such notice be precluded from giving a similar notice on his own behalf but he shall have the option (to be declared in writing not less than three calendar months before the expiration of the notice) to purchase as from the date of the expiration of the notice the share of the partner so retiring for a sum equal to 2 years the gross annual receipts from such share as shown by the average for the last three years immediately preceding the expiration of such notice such sum to be paid in cash at the date of the purchase. In the case of the remaining partner declining or failing to declare his option so to purchase the retiring partner shall be at liberty to sell his own share in the practice and in the capital to a properly qualified man who shall (but subject to the approval of the remaining partner which is not to be unreasonably withheld) be admitted to partnership by the remaining partner subject to obligations and with rights similar to those of the retiring partner at the

time of sale. Such purchaser shall execute a proper deed of accession binding him to observe the stipulations and conditions contained in these presents so far as the same shall be applicable and such other provisions as may be necessary or proper to effect the intentions herein expressed and any difference as to the form or contents of such deed may be referred to arbitration. [Provided always that the said A. B. shall not sell his share in the practice until after the expiration of the year of the partnership and C. D. shall not sell his share until after the expiration of the year of the partnership.] And if a new partner be admitted under this clause the continuing partner shall not be at liberty to sell his share until after the expiration of two years from such admission. If either partner shall die before the expiration of any notice to sell given under this clause such notice shall be void.

The advantages of this clause have been pointed out in the note on clause 1.

The first question that arises hereunder is the date at which either partner is to be allowed to sell. To decide this point, one must ask how soon the junior partner will have obtained a hold upon the practice equal to that of the senior. In the case of an ordinary country practice or a middle class town practice, it should be the end of the third year; and so on according to the class of practice; in a high class town practice, or where the opposition is exceptionally strong, it should be the end of the fifth year, or even later.

The senior partner may fairly claim the prior option to sell out; for instance, he may reasonably ask that he shall be at liberty to sell after the end of the third year, and that the junior shall not be at liberty to sell until after the end of the fifth year.

When one partner has given notice to sell under this clause the remaining partner should not be bound to buy, because the selling partner is retiring for his own convenience; more-

over, the strong objections to the "option" which exist in the case of death do not apply here (*b*).

As regards the price at which the remaining partner shall have the option of purchasing, it should be the same *rate* of purchase as the original purchase price, but based upon the average cash receipts for the three years immediately preceding the retirement (*c*). Provided always that the junior be allowed to increase his share to one-half (if it be less than that) at a price in accordance with clause 23, instead of a new rate.

The proviso at the end of the clause, namely, that when one partner has given notice to sell the other shall not give notice for two years subsequently, is necessary, for otherwise, if immediately afterwards the other gave notice to sell, a deadlock would occur.

The custom is somewhat different if the senior has taken a partner *with a view to retirement;* then the junior should have no option of selling; but he should have the right of buying the senior out at any time after a fixed number of years.

Thus, assuming that A. B. has taken C. D. into partnership with view to retirement, he reserves to himself the right of retiring at any time after the end of, say the third year. Then C. D. should have the right of forcing A. B. to retire at any time after, say the fifth year, if the latter has not previously given notice of retirement. In either event C. D. should be *bound* to purchase A. B.'s share, when he does retire, at a price based upon the value of the practice at the time when he first entered it.

26. Subject to the two next following clauses each partner shall be entitled to weeks' absence for holiday in each year of the part-

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(*b*) It may not unreasonably be objected that the remaining partner might refuse to exercise his option and then put such obstacles in the way of the outgoing partner selling his share, as are indicated in the note on clause 29. In practice this has not been found to be the case, but the difficulty which certainly in theory does exist, may be obviated by making it obligatory for the remaining partner to buy the share of the outgoing partner, as in the case of death, upon such easy terms that he will have no difficulty in re-selling at a profit. The outgoing partner is leaving for his own convenience, and any loss should fall upon him.

(*c*) If either partner is to be allowed to sell out during the first three years a special arrangement must be made as regards price (see note on clause 29).

nership at such times as may conveniently be arranged A. B. to have the prior choice in fixing the time for his own holiday.

The senior partner may reasonably stipulate for priority of choice as regards the time of taking his holiday. It is usual for both partners to have the same length of holiday, but the circumstances of the practice may be such as to entitle the senior to a longer holiday, as in a large good class practice where, in the nature of things, it is to be expected that for some time to come the greater part of the work will fall upon him.

Temporary absence and incapacity.

27. In the event of either partner absenting himself from the practice or becoming from any cause incapacitated from performing his fair share of work therein for more than four entire days in any three consecutive calendar months he shall if required in writing by the other partner so to do provide at his own expense a competent qualified person as substitute. Provided always that nothing herein contained shall be taken to imply a right in either partner to absent himself to the neglect of his duties in respect of the practice.

Clause to determine in case of continued incapacity or lunacy or in case of misconduct.

[The clause in brackets is somewhat stringent.]

28. In the event of any absence or incapacity of either partner continuing (except with the written consent of the other partner) for more than six consecutive calendar months or for more than 200 days in any two consecutive years or if either partner shall become lunatic [*or* if either partner shall commit any breach of the articles herein contained and on his part to be observed and performed or shall do or suffer anything whereby the interests of the partnership shall be or shall be in danger of being seriously injured]

it shall be lawful for the other partner by notice in writing [such notice in the case of breach of these articles or misconduct to be given within fourteen days after the partner giving the notice has knowledge of such breach or misconduct] to determine the partnership but without prejudice to any remedies of the partner who gives such notice. And if the partnership shall be so determined as aforesaid or by reason of a partner having suffered his share to be charged or of the bankruptcy of a partner or shall be dissolved by the Court on account of the lunacy incapacity absence or misconduct of a partner then and in every such case the partner through whose lunacy incapacity absence misconduct bankruptcy or other default the determination or dissolution of the partnership shall have been caused shall for the purposes of these presents be deemed to be dead as from the date of such determination or dissolution and his share and interest in the practice as from such date shall (*mutatis mutandis*) be dealt with as hereinafter provided in the event of the death of a partner the legal personal representatives of a deceased partner being if necessary taken to mean and include a surviving partner or his committee or trustee as the case may be. Provided always that in case the dissolution or determination has been caused by the misconduct or breach of one partner the other partner shall not in any event be bound to purchase his share.

The two preceding clauses deal with very difficult questions, and are found to work satisfactorily. Clause 27 appears stringent, but it is not too much so, being only put into

operation if one partner takes undue advantage of the other and absents himself constantly or inconsiderately.

Surviving partner to purchase, or to have the option of purchasing, the share of the deceased partner.

Mode of calculating purchase-money of share.

29. In the event of the partnership being determined by the death of A. B. in the first year of the partnership C. D. shall purchase [*or* have the option of purchasing] the share of A. B. for the sum of and if in the second year of the partnership C. D. shall purchase [*or* have the option of purchasing] such share for the sum of £ and if in the third year of the partnership C. D. shall purchase [*or* have the option of purchasing] such share for the sum of £ . In the event of the partnership being determined by the death of C. D. during the first three years of the partnership A. B. shall purchase [*or* have the option of purchasing] his share for the sum of £ . If the partnership shall be determined by the death of either partner occurring after the end of the third year of the partnership the surviving partner shall purchase [*or* have the option of purchasing] the share of the deceased partner for a sum equal to times the average gross annual receipts from such share for the three years last past immediately before the date of the partner's death. [Any option to purchase under this clause shall be declared by the surviving partner within fourteen days after he has knowledge of the death of his partner.]

The survivor should be *bound* to buy, and the price should in consequence be made moderate. If he be given the option, in the same way as recommended in the case of clause 25, the representatives of the deceased are at his mercy, for without actually refusing any purchaser whom they may bring forward, he may so deport himself or represent the practice, that no

one would care to join him in partnership, and he would eventually obtain the share for nothing, or at any rate upon his own terms, though we have attempted to remedy this by the three last lines of clause 31.

The case differs from that dealt with under clause 25, since in the latter instance the outgoing partner can look after his own interests and in the last resort retain his share.

With regard to fixing the price to be paid by the survivor, it must be borne in mind that until both partners may presumably be expected to have an equal hold upon the patients (that is, until after two, three, four or five years according to the class of practice), their cases must be dealt with separately. At first, the junior partner's hold upon the *clientèle* is comparatively slight, but as time goes on it is constantly becoming firmer. Take for instance an ordinary country practice of, say, 1,500*l.* per annum, where the purchaser has bought a one-third share for, say, two years' purchase, *i.e.*, 1,000*l.* If the senior die during the first year, the junior should pay such a sum as will, together with what he has already paid, make up one year's purchase (1,500*l.*), *i.e.*, 500*l.*; if during the second year, such a sum as will make up one-and-a-quarter year's purchase (1,875*l.*), *i.e.*, 875*l.*; if during the third year, such a sum as will make up one-and-a-half year's purchase (2,250*l.*), *i.e.*, 1,250*l.* When, however, the junior has come in with view to succession, these prices should be higher.

In the event of the purchaser dying during the first three years, the vendor should, taking the same example, pay his executors about 800*l.*, that is to say, the original purchase-money less 20 per cent.

After the end of the third year, it may be assumed that, in such a practice, both partners will be on the same footing, and the survivor should buy at one-and-a-half year's purchase, based on the average annual receipts from the share of the deceased for the three years immediately preceding his death.

A particular instance has been taken for the sake of clearness. It is necessary to add that each case should be considered on its own merits, as circumstances may materially alter the amounts which should be payable in the event of the early death of the senior partner. Suppose, for instance, that in the above-mentioned practice, the junior partner is not a young man taking a small share only, but an older and more experienced man who is to have a half share from the first; the early death of the senior partner would not be so injurious to such a man, and he should, therefore, if the senior die during the first year, pay such a sum as will, together with what he shall have already paid for his half-share, make up one-and-a-quarter year's purchase for the whole practice.

It may be preferred (though as stated above we deprecate

the alternative) to give the survivor the option of purchasing or refusing to purchase the share of the deceased. In that case, the price should be higher, the same, in fact, as under clause 25, and, in the event of the survivor not exercising his option of purchasing the share, the legal representatives of the deceased should be at liberty to sell it for what they can (as provided in clause 31), the survivor accepting their nominee subject to reasonable conditions, and admitting him to partnership, as in the event of a similar sale under clause 25.

Mode of payment of purchase-money.

30. [If the surviving partner shall duly declare his option to purchase the share of the deceased partner] the practice shall become the property of the surviving partner as from the date of his partner's death subject to the payment from the same date of all outgoings. The surviving partner shall pay the purchase-money in cash within one calendar month of such death unless security approved by the legal personal representatives of the deceased partner shall be given by the surviving partner in which case the surviving partner shall pay the purchase-money as to one-fourth within one calendar month from his partner's decease and as to the remaining three-fourth parts thereof within six twelve and eighteen calendar months respectively from such decease with interest at the rate of 4 per cent. per annum on the amount for the time being outstanding.

It is reasonable that if the survivor buys he should have easy terms of payment; but, on the other hand, the executors of the deceased partner must have the best available security that the money will be paid in due course, for, if no security be given, it would be possible for the survivor to sell out within twelve months and elude payment. If the survivor cannot pay the money down and cannot give satisfactory security, then his proper course is to take in another partner who will provide the necessary capital; and in the alternative

which we have advocated, the executors of the deceased partner will be in a position to bring considerable pressure to bear upon him to induce him to take this course.

[31. If notice declaring such option be not duly given the legal personal representatives of the deceased partner may sell the share of the deceased partner in the practice to a properly qualified man who shall be admitted to partnership by the remaining partner subject in all respects to such approval and subject to such obligations and provisions and with such rights as are mentioned in clause 25 of these presents with regard to a partner admitted thereunder. In the event of the share of the deceased partner being still unsold three calendar months after his death the surviving partner shall purchase the share of the deceased partner upon such terms as to payment or otherwise as may be agreed upon or failing agreement may be settled by arbitration.]

If option not exercised, power to sell share; if not sold, remaining partner to take it at a valuation.

32. Any purchase of a share or part of a share of the practice under these presents shall not (unless otherwise specially provided) include any book debts of the partnership or of either partner. And in the event of either partner or any hereafter admitted partner purchasing the share or part of the share in the practice of the other the purchasing partner shall at the same time purchase a corresponding share in the capital of the partnership (not including book debts) for a sum to be agreed upon or determined by valuation and to be paid in cash at the time of such purchase.

Share of capital to be purchased, but not book debts.

Remaining partner to get in debts.

33. In case of any dissolution of the partnership [otherwise than by effluxion of time] the surviving or continuing partner shall pay and liquidate all partnership debts and liabilities and shall in accordance with the customary dealings of the partnership get in and collect all book debts of the partnership and shall render an account thereof quarterly and at the same times pay the share of the outgoing partner therein to him or his representatives as the case may be.

Final general account.

34. Subject to the provisions of these presents and save as herein otherwise provided upon the determination of the partnership a general and final account in writing shall be made and taken of all the moneys credits property (other than the goodwill and connection of the practice) effects debts and liabilities of the partnership up to the time of the determination thereof and the said moneys credits property and effects or the proceeds thereof shall after discharging or providing for the debts and liabilities of the partnership be divided between the partners or their representatives in the proportion in which they shall at the date of such determination be entitled to the net profits of the partnership.

Restriction on practice where share sold.

35. If the share of either partner in the practice shall be sold or taken over at a valuation under any clause of these presents the outgoing partner shall not at any time thereafter [*or* within years from the date of such sale] exercise or carry on or be directly or indirectly interested in exercising or carrying on upon his own account or in

partnership with or as assistant to any other person the practice profession or business of physician surgeon accoucheur or apothecary at aforesaid or at any place within a radius of 5 miles therefrom. And should the outgoing partner so practise or assist any other person in practising within the limits aforesaid or in any way violate this provision he shall forthwith pay to the remaining or continuing partner the sum of £ [for every month or part of a month during which he shall violate this provision] as ascertained and liquidated damages and not by way of penalty.

The radius depends upon the class and extent of practice and the nature of town or country. It varies from one to twelve miles. The radius in the country is almost invariably ten miles. In towns it varies very considerably. It should be observed that the outgoing partner would not be at liberty to come within the prescribed radius for the purpose of practising, even though he might reside without it.

Notices.

36. Any notice to be given to a partner or his representatives under the provisions of these presents shall be deemed to have been sufficiently given if handed to such partner or addressed to him or to his executors (without naming them) and sent by registered letter to his last known address in the United Kingdom or handed or sent to any one of his executors or administrators or his committee or trustee as the case may be.

Further assurance.

37. Either of the parties hereto shall at the request and at the expense of the other execute and do any deeds and things reasonably necessary to carry out the provisions of these presents or to render the same more easy of enforcement.

38. The cost of the stamps necessary for these presents and a duplicate hereof shall be borne by A. B. and C. D. in equal shares.

Arbitration.

39. If during the continuance of the partnership or at any time afterwards any dispute difference or question shall arise between the partners or their or any of their representatives touching the partnership or the accounts or transactions thereof or the dissolution or winding-up thereof or the construction meaning or effect of these presents or anything herein contained or as to any valuation herein provided for or the rights or liabilities of the partners or their representatives under these presents or otherwise in relation to the premises then every such dispute difference or question shall be referred to arbitration [of two arbitrators] under the Arbitration Act 1889.

In witness whereof the said A. B. and C. D. have hereunto set their hands and seals the day and year first above written.

CHAPTER III.

FORM OF DEED FOR THE ASSIGNMENT OF A MEDICAL PRACTICE.

ARTICLES OF AGREEMENT made this day of 189 BETWEEN of (hereinafter called the vendor) of the one part and of (hereinafter called the purchaser), of the other part.

Recital of agreement.

WHEREAS the vendor has for some time past carried on the practice profession or business of a general medical practitioner in and around the of and is possessed of a valuable professional connection in respect of such practice. AND WHEREAS the vendor has agreed to sell and transfer to the purchaser and the purchaser has agreed to buy and acquire from the vendor the benefit of such practice and professional connection (hereinafter called the said practice) on such terms and subject to such conditions as are hereinafter set forth for the price or sum of £ [And also the fee simple of the house and premises known as now in the occupation of the vendor for the further sum of £]. NOW THESE PRESENTS WITNESS and it is hereby agreed as follows :—

1. IN consideration of the sum of £ as to £ part thereof paid to the vendor by the purchaser by way of deposit and part payment of the purchase-money of the said practice (the receipt of

which sum of £ the vendor doth hereby acknowledge) and as to £ the residue thereof to be secured and paid in manner and at the times hereinafter mentioned, the vendor shall assign to the purchaser as from the day of next (*date of commencement of introduction*) all the goodwill and professional connection of the vendor of and in the said practice now carried on by the vendor in and around the of aforesaid and shall render to the purchaser as far as possible all the patients and customers of the said practice and the purchaser shall buy and acquire the same upon the terms herein mentioned.

Agreement to assign goodwill and render patients.

The value of a practice has, so far as it lies within the scope of this work, been already dealt with in Chapter I.

Drugs, &c.

[2. The said purchase-money shall include all such drugs drug bottles surgery fixtures furnishings and appliances (not being surgical instruments) as shall belong to the vendor and be used for the purposes of the said practice at the date last mentioned and shall not be expended during the period of introduction hereinafter mentioned.]

As has been stated (p. 4), the purchase-money usually includes nothing beyond goodwill. If, however, drugs are included (and the usual course of dividing earnings and expenses during the introduction is adopted), then it should be made clear that the drugs so included are the drugs belonging to the vendor at the end of the introduction—not at the commencement: for otherwise it would be possible for the purchaser to charge the vendor for one-half the cost of such of these drugs as might be used during the introduction (*a*).

(*a*) See clause 7.

3. The purchaser shall buy all the drugs drug bottles surgery fixtures furnishings and appliances (other than surgical instruments) at the vendor's surgery (hereinafter referred to as the surgery stock) at the times [*or* at the time] hereinafter mentioned at prices [*or* at a price] to be agreed upon between the parties or in case of difference to be fixed by valuation. Such prices [*or* price] shall be paid on the dates [*or* date] on which such surgery stock is hereinafter agreed to be bought or taken over or in case of a valuation within three days after the completion of such valuation.

Purchase-money to be paid into a bank until introduction is completed.

4. The said sum of £ the residue of the purchase-money has previous to execution of these presents been paid by the purchaser into the bank to the joint account of the vendor and the purchaser and [subject to the stipulations of these presents (*b*)] shall be paid out to the vendor on the last day of the said period of introduction. Any interest accruing thereon in the meantime shall belong and be paid to the purchaser.

Purchase-money to be paid by instalments. Security for payment.

[5. The residue of the said purchase-money shall be paid by the purchaser as follows:—The sum of £ on the day of 18 the sum of £ on the day of 18 and the sum of £ being the balance of the purchase-money on the day of 18 [together with interest payable on the same dates at the rate of 5 per cent. per annum upon the

(*b*) See clause 11.

amount for the time being outstanding from the date of the commencement of the period of introduction until the respective dates of payment] for the due payment of which the purchaser has previous to the execution of these presents given to the vendor the security following that is to say :—]

The purchase-money is usually paid one half on the signing of the transfer deed, and the balance at the end of the introduction, the latter moiety being secured to the satisfaction of the vendor. If the introduction is short the most convenient form of security is the payment of the second moiety into a bank in the joint names of the vendor and purchaser, as provided in clause 4. Otherwise the most usual security is a promissory note signed by the purchaser and some person of sound financial position, or a form of guarantee, such as that appended to this deed; the latter being preferable when the outstanding portion of the purchase-money is subject to deductions or does not become due for some considerable time (*c*). If the balance of the purchase-money is payable at the end of the introduction no interest is charged; if there are any deferred payments interest is sometimes charged, but by no means invariably.

Under exceptional circumstances the vendor may be willing to accept the practice itself as security for the payment of the balance of the purchase-money. The following proviso should then be inserted so that the vendor may take up again or resell the practice in the event of the next instalment not being paid when it becomes due. In such a case the vendor should retain the tenancy of the house and sublet it to the purchaser until the last instalment has been paid off (*d*).

(*c*) See note on clause 11.

(*d*) Occasionally it may become necessary to agree to accept a considerable portion of the purchase-money by instalments spread over a long period. A proviso that, on non-payment of any instalment, the practice should revert to the vendor, and that he should retain all instalments paid, would not be legally valid. To obviate this, the practice might remain the property of the vendor (the purchaser being in the position of a *locum tenens*, paying the vendor fixed periodical sums out of the profits, and retaining the balance for his services) until a sum equal to the agreed amount had been paid out of the profits, whereupon the practice should become the purchaser's property. The vendor should have the right, on default of payment of any of the periodical sums, to

[PROVIDED ALWAYS, that if the purchaser shall not duly pay the said sum of £ (*the next instalment*) on the said day of next or within seven days thereafter the vendor shall be at liberty by giving notice in writing to that effect forthwith to cancel and determine this agreement and to retain the said sum of £ paid to the vendor on the execution of these presents as ascertained and liquidated damages and upon such notice being given the said practice and everything thereto appertaining shall revert and belong to the vendor as if this agreement had never been entered into. And in such event the purchaser shall not thereafter exercise or carry on or be directly or indirectly interested in exercising or carrying on upon his own account or in partnership with or as assistant to any other person the practice profession or business of physician surgeon accoucheur or apothecary at any place within miles of [during the period of years from the date hereof]. And if the purchaser shall so practise or assist any other person to practise within the limits

Power for vendor to cancel agreement on non-payment.

Restriction on purchaser in such an event.

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cancel the agreement, and retain the original deposit (if any) as liquidated damages. Some of the clauses would in this case need re-drafting.

Another alternative would be to charge the unpaid instalments on the practice, and to stipulate that on any default the practice should be sold, for the benefit of both parties, by a respectable firm of medical agents, who should have special power to resell to the vendor if they thought fit, and, pending sale, to employ either vendor or purchaser or any other person as *locum tenens*. The money to be realised should be applied first in payment of the vendor, the balance to go to the purchaser.

In either alternative a defaulting purchaser should be restrained from practising in the neighbourhood.

aforesaid or in any way violate this provision he shall pay to the vendor the sum of £ as ascertained and liquidated damages and not by way of a penalty.]

Covenant to introduce purchaser.

6. The vendor shall continue to reside in the said from the said day of next until the day of 18 (which period [subject to such variation as is hereinafter mentioned] is herein called the period of introduction) and shall actively assist the purchaser in the conduct of the practice and so far as may be possible and consistent with professional etiquette shall introduce the purchaser to and endeavour to the utmost of the vendor's ability to secure for the purchaser the custom of all such persons as are or have been patients in connexion with the said practice and are still residing in or near the said . And the vendor shall use his best endeavours to secure for the purchaser all the public and other medical appointments which the vendor now holds and which are with the estimated annual value of each such appointment specified in the schedule hereto.

Power to extend or decrease period of introduction.

[PROVIDED ALWAYS that the purchaser shall have the option of extending the period of introduction until the day of 18 on giving to the vendor weeks' notice in writing of his desire so to extend it.]

[PROVIDED ALWAYS that the purchaser shall have the option of terminating the period of introduction at any time on or after the day of 18 on giving to the vendor weeks'

notice in writing of his desire so to terminate it.] The vendor shall be at liberty to absent himself from the work of the said practice and from the of for a portion of the period of introduction not exceeding consecutive days at any time and not exceeding weeks in the aggregate.

The vendor should remember that a thorough introduction is what in a great measure the purchaser is paying for, and that it is incumbent upon him to use every effort to ensure the transfer of the entire connection to the purchaser: he should learn the purchaser's views as to the best means of effecting the introduction and endeavour to carry them out. The manner in which the introduction has been given is not infrequently made a ground of complaint, the vendor should therefore ascertain from time to time whether the purchaser is satisfied with what is being done for him.

The following are some of the methods of introducing a successor:—

(1) As partner when the introduction is long or of uncertain duration;
(2) As *locum tenens*—when the vendor is ill;
(3) By circular—as in the case of death vacancies;
(4) By personal introduction.

We believe it to be a mistake, when a short introduction only is being given, to allow the patients to suppose that there is to be a partnership of indefinite duration, for, as soon as they discover that this is not so, they resent the deception and transfer their custom elsewhere.

To avoid misunderstanding, it should be stated in the deed how many days or weeks or months during the period of introduction the vendor may be absent.

In a large good class practice, the purchaser will be glad of as long an introduction as possible, and, therefore, it may often with mutual advantage be arranged that an introduction of six months shall be given, and that the vendor shall have the option of prolonging it for three or six months. If the vendor has not by the end of the first six months found another practice suited to his requirements, he will find it very convenient to avail himself of such a privilege, and as we have said the purchaser must also benefit by the extension.

Sometimes the vendor is willing to give to the purchaser an option of prolonging or curtailing the period of introduction

of which he, especially if inexperienced, will do well to avail himself.

Purchase of drugs, &c., where profits are shared during period of introduction.

7. The purchaser shall pay the vendor one half of the value of the vendor's surgery stock at the date of the commencement of the period of introduction and such surgery stock shall become the joint property of the vendor and the purchaser. All the proceeds and earnings of the said practice on account of work done during the period of introduction shall be equally shared by the vendor and the purchaser and all expenses incidental to the proper working of the said practice during such period shall be borne and paid by the vendor and purchaser in equal shares but each party shall provide himself with sufficient surgical instruments. At the termination of the period of introduction the purchaser shall buy and take over the vendor's one half share of the surgery stock then in use for the purposes of the practice.

The profits of the practice during the period of introduction are, as a rule, shared equally by vendor and purchaser. This virtually amounts to a partnership, and is therefore open to objection when the introduction is short, and one of the following alternative arrangements is in that case recommended in order to avoid complication of accounts: either let the vendor take all earnings and pay all expenses during the first half, and the purchaser the same during the second half of the period; or let either the vendor or the purchaser take the profits during the whole period and make a weekly allowance to the other. Clauses to carry out these alternatives are given below.

The vendor is, of course, entitled to all moneys paid for work done previous to the date of transfer, and, subject to clause 18, collects them as he thinks fit. The earnings during the introduction (if they are to be equally shared) are collected as in a partnership, those unpaid at the time the vendor leaves being collected by the purchaser, who will from time to time render an account and pay over the moiety due to the vendor.

[8. All the proceeds and earnings of the said practice on account of work done up to and including the day of 18 shall belong to and be paid over to the vendor and all the expenses incidental to the proper working of the said practice to that date shall be borne and paid by the vendor. The purchaser shall buy and take over the vendor's surgery stock as from that date and all the proceeds and earnings of the said practice on account of work done thereafter shall belong to the purchaser who shall also thereafter bear and pay all expenses incidental to the working of the practice until the termination of the period of introduction.]

Where profits of first half of period of introduction are to belong to vendor, and of second half to purchaser.

[9. All the proceeds and earnings of the said practice on account of work done during the period of introduction shall belong to and [if collected by the purchaser] be paid over to the vendor [purchaser] and all expenses incidental to the proper working of the said practice during such period shall be borne and paid by him. The vendor [purchaser] shall during the said period pay to the purchaser [vendor] a monthly sum of £ . The purchaser shall buy and take over the vendor's surgery stock in use for the purposes of the practice on the day of 18 .]

Where one party is paid a salary by the other during period of introduction.

10. The vendor shall during the period of introduction [*or* down to the day of next] provide the purchaser with suitable board and lodging at aforesaid at an inclusive charge of per week.

Purchase-money to be retained in bank or otherwise if specified appointments not transferred within limited period,

11. If any one or more of the said appointments specified in the schedule hereto shall not have been transferred to or obtained by the purchaser previous to the said day of 18 (*the termination of the introduction*) then unless the purchaser shall have failed to use his utmost endeavours to secure the same a sum equal to times the annual value specified in the said schedule of any such appointment not transferred shall be retained [in the said bank in the joint names of the vendor and the purchaser for the period of months] [by the purchaser out of the said sum of £ the balance of the purchase-money payable by the purchaser on the said day of 18 or if the sum so to be retained shall amount to more than such amount the excess shall be retained out of the said sum of £ payable on the day of 18] and the purchase-money shall in consideration of the purchaser's loss of such appointment or appointments be reduced accordingly. PROVIDED ALWAYS that if any such appointment or appointments be subsequently obtained by the purchaser before the day of 18 he shall forthwith pay to the vendor any moneys retained in respect thereof under this clause so that the purchase-money shall only be reduced by a sum equal to times the specified annual value of such appointments as shall not be transferred before the date last mentioned.

to be paid to vendor if appointments acquired by purchaser within an extended period.

It is customary to guarantee the transfer of the appointments; that is to say, in the event of any appointment not being transferred to the purchaser within a certain fixed time

there is a rebate from the purchase-money proportionate to the annual value of the appointment lost; if for instance one and a half years' purchase is being paid for the practice, the amount to be deducted from the premium would be a sum equal to one and a half years' income from such appointment.

It may be politic in order to make the transfer of any appointment more sure that the vendor should defer his resignation until the end of the introduction; a margin of from three to six months should therefore be allowed after the expiration of the introduction in the manner indicated in the text.

If an appointment be transferred from the vendor to the purchaser, but at a reduced or increased rate or remuneration, the premium is unaffected.

A sale is never made contingent upon the transfer of the appointments, although a purchaser will occasionally ask that it should be. At the same time, if any one appointment forms an exceptionally large part of the income, then it is reasonable to make an exceptional allowance in the event of its loss.

As to purchase of house, &c.

12. Unless the purchaser shall have failed to fulfil his part of the stipulations herein contained the vendor shall [subject to the consent of the landlord which he will endeavour (*d*) to obtain] assign and transfer to the purchaser as from the date of the termination of the period of introduction and the purchaser shall accept and take over as from such date the house stables outbuildings garden and premises known as held by the vendor [on a yearly tenancy] [for the residue of a term of years from the day of 18] and all rents rates taxes insurances and other outgoings shall be apportioned as at the date of such transfer.

(*d*) In certain instances where the transfer of the house is a very important factor in the transfer of the practice, as, for example, in the case of a "dispensary" practice, the word *undertakes* may be inserted in place of *will endeavour*.

Speaking generally, a medical man in a town will prefer a lease; in the country, an annual tenancy. But this is not a matter of much importance; for, on the one hand, few landlords will care to disturb such a good tenant as a doctor, and, on the other hand, a doctor does not often care to risk a change of residence.

Where purchase of vendor's house is stipulated for.

[13. The vendor shall sell and the purchaser shall purchase at the date of the termination of the period of introduction the fee simple in possession of the house stables outbuildings garden and premises known as aforesaid as the same are now in the occupation of the vendor for the sum of £ . The purchaser shall accept such title to the property as the vendor has. Two-thirds of the purchase-money shall be allowed (if the purchaser so desires) to remain on mortgage of the property at 4 per cent. per annum for a period of five years the purchaser covenanting to keep the premises so mortgaged in a state of thorough repair and fully insured against damage by fire.]

If the purchase of a house is contemplated it will be better if possible to have a formal contract drawn out providing the conditions of title and other conditions according to which the purchase is to be made. The better the *class* of the practice the easier, as a rule, will it be to find a purchaser for house and practice together.

Where lease of vendor's house is stipulated for.

[14. The vendor shall grant and the purchaser shall take a lease of the house stables outbuildings garden and premises known as aforesaid now in the occupation of the vendor for the term of years from the termination of the period of introduction determinable at the option of the purchaser at the expiration of the first or

years of the said term on giving six calendar months' previous notice in writing to the vendor at the yearly rent of £ payable quarterly. Such lease shall contain covenants on the part of the purchaser to pay the rent aforesaid and rates taxes and outgoings to paint externally once in every three years and to paper paint and whitewash internally in every seventh year of the said term to keep the premises during the term and yield up the same at the expiration thereof in a good and tenantable state of repair [damage by fire excepted] and other usual covenants and shall contain a condition of re-entry on non-payment of the rent whether legally demanded or not for twenty-one days after the same shall have become due or on breach of any of the tenant's covenants. Such lease shall also contain an option for the purchaser on giving six calendar months' notice in writing to the vendor of his desire so to do to purchase the fee simple of the same premises for the sum of £ . If the purchaser shall exercise such option he shall accept such title to the premises as the vendor has.]

If time permits, it is preferable to have the lease drafted and approved before the agreement is signed.

Purchase of fixtures, &c.

15. The vendor shall sell and the purchaser shall buy and pay for before he is put in possession of the said house and premises all the fixtures and fittings belonging to the vendor in and about the said house stables outbuildings garden and premises at a price to be agreed upon between the parties

or in case of difference to be fixed by a valuation thereof.

Vendor to be restrained from afterwards competing with purchaser.

16. If the purchaser shall duly perform and observe the stipulations of these presents on his part to be performed and observed the vendor shall not at any time [during the period of years from and] after the commencement of the period of introduction except as herein previously provided exercise or carry on or be directly or indirectly interested in exercising or carrying on upon his own account or in partnership with or as assistant to any other person the practice profession or business of physician surgeon accoucheur or apothecary at any place within miles of And if the vendor shall so practise or assist any other person to practise within the limits aforesaid or in any way violate this provision he shall pay to the purchaser the sum [of £] [*or* of £ for every month or part of a month during which he shall violate this provision] as ascertained and liquidated damages and not by way of penalty.

See note on clause 35 partnership agreement (p. 29). As a further protection to the purchaser the vendor has in clause 1 undertaken as far as possible to "render the patients" to the purchaser, so that the vendor would not be at liberty to attend any of his old patients though they *came to ask* his advice while he was residing outside the prescribed area.

Books of account to be handed to purchaser.

17. The vendor shall hand over to the purchaser on the termination of the period of introduction all the books of account relating to the said practice and such books shall become the property of the purchaser but he shall permit the

vendor his solicitors or agents to have access thereto at all reasonable times and to have the temporary use thereof at the purchaser's surgery or at any other place where the vendor may require the production of the same for the purpose of getting in the vendor's outstanding accounts.

The books should remain with the purchaser—(1) as a guarantee of *bona fides* on the part of the vendor; (2) to enable the purchaser to see what fees have been charged and how the practice has been managed; and also (3) to prove, if necessary, the value and history of the practice in the event of his being obliged to offer the practice for sale again at an early date.

Vendor not to sue patients for a time.

18. The vendor shall not for the space of months after the commencement of the period of introduction commence or threaten to commence any legal proceedings for the recovery of any debt owing to him in respect of the said practice except in cases where he may have good reason to believe that the debtor is about to become bankrupt or to remove from the neighbourhood or the debtor has become bankrupt or removed or where the debt or part thereof was incurred more than five years previous to such proceedings being commenced or threatened or was incurred by a deceased debtor.

The vendor should not take or threaten legal proceedings during the introduction or for three or six months thereafter, lest by so doing he should alienate the patients from the purchaser.

Further assurance.

19. Each of the parties hereto will on the request and at the expense of the other execute any deeds or instruments in writing that may be reasonably required to carry out the terms of this agreement

or to render the same more easy of enforcement.

Arbitration.

20. If any dispute difference or question shall arise between the parties hereto touching the terms stipulations and conditions contained in these presents or the construction hereof or any matter or thing connected with these presents or any valuation herein provided for or the rights duties or liabilities of either party in connection herewith such dispute difference or question shall be referred to arbitration [of two arbitrators] under the Arbitration Act, 1889.

If the introduction be not of longer duration than six months, it is not usual to make special provision for the death of the vendor occurring before he has completed it, as it would not be likely to affect materially the success of the purchaser; if, however, the introduction is to continue a year or longer, considerable reduction ought to be made in the event of the death of the vendor during the first six months of the introduction, a less reduction if such death occurs during the second six months, and so on. The purchaser will be entitled to all the profits of the practice as from the date of such decease.

If the purchaser die during the introduction his representatives can sell the practice, and the vendor must introduce their nominee for the unexpired portion of the period of introduction: thus, let it be noted by the way, the purchaser's representatives would be in a better position in the event of his death before the end of the introduction than they would be were it to occur just after the introduction had been completed. Obviously, it would be unreasonable to require the vendor to buy back the practice, as he may have contracted to take over another practice upon the supposition that he would be free by a certain date, *i.e.*, the date of the expiration of the introduction.

21. The stamp duty payable in respect of the transfer of the practice and the cost of a duplicate of these presents shall be borne by the vendor and purchaser in equal shares.

In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

SCHEDULE.

Appointments.	Annual Value.
	£ s. d.

Form of Guarantee by Surety.

I of in consideration of the above named entering into this agreement hereby guarantee the due payment by the above named of the sums of money agreed by him to be paid to the above named under article of the above-written agreement.

Dated, &c.

CHAPTER IV.

AGREEMENT BETWEEN PRINCIPAL AND ASSISTANT.

It is of great importance that a medical man engaging an assistant, whether qualified or unqualified, should require him to enter into a formal written agreement, containing, amongst the other conditions on which the assistant is engaged, an undertaking on his part that he will not practise in opposition after the expiration of his engagement. The omission of such a precaution may have very serious results, for, though it is a very rare thing for an assistant to start practice in close proximity to a former principal, and though the principal may not himself fear the result of his doing so, yet, in cases where it becomes necessary, through death, illness or other cause, to transfer the practice, the purchaser will, if well advised, require to be satisfied that there is no risk, however remote, of his meeting with such opposition.

The following is the form of agreement:—

MEMORANDUM OF AGREEMENT made this day of one thousand eight hundred and Between hereinafter called the principal of the one part and hereinafter called the assistant of the other part.

Whereas the principal is now engaged in medical practice at aforesaid and desirous to secure the services of a competent medical assistant. NOW IT IS HEREBY AGREED between the parties hereto as follows:—

1. The assistant contracts and agrees with the

principal diligently and faithfully to serve him as his medical assistant according to the laws and customs of the medical profession at aforesaid for the space of from the date hereof and thereafter until this contract of service shall be determined by either of the parties in manner hereinafter provided.

2. The assistant shall at all times fulfil and observe all the lawful directions of the principal without disclosing the same or the secrets of his employment or profession to any person whatsoever.

3. The assistant shall keep true and just accounts of all business done and moneys paid or received by him on account of the principal and shall forthwith pay over to the principal all sums of money so received by him without any deductions except such as may be allowed in writing by the principal.

4. So long as the assistant shall faithfully perform and fulfil the conditions hereof the principal shall pay to the assistant a salary at the rate of such salary to be paid .

The assistant is sometimes remunerated in part by fixed salary and in part by way of a share of fees for confinements attended by him, or commission on all work done by him; in the latter case, care should be taken to so state the terms that everything may be settled up at any given time, to avoid for instance the assistant retaining a claim upon the practice after the termination of his engagement. The salary is usually payable monthly.

5. This contract of service may be terminated at any time by either party on giving the other

notice in writing of his desire to terminate the same.

The engagement is usually terminable at any time by either party giving to the other one calendar month's notice. Where, however, the assistant is required to furnish a house or incur other similar expense, the notice should be three months. In cash practices of the "dispensary" class, the salary is often paid weekly, and the engagement is subject to determination by one week's notice.

6. Lastly it is specially agreed that for the considerations aforesaid the assistant shall not at any time during the continuance of this contract of service nor within a period of years from the termination thereof practise or cause or assist any other person to practise in any department of medicine surgery obstetrics dentistry or pharmacy in aforesaid nor within miles except with the written consent of the principal his executors administrators or his assigns of his said practice and if the assistant shall so practise or cause or assist any other person to practise in the district aforesaid or in any way violate this provision he shall forthwith pay to the principal his executors administrators or assigns the sum of a month for every month during which or part of which he shall violate or continue to violate this provision such sum or sums being payable as ascertained and liquidated damages and not by way of penalty. And nothing in this clause contained nor any action or proceedings hereunder nor the receipt or recovery by the principal of any sum or sums hereunder shall in any way prejudice the right of the principal to restrain the assistant from practising or causing

or assisting any other person to practise in the district aforesaid in breach of the agreement on the part of the said assistant in that behalf.

With regard to the radius within which, and the length of time during which the assistant shall be debarred from practising in opposition to the principal they vary according to the class and situation of the practice (*vide* note, p. 35), but the time limit is from five to ten years, very much less than in the case of the sale of a practice.

As WITNESS the hands of the parties the day and year first above written.

Witness to the signature }
of the above-named. }

A *locum tenens* should not be required to sign such an agreement unless he is placed in charge of a "death vacancy," or a practice which is about to be offered for sale, or unless the engagement is to last for over a month ; and when he is called upon to sign such an agreement, the terms as regards not practising should be less stringent than in the case of an assistant. Locum tenens.

CHAPTER V.

ASSISTANTSHIP WITH A VIEW TO PARTNERSHIP.

At first sight such an arrangement would appear highly desirable, and nothing is more common than for diffident purchasers and hesitating vendors to suggest it, but unfortunately experience shows it to be far from satisfactory, since only in a very few instances, about one in twelve, does a partnership result.

It is not easy to state in a few words why this should be so, because the causes are so numerous. It might be otherwise, were the principal to have determined finally that he wants a partner, and that the assistant is such a man as he requires; were the assistant to make up his mind that the partnership is suitable as regards locality, income and so forth, and that he can command the necessary capital; and lastly, were the terms of the partnership articles to be provisionally approved before the assistantship is entered upon. But this is rarely done; indeed it is not the least attractive feature of the arrangement to those who propose it that the consideration of all these tiresome details may be shelved indefinitely. But even supposing all possible precautions have been taken upon both sides, unforeseen circumstances are likely to arise to make either one party or the other change his mind.

Experience shows that in the great majority of these abortive assistantships with view to partnership the cause of failure is not any revelation as regards the value or character of the practice or any disclosed shortcomings of the proposed partner, but rather some question about which the dissentient party could equally well have made up his mind in the first place.

It cannot therefore be too strongly urged that where a medical man has decided to take a partner the least practical way in which to set about it is to offer a preliminary assistantship. Even if the delay resulting is a matter of no importance, it will be found in most cases that the value of the partnership is more or less adversely affected.

Of course the risk to the purchaser, namely loss of time, is not so serious a matter; though to be refused a partnership, after finding everything satisfactory, is sufficiently aggravating.

PART II.

Notes on the Law.

CHAPTER VI.

The Partnership Act, 1890.

Medical practitioners enter into partnership as frequently as any class, and the risks of partnership are in their case less on the whole than the risks of partnership between traders and professional men generally. Medical partners have comparatively little joint stock; what is usually the principal partnership asset, the professional connexion or goodwill of the practice, cannot be secretly made away with; they do not in general require expensive offices for carrying on the partnership, nor have they an army of clerks and agents in their employ; the drugs and other stock in trade are not of a nature to invite rash and hazardous speculation, and keeping and accounting for the money of others forms no part of their professional work. The contracts a medical man enters into so as to bind his partner are not often of great pecuniary importance, and actions for negligence against practitioners are rare. What produces profits is not the share of the practitioner in the partnership assets, but mainly his personal skill and attainments.

If the risks were greater it would, in general, be easy to frame agreements for profit sharing, or the pooling of returns, which would avoid the obligations of partnership between the partner to them.

The Partnership Act, 1890 (53 & 54 Vict. c. 39), is the

outcome of several attempts to codify the law of partnership. Stirling, J., said in *Belfield* v. *Bourne*, [1894] 1 Ch. 521, that he regarded the recent Act as being mainly, though not entirely, a codification of the law of partnership. It does not form a complete code, but, as Lord Justice Lindley, the author of the great treatise on the law of partnership, says, (Law of Partnership, 6th ed. p. 2) it "has the merit of reducing a mass of law, hitherto undigested except by private authors, into a series of propositions authoritatively expressed and as carefully considered as any Act of Parliament is likely to be."

The Act is divided into five parts arranged as follows:—

I. Nature of Partnership (sects. 1—4):
II. Relations of partners to persons dealing with them (sects. 5—18):
III. Relations of partners to one another (sects. 19—31):
IV. Dissolution of partnership, and its consequences (sections 32—44):
V. Supplemental (sects. 45—50).

Some of the sections have little or almost nothing to do with ordinary medical partnerships, but it has been thought well to print the Act *in extenso* with short notes to such of the sections as are important for the consideration of usual agreements between medical practitioners.

Part I.—*Nature of Partnership.*

This sub-division is in the main declaratory of the law on the subject as it existed at the time of the passing of the Act.

Definition of partnership.

1.—(1.) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

The expression business is defined, (sect. 45) as including every trade, occupation, or profession.

From the above definition of partnership it is clear that it is not essential to a partnership that there should be any joint

capital or stock, and in partnerships between medical men, in cases where the goodwill is not made a partnership asset and each partner defrays his own expenses, there is frequently no partnership property.

(2.) But the relation between members of any company or association which is—

25 & 26 Vict. c. 89.

(*a.*) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or

(*b.*) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(*c.*) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act.

Rules for determining existence of partnership.

2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any

property from which or from the use of which the returns are derived.

Where it is desired to avoid the obligations of partnership, there will usually be little difficulty in framing an agreement between practitioners under sub-sect. 2 which will not constitute a partnership.

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a.*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(*b.*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(*c.*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(*d.*) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto:

(*e.*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Sub-sects. (3) (b) (c) (d) and (e) are re-enactments with certain alterations of sects. 2, 3, 1, and 4 respectively of Bovill's Act (28 & 29 Vict. c. 86), the whole of which is repealed by sect. 48 of this Act.

An assistant remunerated by a share of the profits of a practice as mentioned in sub-sect. (3) (b) will have a right to overhaul his employer's accounts and books (*Rishton* v. *Grissell*, 5 Eq. 326); and a widow or a child of a deceased partner receiving an annuity as mentioned in sub-sect. (3) (c) will have a similar right.

It would appear that a loan to a trader under a written agreement, at a fixed maximum rate of interest to be diminished if the profits were insufficient to pay such rate, comes within sub-sect. (3) (d) (*Re Vince*, [1892] 1 Q. B. 587). The decision on this case was afterwards reversed [1892] 2 Q. B. 478, on the ground that the agreement there was so obscure that it must be treated as void.

As to cases under sub-sect. (e); where purchase-money is to be ascertained by reference to profits, there is an implied

contract that the business shall be carried on, or if sold that it shall be sold on such terms as to keep alive the rights of the person entitled to such purchase-money. (*Telegraph Despatch & Intelligence Co.* v. *McLean*, 8 Ch. 658.)

It seems that a purchaser of a practice with notice of an annuity charged thereon or on the profits, would take subject to such annuity. (See *Werderman* v. *Société Générale d'Electricité*, 19 C. D. 246, 257.)

The question, whether there is a partnership or not, must be decided by the intention of the parties, to be ascertained by looking at all the stipulations of contract taken as a whole and by the conduct of the parties. What the Court has to get at is the real agreement between the parties. (*Badeley* v. *Consolidated Bank*, 34 C. D. 536; 38 C. D. 238; *Walker* v. *Hirsch*, 27 C. D. 460.) A declaration in an agreement negativing partnership will not prevent the relation between the parties being in fact partnership, if the result of the agreement, fairly construed as a whole, is to give the right and impose the obligations of a partner. (*Ex parte Delhasse*, 7 C. D. 511.)

Persons who share both profits and losses are always in a sense partners, but any partner may by agreement be excluded from having any voice in the control of the firm's business, or from having any interest in the stock-in-trade, goodwill, or other partnership property. (See *Pawsey* v. *Armstrong*, 18 C. D. 698; and the comments on that case in *Walker* v. *Hirsch*.)

In the case of *Walker* v. *Hirsch* (1884), 27 C. D. 460, the plaintiff, who had been a clerk in the employ of the firm of H. & Co., the members of which were the defendants, entered into an agreement with them that for the part taken by the plaintiff in the business he was to receive a fixed salary, and in addition one-eighth of the profits of their business, and to bear one-eighth of the losses thereof as shown by the books when balanced, and the plaintiff agreed to leave with the business the sum of 1,500*l.* at interest: the agreement was to be determinable by four months' notice on either side. The defendants dismissed the plaintiff, who thereupon brought an action asking for the winding up of the partnership entered into by the agreement, an injunction restraining the defendants from excluding him from the partnership, and for a receiver of the partnership property, including the goodwill. The 1,500*l.* was secured by being paid into Court. The Court of Appeal held that on the true construction of the agreement, the plaintiff was in the position of a servant, and that though in a sense a kind of partnership was created, there was no such partnership between the plaintiff and the defendants as to entitle the plaintiff to an injunction or a receiver

of the partnership property. Lindley, L.J., says, at the close of his judgment, p. 473, "Persons who share the profits and losses are in my opinion properly called partners; but that is a mere question of words, their precise rights in any particular case must depend upon the agreement into which they have entered."

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

Under the very similar provision in Bovill's Act (sect. 5) the creditor was held not to be precluded from enforcing any security he might have received from a trader to whom he had made an advance in consideration of receiving a share of profits, although the other creditors of the trader had not been satisfied. (*Ex parte Sheil*, 4 C. D. 789; *Badeley* v. *Consolidated Bank*, 34 C. D. 536; 38 C. D. 238.)

Meaning of firm.

4.—(1.) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

(2.) In Scotland a firm is a legal person distinct

from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro ratâ* from the firm and its other members.

Part II.—*Relations of Partners to Persons dealing with them.*

Power of partner to bind the firm.

5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Partners bound by acts on behalf of firm.

6. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Partner using credit of firm for private purposes.

7. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the

firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

Effect of notice that firm will not be bound by acts of partner.

8. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Liability of partners.

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Liability of the firm for wrongs.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

The business of a firm of medical practitioners is of a nature much more definite than is the business of most partnerships, and the purposes for which a medical partner can pledge the credit of the firm in the ordinary course of business are comparatively few, so that the question whether

such a partner is acting in the business of the firm or not cannot often be raised.

It is, of course, no part of the business of such a firm to receive the money or property of a third person.

Every partner being an agent of the firm, and his other partners, for the purpose of the business of the partnership (sect. 5), and the firm and every partner being liable for any wrongful act or omission of any partner acting in the ordinary course of the business of the firm to the same extent as the partner so acting or omitting to act, it follows that each partner in a medical practice will be answerable for his partner's negligent conduct in the ordinary course of the firm's business; as, for instance, in carelessly dispensing drugs or carelessly conducting surgical operations. If one of two partners is liable for personal negligence, the other is also civilly liable. (*Moreton* v. *Hardern*, 4 B. & C. 223; *Mellors* v. *Shaw*, 1 B. & Sm. 437.)

In the case of *Hancke* v. *Hooper* (7 C. & P. 81), a surgeon was sued for the negligence of his apprentice in improperly bleeding the plaintiff.

It appeared that the plaintiff went into the surgeon's shop where there were two apprentices, and without inquiring for the defendant, the surgeon, asked to be bled. One of the apprentices accordingly bled the plaintiff, who alleged that the operation was unskilfully performed, and that he had in consequence sustained injury.

It was contended for the plaintiff that a surgeon was not only bound to bring to his profession a competent degree of personal skill, but also bound to avoid introducing into his business young persons not of competent skill.

Tindal, C. J., in summing up, told the jury that the defendant, the surgeon, was responsible for the act of his apprentice, and that the question for them was whether they thought the injury sustained by the plaintiff was attributable to a want of proper skill on the part of the defendant's young man, or to some accident, and if the former they should give the plaintiff reasonable damages.

This was, of course, not actually a case of partnership, but the same reasoning would apply to the case of partners in practice, as they hold each other out as competent practitioners. *Primâ facie* damages given against one partner for a partnership act are to be paid like any other partnership debt, but with this exception, that if the damage were occasioned by the personal misconduct or culpable negligence of one partner he alone must bear the consequences and must indemnify the partnership. (See *Bury* v. *Allen*, 1 Coll. 604; *Thomas* v. *Atherton*, 10 C. D. 186, 199.)

Misapplication of money or property received for or in custody of the firm.

11. In the following cases; namely—

(*a.*) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

(*b.*) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

the firm is liable to make good the loss.

Liability for wrongs joint and several.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

Improper employment of trust-property for partnership purposes.

13. If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein:

Provided as follows:—

(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

Persons liable by "holding out."

14.—(1.) Every one who by words spoken or written or by conduct represents himself, or who

knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2.) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death.

Admissions and representations of partners.

15. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Notice to acting partners to be notice to the firm.

16. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Liabilities of incoming and outgoing partners.

17.—(1.) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2.) A partner who retires from a firm does not thereby cease to be liable for partnership

debts or obligations incurred before his retirement.

(3.) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Revocation of continuing guaranty by change in firm.

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

PART III.—*Relations of Partners to one another.*

Variation by consent of terms of partnership.

19. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Questions as to inferring from a course of dealing the consent of the partners to a variation of the articles have sometimes come before the Courts; particularly where accounts have not been taken regularly in accordance with the articles, and a partner has died. It is often stipulated that yearly or half-yearly accounts shall be taken and signed, and that in case of the death of a partner his representatives shall be paid the value of his share as it appears in the last account, with fixed interest on such value in lieu of subsequent profits. Where these accounts have not been taken in accordance with the articles, the Court strives to apply the rule as to variation

by the conduct of the partners so as to do no injustice to the representatives of the outgoing partner.

In *Simmons* v. *Leonard* (3 Hare, 581), an annual account was to be taken, and any deceased partner's share was to be ascertained by the last annual rest; but the partners had altogether omitted to settle any account, and when on the death of a partner it became necessary to take an account of some sort, a general account was ordered to be taken down to the death of the deceased partner.

In *Pettyt* v. *Janeson* (6 Madd. 146), the articles provided that the accounts should be taken every 26th of March, and that the value of the share of a partner who died should be regulated by the last yearly settlement. At first the accounts were regularly settled at the proper date, but afterwards the settlement of the accounts became irregular. A partner died in February, 1813, and the last account prior to his death had been settled on the 5th of November, 1811. It was held by the Court that as this was considered by both parties a binding settlement, they ought to come to the next annual settlement on the 5th of November, 1812, and, treating that which ought to have been done as if it had been done, the Court declared the deceased partner's estate entitled to a share of profits up to that date, being the day which ought to have been the last annual settlement before his death.

In *Lawes* v. *Lawes* (9 C. D. 98), articles of partnership provided that the settlement of the accounts should be made half-yearly, at Lady Day and Michaelmas, and that in case of the retirement or death of a partner his share should be taken at the amount which, according to the then last taken half-yearly rest, should appear to have represented his share, with interest in lieu of profits. The partners afterwards agreed for convenience that the rests or settlements should be made once a year only, at Michaelmas. A partner died in May, 1876, and it was contended by the surviving partners that his estate was entitled to interest only, and not to a share of profits from the preceding Michaelmas. The Court held that the variation of the articles did not show any intention that the financial arrangements of the partners should be altered, or that the money interests were only to be ascertained once a year, and declared that the accounts must be taken under the articles up to the 25th of March last preceding the death of the deceased partner.

With regard to valuations also, the uniform practice of the partners may supersede the exact terms of the articles. In *Coventry* v. *Barclay* (33 Beav. 1; 11 W. R. 892; and on appeal 3 De G. J. & Sm. 320; 12 W. R. 500) partnership articles provided that an annual account and valuation should be made and fully finished between the partners, and should

when finished and signed by all the partners be binding on them. One partner died two months after the taking of the annual account, not having been present at the valuation, and without having signed or expressly approved it, but there was nothing to show that he would not in all probability have accepted the account. His executors alleged that the last valuation was an arbitrary one, and had not been adopted by their testator, and they claimed that a new valuation ought to be made. It appeared that the accounts had been always made up on the same footing. Lord Westbury, L.C., in giving judgment said that he considered that the mode which had been uniformly followed was not inconsistent with the meaning of the words in the articles; and further that if it were not the proper meaning, yet as it was the mode and practice of making valuations which had always been followed without deviation or objection, it was a practical construction of the clause in the articles, which was valid and binding on all the partners, and must be accepted as the rule of this partnership. For if the usages, which on this subject had been uniform and without variation, were not strictly in accordance with the written articles, it became evidence of a new agreement by the partners, and was as binding as if it had originally been clearly prescribed by the articles. But then a question arose, whether that usage or practice had been followed with respect to the last valuation, which had not been signed by the testator. But in his opinion it was not necessary that every partner should be present and actually participant in the work of making the valuation. He was of opinion that a valuation made in accordance with the custom, by the partners present in the partnership premises at the prescribed time would be a good and binding valuation for all purposes of the articles, if it was afterwards accepted or assented to by the absent partner or partners. To make a binding account or valuation it was not necessary that the book containing it should have been actually signed by every partner. The account was conclusive and binding from the time when it was finally settled and agreed to, or in the language of the articles "fully finished" between the partners. When that had been done the account ought to be signed, and the signature of any partner who had not signed might be required by the other partners. It was the rule of the Court to consider that as done which ought to have been done, and if it was found that the account, at the making of which the deceased partner was not present, was afterwards accepted and agreed to by him, then the account must be held to have been in equity signed by him. His lordship then decided that the account and valuation were in conformity with the partnership articles and the agreement between the partners,

and that the account, rest, and valuation were as binding on the deceased partner as if they had been duly signed by him. That conclusion was derived from the partnership articles, the uniform understanding and practice of the partnership, and the good faith and honour of the dealing between the partners.

In *Ex parte Barber* (5 Ch. 687), partnership articles provided that annual balance sheets should be made out, and also an account and balance sheet should be made out on the 31st of December next after the death of a partner, and that his executors should be paid his share by instalments on the footing of such balance sheet. The uniform practice of the firm in making out their balance sheets was to treat the loss occasioned by any asset turning out bad as attributable to the year in which it was discovered to be bad. In 1864 a partner died; and, after the next balance sheet had been made out, various assets which had been treated as good were ascertained to be irrecoverable owing to the failure of debtors of the firm after the 31st of December, 1864, and other depreciations. It was held that the executors were entitled to receive the value of the deceased partner's share as appearing by the balance sheet, without any deduction for the losses subsequently ascertained.

In *Hunter* v. *Dowling* ([1893] 1 Ch. 391; and on appeal, 3 Ch. 212), partnership articles provided for annual accounts and balance sheets to be taken on the 31st of March in each year, or as near thereto as conveniently might be, and to be signed by the partners; and also provided that the share of a partner dying should be taken by the surviving partners at the amount appearing to his credit in the last annual balance sheet which should have been signed previously to his death. A partner died on the 10th of April, 1891, at which time no account had been taken for the year ending on the 31st of March, 1891. The balance sheets had usually been signed about the beginning of May. It was held by Romer, J., and by the Court of Appeal, that the amount of the deceased partner's share must be determined according to an account to be taken for the year ending on the 31st of March, 1891, and not according to the balance sheet for the year before, which was the last annual balance sheet actually signed by the partners.

In this case part of the assets of the firm consisted of leasehold premises, including premises at St. George's-in-the-East, demised to the firm in 1889. These particular leaseholds had not been valued in the accounts of March, 1890, but afterwards, in the same year, notice to treat in respect of them was given by a railway company, and they were, after the deceased partner's death, sold to the railway company for a large sum. Romer, J., said:—"It is clear that on the 31st

of March, 1891, the leaseholds in question were, at any rate, to some extent valuable, and they ought therefore to be valued as an asset, and not the less, because in the accounts of the 31st of March, 1890, when the leaseholds were not, or at any rate were not considered, valuable, they were not valued. There is no practice of the partnership that leaseholds should not be valued; on the contrary, some leaseholds of the firm were valued in the other accounts. This particular lease was only granted on the 24th of June, 1889, and the fact that it was not valued on one occasion cannot establish a principle that under no circumstances was it to be valued, if it became valuable. I shall make a further declaration, that in taking the accounts the leaseholds in question ought to be valued as of their value on the 31st of March, 1891."

This section makes no change in the law, and the question may still arise as to what course of dealing will raise the inference that a variation of the articles has been consented to. Such a question arises where the observance of certain provisions in the articles may have been relaxed, and a partner afterwards calls for strict compliance with the articles. It was said by the Master of the Rolls in *Coventry* v. *Barclay*, that where articles of partnership are clear and distinct, the partners are bound by them; when they are ambiguous or silent, the course of dealing between the partners regulates the mode by which the Court must deal with them; and in some cases the Court has gone so far as to allow the constant usage of partners to supersede the articles themselves; and the Lord Chancellor in the same case held that a usage continued for thirty years inconsistent with the articles would be sufficient to establish a variation. In the case of *Jackson* v. *Sedgwick* (1 Sw. 460), the Lord Chancellor said that articles containing special clauses for taking the accounts, which the parties had never acted upon, ought to be read in equity as if those articles were expunged.

In *Const* v. *Harris* (T. & R. 496), in which case certain partnership questions arose between the proprietors of the Covent Garden Opera House, Lord Eldon, L.C., said (p. 523):—

"In ordinary partnerships nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet, if there be a long course of dealing, or a course of dealing not long but still so long as to demonstrate, that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept a bill of exchange in his own name, without the concurrence of all the others, yet,

if they afterwards slide into a habit of permitting one of them to draw or accept bills, without the concurrence of the others, this Court will hold that they have varied the terms of the original agreement in that respect; so in this case, if it can be shown that in the administration of this property (the Opera House) the proprietors after 1812 pursued a different course from that provided for by the deed of March, 1812, they must be taken to have altered the agreement, and to have substituted the terms to which, in their conduct, they have adhered instead of the terms contained in the original agreement; and, with respect to the plaintiff, there can be no doubt that if, after the deed of 1812 was executed, his testatrix gave into a course of administration of the property, different from the course provided for by the deed, if her acts or the acts of others with her consent, afforded such evidence of departure from the terms of the written agreement as to amount to the substitution of a new agreement, though evidenced only by parol, instead of the written agreement, he claiming under her must be bound by her acts, and cannot be at liberty to revert back from those acts, establishing a new agreement, to call into operation again the old agreement, and to insist that the non-execution of the old agreement is, in such circumstances, a breach of trust."

In the same case it was contended that a practice, not provided for in the articles, but which had been long observed, of rendering accounts daily might be insisted on by one of the parties. Lord Eldon said (p. 518) that with respect to sending the daily accounts, he did not find it stipulated for in any of the instruments; that it was a practice which seemed to have prevailed for a great length of time; but that it was not provided for by covenant; that where there were no stipulations, no covenants, with respect to a particular practice, it followed of necessity that the majority of partners must decide whether that practice should be continued or discontinued; and that if the minority had a proper opportunity given them of considering the matter, their negative would be of no avail.

With regard to an introduced partner taking the articles with any variations at the time of his entering the firm, Lord Eldon said, *Const* v. *Harris* (at p. 521), that a party taking the interest of a partner in a concern, could not be let loose from the obligations that partner was under to the concern; and that, if he chose to ask no questions, he must take at his own risk with respect to those obligations.

From those cases it appears that provisions in articles of partnership may either be abandoned *in toto*, or may be waived *pro hac vice* only; also that a course of dealing inconsistent with the written agreement need not necessarily have been of long continuance to demonstrate an agreement by the partners

to supersede the articles; but that if there has been only an occasional waiver or a waiver of short continuance only, such as the omission to value leaseholds in the case of *Hunter* v. *Dowling*, the Court will not infer that it was intended to abandon the written provisions. If a course of dealing in matters not provided for by the articles has obtained between the partners, so as, in effect, to introduce provisions of greater strictness than those contained in the articles, it appears that one partner cannot as a right insist upon the continuance of such added terms, but it is a question for the firm to determine whether the stricter method shall be continued or discontinued.

Partnership property.

20.—(1.) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2.) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership, shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3.) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land

or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

As to the goodwill of a medical partnership, which is usually the most important, if not the only partnership property, and as to offices and appointments held by partners, see note to sect. 39 of the Act, *post*, p. 94.

Property bought with partnership money.

21. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Conversion into personal estate of land held as partnership property.

22. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

Procedure against partnership property for a partner's separate judgment debt.

23.—(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2.) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits

with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3.) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4.) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5.) This section shall not apply to Scotland.

This section made a change in the law, which, before the passing of the Act, was in a most unsatisfactory state, with regard to execution against partnership property for the separate debt of a partner.

Where a partner suffers his share of the partnership property to be charged under this Act for his separate debt, the partnership may be dissolved at the option of the other partners or partner (sect. 33).

Rules as to interests and duties of partners subject to special agreement.

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

(1.) All the partners are entitled to share equally in the capital and profits of the business, and

must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(*a.*) In the ordinary and proper conduct of the business of the firm ; or,

(*b.*) In or about anything necessarily done for the preservation of the business or property of the firm.

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5.) Every partner may take part in the management of the partnership business.

(6.) No partner shall be entitled to remuneration for acting in the partnership business.

(7.) No person may be introduced as a partner without the consent of all existing partners.

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

It is not uncommon to stipulate in partnership articles between medical practitioners that in certain events a partner, or the representatives of a partner, shall be at liberty to sell his share in the partnership to a properly qualified practitioner, who shall be admitted to partnership by the remaining partner, with rights and subject to obligations similar to those of the outgoing partner. The consent to the introduction of a new partner may be thus given prospectively, and if such an agreement is entered into it is a valid contract and one which the Court must perform (see *Lovegrove* v. *Nelson*, 1 Mylne & Keen, pp. 1, 20). The Court, however, cannot enforce such an agreement specifically against one who refuses to abide by his contract, as it has no machinery for compelling unwilling persons to enter into or continue in partnership. The remedy in such a case is an action for damages against the party who refuses to admit the new partner.

In the following case a surviving partner refused to exercise an option reserved by the articles to a survivor of taking his deceased partner's share at a valuation, and also refused to admit a purchaser into partnership as provided by the articles. The damages assessed appear to have been equal to what the survivor would have paid had he exercised the option.

Featherstonhaugh v. *Turner* (1858), 25 Beavan, 382.

By articles of agreement, dated January 1st, 1856, which recited that the defendant, a surgeon, had agreed to sell to M., his assistant, one-fifth of his business, for two years' purchase, computed at 800*l.* for the one-fifth, the defendant and M. agreed to become and continue partners from the date thereof for such term and time as they should mutually agree so to continue partners. The defendant was to receive four-fifths of the profits, and M. the remaining one-fifth.

The articles contained provisions (sufficiently stated in the judgment) that in the event of the death of one of the partners, or his long absence, the surviving or continuing partner should have the option of taking his late partner's share at two years' purchase, or, should he decline the pre-emption, such share might be sold to a purchaser.

M. died at the end of fifteen months; the defendant declined to purchase M.'s share and refused to admit any purchaser of M.'s share into the business.

The administratrix of M. thereupon filed a bill praying that the defendant might be restrained "from excluding from the business any competent and qualified surgeon who might be willing to purchase the share and interest of M. in the co-partnership," or that the defendant might be ordered to pay such compensation as the Court might direct, and that the partnership account might be taken.

The Master of the Rolls, at the end of the argument, suggested that it should be left to him to fix a proper sum to be paid by the surviving partner, but this was declined by the defendant.

Sir J. Romilly, M.R., said in his judgment:—"I will refer again to the partnership articles in order to determine their meaning. The first clause (omitting the parenthetical part which applies only to the partner being absent or incapacitated) will read thus:—If, during the co-partnership, either of the said parties shall die, it shall be lawful for the surviving or continuing partner (and he shall have the right of pre-emption accordingly) to purchase the share and interest of such dying partner of and in the co-partnership business or practice, at and after the rate of two years' purchase for the same, to be calculated upon the gross receipts. It then provides how that shall be done, but there is nothing binding the surviving and continuing partner to adopt that course. Then the articles provide that if the surviving partner shall decline to purchase the share and interest of the partner dying, it shall be sold to any other person willing to purchase the same.

"Now, undoubtedly, there is a very considerable degree of difficulty in construing this clause, which arises from the circumstance that the principal part of the profit of the business depends on the professional skill and knowledge of the person who conducts it; the person who buys it may know nothing; and it is impossible to compel two persons to carry on business together; but at the same time, if persons enter into a contract of this description, I must, if possible, give not only a meaning, but also effect to it. . . . .

"But Mr. Turner declines to purchase, and therefore the second part of the clause comes into operation, which is—'Or in case such surviving or continuing partner shall decline to purchase the share and interest of and in the said co-partnership business and effects of the partner so dying or retiring therefrom, then, and in such case, such share and interest of and in the said co-partnership business shall or may be sold and disposed of to any other person who may be willing or desirous to purchase the same.'

"However considerable the difficulty may be, I must carry those words into effect. In the first place, I must endeavour to sell the share of the partner dying. It is very possible and highly probable, that unless Mr. Turner, the surviving partner, will give great facilities for that purpose, it will be extremely difficult to effect a sale; and if no facilities should be given for that purpose, and the attempt to sell prove abortive, the question will then arise, whether, according to the true spirit of these articles, it will not be the duty of the Court to ascertain what the interest of the deceased partner in this concern was at the time of his decease, to fix a price upon it and to charge the continuing and surviving partner with that price. This is quite distinct from the question of pre-emption, because if the surviving partner bought the share of the business, he was to buy it at two years' purchase on the gross receipts of the business for the previous year. That is a perfectly distinct thing from ascertaining what the value of the interest of the deceased partner was.

"The question which created the principal difficulty to me was this: whether the interest of the deceased partner did not continue in the profits made by the firm subsequently to his death, and whether, in that event, he would not be entitled to a share of them down to the present time, when the business was sold. If so, the share of the profits would have to be calculated in this manner:—The Court would have to ascertain the amount of the net profits made by the concern (after making a liberal allowance and compensation to the surviving partner, Mr. Turner, for his knowledge, time, and trouble in carrying on the business), and would then have to divide it into fifths, giving one-fifth to the estate of the deceased partner. Many of the words of the clause I have read certainly point in that direction, because, what interest is there of the surviving partner to sell if he has no capital in the concern, and no property in the utensils, goods, stock-in-trade, fixtures, or implements with which the business is carried on, and if he has brought no connexion to the business? If he has none of these it is difficult to say what interest he has in the concern. The other part of the clause, which I omitted, expressly points to the fact that absence and incapacity shall be treated as a dissolution of the partnership, and yet the interest of the surviving or continuing partner is to be sold. I cannot, therefore, as I was at first inclined or disposed to do, treat this as a continuing partnership, except so far as there were any goods, stock, fixtures, implements, or things belonging to the deceased partner, or any connexion in the partnership derived from persons brought to it through the deceased, as to which I shall direct an inquiry. What I propose to do will be this:—I shall refer it to chambers to

sell the share of M. in the co-partnership business, and to settle and consider the conditions of sale necessary and fit for that purpose. I shall then see what course the defendant takes in this matter. My present opinion is, that if the defendant, which he may do by means of obstruction, shall prevent every one purchasing and coming into a partnership, which will merely lead them into dissension and trouble, I shall, in that event, ascertain what was the interest and share of the deceased partner in the partnership business. I propose to insert into the decree that in case it shall appear that such interest cannot be sold, then let there be an inquiry, what was the share and interest of the deceased partner M. in the business at his death. [It was admitted that no stock, fixtures, &c., belonged to M.] I shall then direct an inquiry whether any of the customers were brought into the business through M., and what part of profits made subsequent to his death are attributable to them."

[The defendant's counsel said:—"If the Court should express an opinion as to what course the defendant ought to take, he would be extremely anxious not to act inconsistently with it. But if not, he will be placed in a position of great difficulty; if a gentleman came and told him he was about to purchase, the defendant would say, 'My view is that you are purchasing a partnership which I shall have the power of dissolving.'"]

The Master of the Rolls said:—"That is not my view of the case. This partnership having been entered into between Mr. Turner and M. in consideration of 800*l.* paid by M., I think it was not in the power of Mr. Turner to dissolve it the next day and keep the 800*l.* in his pocket. This Court would have interfered, and though he might have put an end to the partnership, he would have been compelled to repay the consideration. The contract entered into was this: they stipulated that, in case of M.'s death, his representative, or in the case of his retirement, he himself, or in case of incapacity, the persons who had the care of him during that time, should have the power of putting a person precisely in the position that he was in. It was not a partnership to be dissolved merely at will, and although I admit there is considerable difficulty in carrying it into effect, because one cannot tell what Mr. Turner will do, still it is his duty to give what facilities he can for the sale of M.'s share of the business, so as to put the purchaser in the same position as M. was in. If Mr. Turner should not do that, then I am of opinion that it will be incumbent upon me to ascertain the value of the share and interest, and to fix the defendant with the amount. And if any customers who were introduced to the concern by M. have, since his death, continued to employ Mr. Turner,

whereby he has derived a profit, it must be ascertained how much of the profits of the concern have been derived from that source, after making a due and liberal allowance to Mr. Turner for his time and knowledge in realizing those profits, by giving advice and furnishing medicines. I admit I foresee great difficulty in working out this matter, but I have no option, and must make a decree to the effect I have stated."

The account was taken by allowing M.'s estate one-fifth of two years' net profits at the same rate as the net profits for the fifteen months during which he was a partner.

Expulsion of partner.

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Powers of expulsion being of a penal nature are always construed strictly, and must be exercised with that extreme good faith which ought to abound between partners, or the expulsion will be held void, as the Court takes a very strict view of the rights of the parties expelled as against the parties exercising the power of expulsion. If, however, the power is exercised *bonâ fide* the Court will enforce the expulsion.

In *Blissett* v. *Daniel* (1853) (10 Hare, 493), articles of partnership provided that the holders of two-thirds or more of the partnership shares for the time being might expel any partner, by giving him notice thereof in a form thereby prescribed: and if they did expel him the other partners should have a right to buy up his shares in a particular way by valuation.

It was held that the power of expulsion of a partner might be exercised by two-thirds of the partners without any previous meeting of the partners in committee upon the question, and without any cause being assigned for such expulsion, but that the power must be exercised with good faith, and not against the truth and honour of the contract. That such a power must be understood to exist, not for the benefit of any particular parties holding two-thirds or more of the shares, but for the benefit of the whole society or partnership.

That it could not be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value.

That the power was not properly exercised at the exclusive instance of one partner, and, in consequence of his repre-

sentation to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case, and of removing any misunderstanding on the part of his co-partners.

Jessel, M.R., in commenting on this case in *Russell* v. *Russell* (14 Ch. D. 471), says: "All the vice-chancellor decided was this, that in a case of this kind they had no right to expel merely for the purpose of buying up the shares, and that it was not a fair *bonâ fide* exercise of the power. He decided that the partners were not to meet together and say, 'We should like to have so-and-so's shares, and, therefore we will expel him.' That was a consequence of the expulsion, but it was not to be the motive of the expulsion—it was not a *bonâ fide* exercise of the power. Then they alleged that they had grounds of dissatisfaction with the partner, but his reply in effect was, 'If you have any grounds of dissatisfaction you ought to have given me notice to see if I had anything to answer.'"

In *Wood* v. *Wood* (18 L. R. 9 Exch. 195) (a case of a committee having expelled a member under a rule allowing expulsion "if the committee shall at any time deem the conduct of any member suspicious") the maxim *Audi alteram partem* was said by the Lord Chief Baron not to be confined to the conduct of strictly legal tribunals, but to be applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

See also *Steuart* v. *Gladstone* (1878) (10 C. D. 627), where it was held that a partner must, before he can be excluded, have a full opportunity of explaining his conduct; but it being held in that case that the excluded partner had had such opportunity, the exercise of the power of expulsion was upheld.

The section speaks of expulsion by a majority, and this must be distinguished from such a case as *Russell* v. *Russell* (1880) (14 C. D. 471), where partnership articles provided that if at any time during the partnership the business thereof should not be conducted or managed, or the results thereof should not be to the satisfaction of the senior partner, he might determine the partnership by giving the other partners three months' notice in writing of his desire so to determine it. Any differences in relation to the partnership were to be referred to arbitration.

Jessel, M.R., held that the cases of *Blissett* v. *Daniel* and *Wood* v. *Wood* had no application in the case of a single partner and that here the single partner might give the notice capriciously at his own will and pleasure. He need

not act as a tribunal or state the grounds on which he decided; it was open to him to say "I am not satisfied," and there was an end of it.

Retirement from partnership at will.

26.—(1.) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

(2.) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

Where partnership for term is continued over, continuance on old terms presumed.

27.—(1.) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2.) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

It has been expressly decided in the Court of Appeal in *Clark* v. *Leach* (1863) (1 D. J. & S. 409), that a power of expulsion is inapplicable to a partnership at will, and cannot therefore be exercised after the expiration of the original term.

When the members of a mercantile firm continue to trade as partners after the expiry of their original contract without making any new agreement, that contract is held in law to be prolonged or renewed by tacit consent. The rule obtains in the case of many contracts besides that of partnership; and its legal effect is, that all the stipulations and conditions of the original contract remain in force in so far as these are not

inconsistent with any implied term of the renewed contract. The main distinction between the old contract and the new in such a case consists in this,—that the latter is a contract determinable at will. It is an implied term of such a contract that each partner has the right instantly to dissolve the partnership whenever he thinks proper. The right must of course be exercised *in bonâ fide*, and not for the purpose of deriving an undue advantage from the state of the firm's engagements. (Lord Watson in *Neilson* v. *Mossend Iron Co.* (1886), 11 A. C. 298.) The question has often come before the Courts where articles of partnership contain clauses giving an option to purchase, or providing the terms of purchase of, a deceased or retiring partner's share, and it is desired to exercise the option or to enforce a purchase on the terms provided, when business has been carried on, after the expiration of the term created by the articles of partnership, without any fresh arrangement being made. The authorities are, perhaps, not entirely consistent, but it seems that the provisions made by the original contract for the winding up of the partnership affairs on the termination of the original partnership remain in force, unless the special character of the stipulations is such that they cannot reasonably be applied to a contract determinable at will. (Stirling, J., in *Daw* v. *Herring*, [1892] 1 Ch. at p. 288.)

The case of *Yates* v. *Finn* (13 C. D. 839) cannot, as there reported, be relied on as an authority. There were certain material provisions in the articles which do not appear in the report. (See remarks of Stirling, J., in his judgment in *Daw* v. *Herring*, [1892] 1 Ch. at pp. 289, 290.)

In the case of *Cox* v. *Willoughby* (1880) (13 C. D. 868), there was a provision in partnership articles that, on the decease of Cox before the expiration of the partnership term, the surviving partner should pay a stipulated sum as purchase-money for Cox's interest in the goodwill of the business. After the expiration of the partnership term the business was continued by Cox and the defendant without any fresh articles of partnership being executed, and Cox afterwards died. The action was brought to recover the stipulated sum from the defendant. Fry, J., decided that the provision as to the purchase of the goodwill still applied and held that the stipulated sum must be paid by the defendant.

In *Neilson* v. *Mossend Iron Co.* (1886) (11 A. C. 298), there was a clause in the articles of a partnership to continue for seven years, giving an option to be exercised three months before the termination of the contract of partnership. The firm traded beyond the original term, and the House of Lords held that the option was applicable only to the natural termination of the contract as it was to be declared at a definite

period before the expiry of the term. In *Daw* v. *Herring*, ([1892] 1 Ch. 284), there were articles of partnership containing a clause which provided "that within three months after the determination of the partnership by effluxion of time" an option might be exercised. The business was carried on after the expiration of the original term, and Stirling, J., held that the provisions of the above clause remained in force and were applicable to the partnership at will carried on after the expiration of the term created by the articles.

Duty of partners to render accounts, &c.

28. Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Accountability of partners for private profits.

29.—(1.) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property name or business connection.

(2.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

Duty of partner not to compete with firm.

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

A partner cannot buy from his firm or sell to his firm so as to make a profit for himself unless he discloses fully the real facts; nor can a partner secure for himself a benefit which he ought in honour to secure, if at all, for the benefit of the partnership. For instance, if one partner obtains in his own

name the renewal of a lease of partnership property, a Court of Equity will hold such partner a trustee for the firm of the lease so acquired. (*Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.) The same rule would apply to an appointment renewed.

As regards the use by a partner of information obtained by him in the course of the transaction of partnership business or by reason of his connection with the firm, the principle is that, if he avails himself of it for any purpose which is within the scope of the partnership business or of any competing business, the profits of which belong to the firm, he must account to the firm for any benefits which he may have derived from such information, but there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information for purposes which are wholly without the scope of the firm's business. . . . . Suppose a partner become, in the course of carrying on his business, well acquainted with a particular branch of science or trade, and suppose him to write and publish a book on the subject, could the firm claim the profits thereby obtained? Obviously not, unless, by publishing the book, he in fact competed with the firm in their own line of business. (Lindley, L.J., in *Aas* v. *Benham*, [1891] 2 Ch. at p. 256.)

Rights of assignee of share in partnership.

31.—(1.) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2.) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to

which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

PART IV.—*Dissolution of Partnership and its Consequences.*

Dissolution by expiration or notice.

32. Subject to any agreement between the partners, a partnership is dissolved—

(*a.*) If entered into for a fixed term, by the expiration of that term:

(*b.*) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(*c.*) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution by bankruptcy, death, or charge.

33.—(1.) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2.) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

Under the Bankruptcy Act, 1883, sect. 53: "Where a

bankrupt is in the receipt of a salary or income . . . ., the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary income . . . . or any part thereof, to the trustee . . . ." The question how far this section or similar sections in former Bankruptcy Acts enables the Court to set aside, for the benefit of the creditors of a professional man, any part of his earnings in the exercise of his personal skill and knowledge has at different times come before the Courts, and it has been decided that the income spoken of in the Act must be something of the nature of salary, and that the word cannot be taken to refer to income derived solely from personal skill. Income, however, which is derived to a great extent, but not solely, from the exercise of personal skill, may be taken. The principle that the personal earnings of an undischarged bankrupt do not pass to his trustee has only been applied to cases where the personal earnings are personal earnings strictly so called. It is not sufficient that the business is of a character which involves a large amount of personal skill and attention by the bankrupt. It was long ago decided (*Elliott* v. *Clayton*, 16 Q. B. 581) that the proceeds of the business of a surgeon apothecary, which were the result to a great extent of his personal labour, passed to his assignees in bankruptcy, for in his character of an apothecary he sold medicines. It was held on the other hand (*Ex parte Benwell*, 14 Q. B. D. 306) that the income which a well-known "bone-setter," who had been adjudicated a bankrupt, earned by the exercise of his personal skill could not be set aside for the benefit of his creditors, as it arose from fees paid in respect of the exercise of skill in dealing with broken or wounded bones, and not in respect of the exercise of skill in making materials more valuable and then selling them. It should be remembered that the capacity of earning money is not property, and does not vest in the trustee so as to make the bankrupt a slave; as was pointed out in *Re Shine* ([1892] 1 Q. B. 522), the Court can neither restrain a bankrupt from entering into a valid agreement about his salary, nor compel him to earn his salary, nor prevent him from forfeiting it. He is a free man in respect of all these things.

Where the personal earnings of an undischarged bankrupt are received by him under a contract periodically, by way of salary or income, and are more than sufficient for his reasonable maintenance, there is jurisdiction to direct a part of such earnings to be set aside for the benefit of his creditors. (*Ex parte Collins*, [1894] 1 Q. B. 425.) In that case a partner in a firm of dental surgeons had mortgaged his share of the profits of the partnership and the mortgagee had obtained the appointment of a receiver. The mortgagor became bankrupt, but continued to carry on his practice much as before,

and his share of profits was, after the bankruptcy, paid to the mortgagee's receiver as before. The trustee in bankruptcy claimed these profits, and the claim was resisted on the ground that they were the personal earnings of the bankrupt, obtained by the exercise of his personal skill. Vaughan Williams, J., noticing that in the partnership deed mention was made of stock-in-trade, workshops, and assistants, held that the earnings were not personal earnings within the meaning of the rule, and held that the trustee was entitled to them. The judge further added that the fact that moneys might be properly described as personal earnings did not necessarily prevent their falling within the 53rd section. They might cease to have their original character of personal earnings and come to be property in the true sense of the word when they were the net share to which the bankrupt was entitled of the partnership earnings under his arrangement with his partner. He said that if you happen to receive your personal earnings under a contract so that they are not daily earnings but take the shape of a periodical salary, he conceived that, after providing fairly and liberally for the support of the bankrupt, the balance of salary, even though a salary for personal exertions, might be made the subject of an order under the section.

On the death of a partner the surviving partners or partner are the proper persons to get in and pay the partnership debts; and the survivor can sue debtors of the firm without making the representatives of the deceased parties to the action (*Haig* v. *Gray*, 3 De G. & Sm. 741), and can give a sufficient discharge for the amounts due to the firm. (*Brasier* v. *Hudson*, 9 Sim. 1; *Philips* v. *Philips*, 3 Ha. 281).

On the bankruptcy of a partner, the solvent partners have a right to collect the debts of the partnership, and interference by the trustees or assignees of the bankrupt partner will be restrained. (*Allen* v. *Kilbre*, 4 Madd. 464; *Freeland* v. *Stansfeld*, 2 Sm. & Giff. 479, 487; see also *Collins* v. *Barker*, [1893] 1 Ch. 578.)

As to charging a partner's share in the partnership property for his separate debt, see sect. 23.

Dissolution by illegality of partnership.

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

A partnership between persons resident and trading in different countries is dissolved if war breaks out between the

countries whatever be the nationality of the partners; but a partnership between a British subject and a foreigner who both reside in this country is not affected by war between this country and the foreigner's country of origin.

The Apothecaries Act, 1815, (sect. 14) prohibits the practising as an apothecary in any part of England or Wales by any person not being duly qualified. The Act does not define the nature of an apothecary's employment, but Cotton, L.J., says in his judgment in *Davies* v. *Makuna* (29 C. D. 596 at p. 606), that dispensing, mixing medicines, giving medical advice, and attending the sick as medical adviser, must be considered acting as an apothecary. In that case an agreement by a duly qualified practitioner to serve an unqualified person, as assistant in his profession of a medical practitioner, was held illegal and not enforceable; and in the same way an agreement between qualified and unqualified persons to act as medical practitioners in partnership would be illegal.

A qualified practitioner cannot recover charges for medical aid and advice which has been rendered, and the cost of medicine which has been supplied, by an unqualified partner or assistant without consulting the qualified practitioner. (*Howarth* v. *Bearley*, 19 Q. B. D. 303.)

The Medical Act, 1858, the preamble of which states that it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners, does not repeal the Apothecaries Act. The Act of 1858 provides for the keeping and publishing of the "Medical Register" and none but registered persons can recover charges (sect. 32). If the name of a partner should be struck off the register, as provided by sect. 29, for misconduct or on being convicted of felony or misdemeanor, this would not, it seems, prevent his practising so as to make the partnership an illegal one, but would prevent such partner and the firm from recovering charges for work done by the partner so struck off. Such a circumstance would no doubt be held a ground for dissolution by the Court under sect. 35 of the Act (sub-sects. (b) (c) or (f)).

Dissolution by the Court.

35. On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:

(*a.*) When a partner is found lunatic by inquisition, or in Scotland by cognition, or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of

which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner:

(*b.*) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract:

(*c.*) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business:

(*d.*) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him:

(*e.*) When the business of the partnership can only be carried on at a loss:

(*f.*) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

By the County Courts Act, 1888 (s. 67), jurisdiction is given to the County Court to exercise all the powers and authority of the High Court in actions or matters (sub-s. 7) for the dissolution or winding up of any partnership in which the whole property, stock, and credits of such partnership shall not exceed in amount or value the sum of 500*l.*

It should be noted that lunacy does not of itself dissolve a partnership. The continuing partner may be willing to wait and see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution. (*Jones* v. *Noy*, 2 M. & K. 125.) That was a case of partnership between solicitors, in which the incapacitated partner had contracted to be always actively engaged in the partnership business. The continuing partner being considered to have carried on the profession in the hope of the other's recovery, the representatives of the incapacitated partner were held entitled to the profits of his share.

Where the lunatic partner has not been so found by inquisition, the Court requires evidence as to the permanence of the incapacity before decreeing a dissolution.

Where a lunatic partner has no active duties to perform, a dissolution would probably not be decreed at the instance of any other partner.

In an anonymous case reported in 2 K. & J. 441, X., a partner in a firm of shipbrokers, being temporarily of unsound mind, had attempted to commit suicide, a circumstance which, Lord Hatherley (then Page-Wood, V.-C.) said, would, if unexplained, be doubtless a very disastrous thing to any house of business. The other partner filed a bill for dissolution, and moved for an interim injunction to restrain X. from interfering in the partnership affairs. The Vice-Chancellor refused to grant the injunction without evidence to show that X. was, at the time of the motion, incompetent to conduct the business of the partnership.

In a case of *J.* v. *S.* ([1894] 3 Ch. 72), the defendant in a pending action for dissolution of a partnership between brokers was temporarily of unsound mind, and had been placed under restraint, though the Court was of opinion that he was not permanently insane; he eluded his attendant and went to the business premises where he interfered with the business by drawing cheques, and in other ways. Stirling, J., held that the Court had jurisdiction to interfere so as to prevent the defendant from injuring the partnership business, and granted an injunction restraining him from coming on the partnership premises or interfering with the partnership business.

It was stated in argument in the above anonymous case, (2 K. & J. 441) that in the case of a partnership between accouchers, it had been decided that the immoral conduct of one partner was alone a ground for dissolution. The Vice-Chancellor remarked as to this, "In such a case immoral

conduct would materially affect the particular business of the firm."

If a dissolution was granted on that ground it would have been, under the old practice, apparently rather on the ground that such conduct would have destroyed the mutual confidence between the partners than that it would have shaken the public credit of the partnership. Under the present Act, where the Court is specially empowered (sub-sect. (c)) to regard the prejudicial effect of the guilty party's conduct, regard being had to the nature of the business, a dissolution would in all probability be readily granted in the case of such immoral conduct.

In *Essell* v. *Hayward* (30 Beav. 158; 8 W. R. 593), the Master of the Rolls held that a partner, a solicitor, had a right to dissolve at once the partnership with one who had been guilty of embezzlement.

If there is ill-feeling between partners such as to destroy all mutual confidence, or an irreparable breach so that the partnership cannot go on to the advantage of either party, a dissolution will be granted. (*Watney* v. *Wells*, 30 Beav. 56; *Leary* v. *Shout*, 33 Beav. 582.) On the other hand, in *Wray* v. *Hutchinson* (2 M. & K. 235), a case of a partnership between surgeons, where the plaintiff asked for a dissolution on the ground of misconduct of the defendant in the partnership concerns, and afterwards amended his bill making many slanderous and malicious accusations against the defendant, the Master of the Rolls said that although the partnership would be dissolved if the defendant had substantially failed in the performance of his part of the agreement, yet it was not the office of the Court of Equity to enter into the consideration of mere partnership squabbles.

It is not for every trivial departure from duty or violation of the articles of partnership, or for every trifling fault or misconduct that the Court of Equity will interfere and decree a dissolution. (*Anderson* v. *Anderson*, 25 Beav. 190.) In that case the articles of partnership provided that if either partner should give a guarantee in the firm's name without consent, the other might dissolve on giving notice. One partner, in the course of eight years, gave a guarantee for 52*l*., and the other gave notice to dissolve; but it was held that this alone was not in equity a sufficient ground for dissolution.

Where the dissolution of a partnership is decreed by the Court, on any ground other than a breach of duty under the articles, or of good faith, the dissolution will be from the date of the judgment. (*Lyon* v. *Tweddell*, 17 C. D. 529.) That was a case of dissolution on account of incompatibility of temper, and followed *Besch* v. *Frolich* (1 Phillips, 172), where the

ground was the lunacy of a partner. It may be, however, from an earlier date, if there has been any actual misconduct or breach of the partnership articles, as in *Essell* v. *Hayward* (8 W. R. 593), a case where a member of a firm of solicitors had been guilty of embezzlement and breach of trust.

Rights of persons dealing with firm against apparent members of firm.

36.—(1.) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2.) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3.) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

Right of partners to notify dissolution.

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Continuing authority of partners for purposes of winding up.

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt, but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

Rights of partners as to application of partnership property.

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

On a dissolution of partnership medical practitioners cannot insist on having the goodwill and connexion of the late partnership realized (see p. 111); but the value of appointments retained by one partner must be accounted for by him. (*Smith* v. *Mules*, 9 Hare, 556; *conf. Ambler* v. *Bolton*, 14 Eq. 427.)

Apportionment of premium where partnership prematurely dissolved.

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(*a.*) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or

(*b.*) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

With regard to the amount of premium ordered to be returned the rule has been that the Court will look at all the circumstances and do what is equitable between the parties. The section mentions only in this connexion "having regard to the terms of the partnership contract and the length of time during which the partnership has continued," but probably this will not be held to exclude other considerations and alter the principles on which the Court have proceeded, especially as the Act has been held to be mainly a codification of the law of partnership. (See *Belfield* v. *Bourne*, [1894] 1 Ch. 521.)

Where the partnership dissolved was for a term of years the general rule has been to attribute an aliquot part of the premium to each year, and to order the partner receiving the premium to retain so many parts as correspond with the number of years during which the partnership has continued and to return or to forego the remainder; as Wickens, V.C., said in *Wilson* v. *Johnstone* (16 Equity 606) it has always been treated as a mere arithmetical question.

Death (and probably the same would apply to lunacy) is a contingency that must be supposed to be contemplated by all, but where a medical man knowing himself to be in precarious health arranged with another to take him as a partner for a

term of years and give a long introduction, and died in a few months, his representative was not allowed to retain or sue for the whole of the premium. (*Mackenna* v. *Parkes*, 36 L. J. Ch. 366; *infra*, p. 195; but this case turns rather on introduction than on partnership.) Bankruptcy also is an event that must be contemplated. In *Akhurst* v. *Jackson* (1 Swanston, 85), no return of premium was allowed where the partner receiving it, who was at the time embarrassed to the knowledge of those paying it, became bankrupt within a few months. In *Freeland* v. *Stansfeld* (*infra*), however, a return of a proportion was ordered, but apparently in that case the partner paying did not know of the receiving partner's embarrassed circumstances.

Any direction as to return of a part of the premium paid ought to be asked for at the trial of the action. After judgment for dissolution such relief will not be granted except in special circumstances. (*Edmonds* v. *Robinson*, 29 C. D. 170.)

The section speaks of dissolution "otherwise than by the death of a partner," but there is no reason to believe that a case like *Mackenna* v. *Parkes* would now be decided differently.

If the partner who paid the premium was induced by fraudulent misrepresentations, made by or imputable to the other partner, to enter the partnership, he has a choice of two remedies. He may either disaffirm the contract altogether, and take advantage of the next section of this Act; or he may affirm the contract and sue the partner who made the misrepresentation for damages. If the misrepresentations made were not fraudulent, the partner who paid the premium is still entitled to rescission and repayment; and he has the rights given by the next following section (41).

In *Freeland* v. *Stansfeld* (2 Sm. & Giff. 479; 23 L. J. (N. S.) Chan. 923), L. and the plaintiff, surgeons, apothecaries, and men midwives, executed articles of partnership, agreeing to become partners for seven years from the 1st of January, 1850. Each had been practising separately at Chichester, but L.'s practice was the larger. The plaintiff paid to L. a premium of 900*l.*, and he was to take one-third of the profits. In a year and a half L. became bankrupt. The plaintiff filed a bill against the assignees of L. for winding up the affairs of the partnership, and claimed to be allowed a proportionate part of the 900*l.*, and that the sum allowed might be paid out of the partnership assets.

It was contended for the defendants that the plaintiff was not entitled to any return of the premium as he had the opportunity of being introduced to the patients of L. and the means of forming a valuable connexion; also, secondly, that

if he was entitled to anything it ought to be proved as a debt in the bankruptcy.

Stuart, V.-C., said, in his judgment: "The deed recites that the sum of 900*l.* was agreed to be paid, not as a premium for an introduction, but in consideration of L. and the plaintiff entering into and executing the articles of partnership; and that in pursuance and performance of the agreement the plaintiff had paid into the hands of L. the sum of £900. According to this recital, the consideration for the payment of the sum of 900*l.* was the benefit to be derived by the plaintiff from the stipulations entered into by L., and not, as was contended at the bar, the mere introduction of the plaintiff to L.'s professional connections. The profits of the partnership were to be divided in certain proportions during the term of seven years for which the partnership was to continue. The partnership had not lasted quite a year and a half when L., who had received the 900*l.*, became bankrupt. The bankruptcy was a dissolution of the partnership; and it put an end to all the stipulations in respect of which the sum of 900*l.* was paid. It was, therefore, not unnatural, the term of the partnership being thus cut short, not by any act of the plaintiff's, but by the default of L., that the plaintiff should claim to have a return of a portion of the premium, which he had paid as the price for that which he could no longer obtain. It is said, however, that the plaintiff has received his full consideration for the sum of 900*l.*; for that, being a young and inexperienced surgeon, by entering into partnership with L., he was introduced to a very valuable connection, and that he retained a great part of that connection. But the obvious answer to that view of the case is that, whatever may be the value of that connection, it was not to obtain a connection of that kind, and in that way, that the 900*l.* was paid by the plaintiff. The consideration for which that sum was paid is clearly expressed in the deed to be other than that contended for on the defendant's behalf, and it has altogether failed. It is a settled principle in a Court of Equity that if, on a contract, there is a failure of the consideration for which a sum of money is paid, the Court will restore to the party who has paid the money a due proportion of it, in respect of that part of the consideration which has failed. L. at the date of the contract was not in flourishing circumstances, his bankruptcy was not occasioned by any sudden loss, but by a progressive course of incurring debt. It did not appear that the plaintiff knew of L.'s embarrassments."

After deciding that the plaintiff's claim attached by way of lien on the assets of the partnership, the Vice-Chancellor continued:—"The question then remains, how much, and what proportion, of the premium, should be returned to the plaintiff?

Treating the whole sum of 900*l.* as extending over the whole period of seven years, I think that the plaintiff is entitled to have paid to him so much of the sum of 900*l.* as would be proportionate to the period of the partnership term which was unexpired at the date of the bankruptcy. There must be a direction to take accounts of the partnership; and a declaration that, in taking such accounts the plaintiff is entitled to be allowed, out of the partnership assets coming to his hands, 700*l.* as a return of a proportionate part of the premium of 900*l.*"

A somewhat similar case is *Bury* v. *Allen* (1 Coll. 589); there the plaintiff, who gave considerable provocation, had been excluded from the partnership, and the defendant's bankruptcy supervened after such exclusion.

In *Astle* v. *Wright* (25 L. J. (N. S.) Ch. 864), the plaintiff and the defendant were medical men, and by deed, dated the 1st January, 1855, the plaintiff, in consideration of an immediate payment of 500*l.* by the defendant, and a covenant to pay a further sum of 500*l.* by instalments, the first to be paid on the 1st of January, 1856, agreed to take the defendant into partnership for a term of fourteen years; the parties to be jointly interested in the profits, and the plaintiff to introduce the defendant to his patients.

Shortly after the execution of the deed differences arose between the partners; the defendant alleged that the plaintiff had failed to introduce him to the plaintiff's patients, and that, during the negotiations for the partnership, he had misrepresented the value of the business. The plaintiff denied this, and complained that the defendant did not attend at the surgery of the partnership, that he refused to make up the medicines which the plaintiff prescribed, and also, that he did not keep the books of the partnership. Finally, after a few months, it was found impossible to continue the partnership, and both parties desired a dissolution. The first instalment of the unpaid premium was not paid when it became due, and the plaintiff filed this bill, asking that the partnership might be dissolved and the accounts taken; and that the defendant might be charged with the 500*l.* which he had covenanted to pay, with interest at 4 per cent. from the commencement of the partnership. The defendant insisted that the 500*l.* ought to be returned, and that he ought to be released from his covenant to pay any further sums, on the ground that the plaintiff had misrepresented the income arising from the business.

It was argued for the plaintiff that the defendant had obtained large advantages by this partnership: he had obtained introductions to the patients of the plaintiff, and a general knowledge of the practice, with the benefit of the

experience of the plaintiff. The plaintiff, therefore, was entitled to have the premium.

Romilly, M.R., in his judgment, said: "Each party desires a dissolution. The fault lies equally on both, and both have occasioned the impossibility of going on together. The plaintiff contends that he is entitled to retain the whole premium of 1,000*l.*; the defendant, however, insists that the whole ought to be returned. On behalf of the plaintiff, reference has been made to cases in which the partnership has been dissolved by bankruptcy, death, or lunacy, where it has been held that no return of a premium was proper. . . . Where a continuance of a partnership has become impossible by reason of incompatibility of temper, or other causes springing from the parties themselves, unaccompanied by any circumstances controlled by the contract, I have considered the premium as having been paid for the whole term of the partnership, and I have apportioned so much of it as belongs to the period that the partnership has actually lasted, and ordered a return of the rest. The premium here was for fourteen years, and one-fourteenth of this is attributable to each year. The interest of the part, either paid or which ought to have been paid, is not to be accounted for, because, in accordance with the contract, it was the property of the party who was to receive the premium. From the evidence, however, it seems very probable that the income of the business was less than the defendant was made to believe; but from what took place it seems that he had sufficient opportunities to enable him to judge and form an estimate of what the amount of the business was before he entered into the engagement. . . . The defendant remained for a considerable time in the plaintiff's house; he had an opportunity of judging of the nature of the business, and he was able to form a very fair conclusion respecting it from the sample before him. There was, therefore, no misconduct by the plaintiff. The defendant knew what he was about when he entered into the partnership. I must, therefore, make the usual decree—to dissolve the partnership and to take the accounts—and I shall declare that the premium of 1,000*l.* must be apportioned over the whole duration of the partnership, and (after allowing interest as if the whole 1,000*l.* had been paid at the commencement of the partnership) so much of the 500*l.* as has been paid, and which is attributable to the time that has elapsed since the formation of the partnership up to the date of the decree, is to be retained by the plaintiff, and the residue must be returned by the plaintiff, with interest at four per cent. from the date of the decree, not from any earlier period, and that is to be accounted for in taking the

partnership accounts. The defendant, also, is not to pay any instalment under his covenant."

In the case of *Attwood* v. *Maude* (3 Ch. Ap. 369), the plaintiff and defendant had entered into partnership as solicitors, for a term of seven years, the plaintiff paying a premium of 800*l*. The defendant, before entering into the partnership, knew that the plaintiff was inexperienced and incompetent in his profession, and gave that reason for requiring a higher price for a share in the business than he would otherwise have demanded. After the expiration of two years, the defendant complained that the plaintiff's incompetence was injurious to the business, and called on him to dissolve the partnership; the plaintiff thereupon filed a bill praying for a dissolution and for a return of a proportionate part of the premium.

Stuart, V.-C., being of opinion that the dissolution had been caused by the plaintiff's own negligence and incompetence, refused to order the return of any part of the money which he had paid; this was reversed by the Court of Appeal, Cairns, L.C., and Selwyn, L.J.; who held that the negligence charged against the plaintiff could not be considered to be the cause that had brought about a dissolution; and that, as to the incompetence, the defendant before he entered into the contract had had ample means of forming a just opinion of the character and capacity of the plaintiff. Their decision might have been otherwise if any act of fraudulent or wilful misconduct had been alleged and proved against the plaintiff, but there was no such charge. On the whole case, they held that the plaintiff was entitled to the return of such a part of the sum of 800*l*. as bore the same proportion to that sum which the unexpired period of the term of seven years bore to the whole term.

In *Wilson* v. *Johnstone* (16 Eq. 606), the plaintiff sued for a return of a proportionate part of a premium he had paid for a partnership for a term of years. The plaintiff had violated the terms of his partnership articles in various ways, and had been guilty of conduct which the judge considered utterly unjustifiable and in a very high degree wrong, though he did not think it fraudulent in any true sense. Under pressure the plaintiff had consented to a premature dissolution, leaving, it was held, the question of the return of premium open to be dealt with on the same principles as if the partnership had been put an end to by a decree for dissolution at the defendant's suit. Wickens, V.-C., said, that where the claimant of a return of premium had been guilty of gross misconduct, necessitating the dissolution of the partnership, his right might be forfeited; but it was difficult to define what misconduct would be gross enough for the purpose, and the Court did not punish

people by fining them for acts of immorality in the abstract, nor even fraud in the abstract.

In this case he did not think that what was done by the plaintiff had compelled a dissolution; and he did not feel sure that the defendant would have obtained a decree for dissolution if he had filed a bill to get one.

The Vice-Chancellor said, in the course of his judgment:—"In general, an incoming partner, who buys with a premium a partnership for a term of years, and does not get the full benefit for which he contracted, because the partnership is prematurely dissolved by the Court, is entitled to have a portion of the premium returned: and the Court, I believe, has always treated it as a mere arithmetical question; but it might well have been treated in another way. The dissolution by the Court is a variation of the contract which the Court imposes on the parties, and the Court, in so imposing it, generally treats the premium as if it were an aggregate of yearly payments made in advance, and returns to the payer the proportion attributable to that part of the term which it cuts off from that contracted for. . . . It seems to me that, on principle, the only case in which the return of premium ought to be refused, where there is a premature dissolution by the Court, or what is tantamount to a premature dissolution by the Court, is either where there has been an actual or implied release of the right to the premium, or an actual or implied release of the right to be a partner, including under the latter head such a deliberate and serious breach of the partnership contract as might be considered equivalent to a repudiation of it altogether. Mere conduct entitling the other partner to a decree for dissolution would not, I think, on principle, be sufficient, although without such conduct the right could not arise. The mere overdrawing, for instance, would not be enough, nor mere carelessness in keeping accounts, nor mere breach of a contract not to give credit, or the like, unless so deliberate, so continued, and so persisted in after warning, as to amount to a determination to treat the partnership articles as a nullity. He who acts so as to show that he treats the articles as a nullity, as regards his own obligations, cannot complain if they are so treated for all purposes; and this consideration might apply even more strongly when the Court can see a deliberate intention on the part of the partner who paid the premium to get back the premium and slip out of the partnership. In such a case, I have no doubt whatever, he would waive his right to the partnership, and, therefore, his right to a return of the premium. I repeat that it seems to me that, on principle, not every breach of contract by the claimant of a return of premium which would entitle the other partner to a dissolution would entitle the

latter, though perfectly innocent, to refuse a return of the premium."

Perhaps some of the *dicta* in this judgment are more favourable to the claimant for a return of premium than is the recent Act, which gives no relief in cases where "the dissolution is chiefly due to the misconduct of the partner who paid the premium."

It has more than once been held not to be necessary that the conduct of the partner who claimed a return of part of the premium should be altogether free from blame, where the dissolution had been occasioned principally by the misconduct of the other partner.

In *Lyon* v. *Tweddell* (44 L. T. 785; 17 C. D. 529; 50 L. J. Ch. 571; 29 W. R. 689, the reports in the "Law Times" and "Weekly Reporter" are fuller and appear to be the more accurate), the plaintiff, a young medical man, was to be admitted to share the practice of the defendant, an elderly man, established in practice at H. The plaintiff was to pay a premium of 600*l.*, and take one-third of the profits for the first four years, at the end of which time he was to pay a further sum of 500*l.* and to become entitled to one-half of the profits. The articles made no provision for a dissolution, the partnership intended being apparently for the joint lives of the partners, but contained a covenant that the plaintiff should not practise at H., in the event of the partnership being determined in consequence of his misconduct.

Disputes had arisen between the partners, and they found it impossible to continue to work together. On the 4th of June, 1879, shortly after the termination of the first four years, the plaintiff commenced the present action for a dissolution of the partnership, and the action was tried on the 29th of June, 1880, before Bacon, V.-C., who came to the conclusion that there had been faults on both sides, and decreed a dissolution as from the date of the writ, and ordered accounts to be taken, with a declaration that no part of the 600*l.* already paid by the plaintiff was to be returned to him, and that no part of the further premium was to be paid to the defendant. His lordship also declined to restrain the plaintiff from continuing to practise at H.

The defendant appealed, and it was argued on his behalf that the dissolution ought to be from the date of the decree, and that the plaintiff ought not to be let off the payment of the second instalment of the premium as he had had an introduction to the patients, and had probably made a very good bargain.

The appeal was heard by Jessel, M. R., and James and Lush, L.JJ., who decided, as to the first point, that the dissolution ought to take place from the date of the judgment,

the dissolution being caused, not by a misfeasance of either party, but by incompatibility of temper; and as to the second point, it was a matter of judicial discretion as to what should be done in regard to ordering a return of the premium, with the exercise of which discretion the Court of Appeal ought not to interfere. Jessel, M. R., said in his judgment: "When you dissolve a partnership, not on account of anything provided for in the articles, but for some ground which exists outside, that is, on some equitable grounds, the judge never has sufficient knowledge of the circumstances, of the persons, of the patients, or the locality, to be enabled to estimate accurately the proportion of premium which ought to be returned. He does his best on the facts before him. Here the judge below has let the defendant keep the 600*l.*, and forego the receipt of the 500*l.* which he would have got if the partnership had gone on. What the plaintiff gets is not half the partnership. What he does really get I do not quite know. He has passed six years of the best part of his life at H. He may have got some introductions, but it would be unfair to make him pay the 500*l.*, or to restrain him from practising. He would then get nothing for his money."

Where an arbitration clause in partnership articles provided for the reference to arbitration of any difference between the partners as to the construction of any of the articles, "or as to any division, act, or thing to be made or done in pursuance thereof, or to any other matter or thing relating to the said partnership or the affairs thereof," but made no express provision for the reference to arbitration of any question as to the return of the premium paid as the consideration for the partnership, it was held that the arbitrators would have power, under a reference, to award a dissolution of the partnership, and therefore the proper terms of such dissolution, including, if necessary, the return of the premium; and an action in which dissolution and a return of the premium was claimed was accordingly stayed. (*Belfield* v. *Bourne*, [1894] 1 Ch. 521.) This decision of Stirling, J., distinguished an old case of *Tattersall* v. *Groote* ((1800), 2 Bosanquet & Puller, 131), where Tattersall, man-midwife and apothecary, had paid a premium of 420*l.* on entering into partnership for an indefinite term with Groote, apothecary to H.R.H. the Duchess of York, and the articles provided that any dispute might be referred to arbitration. The partnership having been dissolved by consent, it was there held that the question of a return of premium did not fall within the arbitration clause.

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation

Rights where partnership dissolved for

fraud or misrepresentation.

of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(*a.*) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(*b.*) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(*c.*) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

Right of outgoing partner in certain cases to share profits made after dissolution.

42.—(1.) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2.) Provided that where by the partnership contract an option is given to surviving or con-

tinuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

The goodwill or professional connection of a medical practitioner is not, in the absence of special agreement, assets for the use of which a surviving or continuing partner can be made to account. See note on sect. 39 as to appointments.

Retiring or deceased partner's share to be a debt.

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Rule for distribution of assets on final settlement of accounts.

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

(*a.*) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(*b.*) The assets of the firm including the sums, if any, contributed by the partners to make

up losses or deficiencies of capital, shall be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
3. In paying to each partner rateably what is due from the firm to him in respect of capital:
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

Supplemental.

Definitions of "court" and "business."

45. In this Act, unless the contrary intention appears,—

The expression "court" includes every court and judge having jurisdiction in the case:

The expression "business" includes every trade, occupation, or profession.

Saving for rules of equity and common law.

46. The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

Provision as to bankruptcy in Scotland.

47.—(1.) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the

case of an individual the issue against him of a decree of cessio bonorum.

(2.) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

Repeal.

48. The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

Commencement of Act.

49. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

Short title.

50. This Act may be cited as the Partnership Act, 1890.

SCHEDULE.

Enactments Repealed.

Section 48.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 & 20 Vict. c. 60.	The Mercantile Law Amendment (Scotland) Act, 1856.	Section seven.
19 & 20 Vict. c. 97.	The Mercantile Law Amendment Act, 1856.	Section four.
28 & 29 Vict. c. 86.	An Act to amend the law of partnership.	The whole Act.

CHAPTER VII.

GOODWILL AND RESTRICTIONS ON PRACTICE.

Goodwill of a purely personal business.

THE principal asset of a medical practice is in general the value of the professional connection of the practitioner or practitioners. This value of the connection is analogous to the goodwill of a trade, and is often, and conveniently, termed "goodwill"; but it would seem that goodwill is really local, being "the probability that the old customers will resort to the old place," and that the term is not properly applicable to the purely personal business of a medical man, a solicitor, or a broker, which depends on the trust and confidence which clients or patients repose in the personal skill and attainments of practitioners. (See *Farr* v. *Pearce*, 3 Mad. 74; *Austen* v. *Boys*, 2 De G. & J. 627.)

There may be a slight local goodwill attached to a dispensary, or to what has been called a "doctor's shop"; but when a medical man is agreeing to buy the goodwill of a practice, he is really intending to purchase an introduction and exclusive recommendation to the patients connected with the practice which is to be made over to him, and the intention of both the vendor and the purchaser is that these patients are, so far as lies in the vendor's power, to be transferred and rendered to the purchaser.

Distinction between goodwill of a trade and of a profession.

The distinction between the goodwill of a trade and that of a professional business is explained by Lord Chelmsford, L.C., in *Austen* v. *Boys*, 2 De G. & J. 626. In that case a solicitor partner, two days before the expiration of the partnership by effluxion of time, gave notice

of his desire to retire from the partnership, and claimed, under a provision in the articles, the fair marketable value of his interest and share in the goodwill, contending that the "goodwill is a value attaching to the business and incident to it without reference to any term which may be created between the parties engaged in it." The Lord Chancellor said (page 635): "It is very difficult to give any intelligible meaning to the term 'goodwill' as applied to the professional practice of a solicitor in this abstract sense. Where a trade is established in a particular place, the goodwill of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'goodwill' is something distinct from the profits of a business, although in determining its value the profits are necessarily taken into account, and it is usually estimated at so many years' purchase upon the amount of these profits. But the term 'goodwill' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs. I can perfectly understand a solicitor agreeing to relinquish his business in favour of another, and to use his best endeavours to recommend his clients, and engaging not to interfere with his successor by a stipulation not to carry on business within a certain distance; but to sell the 'goodwill' without anything more, and without arranging any price, would be an agreement incapable of being enforced by specific performance."

The Lord Chancellor held, that the partner who had refrained from giving notice of retirement until his interest had become merely nominal was not entitled to any supposed value of his share beyond the duration of the partnership term.

As between professional partners the term "goodwill" Professional

goodwill may, by contract, have an ascertainable value.

may have an ascertainable meaning and value, by contract between the partners, as describing the interest which the retiring partner would have had if he had remained in the partnership, and which, by his retirement before its termination he is willing to relinquish to the continuing partner; but at the expiration of the partnership there is, in the absence of special contract, nothing in the nature of a partnership asset to be sold or valued which can fairly be called goodwill in an ordinary partnership between professional men. See remarks of Jessel, M. R., in *Arundell* v. *Bell* (52 L. J. Ch. 537), which was a case on the goodwill of a partnership between solicitors. In a case where, upon the death of his partner, from whom he had received a large premium, a medical man sold his practice for a considerable sum of money, the representatives of the deceased partner were held not entitled to any share of the money for which the goodwill was sold. (*Farr* v. *Pearce*, 3 Mad. 74.)

The survivor in a professional business need not give up practice and sell the goodwill.

In giving judgment in that case, Sir J. Leach, V.-C., said:—"It would be difficult to maintain that where a partnership is formed between professional persons, as surgeons, and one dies, the other is obliged to give up his business and sell the connexion for the joint benefit of himself and the estate of his deceased partner. When such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions, and where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships. As to so much of the bill, therefore, which prays a return of part of the premium, or a share of what the goodwill of the trade sold for, the bill must be dismissed."

Professional goodwill not a partnership asset.

It follows from this that the so-called goodwill of medical practitioners in partnership is not partnership property within the meaning of sect. 20 of the Partnership Act, 1890, or such property of the partnership as partners in the firm, or their representatives, are, upon a dissolution,

entitled to have realised, for the purpose of the payment of debts and the division of surplus assets under sect. 39. In the case of a practitioner's bankruptcy it would seem that there is no goodwill of his business which the trustee in bankruptcy can sell.

If realised, may in some cases have to be accounted for.

However, where the "goodwill" of a professional practice has been actually realised by a person in a fiduciary position, or by means of an assignment in fraud of creditors, the proceeds may be followed and claimed by those from whom they cannot in conscience be withheld.

Thus, where an attorney, being in insolvent circumstances, disposed of his business (giving a covenant that he would not practise), in consideration of a sum of cash, and an annuity settled upon his wife for life for her separate use, and afterwards on himself for life, it was held that the provision for the payment of the annuity was fraudulent and void against his creditors. (*Neale* v. *Day*, 28 L. J. Ch. 45; 7 W. R. 45.)

In *Small* v. *Graves* (2 De G. & Sm. 706), the widow and executrix of a surgeon-dentist (by an agreement in which she was described as such widow and executrix) sold the goodwill of her late husband's business and the advantages of an introduction to the patients for the sum of 500*l.*, which she claimed to retain for her own exclusive benefit, as arising from her personal influence with the patients; but the judge held that the whole or some part of the 500*l.* must be considered as belonging to the estate of the testator. He intimated that some allowance might be made to the widow, but he could not accede to the proposition that no part of the purchase-money belonged to the testator's estate. Apparently, if the widow had not been executrix, and had not intermeddled in any way with her husband's estate, there would have been no ground for complaint against her for using any influence she had with the patients to secure a benefit for herself.

The purchaser of the goodwill of a business from a trustee in bankruptcy or liquidation has no right to restrain

the bankrupt or liquidating debtor from setting up *bonâ fide* a fresh business and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the goodwill to the purchaser. (See *Walker* v. *Mottram*, 19 C. D. 355.) The trustee can only sell the positive element of the goodwill, that is, property passing by assignment; the trader himself can also sell the negative element, that is, a covenant express or implied not to do things in derogation of the grant. A bankrupt trader, however, cannot be compelled to enter into any covenant restricting him from carrying on business in future in any way whatever, and, if while bankrupt he should enter into such covenant, it would be doubtful whether it could be enforced against him.

Goodwill when a partner has been expelled.

In the same way a partner who has been expelled under a provision in partnership articles, and has been repaid his share of the capital, will not, in the absence of stipulations to the contrary, be restrained from carrying on the business on his own account and soliciting the old customers of the firm. It is just as if the partnership had been dissolved and each party left to carry on the business as he likes. (*Dawson* v. *Beeson*, 22 C. D. 504.)

If to be paid for out of future profits the party to pay must endeavour to earn profits.

If the goodwill of a medical practice is sold in consideration either partly or entirely of a share of the future profits or earnings of the practice for a fixed period, there is an implied covenant that the purchaser will not during that period, by his wilful act or default, prevent the receipt of earnings. (See *McIntyre* v. *Belcher*, 14 C. B. N. S. 654, determined in the Common Pleas in 1863.) The facts of this case sufficiently appear from the judgment of Erle, C. J., who said—"We are bound to give effect to all contracts according to the language of the instrument and the nature of the transaction. The agreement here is, that the goodwill of the practice of a surgeon then lately carried on by one P. should be transferred to the defendant, with possession of the house, and the defendant was

to have sold to him the drugs, instruments, and furniture employed in the business for £17 : 5*s*., the plaintiffs engaging to pay rent and taxes up to a certain day, and that P. should not within ten years from the date of the agreement practise as a surgeon, &c., at or within ten miles of the place ; and the defendant agreed that he would, on condition of the premises, pay the plaintiffs, in respect of each of four successive years, ending, &c., *if he should be living at the end of each respective year*, one fourth part of the earnings and receipts in respect of the said practice without any deduction for expenses. The breach assigned is that the defendant, having been let into possession, has by his own acts and default wholly disabled and incapacitated himself from further carrying on the said business, and from getting or obtaining any further earnings or receipts therefrom, contrary to the agreement in that behalf. The substance of that is, that he has wilfully chosen to destroy the goodwill. Is that a breach of the agreement ? I think it is necessarily implied from the stipulations in the agreement that the defendant would take common and ordinary care so to carry on the business as to realise receipts. And a wilful omission so to do renders him liable to an action."

Willes, J., said : " The nature of the stipulated payments is such that it is necessary that the business should continue to be carried on during the four years. By wilfully incapacitating himself from doing so, the defendant clearly breaks his contract. As, if I grant a man all the apples growing upon a certain tree, and I cut down the tree, I am guilty of a breach."

The other judges, Williams and Byles, JJ., were of the same opinion. (See also *Telegraph Despatch and Intelligence Co.* v. *McLean*, 8 Ch. 658.)

It seems that a successor who purchased a practice with notice of an annuity or other payment contracted to be paid thereout, or out of the profits thereof, would take the practice subject to providing such annuity or payment.

(See *Werderman* v. *Société Générale d'Electricité*, 19 C. D. 246, 257).

What passes by assignment of goodwill.

It is difficult to define what a purchaser of the "goodwill" merely of a professional business acquires, in the absence of any introduction or of covenants restraining those who were before the purchase possessed of the professional connection, and it is clear that the mere assignment of the goodwill of a professional practice conveys very little to the purchaser. Even in the case of a trade the purchaser does not necessarily get much protection, for the vendor may carry on business in the same way as any stranger might lawfully do. Kay, J., says, in the case of the *Bristol, &c. Bread Co.* v. *Maggs* (44 C. D. at p. 620):

Unsatisfactory state of the law as to assignment of goodwill. Remarks of Kay, L. J.

"After some conflict of opinion it has been decided by the Court of Appeal in *Pearson* v. *Pearson* (27 C. D. 145), that a man who sells the goodwill of a business may not only set up a similar business next door and say that he is the person who carried on the old business, but that he may also solicit the customers of the old business to deal with him, although by these proceedings he might not only destroy all benefit to the purchaser of the thing which he had bought, but might recover to himself the actual possession of it. Such a fraudulent proceeding, according to the decision, cannot be prevented by any court of law or equity."

In *Smith* v. *Hancock* ([1894] 2 Ch. 377), Kay, L. J., again remarked on the unsatisfactory state of the law as to goodwill. In that case the defendant, who had been carrying on business of a grocer, as T. P. Hancock, sold the business and covenanted not to carry on or be in anywise interested in any similar business within a specified area. Some time after the sale, the wife of the defendant opened a grocer's shop, within the area, under the style of "Mrs. T. P. Hancock." The defendant took no part in carrying on the business, but he assisted his wife to obtain a lease of the shop, and to prepare a circular to old customers which, to some extent, he distributed. Kay, L. J.,

who differed from the other judges of the Court of Appeal in thinking that an injunction ought to be granted, said: "What the defendant has done seems to me to be a deliberate attempt to defraud the plaintiff by getting back some of the goodwill which the defendant sold to him. It is a principle of English law that a vendor shall not, after the sale, derogate from his own grant. For example, if a man sells a house with windows in it looking over his adjoining land, he cannot afterwards build upon that adjoining land so as to obscure such windows. . . . . If a man sells the goodwill of a business, I have never been able to understand why the same principle should not apply. It is an anomaly by no means creditable to the law that there is an exception to the rule in that case, and it is therefore necessary to obtain an express contract from the vendor not to carry on a like trade."

In *Trego* v. *Hunt* ([1895] 1 Ch. 462), partnership articles provided that at the end of the partnership term the goodwill should be the sole property of one partner. Another partner extracted from the books a list of the names and addresses of the customers of the firm with the object, as he admitted, of using such list, after the expiration of the partnership, for the purpose of soliciting the customers of the firm. On an injunction being applied for, Stirling, J., held that in the absence of express stipulation to prevent the defendant from competing after the determination of the partnership, or from soliciting the customers of the firm, or from making use of information acquired by him while a partner, the defendant was entitled to do what it was sought to restrain him from doing. That result was the legitimate consequence of the decision of the Court of Appeal in *Pearson* v. *Pearson* (27 C. D. 145). The decision was affirmed by the Court of Appeal, the judges holding that they were bound by the decision in *Pearson* v. *Pearson;* but counsel for the plaintiff intimated that the case would probably be taken to the House of Lords, in the hope that

the highest Court might disapprove of the principle of *Pearson* v. *Pearson*.

Render of customers.

A "render of customers," however, has been held to extend much further than an assignment of goodwill. In *Davis* v. *Smaggasgale* (W. N. (1890), p. 158), where the defendant, a varnish and polish maker, had agreed for a consideration to "render" to the plaintiff all his customers, an injunction was asked to restrain the defendant from soliciting any person who had been his customer before the agreement to deal with the defendant or not to deal with the plaintiff in varnish or polish, or otherwise dealing in the same with such customer.

North, J., granted the injunction asked, on the ground that the defendant, having "rendered" his customers, could not by soliciting or supplying them derogate from his own grant; and this decision was affirmed by the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ., *ibid*, p. 169).

Such being the state of the law as to goodwill, the vendor being at liberty, in the homely phrase quoted by Lord Macnaghten, in the *Maxim-Nordenfeldt Case*, to "sell the cow and sup the milk," it follows that the rights of a purchaser from a retiring medical practitioner of a medical practice, or the goodwill of a practice, depend almost entirely on the covenants restraining the vendor from practising as before, and on the stipulations as to an "introduction" contained in the purchase agreement. It is therefore of the highest importance to the purchaser of a practice to have apt covenants inserted so that he may have a legal guarantee that the vendor shall not continue his practice, or start a new practice in opposition to the purchaser, and so re-possess himself of the connection, for the benefit of which the purchaser has given valuable consideration.

Necessity for stipulations as to restric-

It is also of vital importance to a medical man established in practice, when arranging to take a partner, or to a

practitioner engaging an assistant, to guard himself against the risk of the proposed partner or assistant, at the dissolution of the partnership, or the termination of the contract of service, setting up in independent practice in the neighbourhood, and stealing away his late partner's or employer's patients. tions on practice.

Clauses to secure this end are usually inserted in partnership articles, in assignments of, or agreements to transfer, medical practices, and in written agreements engaging assistants; and the breach or alleged breach of such clauses has often led to litigation. A covenant which restricts the right of a medical man to use his art and skill for the benefit of the public where he will, is one of those covenants in restraint of trade which have for centuries been the subject of the decisions of the courts.

Originally all covenants in restriction of trade, whether limited or unlimited, were alike held void, as being contrary to public policy, which required that every man should be at liberty to work for himself; but there have been great changes as to considerations of public policy between the date of the decision of Mr. Justice Hull, in the time of Henry V., when the judge wished to send to prison a plaintiff proceeding on such a covenant, and the recent decision of the House of Lords, in *Nordenfeldt* v. *The Maxim-Nordenfeldt Guns, &c., Co.* ([1894] A. C. 535), where a world-wide restriction was enforced against the defendant, as far as certain businesses formerly carried on by him were concerned. All restrictions of trade at one time held void.

It will be useful to give a short history of the law, and to notice, so far as they bear upon the present subject, some of the very numerous decisions dealing with these covenants in restraint of trade. Extracts from some of the cases that have arisen on bonds or covenants entered into by medical men, and on agreements where the circumstances are analogous to those that arise between medical men, are collected in chronological order in the Appendix, at the end of this chapter.

It is provided by Magna Charta that "No Freeman shall be . . . disseised of his Freehold or Liberties or free Customs . . . but by lawful Judgment of his Peers or by the Law of the Land"; and these words, it was said in some of the old cases, have always been taken to extend to freedom of trade.

In the *Ipswich Tailors' Case*, Mich. 12 Jac. 1, 11 (Reports, 54a), "it was resolved that at the common law no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, *otium omnium vitiorum mater*, and especially in young men who ought in their youth (which is their seed time) to learn lawful sciences and trades which are profitable to the Commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade; and that appears in 2 Hen. V. 5 b; a dyer was bound that he should not use the dyers' craft for two years, and there Hull held, that the bond was against the common law, and by G-d if the plaintiff was here he should go to prison till he paid a fine to the King."

A case in the time of Queen Elizabeth is reported as follows:—

"In debt upon a Bond, the Condition was that if Robert Batchelor did use the trade of a Haberdasher as Journeyman, Servant or Apprentice, or as a Master, within the County of Kent, within the Cities of Canterbury and Rochester, within four years after the date, that then if he pay twenty pound upon request, the Obligation to be voyd. And all the Justices agreed that the condition was against Law, and then all is voyd, for it is against the liberty of a Freeman, and against the Statute of Magna Charta, cap. 20, and is against the Commonwealth (2 Hen. V. 5 b), and Anderson said that he might as well bind himself that he would not go to Church, and judgment was given against the plaintiff." (*Claygate* v. *Batchelor*, Owen, 143.)

"Public policy," however, as Burroughes, J., said, in an often-quoted passage, "is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law"; and as time went on and trade became of greater importance in this country, the common law "which so much favoured trade" adapted itself to the altered conditions. It came to be seen and was recognized by the law that the principle was (as stated by James, V.-C., in *Leather Cloth Co.* v. *Lorsont*, 9 Eq. 345), that: "Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract into which he enters; on the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do that, does not restrain him from alienating that which he wants to alienate, and, therefore, enables him to enter into any stipulation, however restrictive it is, provided that restriction in the judgment of the Court is not unreasonable, having regard to the subject-matter of the contract."

Public policy as to restrictions has changed from time to time.

A man ought to be able to sell to advantage, and therefore to be able to bind himself not to compete with his purchaser.

Jessel, M. R., said: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this

freedom of contract." (*Printing and Numerical Registering Co.* v. *Sampson*, 19 Eq. 462, at p. 465.)

And Fry, L. J., said, in a recent case:—

"I think that the law with regard to public policy is one of a very different description from the law which is laid down in absolute terms for all time. It would be strange, and I think it would be unreasonable, if a contract which might now be for the public benefit were held to be void because, in the reign of Henry V. or in the reign of Elizabeth, that contract was contrary to public policy. It is impossible to look at the history of the law and not to see that contracts which at one time were deemed—and I daresay justly deemed—to be contrary to public policy, at another time have been deemed to be consistent with public policy and for the public benefit. A forcible illustration of that fact is furnished by the very case which is the foundation of this branch of the law, the case in 2 Henry V., which excited the indignation of Mr. Justice Hull in a manner which has made his name immortal in the books. As has been pointed out by Lord St. Leonards, the general principle, that a contract in restraint of trade which is unreasonable is void, is still the law; but the particular conclusion at which the judge arrived—that that particular contract was against public policy—is entirely at variance with modern decisions. What Lord St. Leonards said, in *Egerton* v. *Earl Brownlow* (4 H. L. C. 238), was this: 'Angry as the learned judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the common law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint, created in that way, with a particular object, is now perfectly legal. Without any exclamation of the judge and without any danger of

prison, any subject of the realm may sue upon such a condition as Mr. Justice Hull was so very indignant at in that particular case.'" (Fry, L. J., in *Davies* v. *Davies*, 36 C. D. 359, at p. 397.)

Lord Watson, in his judgment, in the recent *Maxim-Nordenfeldt Case* ([1894] A. C. 535), points out that, in England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy, and remarks that the series of cases on this subject will be found to record the history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other.

Mr. Justice Kekewich, in giving judgment recently, in an action to enforce a restrictive covenant, said:—"It is urged that you must construe this strictly against the covenantors, because provisions of this kind are odious to the law. That may have been said, and there may have been much in it, but to my mind, the odious character of these covenants has been exhausted, and the courts have considered them and limited their effect by restraining them within narrow limits, so that they are not odious to the law, and a covenant within these restricted limits, not to enter into business within certain allowed area nor beyond certain allowed purposes, is no longer against the law, but is recognised and enforced." (*Showell* v. *Winkup*, 60 L. T. 389.)

General and partial restraints of trade.

The old cases seemed to make no distinction between contracts in general restraint and contracts in partial restraint of trade. It has always been held that contracts in general restraint of trade are void as being contrary to public policy, but contracts in partial restraint of trade have repeatedly been upheld in the courts, and the distinction between a general restraint, and partial restraints, of trade "is embedded in the reports and text books of the last three centuries."

Leading case

In the leading case of *Mitchel* v. *Reynolds*, in 1711 (1 P.

of *Mitchel* v. *Reynolds.*

Wms. 181; Smith's Leading Cases, Vol. I.), it was laid down that the general rule is, "that all restraints of trade, which the law so much favours, are bad; but to this general rule there are some exceptions; as if the restraint be only particular in respect of time or place; and there be a good consideration given to the party restrained. A contract or agreement upon such considerations, so restraining a particular person, may be good and valid in the law, notwithstanding the general rule. (Per Willes, C. J., in *The Master, &c. of Gunmakers* v. *Fell*, Willes, 388.)

For a long time after the decision of *Mitchel* v. *Reynolds*, it was the practice of the courts to enquire into the value of the consideration received by the person restrained, and an agreement or bond given to effect a partial restraint of trade was held good or bad, according as the consideration was adequate or inadequate.

Adequacy of consideration is a matter for the parties, and the Court will not examine into it.

App., p. 149.

It was, however, decided by the Exchequer Chamber, in 1837, in the case of *Hitchcock* v. *Coker* (6 A. & E. 438), and has since been regarded as settled law, that in cases of partial restraint the examination of the adequacy of the consideration is not properly for the Court, but for the parties who enter into the agreement; although the burden remained as before upon the covenantee to show that there was some good and valuable consideration. The Court would not inquire whether the party submitting to the restraint made a judicious contract, or weigh whether the consideration was equal in value to that which the party gave up or lost by the restraint under which he placed himself; it was enough that there actually was a consideration for the bargain, and that such consideration was a legal consideration and of some value. It was laid down in the course of the judgment of the Court, that if there is no consideration, or a colourable consideration of no real value, the contract in restraint of trade, which in itself is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void.

The same considerations in general apply to medical practices as apply to localised trades, and decisions in the cases of world-wide businesses and of trade secrets have little bearing upon present requirements.

Requisites of a valid restrictive covenant.

Shortly, the requisites of a valid covenant restricting the right to practice medicine and surgery are two: *first*, there must be a consideration, that is, some value, advantage or forbearance given or extended to the party whose right is to be restricted; and *secondly*, the restrictive covenant must not impose a more extensive restraint than is necessary for the reasonable protection of the party who originally gave the consideration of which the covenant was the acknowledgment. It is obvious, therefore, that a restraint on medical practitioners must be limited as to space, for no practitioner can reasonably require to exclude another from the whole kingdom.

Need not be confined to the lifetime of the person protected from competition.

A restrictive covenant is not necessarily unreasonable because it is not confined to the lifetime of the covenantee, or to such time as he shall continue to carry on business, for it is consistent with public policy that the owner of a business or a professional connection should be able to secure the value of it by assigning it to a purchaser, or should be able to bequeath it; and in *Hitchcock* v. *Coker* (6 A. & E. 349); *Sainter* v. *Ferguson* (7 C. B. 716); *Mills* v. *Dunham* ([1891] 1 Ch. 576), and many other cases, restrictions co-extensive with the life of the covenantor have been held valid.

App., p. 149.

App., p. 161.

A covenant not to practise, not *prima facie* limited as to time, will not be restricted in duration to the lifetime of the covenantee, unless it contains expressions pointing to a shorter period of restriction. (See *Hastings* v. *Whitley*, 2 Ex. 611), where the defendant had covenanted not to practise, within certain limits, at any time after the determination of his engagement with W. "without the consent in writing of the said W." These latter words were held not to confine the period to W.'s lifetime. The argument that W. could not contemplate giving consent

in writing except during his life was overruled, and the bond was held enforceable by W.'s executors.

Such covenants must be evidenced by writing.

These restrictive covenants, not being *prima facie* agreements to be performed within one year of the making thereof, must be evidenced in writing so as to satisfy the Statute of Frauds.

Do not cease when person protected ceases to practise.

The restriction does not cease to operate in a case where the covenantee has ceased by himself or his assigns to carry on business (*Elves* v. *Crofts*, 10 C. B. 241), for if the contract is reasonable when it is made, subsequent circumstances, such as the fact of the covenantee ceasing business, so as no longer to want protection, do not affect its operation. (S. C.).

Reasonableness and validity depends on the nature of the trade or profession.

The reasonableness and therefore the validity of a restraint depends very much upon the nature of the trade or practice which may require a larger or smaller district to carry it on, according to circumstances. A covenant to retire from medical practice altogether would not be enforceable, as such a stipulation would be a general restraint and contrary to public policy. (See *Davies* v. *Davies*, 36 C. D. 359; compare *Perls* v. *Saalfeld*, [1892] 2 Ch. 149.) A covenant to retire from practice altogether for even a limited time would be equally void. (See *Ward* v. *Byrne*, 5 M. & W. 548.)

App., p. 151.

Covenant must be definite.

A restrictive covenant must not be vague in its terms, for the Court will not make a contract between the parties, but will only enforce a definite contract if such have been entered into by them (*Davies* v. *Davies*); and the Court cannot create or carve out a new covenant for the sake of validating an instrument which would be otherwise void. (*Baker* v. *Hedgecock*, 39 C. D. 520.)

Such a covenant need not however be in express terms, but may be inferred from the recitals of a bond. (*Gravely* v. *Barnard*, 18 Eq. 518.)

App., p. 175.

Must not be too wide.

Every restraint which is larger than is required for the necessary protection of the party with whom the contract is made, is unreasonable and void, as being in-

jurious to the interests of the public, on the ground of public policy.

Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber, on appeal from the Court of Queen's Bench, in *Hitchcock* v. *Coker* (6 A. & E. 438), said: App., p. 149.

Must not be more than sufficient for the protection of the covenantee.

"We agree in the general principle adopted by the Court 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." Fry, L. J., has pointed out that that passage was adopted by Lord Wensleydale, when a Baron of the Court of Exchequer, in delivering judgment in *Ward* v. *Byrne* (5 M. & W. 548), and therefore the rule so expressed has the authority of the Court of Queen's Bench, Exchequer, and Exchequer Chamber. (Fry, J., in his judgment in *Rousillon* v. *Rousillon*, 14 C. D. 351.)

In *Benwell* v. *Inns* (24 Beav. at p. 312), Romilly, M.R., said: "If one having a milk walk of one mile in diameter were to require a restriction far exceeding the limit of his walk, and there were no explanation of the necessity of such restriction, that might be an undue restraint of trade." App., p. 167.

If a restrictive covenant is in other ways wider than can be reasonably required, the fact that it is only stipulated to be binding for a short time will not make it less open to objection; for what the law does not allow is not to be tolerated because it is of short duration. When a general restriction, limited only as to *time*, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return. (See *Ward* v. *Byrne*, 5 M. & W. 548, where a covenant not to follow a certain trade for nine months was held void.) App., p. 151.

Reasonable limits vary according to the nature of the practice.

What is a reasonable restriction as to space in the case of a medical practice will vary according to the nature of the practice. For instance, such limits as "within ten

App., p. 145. miles all round from Thetford" (*Davis* v. *Mason*, 5 Term Rep. 118); "within ten miles of Newton in Montgomery-
Country. shire" (*Palmer* v. *Mallet*, 36 C. D. 411); "Weymouth or
App., p. 188. within ten miles thereof," (*Fox* v. *Scard*, 33 Beav. 327);
App., p. 171. "Macclesfield or within seven miles thereof," and even a covenant "not to set up a surgeon in the town of Aylesbury or within twenty miles" (*Hayward* v. *Young*, 2 Chitty
App., p. 146. 407); have been held valid.

London. In London a covenant not to practise or reside within two miles and a half from 28, Dorset Crescent, and a covenant not to reside or visit patients within three miles from an address in Park Street, Camden Town, have been upheld.

Surgeon-dentist. A covenant by a surgeon-dentist not to practise in London has been held good, and an interlocutory injunction was granted where a dentist's assistant had covenanted that he would not for fourteen years practise, or in any way engage in the practice or profession of a dental surgeon, either on his own account or as assistant to any dentist (other than the plaintiff) in the city of Chester, or in either of the counties of Chester, Flint, or Denbigh, within sixteen miles by the nearest road from Chester Cross, or in any place within the boundaries of the borough of Birkenhead (*Bullin* v. *Teece*, W. N. (1868), p. 196); but a covenant not to practise as a surgeon-dentist *at or within* 100 *miles of the city of York* has
App., p. 147. been held too wide to be enforced (*Horner* v. *Graves*, 7 Bingham 735), as has also a covenant by a surgeon-dentist that he would not after the end of his time of service practise in any of the towns where his principals might have been practising before the expiration of his
App., p. 153. service. (*Mallan* v. *May*, 11 M. & W. 653.)

Distance measured as the crow flies. Where a radius is stipulated within which practice is not to be carried on, the distance is measured (unless some other method is adopted in the agreement) in a straight line "as the crow flies." (*Mouflet* v. *Cole*, L. R. 7 Ex. 70; 8 Ex. 32.)

If the district is not defined, or is made too extensive, the restraint will be entirely void, as the Court will not itself fix limits which it would regard as reasonable; if, however, there are two separate limits named, one of which is reasonable and the other unreasonable, the Court will enforce the restraint within the reasonable limits without regarding the illegality of the more extensive restriction; and it will give effect to such restrictive stipulations as the party can legally bind himself to. The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, you may reject the bad part and retain the good. This was so held, in 1726, in the case of *Chesman* v. *Nainby* (2 Strange, 739; 1 Bro. P. C. 234), which ultimately went to and was affirmed by the House of Lords in 1727. In that case a bond was given by the defendant to the plaintiff in consideration of her teaching the defendant the trade of a linen-draper, conditioned that the defendant should not, after leaving the service of the plaintiff, carry on that trade within half a mile of the plaintiff's then dwelling-house, or of any other house that the plaintiff, her executors and administrators, should remove to. A breach was assigned within half a mile of the plaintiff's then house, but it was argued for the defendant that the clause as to removing made the restraint a general one.

Court will not fix limits, but will enforce the reasonable limit if there are separate limits, one reasonable and others unreasonable.

App., p. 144.

The defendant's counsel admitted that if the breach had been assigned upon the *elsewhere*, it might be difficult to support the bond, but contended that that part was good whereon the breach was assigned, and that if a bond was given, with condition to do several things, and some were agreeable to law, and some against the common law, the bond should be good as to the doing the things agreeable to law, and only void as to those that are against the law.

The Court of King's Bench unanimously gave judgment in favour of the plaintiff, and this judgment was afterwards affirmed in the House of Lords.

In the *Maxim-Nordenfeldt Case*, Nordenfeldt had covenanted that he would not for twenty-five years carry on the business of a manufacturer of guns and ammunition, or any business competing or liable to compete with that for the time being carried on by a company to whom he sold his business. The covenant was enforced as to the gun and ammunition business, that part of it being held separable from the restraint from all competition with the assignees. (See the judgments of the Court of Appeal, [1893] 1 Ch. 630.)

On the same principle, where an assistant to a surgeon-dentist had covenanted that after the expiration of a term of service he would not practise in London or in any of the towns or places in England or Scotland where his employers might have been practising before the expiration of the said service, it was held, in an action for damages against him for practising in Great Russell Street, Bloomsbury, that the covenant not to practise in London was valid, the limit of London not being too large for the profession in question; that the stipulation as to not practising in towns where the employers might have been practising during the service, was an unreasonable restriction, and therefore illegal and void; but that the stipulation as to not practising in London was not affected by the illegality of the other part. (*Mallan* v. *May*, 11 M. & W. 653.) It is somewhat amusing to observe that subsequently, on a special case, the judges held that London must be taken in its proper sense as the City of London, and that the defendant was not liable to an action in damages for having carried on the profession of a surgeon-dentist in Great Russell Street, Bloomsbury Square. (13 M. & W. 517.)

App., p. 153.

Court will enforce covenants as to defined patients, although the words of the covenant may

On the same principle of dividing the valid from the illegal portion of a restraint, where a party has covenanted that he will not solicit or attend the present patients of a practitioner, or such as shall have become patients during a contemplated term of partnership or service, and also

those who shall become patients after the expiration of the contemplated term, the covenant will be held separable, and at any rate good as regards those persons who have been patients prior to or during the subsistence of the relationship between the parties, and an injunction will be granted to restrain the covenantor from attending those in the first and second category, they being persons defined before the termination of the relationship; while, as to those who become patients of the covenantee after the relationship has ceased, the restriction will be held not enforceable, they being a body undefined at the time the restraint is to begin to be effective; otherwise the restraint would in fact operate as prohibiting attendance on such persons as might from time to time be named. (See *Nicholls* v. *Stretton*, 10 Q. B. 346; *Baines* v. *Geary*, 35 C. D. 155.) An injunction will be granted to enforce the restriction with regard to the sufficiently defined patients, even in a case where such patients have declared that they would not in any circumstances have called in the rival practitioner for whose benefit the restraint was imposed. (See *Rogers* v. *Drury*, 57 L. J. Ch. 504.)

also include future patients.

App., p. 187.

App., p. 186.

App., p. 190.

It is not unreasonable that a person to be restrained from practising within certain limits should, as an additional safeguard, be also restrained from residing within certain limits. (*Atkyns* v. *Kinnier*, 4 Ex. 776; *Rawlinson* v. *Clarke*, 14 M. & W. 187.)

Practitioner may be restrained from residing in certain limits.

App., p. 165.

App., p. 159.

A covenant is sometimes stipulated for that a retiring practitioner shall not for a term let his house to a medical man; or a covenant that the house of the retiring practitioner shall not, for a term, be let to any medical man in practice. Covenants analogous to these have been upheld.

Where a contract in restraint of trade is partly verbal and partly in writing, parol evidence may be given to show what the consideration for the restriction was. (*Cooper* v. *Southgate*, 10 Rep. 552.)

Parol evidence.

A covenant not to carry on business as a surgeon within certain limits is broken if the covenantor practises as

Person restrained must not act as assistant.

App., p. 188. assistant to another surgeon within these limits. (*Palmer* v. *Mallett*, 36 C. D. 411; cf. *Jones* v. *Heavens*, 4 C. D. 636.)

Employment is sufficient consideration to support restrictive covenant.

An agreement by a medical practitioner to employ as his assistant for such time as the master shall please the person who is to be restrained, or, an agreement to continue such person's existing service as an assistant, has been held sufficient consideration to support a restrictive covenant. (*Davies* v. *Mason*, 5 Term Rep. 118; *Gravely* v. *Barnard*, 18 Eq. 518.)

App., p. 145.
App., p. 175.

Wrongful dismissal of assistant does not allow him to practise in breach of restrictive covenant.

It has been held that the wrongful dismissal of the covenantor by the covenantee cannot be set up as a defence to an action for infringing the restrictive covenant (*Proctor* v. *Sargent*, 2 M. & Gr. 20), neither can the plea that the covenantee did not provide his assistant with a dwelling-house in accordance with a stipulation in the agreement which provided for the restriction. (*Carnes* v. *Nesbitt*, 7 H. & N. 158, 778.) Also, where, in consideration of the assignment of a trade, and of a covenant to desist from using that trade with customers named, the purchaser of the goodwill covenanted to pay an annuity, it was held that a breach by the vendor of his covenant by trading with one of the customers did not entitle the purchaser to refuse payment of the annuity, but the purchaser might have his action against the vendor for breach of the covenant on his part. (*Hunlocke* v. *Blacklowe*, 2 Wms. Saund. 156; confer *Judson* v. *Bowden*, 17 L. J. Ex. 172.)

App., p. 173.
App., p. 143.
Post, p. 204.

Restrictive covenant held void, where it was part of a scheme to allow an unqualified person to practise.

In a case, however, where a qualified practitioner had entered into an agreement to assist an unqualified person in a medical practice which the latter was personally carrying on, and as part of that agreement had bound himself by a restrictive covenant, an injunction to restrain a breach of the covenant was refused on the ground that the agreement was illegal, as being a scheme to allow a medical man to practise without being duly qualified. It was intimated that the covenant would probably have been enforced if the unqualified person had been the mere centre of a

staff of qualified assistants, and had not himself carried on the business of the medical profession. (*Davies* v. *Makuna*, 29 C. D. 596.) App., p. 179.

Either partner may sue assistant on breach of a restrictive covenant.

A restrictive covenant entered into with two or more partners gives such partners joint and several interests in the event of a dissolution of the partnership. Either partner may sue to restrain a breach, and a release of the covenantor by one partner is no defence to an action by another. (*Swallow* v. *Day*, 12 Jur. 403; *Palmer* v. *Mallet*, 36 C. D. 411.) App., p. 188.

Benefit of restrictive covenant passes to an assign of the goodwill of the business, App., p. 185. App., p. 186.

A restrictive covenant adds to the value of the goodwill of a business, and becomes, therefore, part of the goodwill, and is assignable with it, and passes by an assignment of the goodwill so as to give the assignee a right of action on an infringement. (*Jacoby* v. *Whitmore*, 32 W. R. 18; *Showell* v. *Winkup*, 60 L. T. 389; *Baines* v. *Geary*, 35 C. D. 154; *Batho* v. *Tunks*, W. N. (1892) 101.)

or of part of the business. App., p. 167.

In *Benwell* v. *Inns* (24 Beav. 307), it was held that an assignee of part only of the business of the original covenantee was entitled to sue on such a covenant.

Restrictive covenants entered into by medical officers of friendly societies, *qy.* enforceable.

It is sometimes the practice of friendly and provident societies, on entering into agreements with their medical officer, to stipulate that after the termination of his agreement with them he shall not practise in the neighbourhood, but it does not seem to have been finally decided whether such a stipulation can be regarded as reasonably necessary for the protection of such societies so that they can enforce it by injunction. In a case of *Everton and Others* (*trustees of a society at Walsall*) v. *Lynch*, the defendant had entered into an agreement to become medical officer of the Walsall society, and had bound himself not to practise within five miles of Walsall for a term of three years from the termination of his engagement. The defendant afterwards at the end of three or four years resigned and became the medical officer of another society, and it was alleged that as a result many members of the society had gone over to the rival organization in order to follow the defendant.

Wright, J., granted an interim injunction restraining the defendant from practising within five miles of Walsall, but a Queen's Bench Divisional Court (Mathew and Lawrance, JJ.), on the 18th of August, 1894, dissolved this injunction, and said that the trial of the action should be expedited, they being of opinion that the case was one for a jury, that is, for damages and not for injunction.

Romer, J., however, in a very similar case (*Johnstone and Others* v. *Barkley*, on the 22nd of August, 1894, "Law Times" of 25th August, p. 372), considered that an injunction might be granted.

As to avoiding competition by allotting patients,

An agreement entered into by competing practitioners, resident in the same district, to allot certain patients to each, and stipulating that patients so allotted to one of the parties to the agreement should not be attended by the others of them, would not be legally enforceable. (*Collins* v. *Locke*, 4 A. C. 674.)

App., p. 178.

or districts.

Probably an agreement of the same nature to avoid competition, by allotting similarly certain streets or villages lying within a narrow compass, to one party exclusively, would be held equally invalid, though there is a dictum of Lord Campbell somewhat to the contrary in the case of *Shrewsbury and Birmingham Rail. Co.* v. *L. & N. W. Rail. Co.* (21 L. J. Q. B. 89.) In *Hilton* v. *Eckersley* (6 El. & Bl. 47) certain manufacturers had entered into a bond to carry on their works, and in certain events to close them, in conformity with the resolutions of a majority. This agreement was held void as being in restraint of trade in the Court of Queen's Bench, and the judgment was confirmed in the Exchequer Chamber. Crompton, J., one of the judges, in giving his judgment in the Queen's Bench, said: "Most of such cases have occurred where one party has sold a trade or profession to another, or where one party has learned the trade and its secrets from the other, and where, on such considerations, stipulations have been entered into whereby the one party undertakes not to exercise the trade or profession within reasonable limits as

to time and distance. In the present case, the agreement is, that in a certain event, all the parties contracting are to close their works. And the consideration of the promise of each is the promise of the others likewise to close their works. So that the public are not recompensed for the ceasing of the one party by the other parties being able to carry on their trade with increased facilities. It is, I believe, the first case where the mutually abstaining from trade has been the consideration for a bond of this nature." It is true that in *Wickens* v. *Evans* (3 Young & Jervis, 318) (a case which does not appear to have been cited in *Hilton* v. *Eckersley*), three trunk-makers had divided the map of England into three districts, one of which was allotted to each party to the agreement, and mutually agreed that each of them might travel into and sell trunks in his allotted district without interruption from the other two respectively, and the agreement was held valid by the Court of Exchequer. But medical practitioners do not interfere with each other save within limited areas, and in such a case as that supposed the Court might adopt the principle of *Collins* v. *Locke* rather than that of *Wickens* v. *Evans*.

App., p. 147.

There is no objection to an agreement that the fees received from certain patients or from certain districts should be allotted either wholly or in certain proportions to certain parties to an agreement, notwithstanding that the work may be done by a party who does not receive the fees for it. For each party may in turn receive benefit from such a provision; it is no restraint put upon practice but merely a method of profit-sharing or "pooling" receipts. (See *Collins* v. *Locke*, *ubi supra*.)

App., p. 178.

Bond in a penal sum implies agreement not to practise.

A restriction upon practice is usually secured either by a bond in a penal sum given by the person to be restrained conditioned to be void if he shall not practise within the limits, or if he shall pay a stipulated sum of money on so practising; which bond will be read as implying a covenant on the part of the obligor that he will not so practise

App., p. 175. App., p. 191. (*Gravely* v. *Barnard*, 18 Eq. 518; *National Provincial Bank* v. *Marshall*, 40 C. D. 112); or by an express covenant by the person bound that he will not so practise, or if he do so practise, he shall pay a stipulated sum or stipulated sums of money as "liquidated damages." The liquidated damages may be fixed either at one lump sum payable once for all on any infringement of the covenant not to practise; or as separate sums payable upon separate infringements; or for each day or week or month during which the person to be restrained shall practise contrary to the restriction. It is convenient that the stipulated sums should be expressed to be payable as "liquidated damages": that is to say, that the parties agree that the sum or sums stipulated shall be assessed between them as the damages that may be recovered on action brought in consequence of the breach of the covenant or various covenants without giving actual proof of damage suffered.

Liquidated damages or penalty.

Where the intention is to secure the performance of a contract by the imposition of a fine or penalty, the sum named is a penalty, and the party damnified can recover only the amount of damage which he has actually sustained. The expressions of the agreement, however, are not conclusive, and whether the sum stipulated to be paid for a breach is to be treated as a penalty or as liquidated damages is a question of law to be decided upon a consideration of the whole instrument and the surrounding circumstances. In *Mercer* v. *Irving* (E. B. & E. 563) the sum of 300*l.* named in a restrictive bond entered into by a surgeon on selling his practice was not expressed as "liquidated damages," and in an action against the covenantor the jury assessed the actual damages sustained at 25*l.*, but the plaintiff was held entitled to recover the whole 300*l.* In App., p. 161. *Sainter* v. *Ferguson* (7 C. B. 716) the sum mentioned in the agreement was called a penalty, but was held by the Court to be liquidated damages and not a mere penalty; and conversely in certain cases a sum expressed to be payable as liquidated damages has been held to be in fact a penalty,

especially where the money was made payable in respect of the doing or failure to do any of a number of things of different degrees of importance, some of which might result in very inconsiderable damages. Where articles "contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty; but where it is agreed that, if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." (*Astley* v. *Weldon*, 2 B. & P. 346.)

Generally speaking the liquidated damages can only be recovered on breach of the principal object of the covenant, and not of some collateral safeguard. In *Wallis* v. *Smith* (21 C. D. 243), in the Court of Appeal, the rule laid down by Jessel, M.R., and adopted by the Court, was that where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really a penalty and you can only recover the actual damage, and the Court will not sever the stipulations. When, however, the contract contains a condition for the payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for the payment of an ascertained sum of money, the general rule is that the sum named is not to be treated as a penalty but as liquidated damages, though perhaps if one of the stipulations was of very trivial importance it might be treated as a penalty. (See also *Law* v. *Local Board of Redditch*, [1892] 1 Q. B. 127.)

As to forfeiture of instalments.

With regard to the forfeiture of purchase-money to be paid by instalments, see the recent case of *Barton* v. *Capewell Continental Patents Co.* (5 Reports, 374). A deposit paid by a purchaser being a guarantee for the fulfilment of the contract by him may be retained by the vendor even in the absence of any stipulations as to its forfeiture, if the

purchaser makes default; and a stipulation that a first instalment which has been paid on an agreement for the sale of a practice or other property, shall be forfeited as liquidated damages if the purchaser makes default in completing will be held binding. But where an agreement is made that purchase-money shall be payable by instalments at specified times, and in case of default by the purchaser in paying any of the instalments all payments made shall be absolutely forfeited to the vendor as liquidated damages, the sums mentioned will be considered as penal sums and their forfeiture as liquidated damages will not be enforced, for the damages would be increased according as the purchaser had paid more instalments.

Care should be taken to express in the agreement or bond, if such be the intention, that the restraint is to be binding after the termination of the rest of the agreement; as in some cases assistants have argued that the restrictive covenant was only intended to bind them *durante servitio.* (See *Carnes* v. *Nesbitt*, 7 H. & N. 158, 778; 30 L. J. N. S. Ex. 348; 31 *Ib.* 273; compare *King* v. *Hansell*, 5 H. & N. 106.)

App., p. 173.

Protected practitioner can sue either for damages or for injunction, but not for both.

Where a practitioner is protected by a restrictive covenant secured by a bond or by an agreement to pay a sum as liquidated damages, the covenantee, if the restraint is infringed, has a right both at law and in equity, and could, under the old practice, obtain relief in either, but not in both Courts; he could choose his jurisdiction and the remedy he would have. The party whose right was infringed could either sue on the bond or agreement for the damages, or he could apply in the Courts of Equity for an injunction restraining the covenantor from continuing to practise within the defined limits. Where, in the old cases, the complainant desired relief by way of injunction, the practice was for him to file his bill in equity, which was ordered to stand over until the legal right should be established in an action at law. If the plaintiff succeeded and took nominal damages only, he could then obtain

equitable relief by way of injunction, but if he obtained substantial damages, or even proved against the defendant in bankruptcy, the Court of Equity, if he came back to it, dismissed his bill, considering that the plaintiff had had his remedy at law, that the contract no longer existed, and that the defendant, from whom the damages had been recovered, had, at any rate where the damages were fixed at a lump sum, in effect, purchased the right to practise within the limits from which he had been before excluded. (See *Sainter* v. *Ferguson*, 1 Mac. & G. 286; *Fox* v. *Scard*, 33 Beav. 327.)

App., p. 161.
App., p. 171.

This cumbrous practice is now happily obsolete, as by the Chancery Regulation Act, 1862 (Sir John Rolt's Act), it was enacted that in all cases in which any relief or remedy within the jurisdiction of the Courts of Chancery should be sought in any suit or matter instituted therein, and whether the title to such relief or remedy should be or should not be incident to or dependent upon a legal right, every question of law or fact cognisable in a Court of Common Law, on the determination of which the title to such relief or remedy depended, should be determined by or before the same Court.

Courts of Chancery can grant full relief.

Sometimes the liquidated damages are fixed not at a single lump sum, but at stipulated amounts payable in respect of each single breach, or for each day or week during which there shall be any continuing breach. If the covenantee has recovered some of such amounts, it will not be possible for the covenantor to contend that he has purchased any right to practise indefinitely, as the sums recovered are only liquidated damages in respect of such breaches as are sued on; but if afterwards the covenantee applied for an injunction, it would probably be refused, as the covenantee would be held to have already elected which form of remedy he would have.

The plaintiff in applying for an injunction often offers to waive any penalties recoverable under his bond or agreement, the injunction being in his view the only adequate

remedy; and the Court in granting relief by way of injunction has called upon the plaintiff to undertake not
App., p. 175. to sue for the damages (see *e.g.*, *Howard* v. *Woodward*, 34 L. J. Ch. 47); but it has been said by Romilly, M.R., that even without any express waiver, if after obtaining an injunction to enforce a restraint of this nature the covenantee sues for damages, the defendant may come to
App., p. 171. the Court and have the injunction dissolved. (*Fox* v. *Scard*, 33 Beav. 327.)

Protected practitioner, on recovering damages, is taken to have sold the right to practise.

Where the protected practitioner elects to recover the liquidated damages, he is treated as selling the right to practise at a price fixed beforehand, and, as was said by Campbell, C.J., "On the damages being paid, the agreement will be at an end, and the defendant may practise as much and wherever he choose."

Protected practitioner should choose whether he will sue for damages or for an injunction.

It is embarrassing to claim both an injunction and the stipulated damages, as the plaintiff cannot ask for both; and therefore a practitioner protected by a restrictive covenant with stipulated damages should, where his right is infringed, elect his remedy before he issues his writ, and should not embarrass the defendant by claiming relief both by way of injunction and of the liquidated damages.
App., p. 173. In the case of *Carnes* v. *Nesbitt* (1 H. & N. 158, 778; 30 L. J. Ex. 348; 31 *Ib.* 273), the plaintiff claimed both kinds of relief; and, although at an early stage offered to waive the damages and take the injunction, he was held to have precluded himself, by the endorsement on his writ, from claiming an injunction; he recovered the liquidated damages, but the injunction was refused.

In a very recent case, however, *Gent* v. *Harrison*, noted in 95 L. T. Jo. 296, the plaintiff, who made such a double claim, was more leniently treated. There the defendant had entered into an agreement that he would not for the space of three years . . . . act as a tailor, &c., within a certain radius, under the penalty of 500*l.* as liquidated damages. On a breach of the agreement the plaintiff claimed both an injunction and the liquidated damages. An interim

injunction was granted on motion, and the action was ordered to be set down for the point of law to be argued whether the defendant would not, on payment of the 500*l.* liquidated damages, be absolved from any obligation under the agreement. The plaintiff afterwards withdrew his claim for damages, and at the hearing, Kekewich, J., held that the defendant ought, when the motion came on, to have called on the plaintiff to elect whether he asked for an injunction or for liquidated damages, as he could not have both, and the pleadings were therefore embarrassing to the defendant; but he held also that the defendant, having gone on, was too late in taking the point, and there must be an injunction against him as asked.

Court bound to grant injunction where there has been a deliberate breach of contract.

The Courts have jurisdiction to grant damages in lieu of the specific relief; but where there has been deliberate breach of a contract, the Court has no right to measure the damage and no right to refuse the plaintiff the specific performance of the contract. (See remarks of Jessel, M.R., in *Leech* v. *Schweder*, 10 Ch. at p. 468.)

Where no liquidated damages are named in the bond or agreement, the plaintiff may ask for an injunction and for damages; and even where there are liquidated damages named, it would appear, from the remarks in *Carnes* v. *Nesbitt*, 30 L. J. Ex. 349, that it is still open to the protected party to claim an injunction and unliquidated damages.

App., p. 174.

Party restrained cannot elect to pay damages and gain right to practise.

The party, however, who has covenanted not to practise and agreed to pay liquidated damages on any infringement, or who has given a bond, (which bond will be construed as containing an agreement not to infringe its condition: see *London and Yorkshire Banking Co.* v. *Pritt*, 32 W. R. 135) that he will pay liquidated damages if he practise within certain limits, has not the option of paying the sum stipulated and recovering his freedom to practise where he will (see *National Provincial Bank of England* v. *Marshall*, 40 C. D. 112); though if proceedings are instituted against him both for an injunction and for the liqui-

App., p. 191.

dated damages he can call upon the plaintiff to elect which remedy he will pursue.

Bankruptcy of person restrained from practice.

Where a practitioner, who has covenanted to pay liquidated damages in case he should practise within certain limits, becomes bankrupt, the liquidated damages would appear, although such practitioner have not infringed the covenant, to be a contingent liability to which the bankrupt was liable, and to be a debt provable in bankruptcy, capable of being estimated under the Bankruptcy Act of 1883, s. 37 (3) and (4). It would, however, be in most cases unwise to attempt to prove for such hypothetical damages, as the estimated value of such a contingent liability would assuredly be very small; and the bankrupt would become entitled to practise free from the restraint, protected for the future against either damages (as they would have been legally recovered) or proceedings by way of injunction, for the covenantee would have elected to take the alternative remedy. If the covenantee refrains from proving in the bankruptcy, and the covenantor after bankruptcy commits a breach of the restriction, it would seem that the covenantee, having so elected not to take the damages for which he might have proved, would not be precluded from obtaining an injunction. Of course, no damages could be recovered after a bankruptcy had intervened, and no claim had been made in it.

In *Jones* v. *Heavens* (4 C. D. 636), where the defendant had covenanted not to carry on a business within certain limits under a penalty of 100*l.*, an injunction was granted, although the defendant had after the covenant and prior to the breach filed a liquidation petition. The point, however, that the liability to pay the 100*l.* was a debt provable in the liquidation proceedings appears not to have been taken. (Confer *Robinson* v. *Ommaney*, 21 C. D. 780; 23 C. D. 285.)

Proceedings to obtain an injunction where a covenant in restraint of trade has been infringed, being actions to enforce specific performance of a contract, are instituted in

the Chancery Division of the High Court of Justice, which will adjudicate on the legality of the covenant.

Discretion of Court in granting an injunction is governed by settled rules.

The Court will exercise its discretion as to granting an injunction, but this discretion must be exercised according to fixed and settled rules. If there has been material delay on the plaintiff's part, or if with a full knowledge of his rights he has lain by, and by his conduct encouraged others to expend money in contravention of rights which he afterwards asserts, he cannot come to the Court and obtain relief by injunction. The plaintiff is entitled to apply for an injunction as soon as his legal right is invaded, and he is under no obligation to give the defendant any notice before commencing an action.

Interim injunction.

It is usual and advisable for the plaintiff, as soon as possible after commencing his action, to apply to the Court for an *interim* or interlocutory injunction to restrain, until the hearing or until further order, the alleged violation of a covenant of this nature. To entitle the plaintiff to an interlocutory injunction the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiff is entitled to relief. If the plaintiff shows such a *primâ facie* case the Court will grant an interlocutory injunction wherever it appears "just or convenient" so to do, and where a covenant is deliberately infringed it is the duty of the Court to interfere, even on an interlocutory application, and to grant an injunction, notwithstanding that the injury resulting from the infringement is very trifling; for if a contract has been duly entered into between parties it is no answer to a violation of it to say that it will not inflict any injury upon one of the contracting parties.

A perpetual injunction will not be granted before the hearing of the action; but where upon an interlocutory motion the plaintiff obtains the relief which he seeks in the action, he is bound to apply to the defendant to have the costs disposed of on the motion, and unless he does so he is precluded from having the extra costs occasioned by

going on to trial. But if the defendant refuses to allow the matter to be disposed of on motion, or if there is any question remaining open between the parties to be decided, the case cannot be so dealt with. (See *Sonnenschein* v. *Barnard*, 57 L. T. 712.) Where the defendant submits to the whole demand of the plaintiff and to pay the costs, he has a right at once to stop all further proceedings. (*Sivell* v. *Abraham*, 32 Beav. 598.)

Costs.

The plaintiff, on succeeding in obtaining an injunction, is, in general, entitled to have his costs. "Where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts; for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings; or other misconduct which will induce the Court to refuse costs. But where there is nothing of the kind the rule is plain and well settled, and is as I have stated it. It is, for instance, no answer, where a plaintiff asserts a legal right, for a defendant to allege his ignorance of such right and to say, If I had known of your right, I should not have infringed it." (Jessel, M.R., in *Cooper* v. *Whittingham*, 15 C. D. 501.)

When an injunction is granted, it must be obeyed implicitly. Any breach of an injunction or of an undertaking given to the Court may be enforced by writ of attachment, or by committal of the offending party.

APPENDIX OF CASES ON RESTRICTIVE COVENANTS.

Hunlocke v. Blacklowe.

(2 Wms. Saund. 156.)

That vendor of goodwill has carried on business contrary to his covenant is no defence to the purchaser in action for unpaid purchase-money.

In the case of *Hunlocke* v. *Blacklowe*, decided in 1670, the plaintiff, a tailor, had assigned his trade to the defendant and all the benefit of the customers named in a schedule, and had covenanted "*That he would from thenceforth leave off and desist from using and exercising the trade of a tailor with any of the customers named in the schedule*, and the defendant, *in consideration of the performance thereof*, covenanted to pay the plaintiff an annuity. The plaintiff sued for payment of the annuity by quarterly payments; the defendant pleaded in bar that the plaintiff within fifteen days after the date of the agreement used and exercised the art and mystery of a tailor for and with P. (one of the customers named in the schedule) for the sole benefit of the plaintiff, &c., to which plea the plaintiff demurred.

It was argued for the defendant that the words *in consideration of the performance thereof* made a condition precedent, so that when the plaintiff had broken his covenant by trading with one of the customers, the defendant was not bound any longer to pay the annuity; and here the plaintiff had traded with one of the customers before any payment of the annuity became due, and therefore the defendant was discharged from the payment.

Judgment was given by the Court of King's Bench for the plaintiff on the ground that it plainly appeared that the intent was the plaintiff should have the annuity, and therefore it was not a *condition*, but the defendant might have *his action of covenant* against the plaintiff for breach of the covenant on his part.

David Chesman and Wife v. Nainby (1725—7).

(2 Strange, 739; 2 Ld. Raym. 1456; 1 Bro. P. C. 234.)

Where covenant in restraint of trade is partly legal and partly illegal, a breach of the legal part may be sued on without regarding the unreasonableness of the other part.

Elizabeth Chesman had while single entered into a bond with Margery Nainby, which recited that Margery Nainby was "to take her for her hired servant, to attend in her shop, and to inspect her customers there, and to show her goods, and further to stand by and assist her the said Margery in her trade and business of a linen-draper, whereby it is presumed the said Elizabeth, if she continues any length of time in the said service of the said Margery, may become a perfect and knowing person in the said trade and mystery; and whereas the said Margery Nainby consents to hire and take the said Elizabeth upon and in consideration only upon the express promise and agreement of the said Elizabeth that she the said Elizabeth shall not, nor will at any time after she shall have left the service of her the said Margery, set up or exercise the trade or mystery of a linen-draper either by herself, or by any other person or persons in trust for her use, either directly or indirectly, in any shop, room, or place within the space of half a mile of the said now dwelling-house of the said Margery Nainby, situate in Drury Lane, or any other house that she the said Margery Nainby, her executors or administrators, shall think proper to remove to in order to carry on the said trade of a linen-draper; nor shall she the said Elizabeth, within the same space of half a mile, directly or indirectly, be concerned in or assist or instruct any other person or persons in the managing and carrying on of the said trade, under colour or pretence of being a servant to such person or persons, or under any other colour or pretence whatsoever, which said express promise and engagement, joined with the good character and opinion that she the said Margery hath in the integrity and honesty of her the said Elizabeth, is the sole consideration and inducement that hath obliged the said Margery to take the said Elizabeth into her service for the space of three years." The condition of the bond was for the payment of 100*l.* in case of a breach by the said Elizabeth.

The plaintiff continued to live in Drury Lane and to exercise her trade there till the bringing of the action. Elizabeth after leaving the plaintiff married David Chesman, and instructed him in the trade within the half mile.

The plaintiff obtained a verdict in the Court of Common Pleas, and a writ of error was brought in the King's Bench.

The defendant's counsel said: "The first part of the restraint is, indeed, only particular; the defendant is particularly restrained from setting up the trade within half a mile of the dwelling-house of the plaintiff in Drury Lane. So far it may be good: but then it is added, 'or any other house that the said Margery Nainby, her executors or administrators, shall think proper to remove to': this makes it a general restraint, because it puts it in the power of the plaintiff to prevent the defendant from exercising the trade in any part of the kingdom."

The plaintiff's counsel said: "I do not think myself obliged to maintain every part of the condition of this bond. I am afraid if the breach had been assigned upon the *elsewhere*, or upon the clause which speaks of executors and administrators, it might be difficult to support it; but what I rely upon as an answer in this case is, that the condition is good as to that part whereon the breach is alleged." He argued that if a bond be given with condition to do several things, and some are agreeable to law, and some against the common law, the bond should be good as to the doing the things agreeable to law, and only void as to those that were against the law.

The breach was assigned upon part of the condition which was good in law, and, therefore, if the other part to which exception was taken should be against law, yet that would not hinder the plaintiff's recovery upon that part of the condition which was legal.

The whole Court was of opinion that the verdict for the plaintiff should be affirmed, and this judgment was afterwards unanimously affirmed in the High Court of Parliament.

Davis v. Mason (1793).

(5 Term Rep. 118.)

Restraint of practice for fourteen years, and limit of ten miles round Thetford in the case of a surgeon, held to be reasonable. Taking an assistant into service is sufficient consideration for a restrictive covenant.

Davis v. *Mason*, in 1793, appears to be the earliest reported case of a restraint of this nature between medical men. The plaintiff sued on a bond for 200*l.*, the condition of which (after reciting that the plaintiff had taken the defendant as an

assistant in the business of a surgeon, &c., and that the defendant had agreed with the plaintiff not to exercise the business on his own account within the distance of ten miles from Thetford, where the plaintiff resided, for fourteen years), was that the defendant would not exercise the business, &c. within that distance, &c. It was argued that the bond was unreasonable, both in the duration and limits of the prohibition; that fourteen years was too long, and the limit of ten miles all round from Thetford was too extensive; also that it was repugnant to every principle of justice that a medical man should be restrained by law from giving his assistance, even in the greatest extremity, and when there was no time to wait for other help. But above all that the consideration was inadequate, as, the moment the defendant had executed the bond, the plaintiff might have dismissed him. It did not appear that the plaintiff had engaged to instruct the defendant in his profession, or to pay wages or to retain him in his service for any certain length of time.

Lord Kenyon, C.J., in giving judgment for the plaintiff, said: "A bond in restraint of trade cannot be arbitrarily taken, and without consideration; some consideration must appear. But here, the plaintiff being established in business as a surgeon at Thetford, the defendant wished to act as his assistant with a view to deriving a degree of credit from that situation; on which the former stipulated that the defendant should not come to live there under his auspices and steal away his patients. This seems to be a fair consideration for the bond. Then it was objected that the limits within which the defendant engaged not to practise are unreasonable, but I do not see that they are necessarily unreasonable, nor do I know how to draw the line. Neither are the public likely to be injured by an agreement of this kind, since every other person is at liberty to practise as a surgeon in this town."

Hayward v. Young (1818).

(2 Chitty, 407.)

In Aylesbury or within twenty miles held reasonable.

A condition in a bond "not to set up as surgeon or man-midwife in the town of Aylesbury or within twenty miles" was held valid.

Abbott, C.J., in giving judgment for the plaintiff, said: "May not the business of an apothecary extend for twenty miles, and might not the setting-up within that distance be injurious to him"?

Wickens v. Evans (1829).

(3 Y. & J. 318.)

Tradesmen divided England and Wales into districts, and covenanted not to travel into each other's districts. Held reasonable.

In *Wickens* v. *Evans*, three persons, the plaintiff, the defendant, and another, who were carrying on the trade of trunk-makers, and had sustained inconvenience and loss through their competition with each other, divided the map of England and Wales into three districts, one of which was allotted to each, and mutually agreed that each of them might travel into and sell trunks in his allotted district without interruption from the other two respectively; and further agreed that they would not allow any goods in their trade to be manufactured in or sent out from their respective shops into, or participate in the profit arising from the sale of such goods in, each other's district, or should forfeit a liquidated sum for each breach.

The defendant, in breach of the agreement, travelled into the plaintiff's district, and committed several breaches of the agreement, and was sued by the plaintiff for the liquidated damages. The defendant demurred, alleging that the agreement operated in general restraint of trade, and was void; or was an agreement for partial restraint, without sufficient consideration, and that it was an illegal combination.

The judges held that the restraint of trade was only partial, and that there was sufficient consideration for it. Each party had, before the agreement, a right to trade in all the districts: he agreed to retire and to relinquish the trade in two of those districts in order to secure the others in undisturbed possession. In consequence of the loss and inconvenience which the parties had before sustained, they entered into the agreement by which the loss and benefit to each was reciprocal.

Horner v. Graves (1831).

(7 Bingham, 735.)

Limits of "at or within 100 *miles of the city of York" held unreasonable in the case of a surgeon-dentist.*

In the case of *Horner* v. *Graves*, the plaintiff, a surgeon-dentist of York, had engaged the defendant, a dentist of some skill, as his assistant at a salary, and had covenanted to

instruct him in the business or profession of a surgeon-dentist to the best of his skill and knowledge. The defendant had agreed faithfully and diligently to serve as the plaintiff's assistant, and that he would not at the determination of the engagement (provided the plaintiff were then living and practising in the profession or business of a surgeon-dentist) exercise or practise the profession of a surgeon-dentist at or within 100 miles of the city of York, without the previous consent in writing of the plaintiff, under the penalty of 1,000*l.* to be forfeited and paid by the defendant, as and for liquidated damages. After the determination of the term the defendant practised within the prescribed limits.

It was argued in behalf of the defendant that the restraint was unreasonable; that the agreement was mischievous to the defendant and the public without being productive of any corresponding advantage to the plaintiff. That the defendant was estopped to practise over a circle the diameter of which was 200 miles, containing nine whole counties and parts of eight more. If the plaintiff were to labour night as well as day it would be physically impossible for him to draw all the teeth of such a district. If he left home, York was without the benefit of his skill, if he remained at York, patients might die in Lancaster. This was not like a trade which a man might conduct by his agents; the health of the public was endangered without the possibility of any advantage to the plaintiff.

The Court of Common Pleas held that the contract was one which contained a restraint of the defendant to carry on his trade, far larger than was necessary for the protection of the plaintiff in the enjoyment of his trade, and consequently that the covenant creating such restraint could not form the subject of an action.

Tindal, C.J., in delivering the judgment of the Court, cited the rule laid down in *Mitchell* v. *Reynolds* (1 P. Wms. 181): "That voluntary restraints, by agreement between the parties, if they amount to a *general* restraint of trading by either party are void, whether with or without consideration, but *particular* restraints of trading, if made upon a good and adequate consideration, so as to be a reasonable restraint only, are good," and said that, "Upon the bare inspection of this deed it must strike the mind of every man that a circle round York traced with the distance of 100 miles, encloses a much larger space than can be necessary for the plaintiff's protection. The nature of the occupation, which is one that requires the personal presence of the practiser and patient together at the same place, shows at once that the plaintiff has shut out the defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the

one hand, no reason why the defendant should not gain his livelihood, nor on the other why the public should not receive the benefit of his skill and industry through so wide a space."

Hitchcock v. Coker (1837).

(6 Ad. & E. 439; 6 L. J., N. S., Ex. 266.)

Covenant in restraint of business held reasonable, although it is not restricted to the lifetime of the covenantee or to the time during which he may carry on business, and is co-extensive with the covenantor's life. The Court will not examine into the adequacy of the consideration if there is some consideration given.

In *Hitchcock* v. *Coker*, the plaintiff was a druggist, and had taken the defendant into his service as an assistant at an annual salary, and the defendant entered into an agreement, founded upon the consideration of being received as an assistant, that if he should at any time thereafter directly or indirectly in his own name or that of any other person, exercise the trade or business of a chemist and druggist at Taunton, or within three miles thereof, the defendant should pay the plaintiff 500*l.* as liquidated damages. The defendant exercised the trade in Taunton, and the plaintiff obtained a verdict for the 500*l.*

The question of the validity of this agreement was argued ultimately before the Court of Exchequer Chamber (Tindal, C.J., Lord Abinger, C.B., Gaselee and Vaughan, JJ., Bolland and Alderson, BB.), and it was contended for the defendant that the consideration was not adequate to the restraint; and further, that the restraint was oppressive, as it was not limited to the life of the plaintiff or to the time during which he would carry on the business.

Judgment was given for the plaintiff.

Tindal, C.J., who delivered the judgment of the Court, said: "We agree in the general principle that, where the restraint of a party from carrying on 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. But the difficulty we feel is in the application of that principle to the case before us. Where the question turns upon the reasonableness or unreasonableness

of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on,—with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But with respect to *the duration* of the restriction the case is different. The goodwill of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such goodwill considered in those various points of view is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative ; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be by making the restriction of the servant's setting up or entering into the trade or business within the given limit co-extensive with the servant's life. . . . .

"We cannot, therefore, hold the agreement in this case to be void merely on the ground of the restriction being indefinite as to duration, the same being in other respects a reasonable restriction.

"But it was urged in the course of the argument, that there is an inadequacy of consideration in this case, with respect to the defendant; and that, upon that ground, the judgment must be arrested. Undoubtedly in most, if not all, the decided cases, the judges, in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract

in restraint of trade. If by that expression it is intended only that there must be a good and valuable consideration, such consideration as is essential to support any contract not under seal, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favoured by law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void. But if, by adequacy of consideration, more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the Court, in every particular case, which it has no means whatever to execute. It is impossible for the Court, looking at the record, to say whether, in any particular case, the party had made an improvident bargain or not. The receiving instruction in a particular trade might be of much greater value to a man in one condition of life than in another; and the same may be observed as to other considerations. It is enough, as it appears to us, that there actually is *a* consideration for the bargain, and that such consideration is a legal consideration, and of some value. Such appears to be the case in the present instance, where the defendant is retained and employed at an annual salary. We therefore think, notwithstanding the objections which have been urged on the part of the defendant, that the plaintiff has shown upon the record a legal ground of action, and having obtained a verdict in his favour, that he is entitled to judgment."

Ward v. Byrne (1839).

(5 M. & W. 548; 9 L. J., N. S., Ex. 14.)

Covenant in general restraint of a particular business is void for however short a time it is to endure.

In *Ward* v. *Byrne*, the plaintiff, a coal merchant, had taken the defendant into his service, and the defendant had executed a bond, the conditions of which contained, amongst other stipulations, "and also if the said B. shall not follow or be employed in the said business of a coal merchant, either directly or indirectly, for the space of nine months after the said B. shall have left the employment of the said W."

Breach was assigned that the defendant, within nine months after he left the employment of the plaintiff, did follow and was employed in the said business.

The defendant had acted as clerk to another coal merchant: the plaintiff sued on the bond, and a verdict was entered for plaintiff.

A motion to arrest judgment, on the ground that the agreement was void in law as being in restraint of trade, was argued before the Court of Exchequer (Lord Abinger, C.B., Parke, Gurney, and Rolfe, BB.), and the agreement was held illegal and void.

Lord Abinger, C.B., said, in the course of his judgment: "The obligation which the defendant undertakes by his bond is, that he shall neither be or serve a coal merchant in any capacity for nine months. That goes so far beyond what the plaintiff could require, that it is an unreasonable restriction: it is void on both grounds. It is against the principles and policy of the law as to any restraints on trade, and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment; and it is beyond what is necessary for the protection of the plaintiff, or what the justice of the case demands. I think, therefore, that this contract cannot be enforced, and that the judgment ought to be arrested.

Parke, B., said: "Where a limit as to *space* is imposed, the public, on the one hand, do not lose altogether the services of the party in the particular trade,—he will carry it on in the same way elsewhere; nor within the limited space will they be deprived of the benefit of the trade being carried on, because the party with whom the contract is made will most probably within those limits exercise it himself. But when a general restriction, limited only as to *time*, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return."

Rolfe, B., said: "The general policy of the law is against these restrictions, and it is only in deference to the convenience of the trading part of the community that certain exceptions to the general rule have been allowed. Those exceptions have always left things in this state, that, when allowed, a portion of the public is not injured at all; that portion of the public to which the restriction does not extend remains exactly as it did before the restriction took place. But in this case, the whole of the public is restrained during the period in question, and the only argument is, that this is to endure only for a short time; that is to say, that what the law does not allow is to be tolerated, because it is of short duration. I see no principle in favour of such a conclusion. I do not think

this is the law; and I consequently concur with my learned brothers in saying that this contract is void."

Mallan v. May (1843).

(11 M. & W. 653; 12 L. J. Ex. 376; 14 ib. 48.)

Covenant not to practise as a surgeon-dentist in London or any towns or places in England or Scotland where the plaintiffs might have been practising while the defendant was their assistant. Held, a reasonable restraint so far as London was concerned, but unreasonable as to the other places.

The plaintiffs, who were surgeon-dentists, had entered into an agreement with the defendant that the defendant should become their assistant and should be instructed by them in the business of a surgeon-dentist for the term of four years. And it was agreed that, after the expiration of the said term of four years, the defendant would not, directly or indirectly, carry on or be concerned as principal, assistant, or agent in the profession of a surgeon-dentist or any branch thereof *in London or any of the towns or places in England or Scotland where the plaintiffs or the defendant on their account might have been practising* before the expiration of the said service.

The declaration alleged as breaches—first, that the defendant, after the term, carried on the said business in London; secondly, that the plaintiffs had, during the term, carried on business at a place in Middlesex, called Great Russell Street, Bloomsbury; yet the defendant, after the term, carried on the said business in the same place. The defendant pleaded to the first breach "that London in the said agreement and declaration mentioned at the time of making the agreement was and from thence hitherto hath been and still is a certain large and populous district and place, containing more than one million of inhabitants, to wit, one million and half of inhabitants," and that the stipulation touching the defendant carrying on the profession of a surgeon-dentist in London was an undue, unreasonable, and unlawful restriction of trade, and by reason thereof the agreement as to so much thereof was wholly void.

The defendant also pleaded, to the first and second breaches, that the plaintiffs, by themselves and through the defendant on their account, had, during the term, practised at many named towns, some of them distant 150 miles from each other,

and that the stipulation touching the defendant being concerned in the profession of a surgeon-dentist in any of the towns or places in England or Scotland where the plaintiffs or the defendant on their account might have been practising during the term was unreasonable and void.

The judgment of the Court of Exchequer was delivered by Parke, B., who said in the course of the judgment: "Total restraints of trade, which the law so much favours, are absolutely bad, and all restraints, though only partial, if nothing more appear, are presumed to be bad; but if the circumstances are set forth, that presumption may be excluded, and the Court are to judge of these circumstances and determine whether the contract be valid or not. . . . . It is for the Court to determine whether the contract be a fair and reasonable one or not, and the test appears to be whether it be prejudicial or not to the public interest; for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trades are perfectly consistent with public convenience and the general interest, and have been supported: such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is, in effect, the sale of a goodwill, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry. And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or a professional man taking a servant or clerk into his service with a contract that he will not carry on the same trade or profession within certain limits. In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instructions in the secrets of the trade, and the communications of his own skill and experience, from the fear of his afterwards having a rival in the same business. . . . In the present case the statements in the deed declared upon show that the defendant was to be instructed in a business requiring skill and intelligence, and upon the principles above laid down the contract not to exercise the same business within certain reasonable limits was not invalid.

"The question then comes to this, whether the limits assigned by the covenant are unreasonable. It may be safely

laid down . . . . that, whatever restraint is larger than the necessary protection of the party with whom the contract is made is unreasonable and void, as being injurious to the interest of the public on the ground of public policy.

"Applying this rule, and referring to the analogous authorities, it appears to us that for such a profession as that of a dentist the limit of London is not too large . . . . and it makes no difference, in our opinion, that it appears on the face of this record, that London contains a million of inhabitants. We doubt, indeed, whether the comparative populousness of particular districts ought to enter into consideration at all; and if it did it would be difficult to exclude others, such as the number of men of the same profession, the habits of the people in that neighbourhood, and other matters of a fluctuating and uncertain character, which would produce great difficulty and embarrassment in determining such a question. . . . .

"We are of opinion, therefore, that the covenant, the breach of which is that first assigned, is valid.

"The question raised by the demurrer to the last plea renders it necessary to consider whether the covenant on which the second breach is assigned is good in law, upon the principle before laid down. . . . .

"According to the terms of this covenant the defendant is prohibited from carrying on his business, not merely at such place or places as the plaintiffs might be practising in at the time of the expiration of the service, but at any place where they might have been practising before, though for ever so short a time. This covenant goes much beyond what the protection of any interests of the plaintiffs could reasonably require, and it puts into their hands the power of preventing the defendant from practising anywhere. We are therefore of opinion that it is an unreasonable restriction, and the defendant is entitled to our judgment on the demurrer to the second breach.

"It was contended, that, if the covenant was illegal and void as to this part, it was so altogether. But we think that the stipulation as to not practising in London is valid, and is not affected by the illegality of the other part."

The same case came again before the Court of Exchequer (13 M. & W. 511) as to the meaning of the word London, and the Court held that London in the proper sense of the word meant the City of London, and there was no reason for the Court to give to London a popular or colloquial sense, in which Great Russell Street would be understood to be within its limits.

Rannie v. Irvine (1844).

(7 Man. & Gr. 969; 14 L. J. C. P. 10.)

A covenant in restraint of business is enforceable if when entered into it is reasonable.

In the case of *Rannie* v. *Irvine*, before the Court of Common Pleas, the defendant, a baker, had assigned for value the lease of his shop and the goodwill of his baking business, to the plaintiff, and had agreed that he would not set up or carry on, directly or indirectly, during a certain term, the business of a baker within one mile of the said shop under the payment of the sum of 200*l.*, to be sued for and recovered by way of liquidated damages, for every month in which the defendant should commit any breach of the covenant; and also that the defendant would not during such term solicit the custom of or knowingly supply bread or flour to any of the customers then dealing at the said shop, without the consent in writing of the plaintiff, under the penalty of 200*l.*, to be sued for and recovered as liquidated damages for each infraction. A breach was assigned that during the period mentioned the defendant had knowingly supplied bread to F. and B., two customers before and at the time of the said agreement dealing at the shop, and had become liable to pay to the plaintiff two several sums of 200*l.* and 200*l.*

On demurrer the point was argued that the agreement declared on was contrary to public policy and illegal, in that it restrained the defendant from supplying bread and flour to particular persons wherever they might reside, without limit in point of space as to those persons, and under all circumstances, whether such persons changed their residences or continued customers of the plaintiff or not, which was a restraint larger and wider than the protection of the plaintiff could possibly require, and the same must therefore be considered as unreasonable and void in law.

Judgment was given for the plaintiff on the demurrer.

Tindal, C.J., said: "Upon the best construction I can put upon this agreement it does not appear to me to be such a contract in restraint of trade as to compel us to hold it void. The first part of the agreement—that the defendant would not directly or indirectly set up or carry on during the term the business of a baker within one mile of the premises disposed of—is admitted to be good. But it is contended that the latter branch of the agreement, whereby the defendant engages that he will not during the said term solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the said premises without the con-

sent in writing of the plaintiff, is such a restriction upon the defendant's right to trade as renders the agreement void, as being contrary to public policy. In the first place it is to be observed that this is not a general restraint of trade, but only restricts the defendant from trading with a very limited number of persons whose names were well known to him at the time he entered into the contract; and it would not carry the case further than the first part of the agreement, provided the customers continued to reside in the same place. But it is argued that the customers may remove to another district, and that this contract would prevent the defendant from supplying them with bread and flour whithersoever they might go, although they might not be able to obtain so necessary an article as bread from any one else. If, however, the contract is a reasonable one at the time it is entered into, we are not bound to look out for improbabilities and extravagant contingencies in order to make it void. It does not seem to me that in holding this contract to be good we shall be at all extending the doctrine laid down in *Hunlocke* v. *Blacklowe* (2 Wms. Saund. 156). Undoubtedly in that case (where the point was not taken, probably because the very learned person by whom it was argued did not think it tenable) the customers were named in the schedule. That makes no substantial difference, for here the names of the customers would all appear in the defendant's book, and the restraint was virtually limited to a given number of persons ascertained and agreed on by the parties at the time. I think, therefore, our judgment must be for the plaintiff."

Maule, J., said: "The general rule against covenants in restraint of trade is founded upon this, that the law favours trade for the sake of the public, and not for the sake of the parties engaged in it. And the reason of the exception grafted upon the rule is, that the exception is a furtherance of the rule itself. If it were held that a party selling the goodwill of a business could not restrain himself from using for his own profit that which he has agreed to sell, that would operate as a restraint of a very injurious kind. But it is objected here that the restraint goes beyond the limit allowed by the law and what is necessary for the effectual security of the vendee. The provision is, that the defendant shall not during the term solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises without the consent in writing of the plaintiff. That must receive a reasonable construction. For instance, it cannot be held to apply to a dealing in any other trade than that of a baker; nor do I think that the giving bread to an old customer in the way of charity would be an infraction of the contract, and yet both of these cases would fall within the

literal construction of the contract. If, then, we are to give it a reasonable construction, such construction would probably exclude the case that has been put, of this baker and some of his old customers going to some distant spot where bread would be procurable only from him. The possibility that some such extravagant case may occur will not make a restriction unreasonable that is otherwise reasonable and just."

Coltman, J., and Erle, J., gave judgment to the same effect.

Green v. Price (1845).

(13 M. & W. 695; 16 ib. 346; 14 L. J. Ex. 105, 225; 16 ib. 108.)

A tradesman (a wholesale perfumer) on dissolution of a partnership covenanted not to carry on the trade in London or Westminster, or within 600 *miles therefrom. Held, that the covenant was divisible, and was good as to London and Westminster, though void as to the* 600 *miles. Jury directed to assess the damages at the full amount mentioned as liquidated damages.*

Green v. *Price* was an action of covenant brought by the plaintiff as executor of John Gosnell. It had been agreed by deed between the defendant and John Gosnell, who had carried on business as perfumers in partnership, that the defendant for 2,100*l.* should assign to Gosnell his moiety in the goodwill and assets of the partnership, and in consideration thereof, the defendant covenanted with John Gosnell, his executors, &c., that the defendant would not at any time during his life, use, exercise, or carry on within the cities of London and Westminster, or within the distance of 600 miles from the same respectively, the trade or business of a perfumer, toyman and hair merchant, or any trade or business lately carried on by the defendant and Gosnell in partnership; and for the observance of this covenant, the defendant did thereby bind himself, his heirs, &c., to the said John Gosnell, his executors, &c., in the sum of 5,000*l.*, as and by way of liquidated damages, and not of penalty.

The defendant, who had set up in business in his own name in Lombard Street in the City of London, pleaded that the said cities of London and Westminster, and the said distance of 600 miles from the same respectively, within which the defendant was prohibited from carrying on trade, comprised

and included the whole kingdom of England, the dominion of Wales, and the town of Berwick-upon-Tweed, together with a large portion, to wit, nineteen-twentieths of the kingdom of Scotland, and therefore the said supposed covenant was and is void in law.

On demurrer on this plea, the Court held that the covenant was divisible, and was good so far as it related to the cities of London and Westminster; and that a breach assigned that the defendant carried on the trade in the city of London was good; and judgment was given for the plaintiff.

On the execution of the writ of inquiry before Chief Baron Pollock, the jury were directed to assess the damages at 5,000*l.*, which they did accordingly.

Ultimately, the case came before the Exchequer Chamber, and is reported 16 L. J. Ex., p. 108; and it was held that the covenant was divisible, and that though void as regarded the distance of 600 miles from London and Westminster, it was good as regarded the cities of London and Westminster themselves. Also, that the jury were properly directed to assess the damages at the whole 5,000*l.*, and not to ascertain the actual damage, that being the sum named, and the intention of the parties being clear and unequivocal.

Rawlinson v. Clarke (1845).

(14 M. & W. 187; 14 L. J. Ex. 364.)

Where a surgeon who had covenanted not to practise within certain limits attended patients at the request of the covenantee, held no breach.

In *Rawlinson* v. *Clarke*, the defendant had by deed assigned to the plaintiff his business as a surgeon and apothecary carried on by him in Park Street, Camden Town, and the defendant covenanted that he would not . . . . carry on or exercise his practice . . . . by residing or visiting any patient within three miles from the defendant's place of business, and in case of breach of the covenant, would pay to the plaintiff the full sum of 500*l.* as liquidated damages and not as a penalty. The defendant afterwards attended several persons within the three miles, and on one occasion received a sum of 14*l.* 14*s.* for his services, but he attended these persons with the knowledge and consent of the plaintiff in consequence of a request by him that the defendant should for a time continue to visit the patients to keep the connection together.

The jury in an action on the covenant found that the defendant in these instances exercised the practice of a surgeon for the purpose of assisting the plaintiff. The verdict was thereupon entered for the plaintiff for 500*l.* damages, with liberty to the defendant to move to enter a verdict for him, or to reduce the damages to 7*l.* 7*s.*, which the jury found to have been the actual damage sustained by the plaintiff.

A motion was made accordingly, and a rule obtained to show cause on the first point; the rule was refused as to the reduction of the damages by the Court, consisting of three of the four judges who had decided the recent case of *Green* v. *Price*, for the reasons stated in that case; as for a breach of the covenant, the measure of damages was the full sum of 500*l.*

The plaintiff's counsel argued that the parol licence could not discharge a covenant under seal, but the Court held that the defendant was not carrying on business for himself, but was carrying on the business for the plaintiff, and a verdict was entered for the defendant.

Hastings v. Whitley (1848).

(2 Ex. 611.)

Covenant not to practise enforced against the covenantor after the death of the covenantee.

In *Hastings* v. *Whitley*, the plaintiffs were the executors of one Kenrick Watson, a surgeon and apothecary, practising at Stourport. The defendant had been the assistant of Watson and had entered into a bond, the condition of which was that if the defendant should, either as principal or assistant, or either alone or in partnership with any person, exercise or practise, or assist in exercising or practising the profession or business of a surgeon or apothecary at Stourport, or within the distance of ten miles in any direction therefrom, *at any time* after the termination of his engagement with the said Watson, without the consent in writing of Watson first obtained, then and in such case, if the defendant should forthwith pay or cause to be paid to Watson, his executors, administrators, or assigns, the sum of 1,000*l.*, then the bond should be void and of no effect, otherwise it should remain in full force and vigour.

Watson died, and the defendant was sued on the bond as having practised at Stourport.

The defendant pleaded that he did not *in the lifetime* of Watson practise contrary to the conditions.

In proceedings on demurrer one of the defendant's points for argument was that the bond was illegal and void if the condition should be construed to extend to the defendant's practising the said profession after the death of Watson.

The Court (Barons Parke, Alderson, and Rolfe) decided in favour of the plaintiffs.

Parke, B., said: "The words *at any time*, *primâ facie* import that the period is not to be confined to the life of the obligee, but that it is co-extensive with that of the obligor; and it was held in *Hitchcock* v. *Coker* that there was nothing illegal in the restriction being indefinite as to duration, the same being in other respects a reasonable restriction. . . . .

"Now, as this is *primâ facie* a restriction which is not limited as to time, what is there in the terms of the condition to confine it to a period of the testator's lifetime? The only terms which can allow any other construction to be put upon it are the words 'without the consent in writing of the said K. Watson,' and I do not think that these words shorten the period. The defendant would be bound to get Watson's consent if he practised. If he practised without his consent and without paying the 1,000*l.*, he would be liable to the penalty of the bond. I think, therefore, that by putting the ordinary construction on the words of this condition, the defendant has failed to show that he has performed it so as to relieve himself from the penalty of the bond."

Sainter v. Ferguson (1849).

(1 Mac. & G. 286; 1 Com. B. 716; 18 L. J. C. P. 217; 19 L. J. Ch. 170.)

Defendant on being engaged as assistant agreed not to practise within certain limits under a "penalty of 500*l." Engagement held sufficient consideration. Penalty construed as liquidated damages. Plaintiff having recovered judgment for damages not allowed to obtain an injunction.*

In *Sainter* v. *Ferguson*, the plaintiff, who was a surgeon and apothecary at Macclesfield, had on April 12th, 1848, entered into an agreement in writing with the defendant as follows:—

"In consideration that S., of Macclesfield, surgeon and apothecary, will engage me, F., as assistant to him as a surgeon and apothecary, I, the said F., promise the said S.

that I will not at any time practise in my own name, or in the name or names of any other person or persons, as surgeon or apothecary at Macclesfield, or within seven miles thereof, under a penalty of 500*l.* And I, the said S., do hereby agree with the said F. to engage the said F. as an assistant to me as a surgeon and apothecary on the terms aforesaid."

The plaintiff discharged the defendant in August, 1848, and the defendant immediately commenced practice in Macclesfield, on which the plaintiff applied for an injunction, but the Court refused to interfere, on the ground that the plaintiff's equity depended on the legal effect to be given to the agreement, but ordered the motion to stand over with liberty for the plaintiff to bring such action as he might be advised.

The plaintiff accordingly brought an action against the defendant, claiming the 500*l.*, the penalty mentioned in the agreement.

The case was tried at the Chester Spring Assizes in 1849, where, on the part of the defendant, it was objected that the agreement was void as an unreasonable restraint of trade, inasmuch as it professed to bind the defendant not to practise *at any time* as a surgeon and apothecary at Macclesfield, or within seven miles thereof, and that the 500*l.* was in the nature of a penalty merely, and not liquidated damages.

Under the direction of the judge, Cresswell, J., the jury found for the plaintiff, damages 500*l.*, the points of law being reserved.

In the argument before the Court of Common Pleas, it was contended on behalf of the defendant that the fair meaning of the contract was that the defendant should not practise so long as he remained in the service of the plaintiff; that there was no consideration, as the plaintiff was at liberty to dismiss the defendant at any moment; and that the judge had miscarried in telling the jury that the 500*l.* might be treated as liquidated damages and not as a penalty. It was not unimportant to observe that the agreement itself used the word penalty only. Judgment was given for the plaintiff by Wilde, C.J., and Coltman, Cresswell, and V. Williams, JJ.

Wilde, C.J., said in his judgment:—

"It would seem that the parties were not prepared at the date of the contract to fix the period or the terms of the engagement, but left that to be matter for future discussion. The stipulation for the restriction of the defendant's practising at Macclesfield or within the prescribed limit was to have effect only when the subsequent definitive engagement should have been entered into. Supposing the plaintiff to be a person of skill and reputation, the very fact of his engaging the defendant as his assistant would give the latter a great advantage as a rival, inasmuch as his being so authenticated

would naturally give him an opportunity of worming into his employer's connection. An engagement, therefore, even for a short time, would be advantageous to the defendant and detrimental to the plaintiff. But we must suppose that the parties contemplated an engagement reasonable in point of time and other circumstances. It may fairly be assumed that an offer of an engagement which was merely illusory would be rejected by the defendant, and in that case he would not be subjected to the proposed restrictions. He, therefore, would have the means of protecting himself. The plaintiff contracts to enter into a reasonable engagement with the defendant, that is, in effect, to offer such reasonable terms as the defendant would be bound to accept. Looking at the contract, therefore, as importing an engagement which will have the defendant's assent, and the declaration alleging that the plaintiff did, in pursuance of the agreement, engage the defendant as assistant, I think it discloses a sufficient consideration. The next question is, whether the 500*l.* mentioned in the agreement is to be considered as liquidated damages or not. It is now clearly settled that, whether the sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is a question of law, to be decided by the judge upon a consideration of the whole instrument. This agreement does not prohibit the defendant's doing several distinct and independent acts, each of which might be incapable of exact estimation, nor does it involve any of the circumstances that have, in any of the cases, induced the Court to hold the sum to be a penalty only. The whole object of the plaintiff was to protect himself from a rival, and it would be impossible in such case to say what damage might result to him from a breach of the agreement. It is not unreasonable, therefore, that the parties should themselves fix and ascertain the sum that should be paid. And I think we can only give effect to the contract of the parties by holding the 500*l.* to be liquidated damages and not a mere penalty."

The other judges gave judgment to the same effect.

Coltman, J., said: "As to the second point, I agree with the Lord Chief Justice that, although the word 'penalty,' which would *primâ facie* exclude the notion of stipulated damages, is used here, yet we must look at the nature of the agreement and the surrounding circumstances to see whether the parties intended the sum mentioned to be a penalty or stipulated damages. Considering the nature of this agreement and the difficulty the plaintiff would be under in showing what specific damage he had sustained from the defendant's breach of it, I think we can only reasonably

construe it to be a contract for stipulated and ascertained damages."

Cresswell, J., said: "With respect to the damages, I concur in what has fallen from the Lord Chief Justice and my brother Coltman. If there be only one event upon which the money was to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation in order to avoid the difficulty."

Judgment was accordingly signed in the action for 500*l.* damages, and 155*l.* 6*s.* costs.

The defendant having become bankrupt, the plaintiff proved for the amount of costs only, and in June, 1849, applied to Knight Bruce, V.-C., for an injunction, which his honour granted on condition that the plaintiff should not prove for the 500*l.* The defendant moved to discharge the injunction.

In the proceedings before the Lord Chancellor, his lordship said (1 Mac. & G. p. 289): "The Court of Law has determined that the word 'penalty' in the agreement means liquidated damages, and, therefore, there is no right of action now remaining. . . . . It comes, in fact, to this—that after the defendant has paid the price of doing the act, the Court is asked to restrain him from doing that act for which he has paid." And in his judgment the Lord Chancellor said: "When a party comes here for an injunction against the breach of an agreement, the Court assumes jurisdiction, because the remedy at law is not efficient, and the interest of the party requires that the act should be prevented, instead of his merely receiving compensation in the shape of damages; but this jurisdiction is exercised in reference to the right established by the legal contract. In the present case, a party having bound himself by contract not to practise as a surgeon and apothecary under a penalty of 500*l.*, violates his agreement, this agreement, according to the construction put on it by a Court of Law, being held to mean, 'You shall not practise, or if you do, you must pay 500*l.*' The plaintiff, with whom the contract was entered into, came to this Court and asked for an injunction, not having then brought any action, and, as in other cases where there is a legal right in question, the Court ordered the matter to stand over until the legal right should be established. It is true that if the plaintiff had seen the difficulty which has since arisen, he might have put the matter so as to have had the option left him either of exercising his legal right or his equitable remedy, and not to have been precluded from the alternative which, before the action, he had, either to ask for an injunction, or to obtain compensation at law. The order, however, does not provide

for this; it places the plaintiff under no restriction; it only refuses to interfere until the legal right has been tried. It was then the plaintiff's own choice to go on, and the matter now stands just as if the plaintiff had brought the action first, and then come to this Court for an injunction. Now it could not be contended that after obtaining damages at law the plaintiff could have come here for an injunction, but what has taken place is just the same in effect. The Court refused the injunction at the time when no action had been brought; the damages have since been obtained, and the Court has now to consider whether it will interfere to aid a contract which, in fact, no longer exists. The party now applying cannot show that he has any legal right remaining, and the Court cannot, therefore, interfere. If the Court did interfere, it would be telling a party that, though he had purchased the right to do the act, he should not have the benefit of his purchase."

Atkyns v. Kinnier (1850).

(4 Exch. 776; 19 L. J. Ex. 132.)

Surgeon covenanted not to practise or reside within two-and-a-half miles of a London address, with liquidated damages in case of infringement. Covenant broken as to residence, and the liquidated damages awarded.

In the case of *Atkyns* v. *Kinnier*, the defendant, who was a surgeon, accoucheur and apothecary, residing at 28, Dorset Crescent, in London, had agreed in consideration of a present payment of 400*l.*, and a further payment of 380*l.*, to be made at the end of the partnership term, to enter into partnership with the plaintiff for the term of three years, and the defendant had covenanted that he would not, after the determination of the partnership, either alone or in partnership with any other person, and neither for fee and reward or gratuitously, follow or practise in the profession or business of a surgeon, accoucheur, or apothecary, at No. 28, Dorset Crescent (the defendant's then residence), or within the distance of two-and-a-half miles thereof, measuring by the usual streets or ways of approach thereto, nor reside within the distance of two-and-a-half miles of No. 28, Dorset Crescent, without the consent in writing of the plaintiff, and that the defendant would not by any means whatsoever attempt to prevail on any of the patients of the defendant, or of the partnership, to withdraw from the plaintiff, or to employ any other medical

attendant in prejudice to the plaintiff, but, on the contrary, would in all things endeavour to promote and advance the business and advantage of the plaintiff in the profession of a surgeon, &c., so far as it was in the power of the defendant, and as he could reasonably and properly be required to do, and that if the defendant should in any respect break or infringe this stipulation, then, and in such case, he should immediately pay to the plaintiff, his executors or administrators, the sum of 1,000*l.* as and for liquidated damages, and not by way of penalty; but the restriction was not to prevent the defendant from attending any person as a physician or physician-accoucheur, or prescribing as such within the distance of two-and-a-half miles.

After the determination of the partnership term, the plaintiff sued the defendant for the sum of 1,000*l.*, alleging that the defendant resided within the distance of two-and-a-half miles of No. 28, Dorset Crescent, measuring by the usual streets or public ways of approach thereto, to wit, at an address in Southwark.

It appeared at the trial that the defendant's residence in Southwark was more than two miles and a half from No. 28, Dorset Crescent, if measured by the public thoroughfare most frequented by carriages, but if measured by another public thoroughfare along which carriages seldom passed, it was a few feet within the two miles and a half. There was no evidence that the plaintiff had sustained any damage from the circumstance of the defendant residing where he did. It was submitted on behalf of the defendant that the distance ought to be measured by the most frequented road, that as the breach of covenant alleged was not the *practising* as a surgeon, but merely the *residing* within the prescribed distance, such a restraint was unreasonable and void, and that the 1,000*l.* was a penalty, and not liquidated damages. The judge, Rolfe, B., told the jury that the plaintiff had a right to measure the distance by any of the public streets usually frequented, and the jury under his direction found a verdict for the plaintiff for 1,000*l.*, leave being reserved to the defendant to move to reduce the damages to one shilling.

On the motion for a new trial the judges of the Exchequer Chamber unanimously upheld the decision of the judge below. Pollock, C.B., said: "The stipulation is express that if the defendant shall practise *or* reside within two-and-a-half miles from No. 28, Dorset Crescent, measuring by the usual streets, he shall pay the plaintiff 1,000*l.* Here the defendant did reside within that distance measuring by one of the usual ways, though he was beyond it according to another. I can conceive many cases where what may be called private policy may render it necessary for a party to guard against some-

thing which may be easily converted into a means of damage, not because the act is of itself injurious, but because it is a sort of guard or fence, to prevent something else which is injurious from being done. In like manner public policy has, for the protection of the Bank of England against forgery, rendered it criminal to make paper bearing the same water-mark as Bank of England notes. The making of such paper is in itself an indifferent act, but inasmuch as it may afford facilities to forgery, the legislature has on that account prohibited the act. The same motive may operate on the mind of a man in private life, and induce him to frame stipulations similar to those which, it is argued, we ought to construe as illegal because unreasonable and contrary to public policy." Parke, B., pointed out that the covenant not to reside had reference to the benefit of the trade, and did not apply to mere residence, it being, therefore, connected with the covenant not to carry on the trade, and that being legal and binding, the covenant not to reside was legal and binding also. With regard to the question of damages the same judge said: "If a party agrees to pay 1,000*l.* on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty. In this case there is no pecuniary stipulation for which a sum certain of less amount than 1,000*l.* is to be paid, but all the stipulations are of uncertain value. Possibly this may have been a very imprudent contract for the defendant to make, but with that we have nothing to do. Upon the true construction of the deed, the amount is payable by way of liquidated damages, and not as a penalty."

Benwell v. Inns (1857).

(24 Beav. 307; 26 L. J. Ch. 663.)

Where one has entered into a restrictive covenant with the owner of a business, the assignee of a part of the business can sue for an injunction on a breach of the covenantor. Employing the covenantor as a servant is sufficient consideration for his entering into such a covenant.

One Wright had a dairy farm at Peckham Rye, and in connexion with it two London establishments for the sale of

milk, one in the City, and the other at Charles Street, Grosvenor Square. The latter was under the management of the plaintiff, and was carried on under the title of the Friern Manor Dairy Farm.

By an agreement dated the 26th of July, 1852, Wright agreed to take the defendant into his service for one month certain, and until a month's notice to determine the contract and service should be given, in consideration whereof the defendant agreed faithfully to serve Wright, or his future co-partners, executors, administrators, assignees, or successors in business, and would not, during the continuance of such service, nor within the space of twenty-four calendar months after quitting or being discharged from the same, commence, carry on, or be concerned in any way whatsoever either as servant or master, in the trade or business of a cowkeeper, milkman, milk-seller, or milk-carrier within the distance of three miles from Charles Street, Grosvenor Square. The agreement stipulated that if he did, he would pay to Wright, his co-partners, executors, administrators, successors, or assignees ten shillings for every day he should act contrary to the agreement, to be recovered as liquidated damages.

In 1854, Wright, for valuable consideration, assigned to the plaintiff the goodwill of the branch business carried on in Charles Street with the shop, trade fixtures, and utensils on the premises. The agreement with the defendant was handed to the plaintiff on his purchasing the business, as one of the incidents or appurtenances of the business, and the defendant, who had been attached to the branch business in Charles Street, was continued as milk-carrier. Wright covenanted not to carry on a similar business within certain limits.

The defendant gave notice, and in July, 1857, quitted the plaintiff's service, and immediately began to serve the plaintiff's customers with milk, and endeavoured to supplant the plaintiff in his business in the district. The plaintiff filed a bill to enforce the agreement.

It was contended for the defendant that the agreement had been made with reference to the business carried on in Peckham and London; the plaintiff, therefore, did not stand in the position of assignee of Wright. The contract was not divisible. Wright could no doubt restrain the defendant from carrying on the farming business. Also the wages and allowances received by the defendant were not sufficient to support an agreement which was to debar the defendant from trading on his own account.

Romilly, M.R., said: "The agreement was good when it was entered into, and it is good now. Its validity is not affected by the transactions that have taken place between the parties. It was objected that the plaintiff is not assignee

of the business within the meaning of the agreement; I think he is, he is assignee of a part of that which was referred to in the agreement; I see nothing to make this agreement void upon the ground of its being the assignment of part of the business. It was then said that the defendant received no consideration for the agreement. His being a servant at wages was quite sufficient to support the agreement. The defendant ought to have considered the terms of the agreement before he entered into it; he could not object to it afterwards. It was then said that the agreement could not be supported because it was in restraint of trade, and that it would be unreasonable to protect a person in the enjoyment of one mile of milk-walk. If one having a milk-walk of one mile in diameter were to require a restriction for exceeding the limit of his walk, and there were no explanation of the necessity of such restriction, that might be an undue restraint of trade; but I am of opinion that this agreement was confined within reasonable limits. The plaintiff came to the district as the successor of Wright, and the defendant's contract applied to that district. The injunction must, therefore, be continued for two years from the date of the notice; and it will be a virtual breach of it if the defendant assists any other milkman."

Giles v. Hart (1859).

(1 L. T. N. S. 154; 8 W. R. 74.)

Agreement between surgeon and assistant contained a restraint on the assistant's practising after the termination of the agreement. There was a clause allowing the assistant to determine the whole agreement. Held, that on the assistant's giving notice so to determine it, the restraint on practice was still in force.

In the case of *Giles* v. *Hart*, by indenture, in 1854, containing terms on which the defendant became the plaintiff's assistant, the defendant had covenanted that he would not, while acting as such assistant, or after he should cease so to act, and whether the plaintiff should be living or not, and whether the said indenture should be in other respects determined or not, practise in Coggeshall or within five miles therefrom. The deed further provided that it should be lawful for the defendant by giving one month's notice to determine the then present indenture and the covenants and agreements therein contained, and after the expiration of the

month, that the said indenture should cease and determine, subject nevertheless and without prejudice to any right of action which might have accrued or might accrue thereafter to the defendant by virtue of these presents, and for the true performance of the covenants on the part of the defendant not to practise, &c., and the defendant bound himself in the sum of 800*l.*, to be recovered as liquidated damages, to be recovered against him upon breach of the covenant. In October, 1859, the defendant gave the plaintiff written notice that he intended "to determine the said indenture and the covenants and agreements therein contained." The defendant informed the plaintiff that he intended to practise in Coggeshall, and commenced to do so, whereupon the plaintiff filed a bill for an injunction.

It was argued for the defendant that an action ought to be brought to determine the legal right, and that the covenant against practising was determined along with the rest of the deed by the notice.

Stuart, V.-C., said: "This is a case of a covenant to restrain a man from following his profession in a particular town, and it is said that great inconvenience may arise to the inhabitants of the town if he be restrained from practising there. But, true as that observation is, the law is too well established on the subject to make it possible for me, sitting here, not to give effect to a covenant of this kind when I find it inserted in an agreement between professional men. Upon the terms of the present covenant, looking at it in connexion with all the clauses in the deed, I have not a doubt. The argument of the defendant is founded upon the proviso in the deed which, it is said, enabled Mr. Hart, the defendant, by giving a notice, to determine and put an end to the operation of all the clauses in the deed. Such is the general language of this particular deed. But, looking at the whole scope and operation of the deed, and the language of the covenant in question, care was taken to provide that the determination of the other covenants in the deed by a notice to be given by the defendant Hart should not interfere with the operation of this covenant. That seems to me so plainly the construction of the language of the deed that I entertain no doubt at all about it; and my conclusion is that Mr. Hart is bound not to practise within the limits of this town. Therefore I feel bound to grant an injunction to restrain him until further order from practising. With regard to what was asked as to having an action at law directed or sanctioned or countenanced, I cannot listen to it. The terms of the deed seem to me too clear to induce me to ask any judge at common law to assist me with his opinion. If that be so, what justification should I have in indulging one party with the means of assailing the other in any other Court than this?"

King v. Hansell (1860).

(5 H. & N. 111.)

Restriction on doing business limited to the time the defendant remained in the plaintiff's service.

In this case the defendant, on being engaged as commission agent to sell beer and other goods for a firm of brewers, entered into a bond for 200*l.* to serve the plaintiffs faithfully as such agent, and not to engage in, undertake, transact, or do any business in the same trades or business within ten miles of Towcester for himself or any other person or firm; to promote the interest of the plaintiffs, to collect and account for moneys, and not to waste or embezzle the goods entrusted to him. The defendant quitted the employment of the plaintiffs, and was employed within the limits by another firm; and the plaintiffs sued on the bond for 200*l.*

The judgment of the Court of Exchequer was given for the defendant on the ground that all the provisions before and after the stipulation not to engage in business within the particular district applied only to the term of service, and that the object of them was that the defendant should devote his whole time and attention to the plaintiff's business, and therefore the stipulation in question did not extend beyond the period of service.

Fox v. Scard (1863).

(33 Beav. 327.)

A medical practitioner, with whom another has entered into a covenant in a penal sum that he will not practise within defined limits, can, on breach, sue either for the damages, or for an injunction, but not for both.

In *Fox* v. *Scard*, the plaintiff, a surgeon at Weymouth, agreed to take the defendant, a surgeon, as his assistant at a salary. The defendant agreed not to carry on the business of a surgeon at Weymouth, or within twelve miles thereof, without plaintiff's consent during plaintiff's life, or within ten years after his decease, and to execute a bond for securing the due performance of the agreement. This was not in writing.

The defendant at the same time executed a bond to the plaintiff in the penal sum of 1,000*l.* conditioned not to practise at Weymouth, &c. as above stated.

The plaintiff discharged the defendant, but the defendant continued to practise on his own account at Weymouth, and the plaintiff instituted this suit, praying an injunction and offering to waive the penalties of the bond.

The defendant demurred, arguing that it was a case for action at law on the bond, and not for a suit in equity, and that the parties had, by their contract, agreed that the remedy upon the breach of the bond should be by pecuniary damages only.

Romilly, M.R., who did not call on the plaintiff's counsel, said: "I cannot accede to the defendant's view of this case, for I take the principle to be this: Where a person enters into an agreement not to do a particular act, and gives his bond to another to secure it, the latter has a right at law and equity, and can obtain relief in either, but not in both Courts. If he proceeds at law on the bond and recovers damages, and afterwards comes into equity, and states that fact in his bill, a demurrer will lie, because he has chosen the jurisdiction and the remedy he will have. Accordingly, the practice has been to adopt the rule very strictly in equity.

"It sometimes happens that this legal right is in doubt, and in such cases the Court used formerly to direct an action to try the right. This is now prevented by Mr. Rolt's Act, which compels the Court to determine the legal right. But the practice under the old system is a good illustration. When the Court gave liberty to the plaintiff to try his right in an action, if he succeeded and only took nominal damages, he obtained his equitable relief; but if he sought and obtained substantial damages, the Court, when he came back, dismissed his bill, saying, 'You have already had your remedy at law.' But the plaintiff has a right to say, 'I will not have money, or take compensation in damages, but I will have the strict performance of that which is secured to me by the bond,' which, in this case, is in the nature of a covenant by the defendant that he will not practise at Weymouth.

"The bill contains a paragraph waiving the penalties of the bond, but, without that, if, after an injunction had been granted against the defendant, the plaintiff should bring an action for damages, the defendant might come here and have the injunction dissolved.

"The defendant has, for valuable consideration, entered into an agreement not to practise at Weymouth, which he is bound to perform, and if the facts alleged be true, the plaintiff is entitled to relief in this Court. The demurrer must, therefore, be overruled."

Carnes v. Nesbitt (1861).

(7 H. & N. 158, 778; 30 L. J. (N. S.) Ex. 348; 31 *Ib.* 273.)

Where a surgeon's assistant has covenanted with the surgeon that he will not practise within certain limits, the covenant will not be confined to the duration of the service. The protected practitioner cannot sue for both liquidated damages and an injunction. If he first sue for the damages, the injunction will be refused.

In *Carnes* v. *Nesbitt*, an agreement had been entered into between the plaintiff, a surgeon at Cassop, and the defendant, whereby the defendant was engaged as assistant to the plaintiff in his practice as a surgeon, &c. for one month, and so on from month to month until either party should give a month's notice to determine the agreement, at a fixed salary; the plaintiff was to provide a dwelling-house for the defendant, and the defendant was to be allowed for his own use and benefit all fees received from the practice of midwifery, and also from any practice in the immediate neighbourhood of Cassop. And the defendant agreed that he "shall not nor will, either directly or indirectly, by himself or in conjunction with any other person or persons, practise as a surgeon, apothecary, or surgeon-accoucheur" within five miles from Cassop under a penalty or penal sum of 100*l.* to be recoverable by the plaintiff as liquidated damages, "the said sum of 100*l.* having been specified as the amount to be paid and recoverable for the breach or non-observance by the defendant of the last-mentioned clause."

The defendant gave notice to the plaintiff, left his service, and commenced practice within two miles of Cassop.

The plaintiff thereupon issued a writ claiming the 100*l.* penalty, and gave notice of his intention to apply for an injunction to restrain the defendant from so practising.

After serving his writ, and before declaration, the plaintiff obtained a summons to show cause why an injunction should not issue.

The defendant made an affidavit that at the time of entering into the agreement he understood the restriction was only to apply while he continued in the plaintiff's service; and before the judge in chambers he professed to be willing to pay the penalty, in order that he might practise.

Counsel for the plaintiff argued that the fact that the defendant might take private practice near Cassop during the engagement showed that the restriction was to be binding after the service had terminated; also the fact that the

plaintiff had commenced an action for the 100*l.* penalty was not a good objection to his obtaining an injunction; and, if it were, he would enter into a rule of Court not to proceed with the action if he got an injunction to restrain the defendant. He elected to take the injunction and was willing to waive his claim for damages. The agreement, he argued, was not at the election of the defendant; he could not elect to break his engagement by paying for his violation of the contract.

The Court refused the injunction.

Channell, B., said to the plaintiff's counsel, "Your present writ puts you out of the Court. Why not amend your writ by claiming unliquidated damages?"

Martin, B.: "Why not go on with your action?"

Bramwell, B.: "At present you seek for an injunction, and at the same time seek to recover liquidated damages. I think you are not entitled to get both, and on that account would refuse the rule." "I proceed on the ground that plaintiff has shaped his claim for liquidated damages."

The plaintiff afterwards declared on the bond, and claimed 100*l.*, also a writ of injunction to restrain the defendant. The defendant demurred to so much of the declaration as did not relate to the claim for the injunction, and also demurred to so much as did relate thereto. The defendant also pleaded, secondly, that the plaintiff did not provide him a dwelling-house according to the agreement; and, thirdly, that by the notice given by the defendant the agreement had been wholly determined and put an end to.

No counsel appeared for the defendant, but the points in the margin to the demurrer were, that the restraint imposed was only intended to be in force *durante servitio*, and would otherwise have been unreasonable; and that the plaintiff's claim to an injunction could not be supported, the agreement being merely for the payment of a certain amount in the event of the defendant's practising within the prescribed limit.

On the argument on the demurrer the Court held that in accordance with *Sainter* v. *Ferguson* (1 McN. &. G. 286), the plaintiff was not entitled to an injunction; but gave judgment for the 100*l.*, the liquidated damages, holding that the providing the defendant with a dwelling-house was not a condition precedent to the plaintiff's right to sue for a breach, and that it was no answer that the agreement was determined by notice, as the restriction as to the practising applied to the time when the defendant ceased to be assistant.

Howard v. Woodward (1867).

(34 L. J. Ch. 47.)

Although a bond in a penal sum not to practise contains no covenant that the person bound will not so practise, an injunction may be granted.

Howard v. *Woodward* was an action on a bond entered into by the defendant, a solicitor's clerk, which recited an agreement that the defendant should enter into a bond not to practise within fifty miles of Weymouth, the condition being that if the defendant should practise within fifty miles of Weymouth, and should then pay to the plaintiff 1,000*l.* as liquidated damages, the bond should be void. The bond contained no covenant by the defendant not to practise within the prescribed distance. The defendant afterwards started in practice at Weymouth, and the plaintiff filed a bill for an injunction to restrain him. Wood, V.-C., in granting the injunction, said the case was entirely a question of agreement between the parties. Was this bond an agreement that the defendant should not practise within the specified distance, or was it an agreement that he might practise there on payment of 1,000*l.* as liquidated damages? The bond was in a penal sum with a condition, but the recited agreement was to give a bond not to practise; there was nothing to show that the plaintiff intended to sell any part of his business. The Vice-Chancellor therefore granted an injunction, the plaintiff undertaking not to sue the defendant on the bond.

Gravely v. Barnard (1874).

(18 Eq. 518; 43 L. J. Ch. 659.)

An agreement by a surgeon to continue the existing service of an assistant is sufficient consideration for a restrictive covenant entered into by the assistant.

In *Gravely* v. *Barnard*, the plaintiff, a surgeon at Newick, had, some time before 1870, engaged the defendant, who was not then qualified to practise, as his assistant. In 1870, the defendant being about to go up for his examination, executed, at the plaintiff's request, a bond, dated the 12th of March, 1870, in the penal sum of 1,000*l.* The bond recited that the

plaintiff had taken the defendant into his employ and confidence as an assistant in his profession, which employment was to continue as long as the parties should agree; that the defendant did not then possess, but was in the expectation of obtaining, the requisite qualifications to practise his profession, and had, for the consideration aforesaid, agreed to enter into the bond. The condition of the bond was that if the defendant would not at any time thereafter set up, practise, carry on or exercise directly or indirectly either for himself alone, or in partnership or in collusion with any other person except the plaintiff, or in any manner whatsoever, the said several professions, &c., within the parish of Newick, or within ten miles thereof (the town of Lewes excepted) during so long a time as the plaintiff or any person or persons to whom he should sell or dispose of his said business of a surgeon, &c., or to whom he might assign or make over the same, should carry on, practise, or exercise the same professions or businesses, or any or either of them, then the bond should be void, otherwise the same should remain in full force and virtue.

The engagement of the defendant was terminated in June, 1870. The defendant afterwards, in June, 1874, passed his examination, and began to practise within the limits mentioned in the bond. The plaintiff thereupon instituted the suit to restrain him from so doing, waiving by his bill all penalties recoverable at law under the bond.

Jessel, M.R., gave judgment granting the injunction. He said: "The sole question in this case is, whether there is a sufficient consideration for the bond. The case of *Hitchcock* v. *Coker* has settled what consideration is sufficient in these cases. It is enough, in the words of Lord Chief Justice Tindal (6 A. & E. 457), if there is 'a legal consideration, and of some value.' Therefore if, in the present case, the plaintiff can show that he gave any valuable consideration, no matter however small, that is enough to warrant the granting of an injunction, the Court not taking upon itself to decide upon the adequacy of the consideration.

"Now as to what is valuable consideration in these cases there is some authority. In *Davis* v. *Mason* (5 T. R. 118), the taking of a man into service for so long a time as the master should please, was held to be valuable consideration. . . . .

"Is there any difference between an agreement to take into service so long as the master pleases, and an agreement to continue an existing service, so long as the master pleases, that existing service being terminable at the will and pleasure of the master? I can see none; and the only question is, can I reasonably infer from the instrument before me an agree-

ment to continue the defendant's employment? Now upon the defendant's construction the instrument has no meaning; but it is the duty of the Court to construe an instrument so that if possible it may have a meaning, and if that meaning can be fairly got at, the Court must give effect to it. . . . .

"What do the words '*for the consideration aforesaid*' mean? The defendant says they mean nothing, that though the instrument speaks of a consideration, none was given. I cannot adopt that view. I think it must mean that there was an agreement by the plaintiff and defendant that the connection between them was not to be terminated then and there, and if that is the meaning, the case falls within *Davis* v. *Mason*.

"But, it may be said, 'Is it right in such a case as this to infer such an agreement? Must not the agreement be in express terms?' Now on that point the authorities appear to be all one way. In the leading case of *Mitchell* v. *Reynolds* (1 P. Wms. 181), the condition of the bond was, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse for the term of five years if the defendant should not exercise the trade of a baker within that parish, or in case he did he should pay a sum to the plaintiff, then the obligation to be void. No consideration is created here; the assignment is mentioned in the past tense, and therefore must have been previously executed; yet the Court inferred a consideration; they found that the plaintiff took a bakehouse from the defendant, and that the defendant agreed not to carry on his business. So in *Davis* v. *Mason* (5 T. R. 118), the consideration was inferred by Lord Kenyon and the judges of the Court of King's Bench. The condition of the bond there simply recited that the plaintiff had taken the defendant for his assistant, and that the defendant had agreed not to exercise the business on his own account; yet Lord Kenyon in the judgment I have read, says that there was a consideration. That was arrived at by inference. Looking, then, at these two cases, in which remedy was given on an instrument in which there was no express statement of the consideration, but the consideration was inferred, I think I am bound to grant the injunction in this case.

"I also think that this is one of the cases in which I am bound to decide the question of law on the motion, and not to leave it to the hearing; to do otherwise might be to ruin one of the parties."

Collins v. Locke (1879).

(4 A. C. 674 ; 48 L. J. P. C. 68.)

An agreement by merchants to share receipts from certain persons, by whichever of the parties to the agreement the work might be done, held legal; but a provision that, in case named persons should not employ the merchant to whom they were allotted by the agreement, none of the parties should do the work, held unreasonable.

In *Collins* v. *Locke*, a case before the Privy Council in 1879, four stevedores had entered into an agreement of which the object was to parcel out the stevedoring business of the port of Melbourne among themselves. In the first place, they divided certain shipping firms in the port into four sets, one set being allotted to each party to the agreement, and every ship consigned to one of those firms was to be worked by the party to whom the set comprising that firm was allotted, if he could get her. If the firm, however, would not give the stevedoring to the party entitled under the agreement, but required another of the parties to the agreement to do the work, then the party so required should give an equivalent to the person who should so lose the stevedoring.

There was another covenant, the effect of which was that, in the case of ships passing out of the hands of the named firms to which they were consigned and being loaded by other merchants, if the merchants loading such ships should not choose to employ the party who, under the agreement, was entitled to do the stevedoring, all the parties to the agreement should be deprived of the work.

Their lordships held that the objects which the agreement had in view were to parcel out the stevedoring business of the port among the parties to it, and so to prevent competition, at least amongst themselves, and also it might be to keep up the price to be paid for the work. Their lordships were not prepared to say that an agreement having these objects was invalid if carried into effect by proper means, that was to say, 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.

It was held that the provision first above mentioned (that if one of the parties to the agreement should be required to do the work allotted to another under the agreement, the party so required should give an equivalent to the party who lost the stevedoring) was not unreasonable, since it provided

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 entitled. Each party might in turn derive benefit from this clause, and one of the four parties would always get the profit of the ship stevedored, though the work might be done by another of them. As regarded the merchant also, he could have his ship stevedored by the party whom he might require to do it, at least, there was no prohibition against his having it so done.

The other provision, however (that if merchants loading certain ships should not choose to employ the parties entitled to the work under the agreement, all the parties to the agreement should be deprived of the work), their lordships held was productive of wholly different results. Such ships were "so to speak, tabooed to them all." The covenant in such cases restrained 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 had thus entered into was obviously detrimental to the public by depriving the merchants of the power of employing any of those parties, who were probably the chief stevedores of the port, to load their ships, unless in each case they employed the one of the four to whom the ship, as between themselves, had been allotted, however great and well-founded their objections might be to employ him. Such a restriction could not be justified upon any of the grounds on which partial restraints of trade have been supported. It was entirely beyond anything the legitimate interests of the parties required, and was utterly unprofitable and unnecessary, at least, for any purpose that could be avowed.

Davies v. Makuna (1884).

(29 C. D. 596 ; 54 L. J. Ch. 1148.)

An agreement to assist an unqualified man to practise as an apothecary is illegal, and a restraint on practice contained in such an agreement cannot be enforced.

On the 1st of November, 1883, an agreement was entered into between the plaintiff, who was described as a "medical practitioner," and the defendant, who was described as a "medical assistant," by which the defendant was engaged to serve the plaintiff as assistant in his

profession as medical practitioner and accoucheur at Ystrad Rhondda for one year, and so on from time to time, but either of them should be entitled to put an end to the said term of service during the first or in any subsequent year by giving a month's notice in writing. And the defendant agreed that he would not at any time during the continuance, nor during the next five years after the determination of the contract of service, except with the plaintiff's written consent, exercise, or carry on the profession of doctor of medicine, surgeon, apothecary, or accoucheur, or any of them, at Ystrad Rhondda, or within ten miles in any direction, either on his own account or in partnership with or as assistant to any other person or persons.

The plaintiff, who was an M.D. of an American University, was not qualified to be registered under the Medical Act of 1858. The defendant was a duly qualified and registered medical practitioner. In August, 1884, the defendant's engagement was terminated by notice from the plaintiff, and in September, 1884, the defendant commenced practising as a doctor of medicine on his own account at Ystrad Rhondda; and the plaintiff issued a writ claiming an injunction to restrain him from exercising or carrying on the profession of doctor of medicine, surgeon, apothecary, or accoucheur at Ystrad Rhondda or within ten miles thereof.

The plaintiff moved for an *interim* injunction before Pearson, J., on the 20th of November, 1884. The defendant deposed that on the date of signing the agreement, when he visited the plaintiff at his residence, there was on the mantelpiece of the sitting-room a brass plate bearing the plaintiff's name, with the addition of the words "physician and surgeon." This was denied by the plaintiff.

It was argued for the defendant that the covenant was too wide, and therefore bad, and that the action was really brought for the specific performance of the agreement, which was contrary to the policy of the law and was tainted with illegality, as the plaintiff was prohibited from practising at all by the Act 3 Hen. 8, c. 11, and from practising as an apothecary by the Act 55 Geo. 3, c. 194, s. 14. He had besides contravened the provisions of the Medical Act of 1858 (s. 40) by assuming a description to which he was not entitled.

Pearson, J., said: "The objection to the action which has been taken, with reference to the Medical Act of 1858, has been put in two ways. In the first place it is said that the plaintiff is not, and, as matters now stand, cannot be, a properly qualified medical practitioner under the Act; and, secondly, that, that being so, the defendant's covenant is too large, is wider than is required for the purpose for which it was entered into, and that it is therefore bad.

"The first question which I have to determine is, what does the Act order, and how far does it leave persons at liberty, notwithstanding the provisions contained in it."

(His Lordship read sect. 14 of the Apothecaries Act, 1815.) "There is, therefore, in that Act an express prohibition against any person acting as an apothecary except one who is qualified according to the Act. Bt when I come to the Act of 1858, I find it begins with this preamble: 'Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners.' Now, to my mind, that preamble shows what the whole purport of the Act was and the extent to which its provisions were intended to go. It is not an Act to prevent unqualified practitioners from practising, but it is an Act to enable the public to distinguish between qualified and unqualified practitioners. Then it takes away from an unqualified practitioner the power of recovering any fees; but, if it had been intended to prevent any unqualified person from practising, that section would have been wholly unnecessary; the Act would simply have prohibited any such person from practising. No doubt it is difficult to understand the exact limit of sect. 40 [as to wrongful assumption of medical titles], and I do not mean to say that I am absolutely certain what is the proper construction of it. But looking at the preamble of the Act and at sect. 32 [that only registered persons shall recover fees], I think the meaning is, that in order to incur the penalty a person must wilfully and falsely take or use one of the names or titles therein mentioned in such a manner as is calculated to deceive the public. I do not think that the use of one of those titles by an unqualified practitioner, either in a private agreement with another medical man, or on a brass plate not exposed to the public view, would be an infringement of this section. I cannot say why the provisions of the Act were limited in this way; possibly it was not thought necessary to prevent all unqualified persons from practising; and it may well be that the legislature, knowing the habits and customs of the English people, were willing to leave a wide door open, particularly to those, such as rectors' wives and other ladies bountiful, who, with little experience and large benevolence, delight to practise the art of medicine without many injurious results. But, however that may be, I do not see that it has been brought home to the plaintiff that he has done anything improper, although he is not, and cannot be, as matters stand, a qualified practitioner under this Act.

"This, I think, decides the whole question between the parties, for, if that be so, there was no reason why he should not enter into this agreement with the defendant, and there is no reason why the defendant, having entered into the agree-

ment, should not keep it. I must therefore grant the injunction as asked."

The defendant appealed.

On the hearing of the appeal further evidence was adduced on behalf of the defendant, from which it appeared, that in the course of the year 1884 the plaintiff had signed certificates of the cause of death of various persons, to be delivered to the registrar under the Births and Deaths Registration Act, 1874. By each of these the plaintiff certified that he attended the deceased during his last illness, and stated the cause of death. The certificates specified were twelve in number, and the causes of death mentioned were meningitis and convulsions, phthisis, cardiac disease and apoplexy, diarrhœa, convulsions, measles and convulsions, apoplexy, bronchitis, infirmity and anasarca, bronchitis and convulsions, pneumonia and convulsions. The plaintiff did not in these certificates represent himself to be a qualified practitioner.

Evidence was also given, that on the 30th of March, 1885, the plaintiff was convicted and fined at the petty sessions for assuming the title of doctor of medicine. The plaintiff, by affidavit, stated that the circumstances under which he was convicted were, that he was connected with certain collieries in the neighbourhood of Rhondda, and had frequently to give to friendly societies certificates of the death or illness of members, and that in one of such certificates he accidentally signed "John Davies, M.D.," omitting the letters U.S., which he was in the habit of adding, and that on this certificate he was convicted.

The plaintiff also deposed that his assistants, who were qualified apothecaries, invariably attended to that portion of his practice which involved acting in that capacity. That, not being himself registered as an apothecary, he did not compound or dispense medicines, but required his assistants, who were qualified as aforesaid, to perform that duty.

The appeal was heard on the 22nd of April, 1885, and the injunction was dissolved.

The judgments delivered in the Court of Appeal were as follows:—

Cotton, L.J.: "This is an appeal by the defendant, from an order of Mr. Justice Pearson, granting an injunction to compel him to abide by the terms of an agreement entered into between him and the plaintiff. The defendant has broken the agreement, and we cannot look with any favour on his conduct, but we must decide the case according to the principles of the Court. The plaintiff carries on business, as a medical practitioner, at Rhondda, in Wales, and advertised for an assistant. The defendant is a duly qualified medical practitioner. On the 1st of November, 1883, a written agree-

ment was entered into by plaintiff and defendant that the defendant should serve the plaintiff as his assistant in his profession as medical practitioner and accoucheur at Rhondda, at a yearly salary, the engagement being determinable by either party at a month's notice; and the defendant stipulated that he would not, during the continuance of the engagement or within five years after its determination, except with the written consent of the plaintiff, exercise or carry on the profession of doctor of medicine, surgeon, apothecary, or accoucheur, at Rhondda, or within ten miles of it. In August, 1884, the engagement was determined, and in the following month the defendant commenced practising as a doctor of medicine at Rhondda. The ground on which the defendant resists the injunction is that the agreement was to assist the plaintiff in the conduct of the business which he was at that time carrying on, that the business was one which he could not legally carry on, and that the agreement therefore is void for illegality. The plaintiff admits that he had no qualification to act as surgeon, apothecary, or physician, but says that he carries on those branches of his business by means of duly qualified assistants, and not personally. If that had been the real state of the case, I am at present of opinion, though it is not necessary to decide the point, that as the defendant knew the circumstances when the agreement was entered into, it could have been enforced against him, for that the plaintiff would be doing nothing illegal. But is that the state of the case? To my mind it is not shown to be so. I do not go into the question whether the Act 3 Hen. 8, c. 11, is still in force as regards the penalties imposed on persons practising without being duly qualified. But there is an Act, 55 Geo. 3, c. 194, s. 14, which prohibits the acting as an apothecary without being duly qualified. The Act does not define the nature of an apothecary's employment, but dispensing, mixing medicine, giving medical advice, and attending the sick as medical adviser, must be considered acting as an apothecary. It is alleged by the defendant that in the present case the plaintiff has done these things in person. It is deposed, too, that he has in his room a brass plate, on which he is described as 'physician and surgeon,' and though this can only be seen by the patients who come to him, it tends to show that he is not the mere centre of a staff of qualified assistants, but is himself carrying on the business of the medical profession in various forms. The agreement, moreover, describes him as a 'medical practitioner.' Then an affidavit, which was not before Mr. Justice Pearson, verifies a set of certificates of death stating the cause of death, which implies that the plaintiff had attended them and prescribed the requisite medicines, thus acting as an apothecary. The result of the evidence

at present appears to me to be that the plaintiff is exercising a profession which he is not at liberty to carry on in England. The case appears not to have been fully before Mr. Justice Pearson, for he proceeds on the Medical Act of 1858 alone, and if there had been no other Act in the case, I should have been disposed to argue with him; but, as the evidence at present stands, I think that the plaintiff must be taken to have been carrying on a business which the Act 55 Geo. 3, c. 194, prohibited him from carrying on, that the agreement therefore was illegal, and that he cannot enforce it."

Lindley, L.J.: "I have come to the same conclusion. If it were necessary to determine how far the Act 3 Hen. 8, c. 11, is still in force, I should wish to take time to consider, but when we look at the agreement and the facts, I think it is not necessary to determine that question. The agreement describes the plaintiff as a medical practitioner, and the evidence shows what kind of business he carries on. The affidavit, which was not before Mr. Justice Pearson, shows that he carries on the work of a surgeon, physician, and apothecary. The object of the agreement was to get the defendant's assistance in carrying on this business, which the plaintiff was prohibited by the Act 55 Geo. 3, c. 194, from carrying on. It was a scheme to allow a medical man to practise without being duly qualified."

Fry, L.J.: "I am of the same opinion. By the agreement the defendant agrees to serve the plaintiff as his assistant in his profession carried on at Rhondda. What was the profession carried on by the plaintiff? It is suggested that it was a medical profession carried on entirely by means of duly qualified assistants. If that had been so, I am far from saying that the agreement might not be valid. But, upon the evidence, I come without hesitation to the conclusion that the plaintiff acted as an ordinary medical practitioner does, and if so, the agreement was that the defendant should assist the plaintiff in a business which the plaintiff could not lawfully carry on. If so, we cannot interfere. Possibly the covenant may be construed distributively—it is not my present impression that it can—but in the existing state of circumstances, bearing in mind that this is an interlocutory proceeding, I think that we should be doing wrong if we supported the injunction."

Jacoby v. Whitmore (1883).

(32 W. R. 18.)

A covenant in restraint of business is part of the goodwill of the business, and passes by an assignment of the goodwill. The covenant not affected by the removal of the business by the person protected to another shop close at hand.

By an agreement in writing, in 1878, one M. Cheek agreed to employ the defendant as his shopman at his shop, 1, Cambridge Road, on certain terms, and the defendant undertook that he should not, either while in the employment of M. Cheek, or at any time thereafter, within one mile from the said shop, be engaged or connected with the business of an oil colourman, &c., and upon any breach by him of that undertaking and agreement, that he should and would forfeit and pay to M. Cheek the sum of 250*l.* as liquidated damages. M. Cheek afterwards removed his business to another house 150 yards away, and the defendant continued to serve in the new shop.

By an indenture dated 4th April, 1883, Cheek assigned to the plaintiff "all the beneficial interest and goodwill of the said M. Cheek in the said trade or business of an oil colourman, &c.," and upon the sale the defendant set up a shop as an oil colourman, &c., within a mile of 1, Cambridge Road.

The plaintiff moved for an injunction, which was refused, and the plaintiff appealed.

The Court of Appeal (Brett, M.R., Cotton and Bowen, L.JJ.) granted the injunction.

They held that the covenant was not unreasonable, and endured for the life of the defendant, though the original covenantee should cease to carry on business altogether; and that the covenant was not affected by the removal of the business to another shop near at hand. Also, that such a covenant added to the value of the goodwill, and, therefore, was part of the goodwill, and certainly of the beneficial interest, and was assignable with it, and did in fact pass by the sale of the goodwill and beneficial interest to the plaintiff, so as to give him a right of action.

Baines v. Geary (1887).

(35 C. D. 154 ; 56 L. J. Ch. 935.)

An undertaking by a servant not to serve or interfere with any customer served by or belonging to the master, his successors or assigns, can be enforced as to persons who were customers during the employment ; and the part of the undertaking as to future customers is severable from the rest. Such a covenant is assignable.

The defendant, by agreement in writing, agreed to serve the plaintiff Baines, a dairyman, his successors and assigns, and, in consideration of the wages to be paid to him, he undertook that he would not after the termination of such service, serve or cause to be served with milk or any other dairy produce for his own benefit or that of any other person or persons, or directly or indirectly interfere with, any of the customers served or belonging at any time to the plaintiff Baines, his successors or assigns. The plaintiff Baines sold his business to the other plaintiff Edelsten, and on the eve of the completion of the purchase, the defendant left the service of Baines, set up in business as a dairy proprietor, and solicited the custom of persons who had dealt with Baines. The plaintiffs moved for an injunction.

For the defendant it was contended that the undertaking sued upon was too wide. It was unreasonable that the servant should be debarred from soliciting or serving persons who did not become customers of the business till after he left the employment.

For the plaintiffs it was urged that the reasonable construction of the undertaking was that the servant was not to interfere with persons who were customers during the time for which he was employed. The words "at any time" meant "at any time during the continuance of the service."

North, J., said in his judgment: "It has been argued on behalf of the defendant, that the covenant not to serve or interfere with the customers of the plaintiff Baines or his successors, is too extensive, and *Rannie* v. *Irvine* (7 Man. & G. 969 ; see this case, *ante*, p. 156), was relied on. . . . . It is argued that unless the covenant is limited to persons who were customers of the plaintiff Baines at the time when it was entered into, or, at any rate, who became such during the period of the defendant's employment, it would be too extensive. The terms of the covenant in the present case are, no doubt, larger than those of the covenant in *Rannie* v. *Irvine*, and it is said that they are too extensive, and that, therefore,

the covenant must fail altogether. It is quite clear that a covenant in restraint of trade is good, if it does not go further than is necessary to give reasonable protection to the person who imposes it. There is nothing illegal in such a covenant, but it is considered unreasonable if it imposes a larger restraint than is necessary for the protection of the covenantor. The Court, have, however, seen their way to treat such a covenant as divisible, and to enforce it to the extent to which it is reasonable, while declining to enforce such part of it as is unreasonable. There are many reported cases in which covenants in restraint of trade have been held to be divisible as regards space. I will refer only to one, *Price* v. *Green* (16 M. & W. 346; see this case *ante*, p. 158). . . . . No case, however, was cited to me in which a covenant of this kind had been held to be divisible in regard to time, and I postponed my judgment that I might see if any such case had been reported, and I have found the case of *Nicholls* v. *Stretton* (7 Beav. 42; 10 Q. B. 346; 11 Jur. 1008). . . . That decision is precisely in point, and it shows that, although the terms of the covenant were large enough to include all the persons who might be clients of the plaintiff at any time, still it was separable, and was at any rate good as regarded those persons who had been clients of the plaintiff during the time in which the defendant was serving his articles with him, and that the court considered that, as regards persons who became clients of the plaintiff after the defendant had quitted his employment, the covenant would have been bad. That exactly applies to the present case. Whatever may be the true construction of the agreement—whether it extends or not to persons who might become customers of the plaintiff Baines and his successors after the defendant had quitted his employment—it would at any rate be good as regards persons who became customers before he left. I must, therefore, grant an injunction, but limited to restraining the defendant from serving or interfering with any persons who were customers of the plaintiff Baines at any time during the defendant's employment by him.

"Another point taken was that the benefit of the defendant's covenant was not assignable. It has, however, been held in many cases that the obligation of such a covenant is not limited to the time during which the original covenantee continues to carry on his business. In *Benwell* v. *Inns* (24 Beav. 307, *ante*, p. 167), the action was brought by the successor in business of the original covenantor, and the point argued was not that a successor could not sue on the covenant, but that the plaintiff, being only an assignee of part of the business of the original covenantor, was not an assignee of the business within the meaning of the covenant, and was not

entitled to sue upon it. It was held by Lord Romilly, M.R., that the plaintiff was an assignee, and that he was entitled to sue."

Palmer v. Mallet (1887).

(36 C. D. 411; 57 L. J. Ch. 226.)

Where one covenants with two partners that he will not practise within certain limits, either of the two, after dissolution of the partnership, can sue on the covenant. Such a covenant is broken where the person restrained only acts as assistant.

The defendant had been employed as an assistant by Messrs. Hall & Palmer, who were in partnership at N. for their joint lives, with a power to determine the partnership by notice, as surgeons, accoucheurs, and apothecaries, and he had entered into a bond by which he bound himself to them for payment to them, their executors, administrators, or assigns, of 1,000*l.* The bond recited the engagement of the defendant, and that one of the terms upon which he was engaged was, that he should not at any time set up or carry on the business or profession of a surgeon, &c. in the town of N., or within ten miles thereof, and that he should enter into that bond; and the condition of the bond was that if the defendant should not at any time thereafter, either alone or in partnership with or as assistant of any other person, set up or carry on the business or profession of a surgeon, &c., or any branch thereof, or any professional business connected therewith, within the said town of N., or within ten miles thereof, without the consent of the said Hall & Palmer, their executors, administrators, or assigns; and if the defendant should not, by or on behalf of himself or any other person, at any time thereafter, solicit the custom or support of any of the persons who then were or might thereafter from time to time be the customers or patients of Messrs. Hall & Palmer, their executors, administrators, or assigns, or either of them: but so that nothing therein contained should prejudice or affect the right of Messrs. Hall & Palmer, their executors, administrators, or assigns, to restrain by injunction any breach of the recited agreement on the part of the defendant, and to recover damages against him for any antecedent breach thereof in lieu of taking proceedings against him under the bond, then the bond should be void.

Messrs. Hall & Palmer dissolved partnership; each of them continued to practise in N., and Hall retained defendant as his assistant. Mr. Palmer immediately commenced this action for an injunction.

It was argued for the defendant that the bond entered into with Messrs. Hall & Palmer being joint only, Palmer alone could not maintain an action in respect of it. That the bond was intended for the protection of the joint business only, and that joint business having come to an end, the bond could no longer be put in force. That the agreement recited near the beginning of the bond was only "not to set up or carry on the business or profession of a surgeon," &c., and that the defendant had not broken this by becoming assistant to one who carried on such a business. And even if the agreement should be construed as extended by the defeasance, where the term "assistant of any other person" is used, "other" must mean "other than the parties to the bond."

The Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) held, affirming the decision of Chitty, J., that an injunction ought to be granted.

Cotton, L.J., said, in the course of his judgment: "We must look at the position of the parties with whom the agreement was entered into. They were carrying on business as partners. Although they were partners for life, that partnership might be put an end to, and in fact it has been put an end to, so that they had a joint interest as partners in the business which they carried on as surgeons, &c., and they had several interests in it in the event of a dissolution. That being so, the proper construction of this imperfectly recited agreement is that it is an agreeement entered into by the defendant with the partners jointly and severally.

"But there is another objection. It is said that assuming Mr. Palmer to be entitled to sue, yet the defendant has not committed any breach of his contract that he should not at any time set up or carry on the business or profession of a surgeon, and it is said that the defendant is not doing so where he is simply acting as an assistant at a salary for another man who is carrying on the business for his own benefit. I do not think that the question whether the defendant is carrying on the business or profession can depend on whether he is paid by salary or by a certain share of the profits. . . .

"When, as here, the words 'carry on the business or profession of a surgeon' are merely used to denote what is done by a man acting as a surgeon, a man in my opinion acts as surgeon and carries on the business of a surgeon none the less because he is not the principal or engaged in the business as a partner, but is merely carrying it on as an assistant to

somebody else. In my opinion, therefore, on both points the appeal fails."

Bowen, L.J., held that the true construction of the agreement was that either Mr. Palmer or Mr. Hall might enforce it for his own benefit during his lifetime, in the event of the partnership having come to an end.

Rogers v. Drury (1887).

(57 L. J. Ch. 504.)

A medical man restrained from practice within certain limits may not attend persons within those limits, though he has not solicited them, and they have voluntarily sent for him.

In the case of *Rogers* v. *Drury* the parties were medical practitioners in Birmingham, and plaintiff moved for an interim injunction to restrain infringements by defendant of an agreement under which the plaintiff had purchased the defendant's practice within a certain radius, and by which it was expressly provided that the defendant would not practise or reside within such radius, "or in any other way whatsoever, directly or indirectly, enter into competition with the plaintiff in the practice or profession of a physician, surgeon, or accoucheur, within such radius."

By the terms of the agreement the defendant was to be at liberty to commence and carry on a new practice on his own account outside the radius, and was also to be entitled to retain excepted patients mentioned by name.

The plaintiff complained that the defendant had attended patients within the radius other than those excepted by the agreement.

The defendant stated that he had never solicited any such patients, but that they had voluntarily sent for him; that in some instances he had told them that he had disposed of his practice, and they had called in another medical man than the plaintiff, and in others they had told him that, if he did not attend them, they would nevertheless decline to call in the plaintiff, and he altogether denied solicitation or competition on his part.

Chitty, J., in granting the injunction asked for, said: "In this case the facts are, speaking generally, admitted. Moreover, there is no question as to the validity of the covenant, and all I have to ascertain is its meaning. The defendant

says there has been no competition, because there cannot be competition without solicitation, and he also says that the competition contemplated by the agreement must be active competition. Neither of these propositions can be maintained. It is important to ascertain what was the object of the covenant. Its object was to protect the practice which had been bought and paid for. The agreement contains divers clauses to secure this object, and amongst them is this covenant. I decline to draw a distinction between active and passive competition. The covenant is, not to enter into any competition in any way whatever. What I have to do is to give each term in the covenant its full and appropriate meaning, and doing this, and bearing in mind the object of this covenant, I think that it is clearly infringed, for it appears to me that the vendor, by coming into the area of the practice, is acting most injuriously towards the plaintiff and, to my mind, diminishing the plaintiff's fair chance of obtaining that which he has purchased. The defendant has said that the patients would not have called in the plaintiff under any circumstances. To this it can be answered that there might be circumstances under which it would be most important to call in the doctor on the spot . . . . and the skill of the plaintiff is not questioned. The plaintiff is entitled to an order as asked, with costs."

The injunction was subsequently made perpetual.

National Provincial Bank of England v. Marshall (1888).

(40 C. D. 112; 58 L. J. Ch. 229.)

A person subject to a restraint on business has not the option of paying the liquidated damages named, and breaking the agreement.

In the case of *The National Provincial Bank of England* v. *Marshall*, the defendant, on entering the service of the N. P. Bank at Cardiff as a clerk, had executed a bond for payment to the bank of 1,000*l.* The condition of the bond was that it should be void if the obligor should, while employed by the bank, perform the duties therein specified, " and also if the obligor, his executors or administrators, shall pay to the bank the sum of 1,000*l.* as liquidated damages in case the obligor at any time after he shall have retired from any employment in any capacity under the bank, or shall have been dismissed therefrom, shall accept any employment, or allow himself to

be or shall be employed in any capacity whatsoever, in or for any bank not connected with the said bank, within twenty miles of the said bank or any branch thereof at which he shall be employed at the time of such dismissal or retirement or at which he shall have been employed at any time within six months prior to such dismissal or retirement."

The defendant voluntarily left the bank in September, 1888, and immediately entered into the service of a rival bank in Cardiff.

Butt, J., in the vacation granted an interim injunction restraining the defendant from accepting any engagement in any bank unconnected with the plaintiff's bank within twenty miles of their principal bank.

The defendant appealed, and the hearing was by consent treated as the hearing of the action.

It was argued, on behalf of the defendant, that the words of the bond must be taken strictly, and their natural meaning was that he must either abstain from accepting employment within twenty miles, or pay 1,000*l.* to the bank. The defendant was ready to pay the 1,000*l.*, and contended that such payment freed him from all obligation. The words "as liquidated damages" merely meant "in the nature of liquidated damages"; they did not imply the existence of any agreement.

The plaintiffs argued that the payment of 1,000*l.* would not compensate them for the injury which the defendant might cause them by taking employment in a rival bank. The real question was, what was the intention of the parties? Recitals of an agreement were not necessary.

The Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.) held that the injunction was rightly granted and must be continued.

Cotton, L.J., in the course of his judgment, said: "It was contended by the appellant that he had a right to enter into the service or employment of any other bank, provided he paid the penalty of 1,000*l.* That is not the exact language of the clause, and it may be observed that it is not very reasonable to suppose that it was the meaning of the parties; it was not likely that the bank would enter into such an agreement with their servants. The Court in construing such a bond must look at the condition of the bond throughout. It is true that in most cases there has been a recital in the bond, or some other evidence from which the Court has found that there was an agreement between the parties, and in such cases it has been held that if the obligee brings an action he can recover damages, but if he comes into a Court of Equity the agreement will be enforced, if no action for damages has been brought, and an injunction will be granted. Here there

is a sum of 1,000*l.* named as liquidated damages, and the plaintiffs say that the meaning of the clause is that if the bank brought an action, they were not to be obliged to prove what damage they had suffered, but would be entitled without proof of damage to recover 1,000*l.* as liquidated damages. . . . .

"It seems to me that it means that if the bank brought an action they might recover 1,000*l.* damages without actual proof of damage. How can there be damages if there is no broken agreement in respect of which they are claimed? They must be in respect of some violation of an agreement, and this clause, though awkwardly expressed, seems to me to show that the bank looked at the condition as most material, and as prohibiting the defendant from entering the employment of any other bank. If there were no such clause he might have entered into any similar employment, but the clause shows that there was an implied agreement that he should not accept any such employment. I am, therefore, of opinion that there was an agreement which can be enforced by this Court."

Lindley, L.J., said: "There is no recital, nor any language expressly to the effect that the clerk shall enter into no other employment on leaving the service of the plaintiffs; but it is impossible to read the words of the condition without coming to the conclusion that there was really an agreement between the parties to that effect. . . . In my opinion, the true meaning of the condition is that which is contended for by the plaintiffs, namely, that if the plaintiffs should bring an action they were not to be embarrassed by having to prove actual damage, but should be entitled to recover 1,000*l.* damages. In the case of an ordinary bond it would be no answer to such an action that the defendant was ready to pay the penalty. That is settled. And it is not consistent with the bond or with the intention of the parties that the obligor should be free if he paid the penalty of 1,000*l.* He could not acquire the right to break the agreement by paying the penalty. The plaintiffs have an alternative remedy to enforce the agreement if they do not bring an action. Therefore, I think the injunction was rightly granted, and must be continued."

CHAPTER VIII.

INTRODUCTION TO PATIENTS.

Introduction to patients usually provided for on the transfer of a practice.

When a medical practitioner sells his practice it is usual to stipulate that the vendor shall give the purchaser an "introduction" to the patients of the vendor for a stipulated number of weeks or months; and where on a "death vacancy" a practice is being sold by the executors or the widow of a deceased practitioner some introduction is usually provided for.

Importance of introduction.

An introduction is of great importance to a professional man taking up an established practice; and cases turning on introductions have at times come before the Courts, both as to how far an agreement to recommend another to a situation of trust is compatible with morality, and how far the Courts are able to enforce specific performance of such an agreement.

As to the first point, the Court of King's Bench held such an agreement for recommendation, in the somewhat analogous case of a practising attorney, to be unobjectionable in the case of *Bunn* v. *Guy* (1803), 4 East, 190.

In that case a contract which had been entered into by C., a practising attorney, that he would relinquish his practice within certain limits, and would endeavour by every means in his power to influence and induce as many of his clients as he could (whose business he thereby agreed to give up and relinquish) to become the clients of two other attorneys; and would introduce or endeavour to introduce them to the notice and favour of all such his clients, and would not himself practise within certain limits, was held valid.

It was argued that the agreement to recommend the

clients was contrary to morality, and that the law would avoid a pecuniary contract for recommending another to a situation of trust, especially one wherein the public had a deep concern. That it was immoral and illegal in its very nature, because it could only be performed by a fraud upon the person on whom such recommendation was to operate. That the representation to be made in such a case must be a false one, or at least there was a temptation to represent falsely for the sake of the reward.

The Court of King's Bench, however, held the contract valid.

No abatement to purchaser on death of vendor during introduction, except where there has been some concealment or misrepresentation.

Death is a contingency which all persons must be supposed to have in their contemplation; and if there is no stipulation on the subject, and the introduction is cut short by the unexpected death of the vendor, no relief can be claimed by the purchaser. In *Mackenna* v. *Parkes* (*infra*), however, where the vendor, being in a very precarious state of health, concealed from the purchaser, his incoming partner, the nature of his ailment, and there was to a great extent a failure of the stipulated introduction, the purchaser was held entitled, on taking an account, to be remitted a considerable portion of the premium paid.

Mackenna v. *Parkes* (15 W. R. 217; 36 L. J. Ch. 366).

The plaintiff and P., by deed dated 28th February, 1863, entered into an agreement for a partnership as surgeons for 21 years from the 25th of March, 1863; P. to reside within three miles of the business premises and to take an active part in the business for three years, and to introduce and recommend the plaintiff to his patients, the plaintiff agreeing to allow P. to be absent for a period not exceeding three months at one time in any year. The plaintiff was to pay 1,250*l.*; 600*l.* to be paid down and the remainder by two bills of exchange, one at twelve months and the other at two years after date. It appeared that the business produced from 1,000*l.* to 1,400*l.* a year,

and that the patients were between 300 and 400 in number. A medical agent arranged the partnership and put the consideration at 1,250*l.* P. had attended several clubs and benefit societies, and a circular was sent to them on the partnership being entered into; but the plaintiff was not personally introduced to more than half these clubs; and P. gave the plaintiff an introduction to about a dozen only of his private patients. A few weeks after the execution of the deed P. was obliged, from ill-health, to go to the sea, and was absent for several months, and he died in December, 1863. His death had the most disastrous effect upon the business. The plaintiff gave the defendant, who was the executrix of P., notice that he intended to exercise an option reserved in the deed of purchasing the deceased partner's share. The plaintiff afterwards refused to pay the amount due on the bills, and the defendant brought an action upon them. This bill was then filed by the plaintiff to restrain the defendant's action, and for an account and a return of the whole or some portion of the premium paid. It was argued for the defendant that the plaintiff had not complained so early as he might have done, and that by exercising the option to purchase the deceased partner's share he had affirmed the contract.

Kindersley, V.-C., said that this was a simple case of a medical practitioner, owing to bad health, wishing for someone to assist him, and taking a partner on certain terms. One important term was introduction to patients, who would naturally confide in one recommended to them by their own medical attendant; but it was clear that this was only done to an extremely limited extent, and that for several months P. was absent from ill-health, and no doubt the introduction to patients did not take place, as provided for, from this cause. The medical evidence established that P. was suffering from "Bright's disease," and that the disease was such that his condition was extremely precarious, and yet he might live for years. He

had gout also, and the combination led to apoplexy, of which he died. This important fact, namely, the existence of this disease, was not known to the agent, who deposed that, had he known it, it would have formed a material element in fixing the amount of consideration to be paid by the plaintiff. *Primâ facie*, if the plaintiff had not got the benefit he was not liable to the obligation of paying the full amount. The question, then, was whether the plaintiff knew of P.'s state of health when the agreement was entered into. There was a conflict of evidence; . . . but, taking all the matters together, the conclusion must be that the plaintiff was not aware of the ailment under which P. laboured at the time he executed the agreement, nor till some time after that, and that when he knew it, he did not assert his rights, because, probably as a medical man, he considered it possible that P. might live for years and might give him the benefit of an introduction. The plaintiff did not get the introduction he bargained for, and the business naturally fell off, and the plaintiff had not received the benefit which was in the contemplation of both parties when they entered into the agreement. Under these circumstances, according to the cases and the law of this Court, a party might come, where accounts were to be taken between him and another person, and ask for relief in respect of the loss which he had sustained through the non-performance of the agreement between them. In this case it was not disputed that there must be an account, and in taking that account the plaintiff must be debited with the 650*l.*, the unpaid portion of his premium, but credited with so much as ought to be repaid to him. This must be preceded by a declaration that he was entitled to be remitted a reasonable portion of the 1,250*l.*, having regard to the early death of P., and the non-introduction of the plaintiff to his patients. The amount, when ascertained, to be paid to the plaintiff.

Court cannot decree specific performance

The question whether an agreement to sell and transfer a medical practice is a contract of which the Court can

of an agreement for a personal introduction.

decree specific performance must, it would appear, be answered in the negative. The Court has no means of putting the transferee in possession of that which he has agreed to purchase, whether there be stipulations for an introduction to patients or not. The case of *Bozon* v. *Farlow* (*infra*), decided in 1816, though not actually a case on a transfer of a medical practice, is a most instructive case as to the difficulty of effecting a transfer of a professional business where an introduction is not stipulated for.

In *Bozon* v. *Farlow* (1 Mer. 459), a bill was filed for specific performance of an agreement for selling the business of an attorney. The facts appear sufficiently from the judgment of Grant, M.R., who said: "This is a bill for the specific performance of an agreement by which the plaintiff, an attorney at Plymouth, was to give up his business to the defendant, in consideration of a certain sum of money to be paid him by instalments. The defendant, having repented of his bargain, resists the completion of it on several different grounds. My principal doubt, however, has been whether, supposing all his other objections to be surmounted, this is an agreement which a Court of Equity can carry into execution. The defendant agrees to give 3,075*l.* for the plaintiff's business, and the plaintiff agrees that, at a certain period, his business shall be transferred to the defendant. Now the business of an attorney consists in his being employed by others, from the confidence which they repose in his skill and integrity. In what way, then, is the Court to decree the transfer of such a business? What is it that I am to direct the plaintiff to do towards the fulfilment of his part of the contract? The Court must be able to prescribe to both parties what it is that they are reciprocally to perform. The very ground on which the jurisdiction of a Court of Equity, in decreeing a specific performance, is founded, is that it is able to give possession of the very thing which is the subject of the agreement, and which a

court of law cannot do. But, when I order the defendant to pay his 3,075*l.*, in what way am I to proceed in order to put him in possession of the plaintiff's business? What acts am I to direct the plaintiff himself to perform in order to effect that purpose?

"In the case of *Bunn* v. *Guy* (4 East, 190), there was no occasion to consider whether the agreement could be specifically performed; the only question was, whether there was a legal consideration for the securities that had been actually executed. In that case, however, there were means devised by which C.'s business might have been made to pass into the hands of the other parties, for it was stipulated that he should not in future practise as an attorney within 150 miles of London; that he should permit his name to be used in the firm for a considerable time after he quitted the business; lastly and principally, that he should endeavour by all the means in his power to influence and induce his clients to become the clients of Bunn and Guy. The Lord Chancellor doubted not only the propriety but also the legality of some of these conditions; and though it was ultimately determined that they were not illegal, I think he would hardly have decreed them to be specifically executed.

"Does the present case furnish any ground upon which I can decree the plaintiff to perform any of the acts, the performance of which was stipulated in that of *Bunn* v. *Guy*? The only part of this agreement which seems at all to have a tendency to provide for its completion by introducing the defendant into the plaintiff's business, is the stipulation that it shall be carried on in their joint names from the 1st September, 1814, till within ten days of the end of Easter Term, 1815; a stipulation which has never been acted upon, and the period for acting upon which had expired long before the hearing of the cause. The decree which I should have to make would, therefore, be nothing more than an order upon the defendant to pay his purchase-money; or if I were to go any further and to

introduce the words 'upon plaintiff's transferring his business to him,' I should feel myself greatly at a loss in telling the one party what he is to do, or the other what he is entitled to exact.

"It may be said, however, that it constitutes part of the agreement that 'the usual clauses' shall be inserted in the instrument to be executed, and, therefore, that on the basis of that agreement, such clauses might be introduced into it as would sufficiently provide for the defendant's security. But it has not been at all suggested what are the clauses which, independently of positive stipulation, belong to an agreement of this sort as 'the usual clauses.' We have in the case of *Bunn* v. *Guy* an instance of such clauses as have been introduced into an agreement of the same nature with the present. But are they to be considered as stipulations so annexed to this sort of transaction as to be introduced as 'the usual clauses' into the instrument which is to be executed on the basis of the present agreement? Is the plaintiff to be bound, for instance, not to carry on his business of an attorney within 150 miles of Plymouth, or within any and what other distance from that place, when it is manifest from direct evidence in regard to what passed at the time when this agreement was framed, that no such point ever came into discussion between the parties, and when it has been decided, as in *Cruttwell* v. *Lye* (17 Ves. 335), that, unless restrained by positive contract, a man may, after selling the goodwill of a trade, set up a business of the same kind at the same place whenever he pleases. Then, is the plaintiff, in order to allure customers, to permit his name to remain in the firm after his concern in the business has entirely ceased? Admitting that it is not illegal so to contract, yet is it a stipulation so extremely proper for a Court of Equity to sanction that it will introduce it, as of course, into an agreement, the parties to which had never expressed any intention of resorting to it? I apprehend not; and I should think the same, likewise, of the remaining covenant, which is to influence

customers to employ the one party to the agreement, because the other party is paid for so influencing and inducing them.

"There are no means, therefore, that I can prescribe by which the defendant, when he has paid his money, is to have anything secured to him in return for it. I am not called upon to determine whether this is a void agreement, but I think that it is an agreement which a Court of Equity is not able to carry into execution, and that the bill must be dismissed, but without costs, since it was an agreement which was deliberately entered into on the part of the defendant."

It would appear from the judgment of Vice-Chancellor Bacon, in the case of *May* v. *Thomson* (20 C. D. p. 705), decided in the year 1882, that the Court will not decree specific performance of a contract to sell a medical practice where there is a stipulation for an introduction, an introduction being such a contract for personal service as the Court is unable by its decree to enforce. The case was decided on the ground that no binding contract had been entered into; but there are many instructive observations by the Vice-Chancellor, and the Lords Justices who heard the case in the Court of Appeal, on the subject of the sale of medical practices.

The plaintiff wished to sell a non-dispensing medical practice, and the lease of the house where it was carried on, and placed it on the books of a medical agent. After negotiations, the defendant wrote to the plaintiff, accepting the price put on the practice and lease, and adding, "I shall trust to you to give me the best introduction you can during the three months, and afterwards if necessary." The plaintiff, in reply, wrote to the defendant:—"I now write to thank you for acceding to my terms, and in return it will be my aim as well as my duty to give you an effectual introduction to all the patients on my list, and I am thankful that, in introducing you, I shall be able to speak (at convenient seasons) of you in such terms as will

secure their confidence and goodwill towards you, as well as myself," and suggested a date for the defendant's taking over the lease and the practice; but no date was definitely fixed, nor were the terms of the introduction agreed upon. The defendant afterwards declined to proceed any further, and the plaintiff brought an action for specific performance of the alleged agreement, and for additional or substitutional relief in damages for breach by defendant of the agreement. The defendant's conduct was strongly commented on by the Vice-Chancellor.

Vice-Chancellor Bacon, in his judgment, said that though there was no binding contract come to, the meaning of the arrangement was obvious. Between two men of reputation, who had any regard to their own pledged words, that was as good an agreement as could be made. . . . There was no doubt the defendant was in all honesty and in all honour bound by his letter to complete the contract, which he obviously intended to enter into by that letter. . . . . Then there was the stipulation as to personal introduction. "How can the Court direct specific performance of that stipulation? I bear in mind the evidence which had been given, and which I readily receive as a fact, that when medical men sell their practices, the introduction being a principal feature in it, there must be stipulations which ensure the performance of the services attending the introduction by the vendor. As a matter of law, I cannot tell what this introduction means, though, as a matter of fact, I do not affect not to know it perfectly well. There must be some arrangement between them in writing which they can understand, and which judges and juries can understand, if the question ever arises as to what was the meaning of the parties." His lordship did not hesitate to say that the agreement ought in all honesty to be performed.

The Vice-Chancellor concluded by saying that the law compelled him to dismiss the action; but that at the same time the circumstances required him, and the law empowered

him, to say that, in all justice and honesty, it must be dismissed without costs.

The plaintiff appealed from this decision, but his appeal was dismissed.

Jessel, M.R., in the course of the argument before the Court of Appeal, said: "I cannot see my way to making a decree for specific performance of an agreement to purchase a medical practice. What can the Court order the seller to do?"

Remarks in judgments in the Court of Appeal as to introduction.

Jessel, M.R., in his judgment on the appeal, said (p. 718): "What is the meaning of selling a medical practice? It is the selling of the introduction of the patients of the doctor who sells to the doctor who buys; he has nothing else to sell except the introduction. He can persuade his patients, probably, who have confidence in him, to employ the gentleman he introduces as being a qualified man, and fit to undertake the cure of their maladies, but that is all he can do. Therefore, when you talk of the sale of a non-dispensing medical practice—of course, when a man keeps what is called a doctor's shop there is a different thing entirely to sell—you are really talking of the sale of the introduction to the patients, and the length, the character and duration of the introduction: the terms of the introduction are everything. And there is something more, according to my experience, in case of the sale of medical practices,—I do not know how the evidence is with regard to it in this case—there is always a stipulation that the selling doctor shall retire from practice either altogether or within a given distance. It is so always, and there is also sometimes a stipulation that he shall not solicit the patients, or shall not solicit them for a given time. They are both very important stipulations as regards keeping together the practice for the purchasing doctor."

Lord Justice Lindley, in giving his judgment, says (p. 723): "Anybody who knows anything about purchasing businesses of this kind knows perfectly well that

the price and the introduction are mutually important; the price depends on the introduction if that is fixed, and the introduction depends on the price if the price is fixed. Each acts and re-acts on the other, and it is known perfectly well that in negotiating matters of this sort it becomes of the utmost importance to settle what sort of introduction is to be given, and what is to happen as regards alteration of terms for the payment of the price or premium if the purchaser does not get the introduction that is bargained for."

Payment should be made to abate if the introduction is not complete.

Provision should be made in an agreement for the sale of a medical practice, that the payments, or part of the payments, to be made on the transfer, shall abate if the introduction be not actually carried out or if its duration be curtailed. Otherwise the covenants for the introduction and for the payment of the purchase-money may be held independent of each other, as in *Judson* v. *Bowden* (*infra*), and the introduction held not a condition precedent to the payment of the sum covenanted to be paid in consideration for such introduction. In such a case the purchaser of the practice could counterclaim for damages for the loss or refusal of the stipulated introduction.

The case of *Judson* v. *Bowden* (17 L. J. Ex. 172), decided in 1847, was as follows :—

The plaintiff and defendant had by indenture covenanted that they would become partners in the profession and business of surgeons and apothecaries for the term of one year from 1st January, 1845 ; defendant covenanted that he would pay 400*l.* on the execution of the indenture, and 100*l.* on the 25th of March of the years 1846, 1847, 1848, and 1849 respectively, making 800*l.* in all, in consideration of which payments the defendant was to be entitled to the entire profits from the said 1st of January, 1845, he paying all expenses. Plaintiff covenanted to introduce defendant to the patients and friends of plaintiff at first as a partner, and ultimately as his successor, with

the view and for the express purpose of securing their confidence to the defendant. The business of the partnership was to be carried on at the then residence of the plaintiff at Ware, and the plaintiff was to continue to reside and practise in the same residence till June 25th, 1845, and at all reasonable times to be ready and willing to attend and prescribe for patients and to assist defendant in carrying on the said practice till the 1st of January, 1846, and at all subsequent times when plaintiff should be at Ware or in the immediate vicinity. Plaintiff also covenanted from and after the 1st of January, 1846, to introduce defendant as his successor, and to use his best endeavours to establish him in his practice as a surgeon and apothecary in Ware, in consideration whereof the defendant thereby covenanted and agreed to pay the plaintiff the further sum of 50*l.* on the 25th of March, 1846, in addition to and beyond the said sum of 800*l.*

The plaintiff now sued the defendant on his covenant for the payment of the said sum of 50*l.* due March 25th, 1846.

The defendant pleaded that after the said 1st of January, 1846, and at divers times between that day and the 26th of March, 1846, being proper and reasonable times in that behalf, the defendant had requested the plaintiff to introduce him, the defendant, as the plaintiff's successor to divers persons who had been patients of the plaintiff, but the plaintiff would not, when requested, or at any other time, introduce the defendant, &c., nor had the plaintiff from the said 1st of January, 1846, introduced the defendant to any person at all as the plaintiff's successor, nor used any endeavour whatever to establish the defendant in the practice of a surgeon and apothecary in the town of Ware, but had wholly neglected and refused to do so, nor had the plaintiff at any time performed any part whatever of the alleged consideration for defendant's covenant to pay the said sum of 50*l.*

The plaintiff demurred on the ground that the covenant to introduce defendant to plaintiff's patients was not a condition precedent to the payment of the 50*l.*, but was a distinct and independent covenant. The Court upheld the demurrer, considering the defendant's plea bad, as the introduction to the patients was an independent covenant, and clearly not a condition precedent to the payment of the 50*l.*

CHAPTER IX.

ASSISTANTS.

THE majority of the "assistants" of medical practitioners are themselves duly qualified medical men registered under the Medical Acts; but there is still a not inconsiderable number of unqualified men engaged as assistants.

Registration under Medical Act of 1858.

Under the Medical Act, 1858, a practitioner might be registered in respect of his qualification or qualifications; he might be registered in respect of a surgical qualification only, or of a medical qualification only, and the privilege of a medical practitioner registered under the Medical Act, 1858, is that he is entitled, according to his qualification or qualifications, to practise medicine or surgery, or medicine and surgery, as the case may be, and to recover in due course of law, in respect of such practice, any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled, unless he be a fellow or member of a college of physicians, the fellows of which are prohibited by bye-law from recovering at law their expenses, charges, or fees. The amending Act of 1886 enacts that after an "appointed day" in 1887 a person shall not be registered under the Medical Acts in respect of any qualification referred to in any of those Acts unless he has passed a qualifying examination in medicine, surgery, and midwifery; and a medical practitioner registered after that "appointed day" is entitled to practise medicine, surgery, and midwifery in any part of her Majesty's dominions, and to recover in due course of law in respect of such practice, any expenses, charges in respect of medicaments or other appliances, or any fees to which he may

be entitled, unless he is a fellow of a college of physicians, the fellows of which are prohibited by bye-law from recovering at law their expenses, charges, or fees. Sect. 32 of the Act of 1858 enacts that no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under that Act.

Whether persons who practise as surgeons are or are not now liable to penalties for so practising would appear to be an undecided question (as, though the modes of examination have been altered and no penalties under it seem to have been enforced for many years, the Statute 3 Hen. 8, c. 11, has never been repealed. (See *Davies* v. *Makuna*, 29 C. D. 596.) The preamble of that statute recites that "Forasmuch as the science and cunning of physick and surgery (to the perfect knowledge whereof be requisite both great learning and ripe experience) is daily within the realm exercised by a great multitude of ignorant persons, of whom the greater part have no manner of insight in the same, nor in any other kind of learning; some also can no letters on the book, so far forth, that common artificers, as smiths, weavers, and women, boldly and accustomably take upon them great cures, and things of great difficulty, in the which they partly use sorcery and witchcraft, partly apply such medicines unto the disease as be very noious, and as nothing meet therefore, to the high displeasure of God, great infamy to the faculty, and the grievous hurt, damage, and destruction of many of the king's liege people, most especially of them that cannot discern the uncunning from the cunning": and it is enacted, "That no person in the City of London nor within seven miles of the same take upon him to exercise and occupy as a physician or surgeon except he be first approved and admitted by the Bishop of London, or by the Dean of Paul's for the time being, calling to him

Statute 3 Hen. 8, c. 11.

Ante, p. 179.

or to them four doctors of physick, and for surgery other expert persons in that faculty, and for the first examination such as they shall think convenient, and afterward alway four of them that have been so approved, upon pain of forfeiture for every month that they do occupy as physicians or surgeons . . . ."; and there are similar provisions for examining persons out of the City and the precinct of seven miles. Thirty years later the "chirurgeons were covetous," and were not in such good repute. The preamble of the statute 34 & 35 Hen. 8, c. 8, recites the statute above and that, "Sithence the making of which said Act the Company and Fellowship of Surgeons of London, minding only their own lucres, and nothing the profit or ease of the diseased or patient, have sued, troubled, and vexed divers honest persons, as well men as women, whom God hath endued with the knowledge of the nature, kind, and operation of certain herbs, roots, and waters, and the using and ministring of them to such as been pained with customable diseases . . . .; and yet the said persons have not taken any thing for their pains or cunning, but have ministred the same to poor people only for neighbourhood and God's sake, and of pity and charity. And it is now well known that the surgeons admitted will do no cure to any person, but where they shall know to be rewarded with a greater sum or reward than the cure extendeth unto; for in case they would minister their cunning unto sore people unrewarded, there should not so many rot and perish to death for lack or help of surgery, as daily do; but the greatest part of surgeons admitted been much more to be blamed, than those persons that they trouble. For although the most part of the persons of the said craft of surgeons have small cunning, yet they will take great sums of money, and do little therefore, and by reason thereof they do oftentimes impair and hurt their patients rather than do them good"; and it is enacted that any subject of the king having knowledge and experience of herbs, &c., may minister to outward sores

Statute 34 & 35 Hen. 8, c. 8.

and give drinks for certain diseases without incurring any penalty.

Apothecaries Act, 1815, prohibits unqualified persons from practising.

The more recent and, on the subject of unqualified assistants, more important Act, the Apothecaries Act, 1815 (55 Geo. 3, c. 194), prohibits (sect. 14) any person from practising as, or (sect. 17) from acting as, assistant to an apothecary unless he has obtained a certificate of his qualification to practise as an apothecary, or to act as such assistant, as the case may be. By sect. 20 penalties of 20*l.* and 5*l.* respectively for every offence are imposed on any person who acts or practises as an apothecary, or acts as assistant to any apothecary to compound and dispense medicines, without having obtained a certificate; and, by sect. 21, charges may not be recovered unless the practitioner has obtained a certificate.

What is practising as an apothecary?

The Act does not define the nature of an apothecary's employment, but the question has sometimes come before the Courts. In *Apothecaries Co.* v. *Allen* (4 B. & Ad. 625), it was held that a person who advises patients, and compounds and sells the medicines compounded by himself, but does not, and cannot, make up physician's prescriptions, is liable to the penalties of the Apothecaries Act. In *Davies* v. *Makuna*, Cotton, L.J., said, that dispensing, mixing medicine, giving medical advice, and attending the sick as medical adviser, must be considered acting as an apothecary.

Ante, p. 179.

Practice of apprentice of apothecary should be confined to his master's residence.

In the case of *Apothecaries' Co.* v. *Greenwood* (2 B. & Ad. 708), the defendant was apprenticed to his brother, an apothecary. The brother, who resided eight miles from Halifax, took a house there, where the defendant resided. It was proved that the defendant had visited and given medicine to several patients, but he never received anything for his attendances, and his brother was paid for the medicines furnished. This action was brought to recover penalties for acting as an apothecary without certificate. The judge directed the jury to find a verdict for one penalty of 20*l.*, but reserved liberty to the defendant to

move to enter a nonsuit. It was, on the argument, contended that the defendant was only acting as an assistant, which was a distinct offence, subjecting the party to a different forfeiture. Lord Tenterden, C.J., said: "If the defendant in this case be not the apothecary, then his brother must be. Now, could the latter maintain an action against patients he never saw?" and afterwards, in delivering the considered judgment of the Court of King's Bench, he said: "The Act does not in terms require a practising on the party's own account; and it must be obvious that, if a case like the present be not within the Act, a door will be opened whereby the objects of the Act may be evaded, and there may be a practising at several towns under one certificate, and at some of them by persons, under the name and colour of apprenticeship, with little or no benefit to the patients from the skill or knowledge of the person who has obtained the certificate. We think the only safe rule is to confine the practice of apprentices to the residence of their master, whereby the patients may, in general, have the benefit of his skill. In the present case few of the patients could have that benefit in any degree. We think, therefore, the defendant incurred the penalty of the statute."

The Medical Act, 1858, which was passed for the purpose of establishing a register of medical practitioners, so that all persons might be able to ascertain the qualifications of those they apply to, has not by implication repealed the Apothecaries Act, 1815. (*Davies* v. *Makuna*, 29 C. D. 596; *Leman* v. *Fletcher*, L. R. 8 Q. B. 319.) A practitioner registered under the Act of 1858, with a surgical qualification only, was held to be prevented by the Apothecaries Act from recovering for attendance and medicine supplied, except in a surgical case. (*Leman* v. *Fletcher*, *ubi supra*.) It was also held that, where a person, unqualified at the time of the services rendered, became qualified subsequently, and before the trial, he could not maintain an action for his fees. Both qualification and registration

must exist at the time the services are rendered, and not merely at the time of the trial. (*Leman* v. *Housley*, L. R. 10 Q. B. 66, where some earlier cases were not followed.)

As to recovering fees for medical aid given by unqualified assistant.

A qualified practitioner cannot recover charges for medical aid and advice rendered and the cost of medicine supplied by his unqualified assistant without consulting the qualified practitioner. (*Howarth* v. *Brearley*, 19 Q. B. D. 303; 3 Times L. R. 650.)

The facts in that case were, that J. L. F. was a duly qualified and registered medical practitioner, practising at Bury. He had also a branch practice, which was managed by his brother, A. F., who was not qualified to practise medicine or surgery, nor had he obtained a certificate enabling him to practise as an apothecary. In difficult cases A. F. consulted his brother, but A. F. had alone rendered the services and supplied the drugs, in respect of which the action was brought, to the defendant, and had not at any time consulted his brother about the defendant's case. All the drugs and medicines at the branch surgery were bought and paid for by J. L. F., the qualified practitioner.

Judgment was given for the defendant. Lord Coleridge, C.J., said: "The relation between J. L. F. and his brother has not been clearly defined; they were either partners, or master and servant. In effect the duly qualified practitioner sues for services none of which he personally rendered. I do not mean simply that he did not physically render them, but that he gave no advice whatever in regard to, and never even saw the defendant. If the qualified man had given advice, and the unqualified man had been merely the ministering hand under the directing brain of the qualified man, I should be prepared to hold that the services were those of the qualified man. I think that view consistent with common sense. But in this case we have to consider an Act of Parliament the provisions of which, in my opinion, put an end to the plaintiff's right to sue. The Act says, 'no person shall be entitled to recover any

Personally rendering medical services.

charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied unless he shall prove upon the trial that he is registered under this Act.' The qualified man who brought this action did prove that he was registered, but he sued for medical attendance, which he personally, in the sense I have already explained, did not render at all. The ground of my decision is that none of the services were rendered by the plaintiff, and that he cannot recover for services rendered without any reference to himself by another man who stood in this indefinite relation towards him. It is immaterial, I think, what that relation was, though perhaps it is safer to consider it as that of master and servant, and to say that the master cannot recover for services with no part of which he had anything to do."

Denman, J., said: "This action was brought to recover for services alleged to have been rendered to the plaintiff's assignor, who was a duly qualified practitioner. It is for the plaintiff to prove that they were so rendered. This he has not proved. He has only shown that another person, without in any way consulting him, rendered them. The work, in my opinion, was not done for the patient by the qualified man, nor can the plaintiff in this case recover as for work done by the qualified man's servant. Looking at the Act, I think that a registered practitioner cannot give a roving authority to an unqualified person to practise in his name without consulting him or taking his advice, and then sue for the services rendered by the unqualified person. It would be entirely contrary to the purpose and intention of the Act. The services rendered by A. F. were in no way the services of J. L. F."

An unregistered assistant may sue a registered practitioner for his salary. (*De la Rosa* v. *Prieto*, 16 C. B. N. S. 578.)

Pharmacy Act, 1868, as to sale of poisons.

Under the Pharmacy Act, 1868, it is unlawful for a person who is not registered under the Pharmacy Acts (not

being a qualified apothecary or M.R.C.V.S.) to sell or keep open shop for retailing, dispensing or compounding poisons.

A qualified practitioner who "covers" an unqualified assistant lays himself open to professional censure.

General hiring is hiring for a year.

It is advisable, in the interest both of principal and assistant, that the terms of the contract of service should be clearly defined and reduced to writing; for a general hiring, if no time is mentioned, is to be taken as a hiring for a year; that is, the contract is that the relation of master and servant, or principal and assistant, shall continue for a year certain. (*Fawcett* v. *Cash*, 5 B. & Ad. 906.) That salary is paid quarterly, monthly, or even weekly, makes it none the less a hiring for a year. If the parties go on for several years, a contract is presumed for a year in the first instance, and so on for each succeeding year, as long as it shall please the parties; and such a contract being implied from the circumstances, and not expressed, a writing is not necessary to authenticate it.

Assistant dismissed at other time than end of a complete period entitled to damages.

In such a case, therefore, if the principal capriciously dismisses his assistant at any time other than the completion of the current year of service, the assistant is entitled to reasonable damages. (*Beeston* v. *Collyer*, 4 Bing. 309.)

Dismissed for misconduct cannot recover salary for current period;

And, conversely, if the servant or assistant be rightfully dismissed for misconduct before the end of the current year of service, having thus violated his duty before the year expired, so as to prevent his master having his service for the whole year, he cannot recover wages or salary *pro ratâ* for the period expired since the last payment of wages or salary became due (*Turner* v. *Robinson*, 5 B. & Ad. 789); and this although the master has brought an action against him for the misconduct and has recovered damages. The same rule appears to apply if the servant abruptly leaves his master's service during the year. (*Hutmann* v. *Boulnois*, 2 Car. & P. 510.)

but can recover salary overdue.

The assistant is not, however, precluded by such dismissal or dereliction of duty from recovering such salary as has actually become due and is unpaid.

Presumption of yearly hiring may be rebutted.

The presumption, however, that a general hiring is to be taken to be a hiring for a year, may be rebutted. In *Bayley* v. *Rimmell* (1 M. & W. 506), an action had been brought by an assistant surgeon to recover the amount of salary due to him from his employer. The plaintiff claimed for salary for 161 days at the rate of 200*l.* per annum. No specific contract of hiring was proved. It appeared that after the plaintiff had been some time in the defendant's employment, he was taken ill, and went to a hospital, where he remained three months. He did not return to his employment, nor did the defendant request him to do so. It appeared that the plaintiff had been paid different sums of money, but not at any fixed or definite periods. It was submitted that upon this evidence it must be taken to be a general hiring, and that in legal estimation that was a hiring for a year, and therefore that no wages were recoverable, as the year's service had not been performed. Gurney, B., thought that if even this were to be taken to be a hiring for a year, the strict rule of performance was not applicable to a case where the performance was prevented by the act of God, and that the plaintiff was entitled to recover rateably for the time he was engaged in the defendant's employ. The jury accordingly found for the plaintiff for the sum of 59*l.* 16*s.*, the amount claimed.

A rule for a new trial was moved for on the ground that unless the year's service was performed the plaintiff could not claim any wages, and that the damages ought to be reduced.

Lord Abinger, C.B., said: "On the first ground, I think there should be no rule, since there was no evidence of any hiring at all; there was evidence of a service, and I incline to think that the interpretation put on the contract by the plaintiff is the true one, namely, that he was to be paid for his services what they should be worth."

Parke, B., said: "Admitting that there was some evidence of a hiring, and agreeing in the proposition that a

general hiring, if unexplained, is to be taken to be a hiring for a year, I think there is abundant evidence in this case to show that there was no hiring for a year. It appears that payments were made, but they were not made according to the yearly amount, nor at any definite periods of the year. The parties separated in the middle of the year, and neither did the plaintiff return, nor did the defendant require him to return and complete the service: . . . there is really nothing to show that the compensation was to be paid at the end of the year." A rule was granted on the second ground, as to the reduction of damages, to which the plaintiff assented.

Where a servant was engaged for twelve months certain, after which time either party was to be at liberty to terminate the agreement by giving the other a three months' notice, it was held that, at the close of the twelve months, the agreement could be determined by either party without any notice, and that the stipulation as to a three months' notice only applied in case the engagement was prolonged beyond the three months. (*Langton* v. *Carleton*, L. R. 9 Ex. 57.) But where a service from year to year is continued without any definite stipulation as to length of notice necessary to determine it, what is a reasonable notice to be given to terminate the contract at the end of a current year depends on the usage or custom of the trade or profession.

Reasonable notice depends on usage of the profession.

The rule that a general hiring is a hiring for a year is not an inflexible rule. Each particular case must depend upon its own circumstances, and the rule is subject to an exception in which the agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice. (*Buckingham* v. *Surrey and Hants Canal Co.*, 46 L. T. 885; and see *Lowe* v. *Walter*, 8 T. L. R. 358.) Such customs vary in different employments.

In the case of domestic or menial servants there is a well-established rule that the contract may be determined

Assistant is not a domestic servant.

by a month's notice or a month's wages; that depends upon custom. It was held that such custom was not applicable in the case of a chemist's assistant. (*Broxham* v. *Wagstaffe*, 5 Jur. 845.)

Smith v. *Hayward*: three months' notice held sufficient.

In *Smith* v. *Hayward* (7 Ad. & E. 544), the defendant, a surgeon, had engaged the plaintiff as dispenser of drugs at a salary of fifty guineas a year, had paid him a quarter's salary at that rate at the end of the first quarter, and had shortly afterwards dismissed him. The jury found that the agreement was subject to a three months' notice.

Bond v. *Brereton*: one month's notice held sufficient.

In the case of *Bond* v. *Brereton*, however, before Day, J., reported in the "Times" newspaper of 19th January, 1888, it was held that there was a usual custom in the medical profession that one month's notice on either side would terminate an assistant's agreement, and that the amount of one month's salary, which had been paid into Court, was sufficient to meet the plaintiff's legal claims against the defendant in respect of a capricious dismissal by the defendant.

Assistant is discharged by death of principal.

Where personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation, and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary. It is obvious that if the servant die, his master cannot compel his representatives to perform the service in his stead or pay damages, and equally by the death of his master, the servant is discharged of his service, not in breach of the contract, but by implied condition. (*Farrow* v. *Wilson*, L. R. 4 C. P. 744.)

An assistant or his representatives, as the case may be, in the event of the contract of service coming to an end through the death of either party, will be able to recover for the service rendered at any rate down to the last time when a payment became due previous to the death (see *Stubbs* v. *Holywell Rail. Co.*, L. R. 2 Ex. 311), in which case a consulting engineer had been employed for fifteen

months to complete certain works. He was to be paid 500*l.*, as his fee or salary, in equal quarterly instalments. Before the work was finished, and whilst two quarterly instalments which were due to him were unpaid, he died. The company contended they were only liable to pay a *quantum meruit* for the work actually done; but it was held that the right the engineer would have had in his lifetime to sue for the instalments in arrear was not taken away by his death, that the contract was not rescinded, although the act of God had rendered further performance impossible; and the engineer's representatives were held entitled to recover.

Assistant may be dismissed for good cause.

What is good cause for dismissal of assistant?

misconduct;

disobedience;

neglect causing danger to principal's business;

revealing secrets;

claiming to be a partner.

An assistant, like a clerk or other servant, may, of course, be dismissed for good cause. In *Callo* v. *Brouncker* (4 C. & P. 518), it was laid down that where a servant has been engaged for a specified time, he can be dismissed before the expiration of that time only if he has been guilty of moral misconduct, either pecuniary or otherwise, wilful disobedience, or habitual neglect. In *Lacy* v. *Osbaldiston* (8 C. & P. 80), an employer was held justified in dismissing a servant who was so conducting himself that it would be injurious or dangerous to the interests of his master to keep him. In *Wise* v. *Wilson* (1 C. & K. 662), it was held that if an assistant caused real danger to his master's business by coming home late so that he could not compound medicines, and employed the shop-boy to do it, the master would be justified in dismissing him. It has been said that betraying his employer's secrets will justify the dismissal of a servant. (*Beeston* v. *Collyer*, 2 C. & P. 607.) In the case of *Amor* v. *Fearon* (9 Ad. & E. 548), a clerk had claimed, in good faith, apparently, that he was a partner of his employer, and the employer was held justified in dismissing him, although he had offered to continue to discharge his duties as clerk; for a claim to be a partner was incompatible with his position as a servant. If a servant conducts himself in a way inconsistent with the faithful discharge of his duty in the service, it is misconduct

which justifies immediate dismissal. That misconduct need not be misconduct in the carrying on of the service or the business. It is sufficient if it is conduct which is prejudicial, or is likely to be prejudicial, to the interests or to the reputation of the master, and the master will be justified, not only if he discovers it at the time, but also if he discovers it afterwards, in dismissing that servant. (*Pearce* v. *Foster*, 17 Q. B. D. 536.)

Misconduct discovered before, or even after, the dismissal is sufficient to justify the principal in dismissing the assistant.

A master may justify the dismissal of a servant by showing that at the time of the dismissal he knew the servant to have committed an act which justified it; and the jury ought not to be asked whether the master was induced to dismiss his servant from that or from some other cause. (*Ridgway* v. *Hungerford Market Co.*, 3 Ad. & E. 171.)

A dismissal may also be justified where the misconduct which would have entitled the master to dismiss the servant was not known to him at the time but discovered subsequently. (*Spotswood* v. *Barrow*, 5 Ex. 110.)

Disobedience.

A servant may be dismissed for refusal to obey the reasonable orders of his master, and a servant hired by the year and so dismissed before the end of the year cannot recover any wages. After a refusal on the part of the servant to perform his work, the master is not bound to keep him on as a burthensome and useless servant to the end of the year. (*Spain* v. *Arnott*, 2 Stark. 256.) The same applies whatever the period of hiring, and the servant cannot recover any part of the salary current from the last pay day at the time of his dismissal.

Responsibility of principal for negligence of assistant.

A surgeon is responsible civilly to his patients for the negligence or carelessness of his assistant, for he is bound to avoid introducing into his business persons not of competent skill. (*Hancke* v. *Hooper*, 7 C. & P. 81.)

Incompetency.

An assistant, professing to be a skilled person, may be dismissed for incompetency; "*spondet peritiam artis.*" In *Harmer* v. *Cornelius* (5 C. B. N. S. 236), an action against a master for dismissing a person who was engaged as being

a skilled workman, Willes, J., in delivering the judgment of the Court, said that if an apothecary be employed for reward, he impliedly undertakes to possess and exercise reasonable skill in his art; that the public profession of an art is a representation and undertaking to all the world that the professor possessed the requisite ability and skill; and that the Court could see no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired. A servant dismissed without notice for incompetency cannot recover wages for the broken period of service. (*Searle* v. *Ridley*, 28 L. T. 411, in which case it was said that there was no difference between misconduct and incompetency.)

Temporary illness of assistant.

Temporary illness of an assistant will not be a ground for discharging him, or for withholding his salary during his incapacity to do his work. In the case of *Cuckson* v. *Stones* (1 El. & El. 248; 28 L. J. Q. B. 25), the plaintiff had been engaged to serve the defendant for ten years as a brewer, and to teach him to brew, at a salary to be paid weekly; the plaintiff fell ill, and for thirteen weeks was unable to attend personally to business; after his recovery he resumed his duties, but his employer refused to pay him salary for the thirteen weeks, and the plaintiff sued for such salary. Lord Campbell, C.J., in delivering the judgment of the Court of Queen's Bench, said: "If the plaintiff from unskilfulness had been wholly incompetent to brew, or by the visitation of God he had become from paralysis or any other bodily illness permanently incompetent to act in the capacity of brewer for the defendant, we think that the defendant might have determined the contract. He could not be considered incompetent by illness of a temporary nature; but if he had been struck with disease so that he could never have been expected to return to his work, we think the defendant ought to have dismissed him and employed another brewer in his stead. Instead of being dismissed he returned to the service of the defendant when his health was restored, and the

defendant employed him and paid him as before. At the trial the defendant's counsel admitted that the contract was not rescinded. The contract being in force, we think that there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work. It is allowed that under this contract there could be no deduction from the weekly sum in respect of his having been disabled from working for one day of the week: and while the contract remained in force, we see no difference between his being so disabled for a day, or a week, or a month."

Illness caused by assistant's own misconduct.

In *K.* v. *Raschen* (38 L. T. 38), a clerk, who had been obliged to be absent from his duties for a period on account of illness, but who had not been dismissed, sued for his salary. It was held that he was entitled to his salary for that period, and that it was no answer to his claim that the illness was caused by an act of misconduct on his part, which occurred before the contract of service, and which he did not know at the time of the contract would lead to his illness, and render him incapable of performing his work. Hawkins, J., said: "If the plaintiff had been aware, at the time of the making of the contract, that he would be incapacitated from performing his duties, I am not prepared to say that he could recover. But there is nothing to show that he knew anything of the illness which he subsequently suffered from until the agreement had been entered into. . . . ."

Permanent illness, being a disability arising from the act of God, excuses the non-performance of a contract of service (*Boast* v. *Firth*, 4 C. P. 1), at any rate where the illness arises after the making of the contract. It might be otherwise if the illness existed at that time, so that the covenantor covenanted with knowledge of his inability.

Assistant wrongfully dismissed should bring action for damages promptly.

An assistant wrongfully dismissed may sue his employer for damages for breach of contract. He should not wait until the end of the period of service which was contracted for, and then sue for work and labour done as if he had

rendered the services until the expiration of that period. (*Smith* v. *Hayward*, 7 Ad. & E. 544, a case of a surgeon's dispenser; *Fewings* v. *Tisdall*, 1 Ex. 295.) It is the duty of an assistant so dismissed to use diligence to find other employment. He ought not to remain idle in the expectation that he will recover from the master who dismissed him as much as another employer would have paid him for his services. The measure of the damage is rather such loss as may be probable than such as may actually have been incurred. So where a partnership by which the plaintiff had been engaged for a period as agent, was dissolved during the period, such dissolution operated as a wrongful dismissal; and the plaintiff, refusing an offer of employment on the same terms as before by the continuing partners, brought his action for damages: it was held by the Court of Appeal that he was only entitled to nominal damages. (*Brace* v. *Calder*, [1895] W. N. 96; Times Newspaper, May 30th, 1895.)

Restrictive covenants entered into by assistants.

Assistants are frequently required, as a condition of their employment, to enter into a covenant restraining them from competing with their employer during their service and after its termination, and it is generally intended that the restraint shall continue beyond the period of the service. (As to these restrictive covenants generally, see Chapter on Goodwill, *ante*, pp. 108 *seq.*)

An assistant is not absolved from such a restraint by reason of his having been wrongfully dismissed from his employment (see *Proctor* v. *Sargent*, 2 Man. & Gr. 20), or because his employer has not duly performed or paid all that he undertook to perform or pay on his part, as in the case of *Carnes* v. *Nesbitt* (7 H. & N. 778), where the master neglected to find and provide for the assistant a dwelling-house, as provided for in the contract between them.

Either partner may enforce restrictive covenant.

Where an assistant has entered into such a restrictive covenant with principals who are partners, such partners, on dissolution, have joint and several interests, and either

partner may sue to restrain a breach; a release to the assistant by one partner does not avail him against an action by another partner, and he is not at liberty to practise, in violation of his covenant, in the service of one of the late partners without the consent of the other or others. (*Palmer* v. *Mallet*, 36 C. D. 411; compare *Swallow* v. *Day*, 12 Jur. 403.) If the practitioner for whose benefit the covenant was entered into has died or retired from practice, the covenantor is not thereby released from his covenant unless the covenant was by special terms confined to the lifetime of the covenantee, or the time during which he should continue to practise.

A covenant not to set up as a surgeon within certain limits is broken if the covenantor acts as an assistant within those limits. (*Palmer* v. *Mallet*, *ubi supra*.)

Infant.

An infant may enter into a contract which is beneficial to himself, and he is bound by it; and a contract by which he gets employment, coupled with a bargain on his part that he will not compete after his service ceases, may be beneficial to him. Where an infant has continued to be employed after attaining his majority, and has subsequently committed a breach of a restrictive covenant, an injunction has been granted. (*Walton* v. *Everington*, 1 Times L. R. 396; *Evans* v. *Ware*, [1892] 3 Ch. 502.)

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