

## ***NORDENFELT V MAXIM-NORDENFELT:* AN EXPANDED READING**

### ABSTRACT

The 1894 House of Lords decision of *Nordenfelt v Maxim-Nordenfelt* is talked about in terms of being the start of the modern doctrine regarding restraint of trade clauses in contracts. This article considers the decision, both within the context of the other 19<sup>th</sup> century decisions in the area, and those that were decided before and after that time, in order to better contextualise it within the overall history of the doctrine. Key aspects to be examined include the shifting use of the term ‘reasonable’, the excision of the ‘general’ versus ‘particular’ restraints distinction from the law and the trend towards finer-grained categories in legal understandings. *Nordenfelt*, therefore, can be best understood as a point of inflection in the law, rather than the new dawn that it is often now seen to be.

### I INTRODUCTION

Covenants that have sought to bind one individual from working in a given geographic region in a particular area of endeavour have been a feature of the common law for centuries. One decision, *Nordenfelt v Maxim-Nordenfelt*,<sup>1</sup> stands out amongst the hundreds of such cases as almost revolutionary in its recitation of the law. A recent decision from the Supreme Court of Western Australia, for example, included the statement that ‘the modern law in relation to restraints of trade began with the speech of Lord Macnaghten’ in *Nordenfelt*.<sup>2</sup> The research presented here shows that *Nordenfelt* shared much with its antecedents and did not, as a result, offer a significant break from the law as it had been previously understood.

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<sup>1</sup> [1894] AC 535 (*Nordenfelt*).

<sup>2</sup> *Emeco International v O’Shea (No 2)* (2010) 225 IR 423, 427–8. Commentators, such as Trebilcock, consider *Nordenfelt* to be the ‘case that ... ushered in the modern era in England’: Michael Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Carswell, 1986) 43. For Heydon, the decision included the first ‘statement of the doctrine in modern form’: J D Heydon, *Restraint of Trade Doctrine* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2008) 21. Finally, in the opinion of two barristers,

This article considers that, instead of seeing *Nordenfelt* as the beginning of the modern doctrine, it is better seen as a marker in the doctrine's overall history — at most, a point of inflection and at least, an efficient summation of what had gone before that meant earlier decisions no longer needed to be addressed. None of the histories of the doctrine of restraint of trade to date have engaged with the position of *Nordenfelt* within both the wider case law of that century and the overall doctrine. This contribution offers a step or two in that direction — first considering the links between *Nordenfelt* and the more than 80 decisions that preceded it in the 19<sup>th</sup> century;<sup>3</sup> and second, engaging with how it relates to both the case law before it — notably the decision of *Mitchel v Reynolds*<sup>4</sup> — and to the decisions that followed *Nordenfelt* in the 20<sup>th</sup> century. The value of this research is to provide a more nuanced understanding of the doctrine's history. Three aspects of the case law will be engaged with: the range of covenants covered (for example, sale of business as opposed to post-employment restraints); the distinction between general and particular restraints; and a divergent perspective on the test of 'reasonableness' that is at the heart of *Nordenfelt* and of more recent decisions.<sup>5</sup>

## II NORDENFELT AS A 19<sup>TH</sup> CENTURY DECISION

The matters raised by the Law Lords in the *Nordenfelt* decision do not vary, to any considerable extent, from those raised by other 19<sup>th</sup> century judges. This is evident in both the different aspects of the legal tests and the application of public policy to the cases. To be clear, the decisions considered here are mostly restraint of trade decisions — that is, they adjudicate purported agreements between individuals in which one of the individuals covenants to not work, or compete, in a given area or trade in return for some benefit. This Part discusses the similarities in the legal approaches applied throughout the 19<sup>th</sup> century — though there is no suggestion that there were no changes in judicial thinking in that period.

### *A Assessment of Relevant Interests*

The oft-quoted test in *Nordenfelt* is, in part, that:

[r]estraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient

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the 'doctrine finds its clearest modern voice' in Lord Macnaghten's judgment: Tomaso Di Lallo and Glen McGowan, 'The Restraint of Trade Doctrine: Macnaghten Said it Best' (2007) 81 *Law Institute Journal* 52, 53.

<sup>3</sup> Matthews and Adler list 83 19<sup>th</sup> century restraint of trade decisions that predate *Nordenfelt*: Joseph Matthews and Herbert Adler, *The Law Relating to Covenants in Restraint of Trade* (Sweet & Maxwell, 1907) 219–25.

<sup>4</sup> (1711) P Wms 181; 24 ER 347 ('*Mitchel*').

<sup>5</sup> For a current overview of the doctrine of restraints of trade, and an engagement with its history, see Rob Jackson, *Post-Employment Restraint of Trade* (Federation Press, 2014). For the record, Jackson refers to *Nordenfelt* as the 'classic textbook case' in the area: at 8, and considers *Mitchel* to be the 'first modern common law case on post-employment restraint of trade': at 4.

justification, and indeed it is the only justification, if the restriction is reasonable — reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.<sup>6</sup>

That this statement is seen as the start of the modern era suggests that it is a new understanding of the law; and yet there are many earlier 19<sup>th</sup> century decisions that include the word ‘reasonable’ in their judgments and that weigh up the interests of the parties and the public.

To take a couple of examples,<sup>7</sup> as far back as 1831, the Court held:

we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public.<sup>8</sup>

In 1869, it was held ‘that all restraints of trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract’.<sup>9</sup> The final example here is that ‘agreements in restraint of trade are against public policy and void, unless the restraint they impose is partial only, and they are made on good consideration, and are reasonable’.<sup>10</sup> These quotes suggest that the courts in the period 1831–1894 considered similar things in terms of assessing the reasonableness of a given restraint: the interests of the parties themselves and the interests of the wider public.

### 1 *Interests of the Parties*

There are, of course, two specific parties whose interests were considered by the courts — the covenantee and the covenantor. The interests of the covenantees were considered expansively by the judges of the time. For example, unless the restraint was ‘larger and wider than the protection of the party ... can possibly require’,<sup>11</sup> the restraint may be seen as reasonable. In *Horner v Graves*, a reasonable covenant

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<sup>6</sup> [1894] AC 535, 565 (Lord Macnaghten).

<sup>7</sup> See, eg, *Hitchcock v Coker* (1837) 6 Ad & E 438; 112 ER 167; *Whittaker v Howe* (1841) 3 Beav 383; 49 ER 150; *Pilkington v Scott* (1846) 15 M & W 657; 153 ER 1014; *Sainter v Ferguson* (1849) 7 CB 716; 137 ER 283; *Avery v Langford* (1854) Kay 663; 69 ER 281; *Dendy v Henderson* (1855) 11 Ex 194; 156 ER 800; *Rousillon v Rousillon* (1880) LR 14 Ch D 351; *Jacoby v Whitmore* (1883) 49 LT 335; *Parsons v Cotterill* (1887) 56 LT 839; *Mills v Dunham* [1891] 1 Ch 576; *Moenich v Fenestre* (1892) 61 LJ (Ch) 737.

<sup>8</sup> *Horner v Graves* (1831) 7 Bing 735, 743; 131 ER 284, 287 (Tindal CJ).

<sup>9</sup> *Leather Cloth v Lorsant* (1869) LR 9 Eq 345, 353–4 (James VC).

<sup>10</sup> *Collins v Locke* (1879) 4 App Cas 674, 686 (Lord Smith).

<sup>11</sup> *Hitchcock v Coker* (1837) 6 Ad & E 438, 454; 112 ER 167, 173 (Tindal CJ) (emphasis added).

was held to be one that provided for the ‘necessary protection’ for the covenantee.<sup>12</sup> This test was adopted as the appropriate one by Lord Herschell in his speech in *Nordenfelt*.<sup>13</sup> That said, this apparent ‘test’ of reasonableness was not the only one used in the 19<sup>th</sup> century. There were two cases that referred to the ‘fair protection’ of interests.<sup>14</sup> Though, as one of them was *Horner v Graves*, ‘fair’ protection was being equated with ‘necessary protection’.<sup>15</sup>

Unsurprisingly, the dominant interest of the covenantees that was raised by the judges was their protection from competition. The purposes of such covenants were, for example, described as to prevent the covenantor ‘depriving’ the covenantee of customers.<sup>16</sup> Chief Justice Best characterised the covenantor as a ‘rival’ of the covenantee<sup>17</sup> — and in *Nordenfelt*, Lord Herschell considered that Mr Nordenfelt, if not restrained, could set up a ‘rival business’.<sup>18</sup> More fully, it was stated that it is ‘not unreasonable ... 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’.<sup>19</sup> This last example fits the modern paradigm of an employee, when entering into an employment contract, agreeing to not work for anyone else for a given time and within a specified geographical area after the end of the formal employment contract. This is not to suggest that all the 19<sup>th</sup> century restraint cases were in the master-servant context;<sup>20</sup> in all cases, however, there was at least the allegation of an agreement that the covenantor would not compete with the covenantee.<sup>21</sup>

What is noteworthy is the fact that much of the discussion around the protection of the covenantees’ interests focused on the knowledge of the covenantors. For example, the limited number of potential customers for the machine guns, and Mr Nordenfelt’s knowledge of them, was a factor considered by the Law Lords in *Nordenfelt*.<sup>22</sup>

<sup>12</sup> (1831) 7 Bing 735, 743; 131 ER 284, 287 (Tindal CJ). In *Archer v Marsh* (1837) 6 Ad & E 959, 967; 112 ER 366, 369 (Lord Denman CJ), the Court supported a restraint that offered ‘full protection’ to the plaintiff.

<sup>13</sup> [1894] AC 535, 549.

<sup>14</sup> *Horner v Graves* (1831) 7 Bing 735, 743; 131 ER 284, 287 (Tindal CJ); *Rogers v Maddocks* [1892] 3 Ch 346, 355 (Lindley LJ).

<sup>15</sup> In *Nordenfelt*, Lord Ashbourne also referred to the validity of restraints in terms of the ‘fair protection’ of the interests of the covenantee. See *Nordenfelt* [1894] AC 535, 556.

<sup>16</sup> *Proctor v Sargent* (1840) 2 Man & G 20, 36; 133 ER 647, 653 (Coltman J).

<sup>17</sup> *Homer v Ashford* (1825) 3 Bing 322, 327; 130 ER 537, 539 (Best CJ).

<sup>18</sup> [1894] AC 535, 550.

<sup>19</sup> *Hitchcock v Coker* (1837) 6 Ad & E 438, 454–5; 112 ER 167, 174 (Tindal CJ).

<sup>20</sup> The range of circumstances in which restraints were applied will be discussed in more detail below.

<sup>21</sup> It may be noted that this range of circumstances fits the same categories of restraints indicated by Smith: Stephen Smith, ‘Reconstructing Restraint of Trade’ (1995) 15 *Oxford Journal of Legal Studies* 565, 567.

<sup>22</sup> See [1894] AC 535, 559, Lord Ashbourne.

This may make it appear to be a modern decision. However, it was not unusual for other 19<sup>th</sup> century judges, when assessing the validity of the restraint, to look at the knowledge of the covenantor.

In most cases, the knowledge of concern was what would now be referred to as the customer connections of the business. This was the case even where the trade or profession had a ‘monopoly’ on its knowledge.<sup>23</sup> In a dispute involving chemical manufacturers, the court focused on the

knowledge of their customers and their requirements, and of the prices charged to them, and generally of those details which would make the defendants dangerous competitors when the connection was severed.<sup>24</sup>

Even where the ‘skill’ of a covenantor was referred to, the personal connection with the customer was also emphasised.<sup>25</sup> For completeness, agreements in the apparently less skilful trades also made reference to clients: a covenant involving a ‘cow-keeper’ was, for example, upheld so that the covenantor did not ‘appropriate’ the covenantee’s ‘customers to himself’.<sup>26</sup>

Turning to the interests of the covenantor, one aspect of the *Nordenfelt* decision that does not explicitly appear in the ratio of the case, as it is now understood, is that of the consideration received by Mr Nordenfelt in exchange for his agreement to not work in the field, anywhere in the world, for 25 years.<sup>27</sup> That is not to say that the House of Lords did not refer to the issue of consideration. Lord Herschell, for example, incorporated three quotes from earlier cases<sup>28</sup> — each cited with approval — that referred to the consideration gained by the covenantor as important to the assessment of the validity of the restraint. He did not, however, refer to consideration in his application of the law to the facts of the *Nordenfelt* case. Further, Lord Ashbourne repeated, with approval, the finding of the Court of Appeal in *Nordenfelt*: ‘the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee’.<sup>29</sup> Lord Macnaghten also cited *Mitchel*’s reference to consideration with approval without using the term ‘consideration’ in his application of the law. Lord Macnaghten, nonetheless, emphasised the

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<sup>23</sup> Such knowledge was protected in the 19<sup>th</sup> century. See *Makepeace v Jackson* (1813) 4 Taunt 770; 128 ER 534; *Yovatt v Winyard* (1820) 1 Jac & W 394, 395; 37 ER 425; *Leather Cloth v Lorsant* (1869) LR 9 Eq 345; *Merryweather v Moore* [1892] 2 Ch 518.

<sup>24</sup> *Badische Anilin v Schott* [1892] 3 Ch 447, 453 (Chitty J).

<sup>25</sup> *Horner v Graves* (1831) 7 Bing 735, 744; 131 ER 284, 288 (Tindal CJ).

<sup>26</sup> *Proctor v Sargent* (1840) 2 Man & G 20, 34; 133 ER 647, 653 (Bosanquet J).

<sup>27</sup> *Maxim-Nordenfelt v Nordenfelt* [1893] 1 Ch 630, 635. As he signed the covenant when he was 46, the restraint basically kept him from that area of endeavour for the rest of his working life.

<sup>28</sup> [1894] AC 535, 541–2, 544.

<sup>29</sup> *Ibid* 559.

£200 000 received by Mr Nordenfelt in his summation of his reasons.<sup>30</sup> As a result, the matter of the consideration received by the covenantor is, at the very least, implicit in the ratio of *Nordenfelt*.

Given Lord Herschell's reference to earlier cases, in terms of the issue of consideration, it is unsurprising to see the matter included in many other 19<sup>th</sup> century cases.<sup>31</sup> That said, the consideration gained by the covenantor was, in many cases, simply the opportunity to work for the covenantee.<sup>32</sup> It may be noted, however, that there was, according to the judges, a shift over the course of the century in the understanding of the consideration needed to support a restraint of trade. According to Baron Parke:

[t]he agreement is good if there be a sufficient consideration in law to support a contract; and the entering into a partnership, from which the party derives a benefit, is of itself a sufficient consideration to support any promise of this nature, which he may choose to make ... and it is clear, since the case of *Hitchcock v Coker*, that the court cannot inquire into the extent or adequacy of the consideration.<sup>33</sup>

At one level, this change only brought this aspect of assessing contracts in line with judgments in contract law;<sup>34</sup> it also did not indicate a decline in the relevance of consideration to the extent that the issue had disappeared by the end of that century.

One interest of the covenantor that was not given any great judicial consideration was the impact of the restraint on his life.<sup>35</sup> There was, admittedly, a small amount of discussion of how the covenantor will make a living if the restraint is enforced. Lord Abinger, for example, noted the 'right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment'.<sup>36</sup> Another judge considered that 'every man has a right to the fruits of his own unrestricted exertions'.<sup>37</sup>

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<sup>30</sup> *Ibid* 574.

<sup>31</sup> See *Horner v Graves* (1831) 7 Bing 735; 131 ER 284; *Leighton v Wales* (1838) 3 M & W 545; 150 ER 1262; *Ward v Byrne* (1839) 5 M & W 548; 151 ER 232; *Proctor v Sargent* (1840) 2 Man & G 20; 133 ER 647; *Price v Green* (1847) 16 M & W 346; 153 ER 1222; *Gravelly v Barnard* (1874) LR 18 Eq 518; *Collins v Locke* (1879) 4 App Cas 674. It may be noted that consideration was not discussed in all 19<sup>th</sup> century cases. See, eg, *Rannie v Irvine* (1844) 7 Man & G 969; 135 ER 393; *Harms v Parsons* (1862) 32 Beav 328; 55 ER 129; 69 ER 281; *Davies v Davies* (1887) 36 Ch D 359.

<sup>32</sup> See *Homer v Ashford* (1825) 3 Bing 322; 130 ER 537; *Young v Timmins* (1831) 1 C & J 331; 148 ER 1446; *Hitchcock v Coker* (1837) 6 Ad & E 438; 112 ER 167; *Whittaker v Howe* (1841) 3 Beav 383; 49 ER 150; *Sainter v Ferguson* (1849) 7 CB 716; 137 ER 283.

<sup>33</sup> *Leighton v Wales* (1838) 3 M & W 545, 551; 150 ER 1262, 1264.

<sup>34</sup> For discussion on this point, see P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) 448–451.

<sup>35</sup> All of the covenantors in the 19<sup>th</sup> century decisions were male.

<sup>36</sup> *Ward v Byrne* (1839) 5 M & W 548, 560; 151 ER 232, 237.

<sup>37</sup> *Young v Timmins* (1831) 1 C & J 331, 340; 148 ER 1446, 1451 (Bayley B).

and finally, it was held that the covenantor 'should' be able to 'gain his livelihood'.<sup>38</sup> It has to be emphasised that all three of these quotes come from decisions in which the restraint was held to be void; it was, on the other hand, those that held the impugned restraints to be valid that did not express such concerns. Arguably, therefore, the impact of the restraint on the covenantor was only an additional factor to be raised if the courts were looking to strike the restraint down as being unreasonable.

## 2 *Interests of the Public*

While the courts did not have great concern for the need for individuals to work,<sup>39</sup> they did appear to consider other aspects of the public interest when deciding restraint cases. According to Tindal CJ, 'whatever is injurious to the public is void, on the ground of public policy'.<sup>40</sup> At its most simple, the public benefit was stated as 'the law favours trade for the sake of the public, and not for the sake of the parties engaged in it'.<sup>41</sup> More expansively:

[t]he first object of the law is to promote the public interest; the second to preserve the rights of individuals. The law will not permit any one to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen that individual interest, and general convenience, render engagements not to carry on trade or to act in a profession in a particular place, proper.<sup>42</sup>

So, according to Best CJ, the public interest in such contracts should outweigh the interests of either party to the restraint covenant; if that was the case, then the public interest was very much aligned with the covenantees and not the covenantors.

These public interests were characterised in the 19<sup>th</sup> century cases in a couple of ways. Chief Justice Best, for example, went on to suggest that:

Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of

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<sup>38</sup> *Horner v Graves* (1831) 7 Bing 735, 744; 131 ER 284, 288 (Tindal CJ).

<sup>39</sup> It may simply be that, by the middle of the 19<sup>th</sup> century, the benefits of having a 'labour market', that is, a pool of labour available to new and expanding businesses (or, as one historian put it, a 'reserve army of labour': Francois Bédarida, *A Social History of England 1851–1975* (Methuen, 1976) 60) was seen to be good thing.

<sup>40</sup> *Horner v Graves* (1831) 7 Bing 735, 743; 131 ER 284, 287. Another judge said that 'if the contract be made on sufficient consideration, and the public gain some advantage, it will be good': *Wallis v Day* (1837) 2 M & W 273, 281; 150 ER 759, 762 (Lord Abinger CB).

<sup>41</sup> *Rannie v Irvine* (1844) 7 Man & G 969, 978; 135 ER 393, 397 (Erle J).

<sup>42</sup> *Homer v Ashford* (1825) 3 Bing 322, 326; 130 ER 537, 538 (Best CJ).

such contracts is to encourage, rather than cramp the employment of capital in trade, and the promotion of industry.<sup>43</sup>

Unsurprisingly, this quote comes from a decision that supported the covenant in question. The perspective of a judge that ruled the agreement before him to be void was that the ‘restraint is prejudicial to the individual restrained, and to the rights of the public; for ... the public have a right to the benefit which they may derive from such exertions’ of the worker.<sup>44</sup>

It was also suggested that the covenantor was ‘only doing justice, and no more than justice’ to the covenantee<sup>45</sup> — in other words, upholding the restraint was simply a matter of fulfilling the public policy of the courts themselves: that of justice. Interestingly, this quote comes from a decision that held a restraint to be void. The public policy reason given by one of the concurring judges was that:

[T]he 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 ...<sup>46</sup>

Where a restraint is valid, it was considered that 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 instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business.<sup>47</sup>

<sup>43</sup> *Homer v Ashford* (1825) 3 Bing 322, 327; 130 ER 537, 539 (Best CJ). A later judgment suggested that it has been thought that ‘the more any trade is encouraged the more people will be induced to embark their capital in it’: *Proctor v Sargent* (1840) 2 Man & G 20, 37; 133 ER 647, 654 (Maule J). Thereby implying that restraints restricted the investment of capital. The decision in *Proctor v Sargent*, however, supported the covenant in question.

<sup>44</sup> *Young v Timmins* (1831) 1 C & J 331, 340–1; 148 ER 1446, 1451 (Bayley B).

<sup>45</sup> *Ward v Byrne* (1839) 5 M & W 548, 559; 151 ER 232, 237 (Lord Abinger CB).

<sup>46</sup> *Ward v Byrne* (1839) 5 M & W 548, 563; 151 ER 232, 238–9 (Rolfe B). There was no geographical limitation on the covenant in question and, therefore, was easily characterised as affecting the whole country.

<sup>47</sup> *Mallan v May* (1843) 11 M & W 653, 666; 152 ER 967, 972 (Parke B). Chief Justice Erle expressed it similarly by stating that ‘if the law discouraged agreements such as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity’: *Mumford v Gething* (1859) 7 CB(NS) 305, 319; 141 ER, 834, 840.

The public interest in ‘choice’ also was argued to extend to the merchandise that would have been available to the public if a restraint was held to be void. In the case of *Tallis v Tallis*, that interest was insufficient to void the covenant.<sup>48</sup>

It should be noted, however, that the descriptions of the public’s interest in allowing, or invalidating, restraints became less common as the century progressed. It may even be suggested that ‘lip service’ was given to the notion of the interests of the public while the issue was decided in terms of the impact on the interests of the covenantee.<sup>49</sup> To take an example, in *Rogers v Maddocks*, Lindley LJ included a lengthy quote from *Horner v Graves* that ended with the assertion that ‘[w]hatever is injurious to the interests of the public is void, on the grounds of public policy’.<sup>50</sup> What immediately followed that quote was:

[c]an we say here that the restraint is greater than is reasonably necessary to afford fair protection to the interest of this employer when we consider what his interest is? I see no difficulty in coming to the conclusion that, construing the prohibition literally, as I think we ought, it does not exceed the reasonable limit.<sup>51</sup>

In *Badische Anilin v Schott*, the issue of the public was limited to cases involving general restraints of trade:

[w]here the restraint is general, that is, without qualification, it is bad as being unreasonable and contrary to public policy; where it is partial, that is subject to some qualification either as to time or space, the question is whether it is reasonable, and, if reasonable, it is good in law.<sup>52</sup>

In *Nordenfelt* itself, the Law Lords were not that dismissive of the public interest, though the one characterisation of such interest was more restricted than that which was acknowledged in earlier cases: it ‘has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the goodwill of a business or calling’.<sup>53</sup> In other words, the law should limit competition in order to give the seller of a business a better price (as a return for the effort she or he put in the process of building the business up).

One other aspect of public interest that was raised by the Law Lords in *Nordenfelt*, but that has been ignored by all the commentary since, has been that of Mr Nordenfelt’s machine guns as instruments of war. Lord Macnaghten stated that ‘it can hardly

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<sup>48</sup> *Tallis v Tallis* (1853) 1 El & Bl 391; 118 ER 482.

<sup>49</sup> One commentator has suggested that the ‘public interest test’, as expressed in the *Nordenfelt* decision, ‘merely paid lip service to the notion of free competition’: David Meltz, ‘Happy Birthday Mr Nordenfelt! – The Centenary of the Nordenfelt Case’ (1994) 2 *Trade Practices Law Journal* 149, 153.

<sup>50</sup> [1892] 3 Ch 346, 355.

<sup>51</sup> *Ibid.*

<sup>52</sup> [1892] 3 Ch 447, 451 (Chitty J).

<sup>53</sup> [1894] AC 535, 548 (Lord Herschell).

be injurious to the public, that is, the British public, to prevent a person from carrying on a trade in weapons abroad'.<sup>54</sup> Lord Watson was even more blatant:

I venture to doubt whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered competition in the sale of arms of precision to tribes who may become her antagonists in warfare.<sup>55</sup>

In the relative peace of 21<sup>st</sup> century Australia, it is easy to forget the militaristic mindset, and the aggressive foreign policy stance, of late 19<sup>th</sup> century Britain.<sup>56</sup>

At the time the decision was handed down, the country was engaged in three wars: the Ekumeko, the Mahdist and the First Matabele War. Further, since 1850, Britain had been engaged in 33 other conflicts. Most of these may be characterised as skirmishes aimed at furthering policies of colonial expansionism;<sup>57</sup> however, there was also a growing fear of another European war after the emergence of the German Empire in 1871.<sup>58</sup> In addition, there were debates in Parliament over Britain's readiness for a war in Europe<sup>59</sup> and a slew of newspaper stories around the potential conflicts (including the possibility of invasion).<sup>60</sup> While it cannot be proven that the fear of

<sup>54</sup> [1894] AC 535, 574 (Lord Macnaghten).

<sup>55</sup> [1894] AC 535, 554. Lord Watson had characterised the potential customers of the respondent as 'governments and potentates, great and small, civilised and savage, who for purposes *offensive* or defensive, desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition': [1894] AC 535, 552 (emphasis added).

<sup>56</sup> As an aside, it may be pointed out that the importance of the threat of war in the late nineteenth century is also evident in other area of law. The *Patents, Designs and Trade Marks Act 1883*, for example, includes an extensive section (s 44), with 12 sub-sections, that authorises the assignment of patents over 'instruments or munitions of war' to the Secretary for War. Such assignments did not appear to require that the country be at war at the time; and, unsurprisingly, the section also allowed for the patent, including the description of the invention, to be kept secret.

<sup>57</sup> For a discussion of the British mindset of expansionism, see Michael Howard, 'Empire, Race and War in pre-1914 Britain' in H Lloyd-Jones, V Pearl and B Worden (eds) *History and Imagination: Essays in Honour of H. R. Trevor-Roper* (Duckworth, 1981).

<sup>58</sup> Or, as it has been described, 'the Germans had egotistically upset the balance of power in 1870': G Wawro, *Warfare and Society in Europe, 1792–1914* (Routledge, 2000) 124.

<sup>59</sup> For example, there was a House of Commons debate in which the Member for Galway said that increase in estimates in expenditure 'does not mean that the Government is thinking of war, but that Great Britain's preparations cannot be allowed to fall too far behind those of other Powers: United Kingdom, *Parliamentary Debates*, House of Commons, 11 March 1889, vol 302, col 1457 (John Pinkerton).

<sup>60</sup> See, 'The Real Defence of England' *The Pall Mall Gazette* (London 16 September) 1870; 'Threatened Prussian Invasion of England' *Reynolds's Newspaper* (London) 8 January 1871; 'Defence of England' *The Morning Post* (London) 23 October 1872; 'How England might be Invaded' *The Penny Illustrated Paper and Illustrated Times* (London) 17 February 1877; 'The Defence of Great Britain' *Times* (London) 2 March

war did direct the minds of the Law Lords,<sup>61</sup> this evidence does suggest that the prospect of war was very much in the minds of the public.<sup>62</sup>

### B 'Reasonable' Covenants in the 19<sup>th</sup> Century

It is clear that a range of interests were considered by the judges of that century. It is almost time to consider how they applied the test of reasonableness to the competing interests. First, however, an overview of the outcomes of the 19<sup>th</sup> century restraint decisions should be considered. According to Matthews and Adler, only 24 per cent of the pre-*Nordenfelt* 19<sup>th</sup> century decisions held the covenant to be void.<sup>63</sup> Even in the five cases where the covenantor was 'an infant' (ie, under the age of majority) at the time of the covenant, only one contract incorporating a restraint was ruled against.<sup>64</sup> In these cases, it may be that the judges considered it to be more in the public interest that these young people received training, and a position in the workforce, than it was for them to have greater freedom of work at the end of the contract.<sup>65</sup>

Given this bias, the issue becomes whether a 'reasonable' covenant in the 19<sup>th</sup> century equates to what a 'reasonable' restraint would now be. It was not, for example, a restraint that a reasonable person would consider to be appropriate;<sup>66</sup> nor was it a 'reasoned' weighting of the interests of the two parties and the broader public. Instead, the reasonableness of a covenant in that century focused on the protection of

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1889, 'The Defence of London and England' *The Morning Post* (London) 8 May 1886; 'Naval Defence of England' *Lloyd's Weekly Newspaper* (London) 5 August 1888; 'Speculation as to the Invasion of Britain' *Aberdeen Weekly Journal* (Aberdeen) 26 December 1892; 'Invasion of England' *The Bristol Mercury and Daily Post* (Bristol) 21 April 1894.

<sup>61</sup> It may also be noted that there was another restraint of trade decision that had a military aspect: *Harvey v Corpe* (1885) 79 LT 246. In that decision, the defendant was held to a covenant that prevented operation of a business, anywhere in Europe, to supply of concentrated meat. The plaintiff was a supplier of concentrated meat to the army. It is possible, therefore, that the defendant was, in fact, being prevented from supplying any European armies with concentrated meat.

<sup>62</sup> See generally Michael Paris, *Warrior Nation: Images of War in British Popular Culture, 1850–2000* (Reaktion Books, 2000) ch 1.

<sup>63</sup> Matthews and Adler, above n 3, 224–5. This figure is calculated from the information that 12 of the 83 decisions they list were decided in favour of the covenantor.

<sup>64</sup> *Francesco v Barnum* (1889) 43 Ch D 165. See also Matthews and Adler, above n 3, 191. Matthews and Adler note that this is not, properly, a restraint of trade decision but one that focused on the law of apprenticeships.

<sup>65</sup> It may also be that the judges considered, without explicitly stating the fact, that the younger people were more mobile than older workers or business owners. There is little discussion in the decisions as to the capacity of covenantors to move locations. This may be because it was seen as accepted that people move for work or that the judges were not looking for reasons to hold the restraints invalid.

<sup>66</sup> This may not be surprising when it is acknowledged that the individual *qua* individual was only entering into the tests of the legal discourse near the end of the nineteenth century. For example, the

the interests of the covenantee and not the covenantor. This is evident in the contemporaneous assessment of *Nordenfelt* as holding the ‘test of the validity of a contract in restraint of trade is its reasonableness in the interests of the covenantee, to which the proviso is added that the covenant must not otherwise offend against public policy’.<sup>67</sup>

It has to be acknowledged, however, that the protectable interests of the covenantee did depend on a range of factors. These factors included the ‘nature of the trade or profession [and] the populousness of the neighbourhood’;<sup>68</sup> and further, restraints that were not limited to a particular trade were considered general restraints, and therefore, void. That said, one aspect of the restraints that was not discussed, in any of the cases, was the length of the restraint in question.<sup>69</sup> That is, there was no argument whether a shorter, or longer, term would have been better. A range of durations were upheld — the shortest was for six months,<sup>70</sup> another 26 cases had no limit of time specified and a further 12 were limited to the life of the covenantor.<sup>71</sup> The test of reasonableness, therefore, does not seem to be an assessment of what a reasonable person would consider to be an appropriate restraint on the covenantor. This is unsurprising if the use of the word ‘reasonable’ in different legal contexts is considered.

There has been little analysis of the history of the term ‘reasonableness’ across the different areas of law. Work has, of course, been done into the history of the

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use of the word “fruit salt” by Dunn is calculated, and I think designed, to create a confusion in the minds of those persons to whom Mr Dunn’s advertisements are addressed, and to lead the ordinary run of such persons to suppose that this baking powder is in some way or other connected with Mr Eno’s preparation.

*Eno v Dunn* (1890) 15 App Cas 251, 263.

<sup>67</sup> Matthews and Adler, above n 3, 39–40.

<sup>68</sup> *Hitchcock v Coker* (1837) 6 Ad & E 438, 454; 112 ER 167, 174 (Tindal CJ).

<sup>69</sup> It was suggested in one treatise that the ‘duration of the restraint may ... sometimes be material in deciding upon the unreasonableness of a contract of this kind: S M Leake, *The Elements of the Law of Contracts* (Stevens, 1867) 390. The case cited, however, merely noted that, where a covenant was unreasonable due to its geographic scope, the duration of the restraint could not make it reasonable: *Proctor v Sargent* (1840) 2 Man & G 20; 133 ER 647.

<sup>70</sup> *Watts v Smith* (1890) 62 LTR 453.

<sup>71</sup> This was typical of the justifications for the lengthy restraints:

If ... 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 unreasonable that the restriction should go so far as to secure to the master the enjoyment of the same trade to his purchaser, or legatee, or executor.

*Hitchcock v Coker* (1837) 6 Ad & E 438, 454–5; 112 ER 167, 174 (Tindal CJ).

‘reasonable man’;<sup>72</sup> however, as a legal construct that gained currency after the assessment of ‘reasonable’ restraints of trade,<sup>73</sup> it may be of lesser relevance than the concept of the reasonableness of ‘doubt’ in the criminal law.<sup>74</sup> The histories of that concept indicate that there was a strong moral aspect to the assessment of guilt in the criminal law of the 19<sup>th</sup> century and before. This means that the use of the term ‘reasonable’ was not an indicator of a rational understanding of the doubt — reasonable doubt was any doubt that would ‘preclude the jurors from being morally certain’.<sup>75</sup>

That being said, there was also a tendency to use the application of ‘reason’ in the context of assessing probabilities: reason ‘can throw light upon [the] comparative probability’ of particular views or events.<sup>76</sup> I would suggest, however, that the application of the word ‘reasonable’ in 19<sup>th</sup> century restraint of trade cases may be better understood from a moral perspective than one of balancing probabilities. A reasonable restraint, then, would be a restraint that a judge could assess, with a ‘satisfied conscience’,<sup>77</sup> as being proper in the circumstances of the case.

Such an assessment accommodates the high rate at which restraints were upheld. It was seen as proper that the investors in the business (where a company was being sold) or the owner of the business (where the restraint applied to a worker) were given the protection of the law on the basis that restraints ‘encourage, rather than cramp the employment of capital in trade, and the promotion of industry’.<sup>78</sup> Therefore, the general restraint in *Nordenfelt*, may be seen as ‘reasonable’ in the 19<sup>th</sup> century

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<sup>72</sup> See, eg, Ronald Collins, ‘Language, History and the Legal Process: A Profile of the “Reasonable Man”’ (1977) 8 *Rutgers-Camden Law Journal* 311.

<sup>73</sup> One of the first uses of the phrase ‘reasonable man’ is in *Blyth v Birmingham Waterworks* (1856) 11 Ex 781, 784; 156 ER 1047, 1049 (Alderson).

<sup>74</sup> It appears that one of the first uses of the phrase ‘reasonable doubt’, in a criminal law context (albeit in Boston, Massachusetts), was in the judge’s address to the jury in *Rex v Wemm*. The address, by Oliver J, is included in L K Wroth and H Zobel, *Legal Papers of John Adams*, vol 3 (Belknap Press, 1965) 309. In England, the phrase was in use by, at least, 1784; and there were earlier examples of phrases such as ‘reasonable cause for doubt’: James Whitman, *The Origins of Reasonable Doubt* (Yale University Press, 2008) 198–9.

<sup>75</sup> Steve Sheppard, ‘The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof have Weakened the Presumption of Innocence’ (2003) 78 *Notre Dame Law Review* 1165, 1201, 1196. This quote is in reference to a US articulation of the test; however, Starkie also ‘equated moral certainty with absence of reasonable doubt’. See also James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, 2008).

<sup>76</sup> James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Liberty Fund Indianapolis, first published 1873, 1993 ed), 212.

<sup>77</sup> For Shapiro, ‘by the late eighteenth century, the satisfied conscience and beyond reasonable doubt standards had become explicitly linked: Barbara J Shapiro, “Beyond Reasonable Doubt” and “Probable Cause”: Historical Perspectives on the Anglo-American Law of Evidence (University of California Press, 1991) 25.

<sup>78</sup> *Homer v Ashford* (1825) 3 Bing 322, 327; 130 ER 537, 53 (Best CJ).

understanding of the word — it was, in fact a ‘proper’ restraint given the circumstances. The decision, as a result, should better be seen as one very much rooted in the 19<sup>th</sup> century and not a modern one.

### *C Other Aspects of Restraints of Trade in the 19<sup>th</sup> Century*

In addition to the similarities in terms of the substantive law, the *Nordenfelt* decision shares, with the other 19<sup>th</sup> century decisions, a particular perspective on the operation of restraints as contractual obligations.<sup>79</sup> It may be noted, first, that the general approach of the judges for much of that century may be understood in terms of the ‘sanctity’<sup>80</sup> of contracts.<sup>81</sup> It has, however, been suggested that, by 1870, this laissez-faire approach of the English judges had waned.<sup>82</sup> An analysis of the judgments in this area shows that covenants in restraint of trade do not appear to have been treated as a distinct subset of contracts.<sup>83</sup>

As noted above, that three quarters of the disputes ended with the covenant being upheld suggests that the judges did not wish to interfere. However the fact that relatively small-scale disputes still made their way to the courts could suggest that either the parties, their lawyers, or both, did not think the cases to be pre-determined.

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<sup>79</sup> The intention here is not to assert a theory of contract that united the judges but to distil a general perspective on the nature of agreements that is evident in the judgments. For a rigorous examination of the development of theories of contract, see James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Clarendon, Oxford, 1991).

<sup>80</sup> That being, ‘contracts when entered into freely and voluntarily shall be held sacred and shall be enforced’: *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462, 465, (Jessel MR).

<sup>81</sup> A justification for the privileging of contracts was provided by Jessel MR:

I have always thought, in those cases where the Court is satisfied of the bona fides of a transaction, and its entire freedom from the mischief which the established principle of law was intended to prevent, that the Court should lean on the side of fair dealing, and should not so apply the principle of law so as to make it comprise a case not within the mischief which it was intended to prevent without absolute necessity, the necessity being that of preserving the principle untouched for the guidance of mankind in their ordinary transactions.

*Albion Steel and Wire Company v Martin* (1875) 1 Ch D 580, 584–5.

<sup>82</sup> P S Atiyah, *An Introduction to the Law of Contract* (Clarendon Press, 5<sup>th</sup> ed, 1995) 15. For a discussion of the laissez-faire approach to restraints of trade, see Trebilcock, above n 2, 18–29. It may, however, be better to see the issue, with respect to restraints of trade, as the courts protecting the advantage that comes from the being the ‘first-mover’ in a given area. That is, the courts are protecting those individuals who have been successful in starting, or maintaining a business. Expressed differently, it may be seen as the courts protecting the ‘entrepreneur’ as the ‘ideal citizen for the bulk of the middle class’: Harold Perkin, *The Origins of Modern English Society 1780–1880* (Routledge & Kegan Paul, 1969) 221.

<sup>83</sup> It may be noted that the courts themselves have highlighted the role that the laissez-faire approach to contracts had on the development of the doctrine of restraints of trade: *Attwood v Lamont* [1920] 3 KB 571, 581 (Younger LJ).

A dispute over a six-month restraint was litigated<sup>84</sup> — despite the fact that restraints for periods of 20 years,<sup>85</sup> 21 years<sup>86</sup> and even those unlimited by time<sup>87</sup> were upheld. Further, there were a number of disputes involving carriers<sup>88</sup> and milkmen<sup>89</sup> which suggest that litigation was not just the province of the middle and upper classes. This, in itself, may separate this area of law out from the other areas of private law.<sup>90</sup>

Two other features of 19<sup>th</sup> century restraints need to be considered. First, it is worth emphasising the nature of the disputes being adjudicated under the broad heading of restraints of trade. As noted above, the covenants arose in a range of contractual relationships. The *Nordenfelt* decision, as an example, related to the sale of the plaintiff's business. Other agreements that included restraints of trade were based around an agreement to provide goods at a set price,<sup>91</sup> the sale of goodwill with a business,<sup>92</sup> an agreement to divide up a given area between different manufacturers and their agents,<sup>93</sup> or the dissolution of a partnership.<sup>94</sup> And, of course, in a relatively small number of cases, the restraint bound an employee from working for any competitor of the covenantee for a specified amount of time.

This range of fact situations has a couple of consequences for the understanding of the law of the time. First, as most of these examples reflect situations in which negotiations were undertaken by equals, it is not surprising that the judgments did not highlight any impact of unequal bargaining power. In other words, in the majority of cases, the negotiations took place between business people. On the one hand, this may explain the fact that the closest the judges came to this acknowledgement was an assessment that one agreement could be seen to be a 'hard bargain'.<sup>95</sup> On the other hand, it is possible that given the interest the judges appear to have had in protecting contracts as mutually agreed upon obligations, they may have been less than keen to highlight any concerns about the nature of the contracts.

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<sup>84</sup> *Watts v Smith* (1890) 62 LTR 453.

<sup>85</sup> *Whittaker v Howe* (1841) 3 Beav 383; 49 ER 150.

<sup>86</sup> *Dendy v Harrison* (1855) 11 Exch 194.

<sup>87</sup> *May v O'Neill* (1875) 44 LJ(Ch) 660.

<sup>88</sup> *Wallis v Day* (1837) 2 M & W 273; 150 ER 759; *Archer v Marsh* (1837) 6 Ad & E 959; 112 ER 366.

<sup>89</sup> *Benwell v Inns* (1857) 24 Beav 307; 53 ER 376; *Cornwall v Hawkins* (1872) 41 LJ(Ch) 435; *Baines v Geary* (1887) 35 Ch D 154; *Evans v Ware* (1892) 3 Ch 502.

<sup>90</sup> According to Simpson, the 'working classes' were 'very rarely' in the courts as litigants; and that the 'private common law of the Victorian period emerges out of conflicts between the affluent, or [the] relatively affluent': A W B Simpson, 'Victorian Law and the Industrial Spirit' in *Selden Society Lectures 1952–2001* (William S Hein & Co, 2003) 619.

<sup>91</sup> *Gale v Reed* (1806) 8 East 80; 103 ER 274.

<sup>92</sup> *Harrison v Gardner* (1817) 2 Madd 198; 56 ER 308.

<sup>93</sup> *Wickens v Evans* (1829) 3 Y & J 318; 148 ER 1201.

<sup>94</sup> *Tallis v Tallis* (1853) 1 El & Bl 391; 118 ER 482.

<sup>95</sup> *Kimberley v Jennings* (1836) 6 Sim 340, 350; 58 ER 621, 625 (Shadwell VC).

The second consequence of the range of contracts that incorporated a restraint is that the test of ‘reasonableness’ was applied broadly enough to cover the different types of agreement. This, of course, is similar to the breadth of application of the test in negligence cases;<sup>96</sup> however, when tortious liability is assessed, the circumstances of the case are explicit. In 19<sup>th</sup> century restraint decisions, judges were not talking about ‘reasonable’ sale of business covenants, nor ‘reasonable’ post-employment restraints. It is possible that, given the range of circumstances to which it would have to be applied, the test was set low — so low that only the more egregious covenants were held to be invalid — so that the standard was applicable across the board. This meant that what was reasonable for an independent former business owner to tolerate as a restraint was not differentiated, in law, from what was reasonable for a milk seller employee to suffer.

The final aspect of the discussion of the operation of covenants as contractual obligations was evident in the distinction between general and particular restraints of trade. Lord Justice Bowen provided a clear definition of the distinction:

[C]ontracts in general restraint of trade may be defined as those by which a person restrains himself from all exercise of his trade in any part of England. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade. . . . An agreement in ‘particular’ or ‘partial’ restraint of trade may be defined as one in which the area of restriction is not absolute, but in which the covenantor retains for himself the right to still carry on his trade either in some place, or for the benefit of some person, or in some limited or prescribed manner.<sup>97</sup>

In addition, there were a small number of decisions that may be read to define a general restraint as being one that was unlimited as to the nature of the business that the covenantor was not to work in.<sup>98</sup>

Throughout the 19<sup>th</sup> century, there were references to this issue. In 1822, for example, it was held that the ‘policy of the law will not permit a general restraint of trade’ yet will allow a more restricted restraint.<sup>99</sup> Expressed more fully, the

rule of law is, that a contract in general restraint of trade is void, as being against the policy of the law; but if the contract be made on sufficient consideration, and the public gain some advantage, it will be good.<sup>100</sup>

<sup>96</sup> Though, it should not be forgotten that the test of ‘reasonableness’ was not quite so ubiquitous in 19<sup>th</sup> century negligence cases as it is today.

<sup>97</sup> *Maxim-Nordenfelt v Nordenfelt* [1893] 1 Ch 630, 651–4.

<sup>98</sup> For example, in the case of *Baker v Hedgecock* (1887) 39 Ch D 520, 522, the restraint was for a period of two years and had a geographical reach of only one mile. But, as the covenant was unlimited as to the nature of employment, even the plaintiff admitted that restriction, as written, was void.

<sup>99</sup> *Bryson v Whitehead* (1822) 1 Sim & St 74, 77; 57 ER 29, 31 (Leach VC) See also *Morris v Colman* (1812) 18 Ves Jun 437; 34 ER 382; *Wickens v Evans* (1829) 3 Y & J 318; 148 ER 1201.

<sup>100</sup> *Wallis v Day* (1837) 2 M & W 273, 281; 150 ER 759, 762 (Lord Abinger CB).

Yet despite the Court of Appeal in the *Nordenfelt* case spending time debating the distinction, in the end, Lord Herschell considered the distinction ‘somewhat academic’.<sup>101</sup>

It is arguable that this distinction, despite having limited practical value,<sup>102</sup> may be used to flesh out the courts’ attitudes to contracts in this area. The prohibition on general restraints can be understood to be a mechanism through which public policy could enter the adjudication process without impacting on the courts’ assessments of the interests of the parties. In other words, the asserted prohibition on general restraints in the 19<sup>th</sup> century allowed the judges to pay lip service to the public interest by limiting, in most cases, the relevance of policy to those cases in which a general restraint was trying to be asserted. That is, the broad prohibition allowed the courts to permit a range of restraints because they could say that there is a much worse category of restraints that are banned.<sup>103</sup> This prohibition had a purpose until the *Nordenfelt* decision upheld a 25-year restraint with, on paper at least, a global reach.

### III NORDENFELT AS A POINT OF INFLECTION IN THE LAW OF RESTRAINTS

Given that reasonableness was at the heart of the restraint of trade doctrine both before and after *Nordenfelt*, and given that there was a shift in the use of the general–particular distinction, it may not be that the decision represented a clean break in the doctrine. Instead, *Nordenfelt* may be best seen as a point of inflection in the history of restraint of trade cases. To argue this point, recourse needs to be made to both what came before the 19<sup>th</sup> century and what followed it.

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<sup>101</sup> *Nordenfelt* [1894] AC 535, 547, 571. Lord Herschell justified the distinction as being academic on the basis of the changes in English society that had taken place in the 19<sup>th</sup> century — changes that were summarised by Lord Macnaghten as the ‘discoveries of science and the practical results of those discoveries’. The implication to be drawn is that, because technology has changed, they were then justified in upholding one of the most punitive restraints possible — that is, general restraints were no longer contrary to law because of the advances of science — an outcome that would not occur in a (more) modern world in which the technological advances are vastly in excess of those seen by the Lords Herschell and Macnaghten.

<sup>102</sup> It was noted that there had been ‘several cases in which covenants in restraint of trade have been held valid, although the restraint extended over the whole of England: *Maxim-Nordenfelt v Nordenfelt* [1893] 1 Ch 630, 649 (Lindley LJ). Lord Justice Lindley cited five decisions; one of these, however, may be understood as a trade secrets case: *Leather Cloth v Lorsant* (1869) LR 9 Eq 345.

<sup>103</sup> It may be noted that, of the 12 19<sup>th</sup> century decisions that held the restraint to be void, four had no limit of space, one had a range of 200 miles from York and two had no limit as to the nature of the business. Of the remaining five, one was held void because the agreement was verbal: *Davey v Shannon* (1879) LR 4 Ex 81; one was void for being too vague: *Davies v Davies* (1887) 36 Ch D 359; and one failed because it was contained in an apprenticeship deed: *De Francesco v Barnum* (1889) 43 Ch D 165.

*A Mitchel v Reynolds*

The history of restraint of trade law is sometimes said to extend back into the medieval period. There is, however, a shortage of source material to examine that was produced before the Elizabethan period. There was, fortunately, one pre-19<sup>th</sup> century restraint of trade decision that may be seen to also operate as a point of inflection in the history of this area of law — *Mitchel* in 1711. That decision summarises the relevant early modern law and purports to offer a statement as to the extent of the law at that time. The ratio of *Mitchel*, as repeated by the 19<sup>th</sup> century cases, was:

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 good and adequate consideration, so as to be a proper and useful contract are good.<sup>104</sup>

As an aside, it may be noted that the Chief Justice in that decision equated a ‘proper and useful contract’ with a ‘reasonable restraint’.<sup>105</sup>

More significantly, it was the *Mitchel* decision that was the conduit through which the distinction between general and particular restraints entered the 19<sup>th</sup> century jurisprudence. It is not clear why Parker CJ in *Mitchel* carried out a survey of the case law in the area when ruling on a restraint that bound a baker to not work within a single parish; however, the Chief Justice produced a taxonomy that included voluntary agreements and involuntary restraints. Key here is the fact that, while general restraints are discussed as being void, the only examples cited that cover the whole of England are those that emanate from the Crown.<sup>106</sup> It is possible, therefore, that the prohibition on general restraints was merely a reminder of the common law’s power to limit the exercise of the royal prerogative.<sup>107</sup> This perspective also explains the occasional references to the Magna Carta as a basis for limiting the use of restraints<sup>108</sup> — as the purpose of that document was the curtailing of the King’s

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<sup>104</sup> *Horner v Graves* (1831) 7 Bing 735, 741–2; 131 ER 284, 287 (Tindal CJ).

<sup>105</sup> *Horner v Graves* (1831) 7 Bing 735, 742; 131 ER 284, 287.

<sup>106</sup> The judgment cites, as general restraints, decisions such as *Prugnell v Gosse* (1649) Aleyn 67; 82 ER 919 and *Franklin v Green* (1610) 1 Bulst 11; 80 ER 717. The former decision, however, related to a restraint covering Basingstoke only and the latter only covered London. Jackson, above n 5, mentions Coke’s potential impact on the decision in *Mitchel*, with Coke being a strident opponent of the royal prerogative in the early modern period. For a discussion of Coke’s role in critiquing monopolies, see C Dent, ‘“Generally Inconvenient”: The 1624 *Statute of Monopolies* as Political Compromise’ (2009) 33 *Melbourne University Law Review* 415, 442.

<sup>107</sup> Unsurprisingly given this interpretation, one of the decisions cited as authority for this point is *Darcy v Allen* (1603) 11 Co Rep 84b; 77 ER 1260.

<sup>108</sup> See, eg, *Chamberlain of London’s Case* (1590) 3 Leonard 264; 74 ER 674; *Claygate v Batchelor* (1601) Owen 143, 143; 74 ER 961, 961; *Barrow v Wood* (1643) March NR 191, 193; 82 ER 470, 471; *Mitchel v Reynolds* (1711) 1 P Wms 181, 183; 24 ER 347, 348; *Ward v Byrne* (1839) 5 M & W 548, 559; 151 ER 232, 237.

powers.<sup>109</sup> Further, those particular restraints, referred to in *Mitchel*, that were held to be valid included those relating to the rights of the guilds and cities to regulate workers;<sup>110</sup> arguably, then, the application of law to restraints in the early modern period was aimed at protecting those entities that held economic power at the time.<sup>111</sup>

Chief Justice Parker's survey of the earlier cases also facilitates a view of the range of circumstances in which the covenants were used. Obviously, these included exercises of Crown prerogative — such as the restriction around the production of playing cards in *Darcy v Allen*.<sup>112</sup> There were also restraints under the ordinances of the City of London (for example, relating to the sale of cloth)<sup>113</sup> and of guilds (for example, relating to the sale of silk)<sup>114</sup> and also under the custom of the City (for example, relating to those who had the right to trade in London).<sup>115</sup> Finally, there were a number of decisions that bound an individual — such as the case in which one blacksmith 'took a bond of another ... that he should not exercise his trade or art'

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<sup>109</sup> The section of the Magna Carta, cap 39, that is cited in this context states that:

no free man shall be seized, imprisoned, dispossessed, outlawed, exiled or ruined in any way; nor shall we attack him or send men to attack him, except by the lawful judgment of his peers and the law of the land.

For a discussion of the clause, see P Vinogradoff, 'Magna Carta, C. 39' in *Magna Carta Commemoration Essays* (Royal Historical Society, London, 1917). Of course, any benefit of the Magna Carta only flowed to the free men of the Kingdom and not to the majority of the workers of the land: Robert Bartlett, *England under the Norman and Angevin Kings 1075–1225* (Clarendon Press, 2000) 65. Further, it has been argued that the Barons, when negotiating that clause, only had thoughts for themselves: R Powicke, 'Per Iudicium Parium Vel Per Legem Terrae' in *Magna Carta Commemoration Essays* (Royal Historical Society, London, 1917) 96.

<sup>110</sup> See, eg, *Chamberlain of London's Case* (1590) 5 Co Rep 62b; 77 ER 150; *City of London Case* (1610) 8 Co Rep 121b; 77 ER 658; *Mayor and Commonality of Colchester v Goodwin* (1667) Carter 68; 124 ER 829. For a discussion of the role of guilds in the history of the doctrine of restraint of trade, see Harlan M Blake, 'Employee Agreements not to Compete' (1960) 73 *Harvard Law Review* 625, 631–7. It may be noted that Blake's take on the history of restraints is not the same as the one here.

<sup>111</sup> Examples of cases acknowledging or protecting the interests of the city corporations include *Chamberlain of London's Case* (1590) 5 Co Rep 62b; 77 ER 150; *City of London Case* (1610) 8 Co Rep 121b; 77 ER 658; *Mayor and Commonality of Colchester v Goodwin* (1667) Carter 68; 124 ER 829. That only one case: *Masters, Wardens and Assistants of Silk Throusters v Fremantee* (1669) 2 Keb 309; 84 ER 193, seems to support the power of the guild to enforce controls over workers suggests that these entities were losing power to the cities and the trading corporations. It may be noted that the cities and corporations (and not the guilds) were the subject to an explicit exception in the *Statute of Monopolies 1624* that limited the grant of patents by the Crown.

<sup>112</sup> (1602) Noy 173; 74 ER 1131.

<sup>113</sup> *Chamberlain of London's Case* (1590) 5 Co. Rep 62b; 77 ER 150.

<sup>114</sup> *Wardens and Corporation of Weavers v Brown* (1601) Cro Eliz 803; 78 ER 1031.

<sup>115</sup> *Case of the City of London* (1610) 8 Co Rep 121b; 77 ER 658.

within the same town,<sup>116</sup> a sale of business case that bound a joiner<sup>117</sup> and another that bound a mercer.<sup>118</sup> The range of covenants considered in the nineteenth century was, therefore, narrower than the range considered in *Mitchel*. While Parker CJ did discuss the different decisions in terms of certain categories,<sup>119</sup> the discussion was broader than just the agreements between two individuals that became the focus of the restraint of trade doctrine over the last two centuries.<sup>120</sup>

Reference may also be made to the use of the term ‘reasonable’ in *Mitchel*. It is even less clear how the term was meant then than it was in the 19<sup>th</sup> century. The word (or its antonym) was used eight times in the judgment and in a variety of contexts. For example, it was held to be ‘reasonable for the parties to enter into’ the agreement,<sup>121</sup> there was also reference to a ‘reasonable by-law’;<sup>122</sup> a characterisation of the law as ‘not so unreasonable’;<sup>123</sup> a reference to a ‘reasonable and useful contract’;<sup>124</sup> and the assessment that ‘what makes this more reasonable is, that the restraint is exactly proportioned to the consideration’.<sup>125</sup> The term, therefore, was used more loosely than it was later.

Arguably, there are two senses of the word being used. The first relates to a sense of ‘fairness’ — for example, the law being seen as ‘not so unreasonable’. The second sense is one of an almost quantitative ‘balancing’ of interests. This is most evident in the reference of the restraint being ‘exactly proportioned to the consideration’ and in the reference to the ‘reasonable by-law’. The by-law in question was the focus of the *Chamberlain of London’s Case*,<sup>126</sup> and in Coke’s version of the report, it was held that:

<sup>116</sup> (1587) 2 Leonard 210, 210; 74 ER 485, 485. The report does not give the names of either the plaintiff or the defendant.

<sup>117</sup> *Rogers v Parrey* (1614) 2 Bulst. 136; 80 ER 1012.

<sup>118</sup> (1641) March NR 77; 82 ER 419. Again, no names were attached to the report.

<sup>119</sup> The categories he used were grants from the Crown, customs, by-laws and those that were either voluntary or involuntary.

<sup>120</sup> It may be noted too, that Parker CJ’s discussion of voluntary restraints does not cite any cases that would now be considered to be post-employment restraints (though it may be noted that he refers to one – Perk 228 – that is not reprinted in either the English or Revised Reports). Despite this, he makes the claim that:

[a]nother reason is the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantage in trade, and to reduce it to as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account.

*Mitchel* (1711) 1 P Wms 181, 190; 24 ER 347, 350. Even in the 18<sup>th</sup> century, claims were made about bad practices without recourse to evidence.

<sup>121</sup> (1711) 1 P Wms 181, 182; 24 ER 347, 348.

<sup>122</sup> (1711) 1 P Wms 181, 185; 24 ER 347, 348.

<sup>123</sup> (1711) 1 P Wms 181, 191; 24 ER 347, 351.

<sup>124</sup> (1711) 1 P Wms 181, 196; 24 ER 347, 352.

<sup>125</sup> (1711) 1 P Wms 181, 197; 24 ER 347, 352.

<sup>126</sup> (1590) 5 Co Rep 62b; 77 ER 150.

Id. for hallage was good, because it was *pro bono publico*, and it was competent and reasonable, having regard to the benefit which the subject enjoyed by reason of the said ordinances, and such assessments being for the maintenance of the public good, and not *pro privato lucro*, were maintainable by the law.<sup>127</sup>

It, therefore, appears that Parker CJ in *Mitchel* was using the word ‘reasonable’, at least some of the time, in the same sense that Coke employed it. If this is the case, then Parker CJ held the restraint to be ‘reasonable’ because the period of the restraint, five years, matched the period of the lease granted by the covenantor to the covenantee. Such a balancing is not evident in the case law of the 19<sup>th</sup> century.

Finally, it may be pointed out that, in contrast to much of the 19<sup>th</sup> century case law, there was, in the 17<sup>th</sup> century, significant discussion around the impact of the restraint on those bound by it. In Noy’s record of *Darcy v Allen*, for example, there is the assessment that this particular grant was ‘contrary to the laws of the realm, contrary to the laws of God, hurtful to the commonwealth and in no part good or allowable’.<sup>128</sup> The law of God he refers to is ‘every man should live by labour, and he that will not labour, let him not eat’.<sup>129</sup> Also, in Coke’s report of the *Ipswich Tailors Case*, he stated that:

at common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil ... and especially in young men, who ought in their youth to learn lawful sciences and trades which are profitable to the commonwealth.<sup>130</sup>

The language used to justify the findings include statements such as: restraints of trade are ‘against the law, and ... void, for it is against the liberty of a free-man’;<sup>131</sup> monopolies ‘tend to the impoverishment of diverse artificers and others who, before, by the labour of their hands ... had maintained themselves ... who now will of necessity be constrained to live in idleness and beggary’;<sup>132</sup> and the Crown ‘cannot make a monopoly for that is to take away free trade, which is the birthright of every subject’.<sup>133</sup> The strength of this

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<sup>127</sup> Ibid 151–2.

<sup>128</sup> (1602) Noy 173, 174; 74 ER 1131, 1133.

<sup>129</sup> 2 Thessalonians 3: 8–10.

<sup>130</sup> (1614) 11 Co Rep 53a, 53b; 77 ER 1218, 1219.

<sup>131</sup> *Claygate v Batchelor* (1610) Owen 143, 143; 77 ER 961, 962.

<sup>132</sup> *Darcy v Allen* (1602) 11 Co Rep 84b, 86b; 77 ER 1260, 1263. It was also argued in a later case that a restraint, ‘being the encouragement of idleness’ was void: *Ferby v Arrosmyth* (1669) 2 Keb 377, 377; 84 ER 236, 236. The court did not rule as to whether the restraint was void for that reason.

<sup>133</sup> *Cloth-workers of Ipswich Case* (1614) Godbolt 252, 253; 78 ER 147, 148. These statements appear to reflect an understanding that, in the 17<sup>th</sup> century, work was fundamental to life in England. For Sacks, at the time it was understood that ‘every free man had a godly obligation (not just a right) to earn his bread, a duty which could not be bridged without his consent’: David Sacks, ‘The Countervailing of Benefits: Monopoly, Liberty and Benevolence in Elizabethan England’ in Dale Hoak (ed), *Tudor Political Culture* (Cambridge University Press, 1995) 275.

language was not evident in the 19<sup>th</sup> century judgments — this either could reflect a lack of concern on the part of the late Georgian and Victorian courts or a particular level of passion, against the power of the Crown, of the early modern judges.

### B 20<sup>th</sup> and 21<sup>st</sup> Century Restraint Cases

To complete the understanding of *Nordenfelt* as a point of inflection in the law requires that reference be made to what followed it. Four aspects of the later law will be considered. The first is how the judgment was received in the early 20<sup>th</sup> century case law and treatises. Secondly, there will be a brief discussion of the interests that can be seen to be protected now. Thirdly, in a related matter, a discussion of the current meaning of the term ‘reasonable’ in this context. Finally, there will be a discussion of the particularised nature of the circumstances in which the doctrine is applied.

As befitting its status as the first House of Lords decision that ruled on a restraint of trade, the *Nordenfelt* decision was not ignored by later courts. However Lord Macnaghten’s speech was not immediately seen as containing the ratio of the judgment. It took 20 years for ‘Lord Macnaghten’s test [to] become the touchstone of the matter’,<sup>134</sup> with the decision of *Mason v Provident Clothing and Supply Co*<sup>135</sup> marking the change in reading of the *Nordenfelt* decision.<sup>136</sup> For example, one 1908 treatise included extracts from the decisions of Lord Herschell and Lord Watson but not Lord Macnaghten.<sup>137</sup> Further, an article summarising the decision for the United States market only quoted from the speeches of Lords Herschell, Ashbourne and Morris.<sup>138</sup> Of course, post the *Mason* decision, it has been Lord Macnaghten’s judgment that has ‘appeared in virtually every case since’.<sup>139</sup> As the House of

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<sup>134</sup> *Attwood v Lamont* [1920] 3 KB 571, 586 (Younger LJ).

<sup>135</sup> [1913] AC 724 (*‘Mason’*).

<sup>136</sup> A survey of a number of the cases decided between 1894 and 1913, however, suggests that Lord Macnaghten’s judgment was influential before *Mason*. In a number of decisions, Lord Macnaghten’s speech was the only judgment from *Nordenfelt* that was referred to: see, eg, *Haynes v Doman* [1899] 2 Ch 13, 26 (Lindley LJ); *Attorney-General of the Commonwealth of Australia v Adelaide Steamship Co* [1913] AC 781, 795 (Lord Parker). In one decision, Lord Macnaghten’s speech was referred to, as well as that of Lord Herschell: *Underwood & Sons v Barker* [1899] 1 Ch 300, 310, 311 (Vaughan Williams LJ). Other restraint of trade decisions did not refer to *Nordenfelt* at all: see, eg, *William Robinson & Co. v Heuer* [1898] 2 Ch 451; *Townshend v Jarman* [1900] 2 Ch 698; *Edmundson v Render* [1905] 2 Ch 320; *Henry Leatham & Sons v Johnstone-White* [1907] 1 Ch 322.

<sup>137</sup> Sir John Macdonell, *The Law of Master and Servant* (Stevens & Sons, 2<sup>nd</sup> ed, 1908) 102–3. The Matthews and Adler treatise devotes an entire chapter to the decision, and as a result, discusses the speeches of all five Law Lords: Matthews and Adler, above n 3, ch 2.

<sup>138</sup> J Knowlton, ‘The New Doctrine Concerning Contracts in Restraint of Trade’ (1909–10) 8 *Michigan Law Review* 298, 299–301.

<sup>139</sup> Meltz, above n 49, 152.

Lords decision in *Nordenfelt* was unanimous, there is little, in principle, difference between the findings of each of the Law Lords and their reasons for them. That said, a distinction has been made between the findings of the Law Lords with respect to the continued relevance of the rule between general and particular restraints.<sup>140</sup> This, however, does not go to the understanding of matters such as the reasonableness of, or the interests to be protected by, the covenant.

What did change over the course of the 20<sup>th</sup> century was the understanding of the basis upon which restraint cases should be decided. As a reminder, shortly after the *Nordenfelt* judgment, one judge expressed the regret that:

the doctrine, unhappily I think, prevailed that in questions between employer and employed the interests of the employer alone are to be considered, and that no agreement is invalid, however oppressive and however fatal it may be to the possibility of the employee earning his own living in this country.<sup>141</sup>

This assessment would not be accepted now. One recent article has suggested that:

the current law calls for several judgments to be made: whether the employer has a legitimate interest, how the employee threatens that interest, whether the interest needs immediate protection, whether the protection needs to go so far, and whether the detriment to the employee and the public interest is too great.<sup>142</sup>

A more complete description is offered in the decision *Stacks Taree Pty Ltd v Marshall [No 2]*.<sup>143</sup> In that decision, 12 ‘principles relevant to the validity of restraint of trade clauses’ were listed. A number of these are:

(1) The Court gives considerable weight to what parties have negotiated and embodied in their contracts, but a contractual consensus cannot be regarded as conclusive, even where there is a contractual admission as to reasonableness; (2) an employer is not entitled to require protection against mere competition; (3) an employer is entitled to protection against the use by the employee of knowledge obtained by him of his employer’s affairs in the ordinary course of trade; and (4) an employer’s customer connection is an interest which can support a reasonable restraint of trade, but only if the employee has become, vis-à-vis the client, the human face of the business, namely the person who represents the business to the customer.<sup>144</sup>

This understanding is much broader than the approach found in *Nordenfelt* or in the cases immediately after that decision was handed down by the House of Lords.

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<sup>140</sup> Matthews and Adler, above n 3, 63–4.

<sup>141</sup> *Henry Leatham & Sons v Johnstone-White (No 2)* [1906] 1 Ch 189, 194 (Neville J).

<sup>142</sup> C Arup et al, ‘Restraints of Trade: The Legal Practice’ (2013) 36 *University of New South Wales Law Journal* 1, 2.

<sup>143</sup> [2010] NSWSC 77 (1 March 2010).

<sup>144</sup> *Ibid* [44].

More specifically, there are a number of aspects of the modern understanding of the labour market that informs the law in the area. Current understandings of restraints include an acceptance of the need to protect the knowledge of the employer while enabling the employee to retain some knowledge to enhance her or his future employability.<sup>145</sup> This understanding, therefore, allows for an acceptance and perhaps the facilitation of employee mobility.<sup>146</sup> Such an understanding also permits a conception of the worker as being active in her or his own professional development. Further, the literature in the area at least considers the importance of the unequal bargaining power of employer and employees.<sup>147</sup> These perspectives offer a much more nuanced understanding of employers, workers and the employment relationship than was evident in the 19<sup>th</sup> century.

With respect to the issue of reasonableness now, the current law is that:

[t]he test of reasonableness is measured by reference to the interests of the parties concerned and the interests of the public ... The requirement that the restraint be reasonable in the interests of the parties means that the restraint must afford no more than adequate protection to the party in whose favour it is imposed.<sup>148</sup>

The shift highlighted in this quote is from the 19<sup>th</sup> century ‘necessary protection’ of the covenantee<sup>149</sup> to her or his ‘adequate protection’. Whereas now, in the case of post-employment restraints, ‘an employer is not entitled to require protection against mere competition’,<sup>150</sup> in the *Nordenfelt* decision, it was the threat of competition that gave the House of Lords a basis for enforcing the restraint. Admittedly, the current test has been described as ‘extremely elastic’.<sup>151</sup> However given the facts that Australian practitioners consider that a six-month restraint would have a good chance of success whereas a ‘year would usually be too long unless the employee was a senior manager’,<sup>152</sup> it is clear that what is considered reasonable now is significantly different to what was considered reasonable in the 19<sup>th</sup> century.<sup>153</sup>

<sup>145</sup> See, eg, Christopher Arup, ‘What/Whose Knowledge? Restraints of Trade and Concepts of Knowledge’ (2012) 36 *Melbourne University Law Review* 369.

<sup>146</sup> See, eg, William van Caenegem ‘The Mobility of Creative Individuals, Trade Secrets and Restraints of Trade’ (2007) 14 *Murdoch E-Law Journal* 265.

<sup>147</sup> See generally Joellen Riley, *Employee Protection at Common Law*, Federation Press, Sydney, 2005.

<sup>148</sup> *Stacks Taree Pty Ltd v Marshall [No 2]* [2010] NSWSC 77 (1 March 2010) [44].

<sup>149</sup> *Horner v Graves* (1831) 7 Bing 735, 743; 131 ER 284, 287 (Tindal CJ)

<sup>150</sup> *Stacks Taree Pty Ltd v Marshall [No 2]* [2010] NSWSC 77 (1 March 2010) [44].

<sup>151</sup> David J Brennan, ‘Springboards and Ironing Boards: Confidential Information as a Restraint of Trade’ (2005) 21 *Journal of Contract Law* 71, 85.

<sup>152</sup> Arup et al, above n 140, 13. These days, the 30-month restraint applied in *Miles v Genesys Wealth Advisers Ltd* (2009) 201 IR 1, is seen as a very long restraint.

<sup>153</sup> There were, for example, two 20<sup>th</sup> century Australian decisions that allowed restraints that would not be upheld today: *Hamilton v Lethbridge* (1912) 14 CLR 236 (unlimited duration — within 50 miles of Toowoomba) and *Brightman v Lamson Paragon* (1914) 18 CLR 331 (10 years — all of Australia and New Zealand).

To round out this discussion of the recent law in this area, mention must be made of the range of circumstances in which restraints of trade are considered. Heydon, in his text, refers to employee covenants, restraints protecting goodwill after the sale of a business, non-ancillary vertical restraints (such as supply contracts) and non-ancillary horizontal restraints (he refers to cartels and trade unions).<sup>154</sup> Jackson, in his text, focuses on post-employment restraints, has a chapter on ‘Restraints of Trade Provisions in Sale of Business Agreements’ and states that restraints in ‘leases, franchises and so forth [are] outside the scope of this work’.<sup>155</sup> Unlike for most of the 19<sup>th</sup> century, the law differentiates between these categories. Heydon, for example, highlights the ‘leading case’ for sale of business restraints as *Trego v Hunt*<sup>156</sup> and not *Nordenfelt*, and begins his discussion of exclusive supply contracts with *McEllistrim v Ballymacelligott*.<sup>157</sup> Further, *Nordenfelt* is not referred to at all in his discussion of non-ancillary vertical and non-ancillary horizontal restraints. The law in this area, therefore, has fractured since the time of *Nordenfelt*. In part, this is not surprising given the increase in litigation since then. It is also worth noting that, additionally, it mirrors the processes of categorisation that occurred in other areas of law.<sup>158</sup> Again, *Nordenfelt* is best seen as a way-marker in the overall story of the doctrine rather than the sign-post for a radical shift in direction.

#### IV CONCLUSION

This expanded view of *Nordenfelt* shows it to be a 19<sup>th</sup> century decision that conformed to the approach adopted for much of that century.<sup>159</sup> Of course, that assessment does not explain why it is seen as the beginning of the modern doctrine — though that could simply be the result of the fact that it was the first such case to make it all the way to the House of Lords and it was decided just before that forum ‘considered

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<sup>154</sup> Above n 2. Employee restraints take up three chapters of the book; however, he devotes a chapter to each of the last three categories.

<sup>155</sup> Above n 5, 118. At one level, Jackson’s decision is not surprising given the title of the book. The point here is, however, that this fine-grained level of differentiation has occurred in the doctrine since the 19<sup>th</sup> century.

<sup>156</sup> [1896] AC 7; J D Heydon, *Restraint of Trade Doctrine* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 1999) 146.

<sup>157</sup> [1919] AC 549; Heydon, above n 156, 172.

<sup>158</sup> See, eg, Chris Dent, ‘The Privileged Few and the Classification of *Henwood v Harrison*: Foucault, Comment and Qualified Privilege’ (2005) 14 *Griffith Law Review* 34.

<sup>159</sup> As noted by Trebilcock, ‘it is far from clear that Lord Macnaghten himself considered that his judgment marked any significant break’ from the earlier case law: Trebilcock, above n 2, 43–4. Sanderson takes it further and suggests that the ‘modern test now approved by the House of Lords (in *Nordenfelt*) is practically an application of the principles laid down in *Mitchel v Reynolds*’: W Sanderson, *Restraint of Trade in English Law* (Law Book, 1926) 47 – thereby implying that the law expressed in *Nordenfelt* was nothing new and, in fact, reinforced the position of the early 18<sup>th</sup> century.

itself absolutely bound by its past decisions'.<sup>160</sup> That it was a decision of the Law Lords meant that it set in stone its articulation of reasonableness<sup>161</sup> and the side-stepping of the particular–general restraints divide that had persisted since *Mitchel*.

Understood more broadly however, *Nordenfelt* is only a point of inflection in the doctrine. Reasonableness did exist both before and after it, but the test's application changed (but not as a result of Lord Macnaghten's use of the test). With respect to the particular-general restraint distinction in the law, the House of Lords, by enforcing a (general) restraint that covered the extent of the House of Lords' jurisdiction (as well as, on paper, the rest of the world), allowed the courts to move beyond that framing of the problem that had persisted since *Mitchel*. Finally, *Nordenfelt* was a marker in the trend towards particularisation in law. That is, the range of cases covered in *Mitchel* was broader than in *Nordenfelt*, and the range covered in *Nordenfelt* is wider than the more focused legal categories of restraints used today. None of this is to say that *Nordenfelt* was not important – it just may not deserve the 'love' it gets in the cases and commentary today.

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<sup>160</sup> R Cross and J W Harris, *Precedent in English Law* (Clarendon Press, 4<sup>th</sup> ed, 1991) 5.

<sup>161</sup> It could be, too, that Lord Macnaghten's articulation of the test was particularly pithy (despite the quote used above coming in at 93 words). If that is the case, then its use may be the result of the 'repeatability' of legal statements in the perpetuation of the law: see also Chris Dent and Ian Cook, 'Stare Decisis, Repetition and Understanding Common Law' (2007) 16 *Griffith Law Review* 131.