By contract of partnership betwixt two Booksellers in Glasgow wherin the one for three years renounced his trade of bookselling there, and communicated the use of his stock of Books to the other upon that other's paying to him yearly during that time a certain neat sum and restoring the value of the said stock at the three years: It being provided that if, at expiring of the three years either party did refuse to enter into such a new contract the refuser should not be concerned by himself or others in Bookselling within Glasgow directly or indirectly; without prejudice to the other party to sell and buy books there as he pleased: The partner who at expiring of the three years refused to renew the contract raised a Reduction of the said Tolerating Clause upon these Grounds, That it was contra bonos mores, tending by monopolie to distress the country and city where the parties lived: and for finding the Refusser to renew the contract of his Burgesship, he being thereby obliged not to sell Books or keep shop or exercise the trade in Glasgow: a penalty which could not be lawfully stipulated and imports an obligation upon him to continue this Limitable partnership during Life contrary to the Law and nature of Society which may be dissolved at the pleasure of any one of the partners. It was answered That the penalty on either of the partners refusing to continue the Contract that he should not keep a Bookselling Shop in Glasgow was equal on both sides, laying no more burden on the one than on the other: and because that place was too narrow for two such like shops prohibited suitably, that the Recusant should not take up another shop to keep upon the other: Nothing hinders any man who a Burgess to agree with any other that he shall not deal in such a particular Town, in such or such a particular commodity or carry on any Trade at all in such a particular place: This could lend to no Monopoly, because any other person or number of persons could set up the same trade at Glasgow notwithstanding of the paction of those parties; and the party so debarred in Glasgow could follow or carry on the Trade many other places than Glasgow. The Restrictive paction of discontinuing the Bookselling Trade in Glasgow by the party refusing to enter into a new contract is against no Law: For it was not unlawful for him not to set up Bookselling in Glasgow, how could it be unlawful for him to pact or not to do what no Law obliged him to do: or to paction not to do that which at the utmost it was voluntary for him either to do or not to do: as he thought fit. The privilege of carrying on any trade in a particular Town is indeed a Right of property in them that have it: But what then does any man to restrain himself by paction in the exercise of his own property? Is this common right of a subject to purchase any trade to be sold or exposed to sale: But makes it not an unlawful paction for a man to agree that he would not purchase that estate, or that he would not interpose in the purchase with another? But leave it to him to consider before the paction the power of purchasing was a common Right. Two persons (for instance two Booksellers) resolve to follow the trade of Bookselling and apprehending that both of them following the same trade might be a prejudice to them both because it might divide the business of their common friends the first paction that one of them should not be an advocate, and the other should not be a writer: or that one of them should be a Lawyer in Scotland, and the other not but take him self to be a Lawyer in England: would this be an unlawful paction, because before such pactions each of them in the common Right of the subject might follow which employment they pleased? as also there any thing more common, than for two trading companies to enter into Bargain, that they shall confine the exercise of trade to such a particular place or bounds, in order not to interfere with the other, or that the Trade of Surgeon of both might not be blended by undertaking one another? But to go a little further, Where do we have the distinction of Trades arise but from the common consent of mankind, which such distinctions are both lawful and useful, and from a tacit paction of all the Roman Trades men consented that they should limit the common Right of the subject to confine themselves to one particular Trade? This way the very foundation of the distinction of all trades. The taking up [illegible] by any Trade is the common Right of all the subject but when the taking up [illegible] one it is no more no left common tacit paction to limit our common Right and to confine the particular [illegible] to one trade. And the very same thing is the foundation of all corporations, the foundation of the freedom of one Burgh differing from another and the foundation of the privileges of all companies: this common Right of the subject is the same to all men as strangers when they could be applied to the present cases. But that he be not limited by such a common Right to be limited by Law, by Grant or paction: But according to this doctrine all three were unjust as being an Incroachment upon the common Right of the subject. If two merchants agree that to prevent their interfering in point of trade, one of them shall not set up his trade in one place, but leave the trade of that place to his fellow: this publick utility cant make this unlawful: For if the particular trade be at all useful, the carrying of it on in particular places, rather makes it more diffusive and consequently more for the publick utility. nor furr is this contrary to the Right and privilege of Burgesship, which is merely personal and may be limited or intirely renounced by any man of his pleases. By right of burgesship a man is free equally to exerce all trades: But cannot he lawfully confine himself to one? A person that is burgess both in Glasgow and Edinburgh is confined by the common Rules to exerce his Trade in the place where he resides. If he reside in one he is not allowed to exerce his Trade in the other and that hath been awarded in sundry cases. Again this was no tendency to a monopoly here in any sense: For every body else except the person who made the Bargain, is at liberty to follow on the same trade in the place. I thinks first and consequently there is no Monopolie: Any person restraining himself from following a particular trade in one particular place could not be said to make a Monopoly to other with respect to that place or to the nation in general. With respect to that particular place every body may carry on the Trade but he who has pactioned with respect to the nation, every body may set up his Trade in any other place: As pactions a neighbouring Horse brings himself under a Barbie to his neighbour that he shall not set up a Brewery within his Ground and gets a consideration for it, what would make this unlawful? more not the Lords of Session so far from finding such a Bond of Servitude from the Baron Restraining to the Town of Edinburgh to be unlawful or bond that they have so repeatedly sustained it: one having a Right of Salmon fishing either in the higher or lower parts of a River, Bargains with his neighbour that he shall not exercise his Right of fishing that the others fishing might be more Lucrative, would this be unlawful? because it was contrary to the particular or common Right: The contractors of Session who pactioned pacta conventa for a sum: a man might not first make an Agreement with Intent only to have an opportunity to worm his neighbour out of his Trade and do them or not: yet he cannot by paction restrain his Liberty and oblige himself either to do or not to do such things. A Tradesman for Instance may work to whom he pleases, to whom as well as to any other man: But then he cannot by paction oblige himself not to work to any body else: A man may sell his fish to whom he pleases, to whom as well as to any other man: But then he cannot bind himself that he will do so by contract, seeing this were a restraining his natural freedom constantly to his master and to no body else: But then he cannot by paction confine himself to any particular place: A servant may hire himself to another & continue with him all his Life, but then he cannot bind himself during Life which were to introduce a Slavery contrary to our constitution. And upon the same plan one may abstain from exiling in any one Town in the nation, or places: But then he cannot by paction restrain or banish himself from any particular Town. And just so Burgesses of a Burgh may live idle, and neither employ themselves in Trade or Handicraft. But then one cannot by any paction excluded himself from this Right of Burgesship and from a capacity of advancing the good of the Burgh in which he is a Burgess, which is a tying up a Right competent to him as a freeman and a Burgess, that is not in his power to renounce in favour of a third party. Now the excluding this pursuer from his trade of Bookselling in Glasgow if there were no other Booksellers in Town, would be a Monopoly, and the Defenders of there were other Booksellers there might make like pactions with them and thereby exact upon the rest of the Burgesses Land in England any Restraint upon Trade by Charter or by Law is void, as being against the Liberty and freedom of the subject. The Lords of Session found the said debarring clause in the contract to be a Lawful paction and not contrary to the common Liberty of the subject and therefor repelled the Reason of Nullity of the contract on the Grounds aforesaid and decerned and ordained the partner who at expiring of the three years refused to renew the contract to leave and desist from his trade of Bookselling in Glasgow which not by himself or by others directly or indirectly intimo coming 5 February 1735 And upon Stalker Contra Mr Alexander Carmichael. In like manner it may be judged and resolved by the court of Kings Bench in England That a Bond or promise to restrain one self from trading in a particular place, if made upon a reasonable consideration, is good. Such is if there be no reasonable consideration, or to restrain a man from trading at all, 1 Sayers Williams Reports bottom of 24 Mildred Barnes & Reynolds, where the Law upon this Head is stated, and jarring opinions reconciled.