

1 Exhibit from Kenya Gazette No 14 ^{29/3/32}
Bill to render lawful certain contracts
in restraint of trade.

? Publicly

H.S. Prichard
5/3/32
H.S. Prichard
5/3/32

ms

2 For Kenya — 256 — 2/6/32
Nos. 2 Authenticated & 12 printed copies
of the Contract in restraint of trade Ordinance,
1932, together with Legal Report.

Spares to
Library

I assume that the mere
repeal of section 27 of the Indian
Contract Act would not be sufficient.
This act was applied by Article
11(B) of the EA Ordinance 1897, and
on 18/2/32 Kenya which has since
passed I raised the question whether
modification of an applied act would still
require the issue of an order by the
G.O. as laid down in the O.I.C.
? Subject to any legal objections
signify your disallowance.

this has been
answered

H.S. Prichard
11/7/32

3

Please see attached memorandum which (as regards S.S.)
Mr. Abraham and I have prepared. This
comment on S.S. is his and I quite agree

J. G. ...
28/7

I have discussed further with Mr. Roberts-Wray
Reb. rec. enclos. for Lpo's counsel
copy of - memo prepared by the my
advisers, and say that no advice
will be tendered E-1457 in respect of
the Ord. - pending ~~recd~~ of Lpo's further
advice.

Enclose the Note (3 - file) as
amended in pencil. A fair copy of the
note shd. be put up with the apt. dispatch
H. D. Smith
20/12

4 Lolo 568 (1703) 2 amend 8/12
4 August

Lo
of President

No reply to No. 11 has yet been received.

8/10/52

It was a draft amending
Bill in a recent 9/12/52
72 amend. H. D. Smith

5 Govt Notice No. 664 of 1952
Cabinet in Cabinet of Trade (No. 2) Ordinance 1952

? This seems to accord with
the suggestion in the memo of 3 - but
against the latter treated
copies upon passing to the legal
advisers H. D. Smith

19/12/52

GOVERNMENT NOTICE No. 667

His Excellency the Governor in Council has approved of the following Bill being introduced into the Legislative Council.

G. BERESFORD STOIKE,
Acting Clerk of the Legislative Council.

A Bill to Render Lawful Certain Contracts in Restraint of Trade.

BE IT ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows:—

Short title.

1. This Ordinance may be cited as "the Contracts in Restraint of Trade (No. 2) Ordinance, 1982."

Contracts in restraint of trade.

2. Any agreement or contract which contains any provision or covenant whereby any party thereto is restrained from exercising any lawful profession, trade, business, or occupation, shall not be void only on the ground that such provision or covenant is therein contained:

Power of Court to declare covenant void

Provided that the Supreme Court shall have power to declare such provision or covenant to be void where the court is satisfied that, having regard to the nature of the profession, trade, business, or occupation concerned, and the period of time and the area within which it is expressed to apply, and to all the circumstances of the case, such provision or covenant is not reasonable either in the interests of the parties, inasmuch as it affords more than adequate protection to the party in whose favour it is imposed against something against which he is entitled to be protected, or in the interests of the public, inasmuch as such provision or covenant is injurious to the public interest:

And provided further that where a minor has entered into any agreement or contract containing any such provision or covenant the court shall also take into consideration whether it was for his benefit that he did so.

3. Notwithstanding and in addition to anything contained in the last preceding section any such provision or covenant shall be void in any case where an employer terminates the services of an employee in contravention of the terms of the contract of service.

Saving where service terminated in contravention of contract.

4. The Contracts in Restraint of Trade Ordinance, 1932, is hereby repealed.

Repeal.
No. 5 of 1932

OBJECTS AND REASONS.

This Bill repeals the Contracts in Restraint of Trade Ordinance, 1932, and re-enacts it in an altered form. The Secretary of State has expressed the opinion that section 2 of the Ordinance as it stands does not quite accurately reflect the principles laid down by the House of Lords in the Nordenfolt Case, and has suggested that the wording might be altered to achieve this object.

Clause 2 of the Bill gives expression to the suggestion of the Secretary of State.

Section 3 of the present Ordinance is thought by the Secretary of State to be too wide in its incidence, and Clause 3 of this Bill, which provides that any provision or covenant in restraint of trade shall be void in any case where an employer terminates the services of an employee in contravention of the terms of the contract of service, is of a more restricted nature.

No expenditure of public moneys will be involved if the provisions of this Bill become law.

Handwritten initials and number 4

C. O.

C. D.
R 29 JUL
D 118

Mr. Priestman *24/7*

Mr. *Darwin 29/7*

Mr.

Mr. Parkinson

Mr. Tomlinson

Sir C. Bottomley

Sir J. Shuckburgh

Permt. U.S. of S.

Parly. U.S. of S.

Secretary of State

Answered by No 1 on 30/2/33 14 August 1932
S + 4

Sir,

DRAFT:

KENYA

NO. 368

GOVERNOR

I have etc. to acknowledge the receipt of your despatch No. 256 of the 8th of June forwarding authentic copies of a Ordinance to *ated* Render Lawful Certain Contracts in Restraint of Trade.

2. I enclose, for your consideration, a copy of a memo. prepared by my *on certain points in the Ordinance* Advisers, and *in the meantime* no advice will be tendered to His Majesty in respect of the Ordinance pending the receipt of your further observations.

I have etc.

(for the Secretary of State)
(Signed) R. W. HAMILTON

X1894 A.C.

This ordinance, according to the legal report, purports to embody the principles relating to restrictive commercial covenants laid down by the House of Lords in the famous *Mordenfelt* case, but it is doubtful whether it does so. It will be seen from the proviso that the Court, in coming to a decision as to whether the covenant is reasonable, land of course, that is the point for decision, (see Lord Macnaghten in the *Mordenfelt* case), should take into consideration any restriction relating to space or area, having regard to the nature of the profession, trade or occupation concerned. In the first place, the words "space" and "area" are synonymous, and no doubt "time and area" is meant. In the second place, all covenants in restraint of trade restrict in time and space (within or without limits) the exercise of a particular trade or business and to impose the test prescribed by the ordinance is merely to say that to test the reasonableness of an agreement the Court must consider its terms. This does not carry the matter far enough. Lord Macnaghten in the *Mordenfelt* case stated that the restriction must be reasonable, and that reasonable means reasonable in the interests of the parties and reasonable in the interests of the public, and he explained that the test of reasonableness in the interests of the parties is whether the restriction affords adequate protection to the party in whose favour it is imposed, and the test of reasonableness in the interest of the public is whether the restriction is injurious to the public. Lord Parker, in *Herbert Morris, Ltd. v. Saxelby* 1916 A.C., adopting the dictum of Lord Macnaghten, said that what the latter meant by the restriction affording adequate protection to the party in whose favour it

is imposed was affording no more than adequate protection, and this limitation seems obvious.

If, therefore, the Kenya Legislature desire to embody in this enactment the principle of English law relating to covenants in restraint of trade, it is suggested that they should reconsider the wording of section 2 to bring it into line with the principle enunciated in the cases quoted above, which seems to be as follows:-

A provision or covenant in restraint of trade is void unless, having regard to the nature of the profession, trade, business or occupation concerned, and the period of time and the area within which it is expressed to apply, and all the circumstances of the case, such provision or covenant is reasonable in the interest of the parties (that is to say, it affords no more than adequate protection to the party in whose favour it is imposed against something against which he is entitled to be protected), and reasonable in the interest of the public (that is to say, not injurious to the public interest).

Section three of the Ordinance necessarily implies that if an employer terminates the services of an employee by giving him notice in accordance with a term in the contract providing therefor, or terminates these services because the employee has proved technically incompetent or has become so ill that he is unable to perform his duties, the employee is relieved from the obligation imposed by the covenant. This appears to be a novel principle, and, in the absence of decisive precedent or other strong justification, could hardly be accepted by the Secretary of State.

x 1894 A.C.

vide Ld. Macnaghten in the Nordenfolt case.

Copy for Sir A. G. G. G.

This Ordinance, according to the legal report, purports to embody the principles relating to restrictive commercial covenants laid down by the House of Lords in the famous Nordenfolt case, but it is doubtful whether it does so. It will be seen from the proviso that the Court, in coming to a decision as to whether the covenant is reasonable (and of course, that is the point for decision) should take into consideration any restriction relating to space or area, having regard to the nature of the profession, trade or occupation concerned. In the first place, the words "space" and "area" are synonymous, and no doubt "time" and "area" is meant. In the second place, all covenants in restraint of trade restrict in time and space (within or without limits) the exercise of a particular trade or business and to impose the test prescribed by the Ordinance is merely to say that to test the reasonableness of an agreement the Court must consider its terms. This does not carry the matter far enough. Lord Macnaghten in the Nordenfolt case stated that the restriction must be reasonable, and that reasonable meant reasonable in the interests of the parties and reasonable in the interests of the public, and he explained that the test of reasonableness in the interests of the parties is whether the restriction affords adequate protection to the party in whose favour it is imposed, and the test of reasonableness in the interest of the public is whether the restriction is injurious to the public. Lord Parker, in Herbert Morris, Ltd. v. Saxelby 1916 A.C., adopting the dictum of Lord Macnaghten, said that what the latter meant by the restriction affording adequate protection to the party in whose favour it is imposed was affording no more than adequate protection, and this

this limitation seems obvious.

If, therefore, the Kenya Legislature desire to embody in this enactment the principle of English law relating to covenants in restraint of trade, it is suggested that they should reconsider the wording of section 2 to bring it into line with the principle enunciated in the cases quoted above, which seems to be as follows:-

A provision or covenant in restraint of trade is void unless, having regard to the nature of the profession, trade, business or occupation concerned, and the period of time and the area within which it is expressed to apply, and all the circumstances of the case, such provision or covenant is reasonable in the interest of the parties (that is to say it affords no more than adequate protection to the party in whose favour it is imposed against something against which he is entitled to be protected), and reasonable in the interest of the public (that is to say, not injurious to the public interest).

Section three of the Ordinance ~~submits in my opinion a most astonishing proposition of law, and I should like to know what authority can be cited for it, since it necessarily implies that if an employer terminates the services of an employee by giving him notice in accordance with a term in the contract providing therefor, or terminates these services because the employee has proved technically incompetent or has become so ill that he is unable to perform his duties, the employee is relieved from the obligation imposed by the covenant.~~

This appears to be a novel principle, and which, in the absence of decisive precedent or other strong justification, could hardly be accepted by the S.C.

The law on this
and aimed in
General will not be
v. Adkins
A.C. 1909 118

Adkins

2/2/33

KENYA.

No. 256



RECEIVED
27 JUN 1932
COL. OFFICE

GOVERNMENT HOUSE,
NAIROBI,
KENYA.

8th June, 1932.

Sir,

I have the honour to forward herewith two authenticated and twelve printed copies of an Ordinance intituled "the Contracts in Restraint of Trade Ordinance, 1932," which duly passed its third reading in the Legislative Council on the 5th May, 1932, and to which I assented in His Majesty's name on the 26th May, 1932.

A copy of the Legal Report by the Acting Attorney General is also enclosed.

I have the honour to be,

Sir,

Your most obedient, humble servant,

Brigadier-General,
GOVERNOR.

THE RIGHT HONOURABLE

MAJOR SIR PHILIP GUNLIFFE-LISTER, P.C., G.B.E., M.C., M.P.,

SECRETARY OF STATE FOR THE COLONIES,

DOWNING STREET,

LONDON, S.W. 1

Ans. 568 + August

LEGAL REPORT.

THE CONTRACTS IN RESTRAINT OF TRADE BILL, 1932.


This Bill has been introduced into the Council as a result of representations made by the Law Society of Kenya and the Association of Chambers of Commerce of East Africa.

In England, in the case of a professional employer engaging an assistant, it is usual to insert in the agreement a clause restraining the employee, on the termination of his engagement, from practising a competitive business within a certain radius and within a certain period of time. In this Colony, however, the Indian Contract Act applies, and under that Act, any agreement by which any one is restrained from exercising a lawful trade, profession or business is void except in certain specific cases, namely, one, where the good will of a business is sold, the seller of the good will may agree with the buyer to refrain from carrying on a similar business, within certain limits, so long as the buyer carries on a like business therein; two, partners who are dissolving or about to dissolve partnership may agree not to carry on business in competition within a certain area; and, three, partners may agree that some one or all of them will not carry on any business, other than that of partnership during the continuance of the partnership. Now it is considered that the lack in this Colony of the protection afforded to English employers in respect of restraining their employees is not in the best interests of the public, seeing that it is calculated to prevent employers from engaging well-qualified employees because the latter might, within a short time, in the absence of any such restraint, become serious competitors. Accordingly

9

this Bill has been drafted, and has received the approval both of the Law Society of Kenya and of the Association of Chambers of Commerce of East Africa. The Bill, which embodies the principles laid down in the well-known case of the Maxim Gun Company vs Nordenfeldt, which principles are the law in England today, provides that any agreement or contract which contains any provision or covenant whereby any party thereto is restrained from exercising any lawful profession, trade, ~~or~~ business, or occupation, shall not be void only on the ground that such provision or covenant is therein contained. Power is conferred on the Courts to declare such provision or covenant to be void where the Court is satisfied that such provision or covenant is not reasonable.

In my opinion, His Excellency the Governor may properly assent to this Bill in the name and on behalf of His Majesty.


ACTING ATTORNEY GENERAL.

Nairobi,
5th May, 1932.



Colony and Protectorate of Kenya.

IN THE TWENTY-THIRD YEAR OF THE REIGN OF
HIS MAJESTY KING GEORGE V.
JOSEPH ALOYSIUS BYRNE, K.C.M.G., K.B.E., O.B.,
Governor.

Assented to in His Majesty's
name this 26th day of May, 1932.

J. BYRNE.

Governor.

AN ORDINANCE TO RENDER LAWFUL
CERTAIN CONTRACTS IN RESTRAINT
OF TRADE

No. V of 1932.

**An Ordinance to Render Lawful Certain
Contracts in Restraint of Trade.**

ENACTED by the Governor of the Colony of Kenya,
with the advice and consent of the Legislative Council
thereof, as follows:—

1. This Ordinance may be cited as "the Contracts in Restraint of Trade Ordinance, 1932."

2. Any agreement or contract which contains any provision or covenant whereby any party thereto is restrained from exercising any lawful profession, trade, business, or occupation shall not be void only on the ground that such provision or covenant is therein contained.

Contracts in
restraint
of trade.

Provided that the Court shall have power to declare such provision or covenant to be void where the Court is satisfied that such provision or covenant is not reasonable and in determining whether any such provision or covenant is reasonable the Court shall take into consideration any restriction relating to the space or area within which it was contemplated that such provision or covenant should apply having regard to the nature of the profession, trade, business or occupation.

Power of
Court to
declare
covenant void.

And further provided that where a minor has entered into any agreement or contract containing any such provision or covenant the Court shall also take into consideration whether it was for his benefit that he did so.

3. Notwithstanding and in addition to anything contained in the last preceding section any such provision or covenant shall be void in any case where an employer terminates the services of an employee on grounds other than grounds of misconduct.

Saving where
services
terminated

4. Section 27 of the Indian Contract Act (Act No. IX of 1872) as applied to the Colony is hereby repealed.

Repeal

Passed in the Legislative Council the fifth day of May,
in the year of Our Lord one thousand nine hundred and
thirty-two.

This printed impression has been carefully compared by
me with the Bill which passed the Legislative Council and is
presented for authentication and assent as a true and correct
copy of the said Bill.

H. E. BADER

Acting Clerk of the Legislative Council.

OBJECTS AND REASONS.

This Bill is the outcome of representations made by the Law Societies and the Association of Chambers of Commerce of East Africa.

2. In England, in the case of a professional employer engaging an assistant, it is usual to insert in the agreement a clause restraining the employee, on the termination of his engagement, from practising a competitive business within a certain radius and within a certain period of time. Under the Indian Contract Act, as applied to the Colony, however, any agreement by which anyone is restrained from exercising a lawful profession, trade, or business is void except in certain specific cases.

3. It is considered that the lack in the Colony of the protection afforded to English employers in respect of restraining their employees is not in the best interests of the public, in that it is calculated to prevent employers from engaging well qualified employees because the latter might, within a short time, in the absence of any such restraint, become serious competitors.

4. This Bill has, therefore, been drafted, and has received the approval of the Law Societies and the Association of Chambers of Commerce.

The Bill provides that any agreement or contract which contains any provision or covenant whereby any party thereto is restrained from exercising any lawful profession, trade, business or occupation shall not be void only on the ground that such provision or covenant is therein contained.

Powers are conferred on the Courts to declare such provision or covenant to be void where the Court is satisfied that such provision or covenant is not reasonable.

The Bill also provides that any such provision or covenant shall be void in any case where the services of the employee are determined on grounds other than misconduct.

5. No expenditure of public moneys will be involved if the provisions of this Bill become law.