in a penalty of $5,000, that the grantees during the construction of the waterworks will obey the provisions of the ordinance. As the grantees never constructed or attempted to construct any waterworks under the license given them by the city ordinance, there has been no breach of the condition of the bond. We are of opinion that it was error in the circuit court of the eastern district of North Carolina to hold that, by the terms of the ordinance of the city of Goldsborough, the licensees therein agreed to furnish the city of Goldsborough with waterworks by the 1st day of October, 1887, and were bound, pursuant thereto, to construct and operate waterworks for the use of that city; and that the court erred in holding that the defendants below violated the conditions of a certain bond executed by them to the plaintiff (below) wherein they agreed to pay the plaintiff the sum of $5,000 in case they did not faithfully perform the terms of their contract during the construction of waterworks for the plaintiff. We think there was error in these rulings, for which the judgment of the court below should be reversed, and the suit dismissed, with costs, and it is so ordered.

OLIVER *et al. v.* GILMORE.

(Circuit Court, D. Massachusetts. September 14, 1892.)

No. 3,887.

1. CONTRACTS—PARTIES TO ACTIONS.
Upon a contract between manufacturers, by which, in consideration of the party of the first part not using his plant for a certain purpose, the parties of the second part severally agree to pay him a percentage on their sales, he may maintain an action against one of them alone, where it is plain that each is holden only for his own payment.

2. MANUFACTURING CORPORATIONS—ULTRA VIRES—LIMITING PRODUCTION.
A private manufacturing corporation stands on the same footing as an individual with respect to its power to enter into contracts to limit production, for, as it owes no special duty to the public, it can ordinarily limit or omit the exercise of its corporate powers.

3. CONTRACTS—PUBLIC POLICY—LIMITING MANUFACTURES.
A contract between manufacturers, whereby the first party agrees, in consideration of a percentage on the sales made by the second party, not to use his plant for the production of strap and T hinges for five years, the contract to be void in case the second party increase his facilities for the production of such hinges, is void as against public policy.

4. SAME—ENFORCEMENT—PARTIAL PERFORMANCE.
The contention of the first party that, as he had fully performed his promises, he could recover the pecuniary consideration, even though the contract was not enforceable while entirely executory, was without merit.

At Law. Action by Henry W. Oliver and others, constituting the firm of Oliver Bros. & Phillips, against Edwin W. Gilmore upon a contract. On demurrer to the declaration. Sustained.

The contract in question, marked "Exhibit A," was as follows:

"Memorandum of agreement made and concluded this fifteenth day of February, (1883,) eighteen hundred and eighty-three, by and between Oliver Bros. & Phillips, party of the first part, and the Stanley Works, a corporation of the state of Connecticut, Roy & Co., a corporation of the state of New York, E. W. Gilmore & Co., of North Easton, Mass., C. Hager & Son, of St. Louis, Mo., McKinney Manufacturing Company, of Allegheny, Pa., the Peck, Stowe & Wilcox Company, a corporation of Cleveland, Ohio, and elsewhere, the Ætna Nut Company, a corporation of the state of Connecticut, and Sargent & Co., a corporation of the state of Connecticut and of New York, parties of the second part, witnesseth: That the said party of the first part agrees that the works, factory, and machinery owned, leased, and controlled by them, situate in Pittsburgh or elsewhere, shall not be operated or used by any person whatever for the manufacture of strap and T hinges (it being understood that the said Oliver Bros. & Phillips may use any machinery other than their regular strap and T hinge machinery for the manufacture of wrought-iron butts) for and during the period of five (5) years from and after the first day of March, (1883,) eighteen hundred and eighty-three. In consideration whereof, the said parties of the second part severally agree to pay to the said party of the first part, from and after the first day of March, 1883, a sum of money equal to three and one half per centum of the net sales of strap and T hinges, sold by the several parties of the second part during the month of March, 1883, and for each succeeding month during the period of this agreement, which said sales shall be ascertained and reported to said first party as follows: On or before the fifteenth day of each month after March, 1883, each individual, firm, or corporation composing said second parties, forming or operating a separate establishment for the manufacture of strap and T hinges, shall make a report under oath, to be signed by some member of the firm or officer of the corporation, as the case may be, and by a bookkeeper or other person, a member of, or in the employ of, said firm or corporation, who shall be best acquainted with the *data* from which sales are made up, or by the person making up said sales, attested to before a notary public or justice of the peace, of the net amount of the sales for the calendar month preceding, which said report shall be accompanied by a check or draft for the per centum, as before provided. The reports and drafts herein provided for shall be made to the Wheeling Hinge Company, of Wheeling, West Va. It is further agreed that, should either of said second parties fail to make report of sales and pay over the per centum thereon contemplated by the terms of this agreement at the times herein designated, to said first party, notice of such failure shall be forthwith mailed to each of said second parties, and if within thirty days after the mailing of such notice the terms of this agreement are not complied with by the corporation or firm so in default, or in case of failure by the defaulting party, then, by the association of strap and T hinge manufacturers, this agreement shall, at the option of said first party, be no longer in force, and the first parties shall be at liberty to resume the manufacture of hinges the same as if this agreement had not been made. It is also agreed that if any one of the parties of the second part should build, buy, or place in their works any additional machinery, which will in any way increase their present facilities for the manufacture of strap and T hinges, this agreement shall thenceforth be null and void. In witness whereof the said Stanley Works, the said Roy & Co., the said E. W. Gilmore & Co., the said C. Hager & Son, the said McKinney Manufacturing Company, the said Peck, Stowe & Wilcox Company, the said Ætna Nut Company, and the said Sargent & Co., have affixed their names and official signatures. This agreement to be void and of

no effect unless signed and agreed to by all the parties named in the body of this agreement; but, if so signed by all, to remain in force until the expiration of the time specified in this agreement.

"OLIVER BROS. & PHILLIPS.
"THE STANLEY WORKS,
"WM. H. HART, Treasurer.
"ROY & COMPANY.
"E. W. GILMORE & CO.
"C. HAGER & SON.
"MCKINNEY MFG. CO.,
"WM. S. MCKINNEY, President.
PECK, STOWE & WILCOX CO.,
By R. A. NEAL, President.
ÆTNA NUT CO.,
By R. A. NEAL, President.
SARGENT & CO.,
J. B. SARGENT, President."

The declaration was in two counts, as follows:

"*First Count.* The plaintiffs say the defendant made a contract with them, a copy of which is hereto annexed, marked 'A,' whereby, in consideration of the agreements therein made by the plaintiff, the defendant promised to pay to the plaintiffs, on or before the fifteenth day of each month, except January, in the year 1887, a sum of money equal to three and one half per cent. of the net sales of strap and T hinges made by him during the month preceding, and the defendant further promised to make a report of said sales, signed and sworn to, as provided in said agreement, and send the same to the Wheeling Hinge Company; and the plaintiffs have done all things which they agreed to do in said contract. And the plaintiffs say that three and one half per centum of the net sales made by the defendant during the first eleven months of 1887 amounted to the sum of three thousand dollars during each of said months, but the defendant has neglected and refused to pay said sum of three thousand dollars, and has neglected and refused to make reports as aforesaid, though demand was made upon him so to do on the fifteenth day of each of said months; wherefore the defendant owes the plaintiffs said sum of three thousand dollars, and interest thereon from each of said fifteenth days.

"*Second Count.* And the plaintiffs say the defendant made a contract with them, a copy of which is hereto annexed, marked "A," whereby, in consideration of the promises therein made by the plaintiffs, the defendant promised not to build, buy, or place in his works any additional machinery which would in any way increase his facilities for the manufacture of strap and T hinges, and the plaintiffs have done all things they agreed to do in said contract; but the defendant, during the year 1887, at divers times, did build, buy, and place in his works additional machinery for the manufacture of strap and T hinges, whereby the plaintiffs are greatly damaged, to wit, in the sum of ten thousand dollars."

M. F. Dickinson, Jr., and *Samuel Williston*, for plaintiffs.
Francis L. Hayes, for defendant.

PUTNAM, Circuit Judge. Plaintiffs concede that the second count is invalid. The important and difficult questions in the case turn on the first count, and the contract which is made a part of it by its tenor. We desire at the outset to dispose of two or three minor considerations. It is clear that the point of nonjoinder of other parties is not well taken, because it is plain that each subscriber to the contract is holden only for his own payment. Also, on the matter of *ultra vires*, inasmuch as a corporation instituted for private trading or manufacturing purposes, and owing no special duty to the public, can ordinarily limit or entirely

omit the exercise of its corporate powers, and is no more holden than an individual to proceed at a pecuniary loss with its intended operations, no question of that sort can be raised on a declaration alleging unqualifiedly that a contract was made. In a declaration of this character, all questions of *ultra vires*, authority of officers of the corporation, and formalities of execution are covered in; and objections in reference thereto can only be made to appear by subsequent pleadings, or by the facts as developed at the trial. The proposition of the plaintiffs that, as they had fully performed, the defendant is liable, even if the contract could not be enforced while it was executory on both parts, is not sufficiently sustained by the authorities cited by them, and is controverted by *Bishop* v. *Palmer*, 146 Mass. 469, 16 N. E. Rep. 299; *Arnot* v. *Coal Co.*, 68 N. Y. 558; *Gibbs* v. *Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553; and *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. Rep. 478. Also, the plaintiffs' proposition that what is sought to be accomplished by this contract indirectly might have been, under the law, accomplished directly, by the defendant's purchasing the works and closing them, does not aid us in coming to a conclusion in this case. There are many matters which the law cannot prevent, but which it refuses to aid when in an executory form. This is singularly illustrated by many of the expressions in the house of lords in *Steamship Co.* v. *McGregor*, [1892] App. Cas. 25. Also the decisions quite uniformly recognize the distinction, in actions for the price of manufacturing plants sold, between cases where the vendor merely has knowledge of the purpose of the purchaser to create a monopoly, and those where the vendor becomes an active participant in that purpose. If we were to accept the law without modification, as one branch of it was left by the court of king's bench in *Mitchel* v. *Reynolds*, 1 P. Wms. 181, (A. D. 1711,) and as the other was stated in 4 Bl. Comm. pp. 156–159, concerning forestalling and engrossing, there would seem to be no doubt that the demurrer would necessarily be sustained. So far as the latter branch is concerned, the contract would seem to be in violation of the old rules of the common law, intended to prevent the gathering up of the control of commodities into few hands; and, as to the former, while *Mitchel* v. *Reynolds*, was that of an individual excluding himself from pursuing his occupation, yet there can be no difference in principle or practical application between shutting out a person and shutting out a manufacturing plant or establishment. Indeed, the latter would much more probably tend to the detriment of public and private interests than the former, and on a much larger scale. In such instances, not only does an individual operative suffer the personal injury against which *Mitchel* v. *Reynolds*, was aimed, but the public receives detriment through a destruction of values and a depopulation extending through entire towns or villages. We must, however, take cognizance of the fact that the rules formerly laid down touching this topic are not now to be regarded as inflexible, and have been considerably modified. *Gibbs* v. *Gas Co.*, *ubi supra*, 409, and *Fowle* v. *Park*, 131 U. S. 88, 97, 9 Sup. Ct. Rep. 658. This has, perhaps, been the result of the pressure of the tremendous advances made by the

vast extensions and rapidly increasing complications of modern business and manufacturing affairs, and of an apparent inability of perceiving how the old, strict rules can be applied judicially to the present conditions without laying down propositions which might in their application check enterprise, or interfere with freedom of trade. The departure in this direction by the judiciary and by legislation have been even more marked in Great Britain than in the United States. This will be seen, so far as the courts are concerned, from striking expressions in some of the English cases which we will cite, especially by the result in *Collins* v. *Locke*, L. R. 4 App. Cas. 674, and by many things said in *Steamship Co.* v. *McGregor*, *supra*, in the house of lords, by Lord COLERIDGE, (21 Q. B. Div. 544,) and in the court of appeal, (23 Q. B. Div. 598.) While in the United States there is a tendency to revive, with the aid of legislation, the strict rules of the common law against all forms of monopoly or engrossing, the legislation of Great Britain has had a different tendency. In *Steamship Co.* v. *McGregor*, 23 Q. B. Div. 628, 629, Lord Justice FRY said:

"The ancient common law of this country and the statutes with reference to the acts known as badgering, forestalling, regrating, and engrossing indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public. They were held criminal accordingly. But early in the reign of George III. the mind of the legislature showed symptoms of change in this matter, and the penal statutes were repealed, (12 Geo. III. c. 71,) and the common law was left to its unaided operation. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, had a tendency to discourage the growth and to enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past; the indication of a new policy for the future. The new policy has been more clearly declared and acted upon in the present reign; for the legislature has, by 7 & 8 Vict. c. 24, altered the common law by utterly abolishing the several offenses of badgering, engrossing, forestalling, and regrating."

Therefore, in view of the modern English tendency, encouraged in the legislation explained by Lord Justice FRY, it may not be safe to follow the later English decisions too closely, although some of their most extreme expressions are found in the cases cited by the supreme court in *Gibbs* v. *Gas Co.*, 130 U. S. 396, 9 Sup. Ct. Rep. 553. We do not intend, however, to launch into a boundless sea of trouble by attempting a general investigation of the present condition of this branch of the law in the United States and Great Britain. We have referred to it only to show the necessity of making an examination sufficient to ascertain whether there are any modifications of the old rules which reach the case at bar. We think it will be found that the later decisions divide themselves into three or four classes, none of which affect it. One embraces such cases as *Collins* v. *Locke*, *ubi supra*, and *Machinery Co.* v. *Dolph*, 138 U. S. 617, 11 Sup. Ct. Rep. 412, and 28 Fed. Rep. 553. This consists, not in agreements that establishments shall be closed, or that any one shall withdraw from

his trade or profession, although such results may incidentally follow, but in agreements for apportionments between individuals or corporations; and these are quite likely to be in the line of the modern division of labor, and thus prove of advantage to the community. Another class relates to new enterprises, for the building up of which parties are not likely to venture, unless permitted to impose their own conditions. This class is illustrated in part by *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658; and *Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345. Another relates to conditions on which persons enter the employment of manufacturers or dealers, and is illustrated by *Rousillon* v. *Rousillon*, 14 Ch. Div. 351. Still another class, and perhaps the most striking of all, is that which enlarges the limitation of the territory within which, for proper reasons, an individual may bar himself from pursuing his trade or profession. The courts now seem to consider that *Mitchel* v. *Reynolds* referred to a trade which was necessarily local, at a period when all trades were presumably of that character; and that is therefore not strictly applicable to the present condition of affairs, when the good will which a manufacturer or dealer secures is often national or international in its character, requiring for its protection agreements likewise national or international in their effect. The principle of this class is recognized in *Rousillon* v. *Rousillon*, *ubi supra*, and in *Navigation Co.* v. *Winsor*, 20 Wall. 64.

We think it will be difficult to find any departure or modification of the old rules not covered by the foregoing classification, no part of which seems to touch the case at bar. This relates solely to the question whether a contract is against public policy, in which, for a merely pecuniary consideration, a manufacturer agrees to close his works entirely, or in part, for a specified number of years; in the case at bar made all the more characteristic in consequence of the counter stipulation that, if either of the other parties to the agreement should extend his works, the contract should become void. The defendant maintains that there is a lack of legal consideration for his promise. We presume he does not mean by this that a contract which may in some senses operate in restraint of trade, is invalid simply because the only consideration which the promisor receives is a pecuniary one. In *Navigation Co.* v. *Winsor*, *ubi supra*, this was the only consideration; yet the court sustained the contract, observing that the stipulation objected to "was presumed to be founded on a valuable consideration in its influence on the price paid for the steamer." The cases are full of observations to the effect that the courts maintain these contracts under reasonable circumstances, principally because it is through them only that parties who have built up by honest industry a trade with a valuable good will, can secure an equivalent for the latter. The suggestion of the defendant on this point, however, leads directly to a proposition which seems to open a path through this case.

It will be observed that, although the suggestion of the defendant that a mere pecuniary consideration is not sufficient to sustain these contracts cannot be taken without qualification, yet this class of agreements is so different from ordinary ones that no action can be maintained on one of

them, because it is under seal, without some reasonable consideration is shown. What is this reasonable consideration? Ordinarily, it is that when the covenanter surrenders his trade or profession an equivalent is given to the public; because, ordinarily, as a part of the transaction, the covenantee assumes and carries on the trade or profession, nothing is abandoned, and only a transfer is accomplished. The same occupation continues; the same number of mouths are fed. So, in the later cases, modifying *Mitchel* v. *Reynolds* with reference to the territory within which agreements to withdraw from a trade or profession may lawfully be effective, as the fact is that the field through which the transfer of the business operates is frequently national or international, instead of local. So, also, in the class of cases already spoken of, in which there is only a division of labor. This doctrine of compensation, by force of which the public and individuals lose nothing, was recognized in *Navigation Co.* v. *Winsor*, *ubi supra*, in a striking way. The original contract under discussion in that case related to a period of seven years. As to this, the court said (page 71) that "the public was not injured by being deprived of any of the business enterprise of the country." A subsequent contract was made, which was the one then before the court, by which, without any compensation to the public, a new contract covering ten years was made for a merely pecuniary consideration, and the court held it void for the additional three years. In this case the court used (page 69) the following expressions:

"This stipulation was necessary to protect the former company from interference with its own business. It had no tendency to destroy the usefulness of the steamer, and did not deprive the country of any industrial agency. The transaction merely transferred the steamer from the employment of one company to that of another, situated and doing business in another state. It involved no transfer of residence or allegiance on the part of the vendee in order to pursue its employment, nor any cessation or diminution of its business whatever. The presumption is that the arrangement was mutually beneficial to both companies, and that it promoted the general interests of commerce on the Pacific coast."

To a like effect is *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 53, 54, 11 Sup. Ct. Rep. 478.

Navigation Co. v. *Winsor* laid down very satisfactorily the reasons supporting this branch of the law, stating that one is the injury to the public by being deprived of the restricted party's industry, and the other the injury to the party himself by being precluded from pursuing his occupation, and being thus prevented from supporting himself and his family. It seems to the court that the case at bar is subject to both of the objections stated, without any proper compensatory consideration. The court also thinks that, in lieu of having "no tendency to destroy the usefulness" of property, or "to deprive the country of any industrial agency," or to require "transfers of residence or allegiance," or "the cessation or diminution of business," it is in all these respects directly the reverse.

Some of the decisions observe that contracts are presumably invalid

which prevent a manufacturer from operating his works for a considerable period of time as he may deem his own interests or those of the public require; and the court finds nowhere any modification of the old rules which relieves the case at bar from this objectionable feature. It is not intended by this to say, whether or not, in an emergency of an overstock, manufacturers or miners may stipulate for handling their works or mines in a specific manner, or for shutting them down in whole or in part, each for such limited time as would ordinarily enable a congested market to relieve itself; but a contract extending over a period of five years, intended, like this at bar, for restricting production, and absolutely binding manufacturers and dealers, while still retaining their plants and establishments, to operate them in a particular way, or to shut them down in whole or in part, is such an incumbrance on the freedom of individual action, necessary to the public good, as to be invalid. Therefore, in view of the fact that by this contract plaintiffs stipulate to shut down their works, at least so far as strap and T hinges are concerned, for the long period of five years, for no consideration except a pecuniary one, and without a lawful equivalent with reference to the continuance of manufacturing, or its development, in other directions, and also in view of the other fact, that this contract is especially marked by the further stipulation that it shall be void if the other parties to it increase their existing facilities, the court holds that, as the case stands, the demurrer must be sustained as to both counts. The expression of the supreme court in *Gibbs* v. *Gas Co.*, 130 U. S. 396, 409, 9 Sup. Ct. Rep. 553, repeated in *Fowle* v. *Park*, 131 U. S. 88, 9 Sup. Ct. Rep. 658, that "the question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable," must, however, be regarded. The court will not presume to define, in advance of the facts which may be shown, or perhaps to define at all, what may be the practical effect of these expressions; but, being warned by them, it cannot determine on this demurrer that it is impossible for the plaintiffs to allege particular circumstances, not now appearing, which may modify the result. It is equitable as between the parties that the plaintiffs should recover the money stipulated for by the contract; therefore an opportunity should be given to amend, if desired.

Demurrer sustained. The first and second counts and the declaration are adjudged insufficient. Judgment for defendant, with costs, unless on or before November rules next plaintiffs amend, and pay costs to the time of filing their amendment.

ASPLEY *v.* MURPHY *et al.*

(*Circuit Court of Appeals, Fifth Circuit.* June 20, 1892.)

No. 80.

1. PROBATE COURTS—JURISDICTION—SPECIFIC PERFORMANCE—REPEAL OF STATUTE.
Act Tex. 1846, entitled "An act to organize probate courts," (2 Sayles' Early Laws Tex. art. 1786,) which, in section 27, expressly repeals "all laws and parts of laws heretofore in force relative to the duties of probate courts," was applicable only to laws conferring general probate jurisdiction, and not to Act Tex. 1844, § 2, (1 Sayles' Early Laws Tex. art. 1341,) which vests in those courts the special power of enforcing specific performance of contracts to convey land. 50 Fed. Rep. 376, affirmed.

2. SAME.
The act of 1846, itself, by sections 2, 13-16, conferred power upon the probate courts to authorize an administrator to make a deed in satisfaction of a claim for land due by the estate, when the administrator accepted the claim, and the court, on evidence taken, approved the same.

Error to the Circuit Court of the United States for the Northern District of Texas.

Action by Robert F. Aspley against J. P. Murphy and others to recover an undivided two-ninths interest in and to block 77, in the city of Dallas, Tex. The circuit court, over the objection of plaintiff, admitted in evidence certain records of the probate court. See 50 Fed. Rep. 376. The court afterwards instructed the jury to return a verdict for the defendants. Plaintiff brings error. Affirmed.

Chas. I. Evans and *B. H. Bassett*, for plaintiff in error.

Simkins & Morrow, (*W. S. Simkins*, of counsel,) for defendants in error.

Before PARDEE, Circuit Judge, and LOCKE and BILLINGS, District Judges.

BILLINGS, District Judge. This case is before this court upon a writ of error to the circuit court of the United States for the northern district of Texas. The suit was an action of trespass to try title, brought by the plaintiff in error against the defendants in error, to recover an undivided interest in a block of ground situate in the city of Dallas. There was a trial by jury, and there is a bill of exceptions as to the admission of a deed offered in evidence by the plaintiff below. The bill of exceptions presents several grounds of exceptions to the admission of the deed. But one ground was insisted on in the argument, and that presents the question: "In the year 1847, had the probate courts of the state of Texas the power to authorize an administrator to make a deed in satisfaction or payment of a claim for land due by his estate, where the administrator accepted the claim, and the court, upon evidence taken, approved it?" The record shows that the facts in the case bearing upon this question were as follows:

John Grigsby died in March, 1841. In February, 1847, the administrator of his estate, the administration of which was pending in the