9, 1934

In the Priby Council.

No. 41 of 1933.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

BETWEEN

VANCOUVER MALT & SAKE BREWING COMPANY LIMITED ... ... (*Defendants*) *Appellants*,

AND

VANCOUVER BREWERIES LIMITED ... (*Plaintiffs*) *Respondents*.

CASE FOR THE APPELLANTS.

1. This is an appeal from the judgment of the Court of Appeal of British Columbia dated the 27th day of January, 1933, affirming by a majority (dissentiente McPhillips J.A.) the judgment of McDonald J. in the Supreme Court of British Columbia dated 7th day of June, 1932, whereby he declared that the Agreement dated 5th day of December, 1927, mentioned below, is a valid agreement and enforceable by the Respondents against the Appellants and granted an injunction against the Appellants restraining them from acting contrary to the terms thereof. Record. p. 119 A.A. p. 119 C.

2. There are two principal questions involved in this appeal. One is whether the Agreement which the Respondents rely upon is void, as being an unreasonable restraint of trade or directed to the establishment of a monopoly or as constituting an offence under Section 498 of the Canadian Criminal Code (R.S. Canada 1927 c. 36) which prohibits combinations or agreements to restrain or injure trade or commerce. The other question is whether the Agreement was executed in such circumstances as to be binding upon the Appellants at all.

3. At all material times both the Appellants and Respondents, which are limited companies incorporated in British Columbia, had power under their respective Memoranda of Association to carry on the business of brewers in all its branches. Under the Dominion Excise Act (R.S. Canada 1927 c. 60) such business cannot be carried on except under the authority of a licence for the purpose granted by or under the authority of the Minister p. 128, l. 4. p. 120, l. 20.

VACHER—7251.

Record.

of National Revenue. Such licences are annual licences issued to approved applicants, limited to the conduct of the business on specified premises, and must be supported by the bond of a guarantee company as surety for the licensee.

p. 17, l. 22. p. 75, l. 7. p. 17, l. 24. p. 24, l. 4. p. 79, l. 14. p. 69, l. 37. p. 76, l. 10. p. 58, l. 21.

4. At the date of the Agreement both the Appellants and the Respondents held the necessary brewers' licences for the current year. The Respondents were in fact brewing beer in Vancouver and had done so for a number of years previously. The Appellants had never brewed any beer or any other beverage except Sake (a Japanese liquor brewed from rice) and had no facilities for brewing beer. They had been brewing Sake since their incorporation in 1923. The Appellants' licence related to premises different from those in respect of which they held a licence at the date of this action.

p. 16, l. 31. p. 28, l. 44. p. 75, l. 7. p. 17, l. 32. p. 18, l. 3. p. 20, l. 9. p. 20, l. 30. p. 21, l. 6.

5. According to the evidence of Henry Reifel, who was President of the Respondent Company at the date of the Agreement, there were no breweries who brewed in the year 1927 in the City of Vancouver other than the Appellants and the Respondents. One other brewer's licence was held in that year by a company having its brewery in the City, called the Canadian Brewing and Malting Company Limited, but that company did not brew beer in 1927, though it resumed again in 1928. There was a brewery, called the Westminster Brewery, operating at New Westminster about fourteen miles from Vancouver, and breweries, known as the Rainier Brewery, the Victoria Phœnix Brewing Company Limited and the Silver Springs Brewery Company Limited, situate outside, all of whom were selling beer at that time in Vancouver. The two last-named are situate in the City of Victoria, Vancouver Island, some eighty-three miles away from Vancouver by water and in a different Excise area.

p. 22, l. 1. p. 22, l. 6.

6. At all material times the only permitted customer for breweries in the Province of British Columbia was the Government Liquor Control Board (Government Liquor Act R.S.B.C. 1924 c. 146, s. 28, s. 55 as amended by the Government Liquor Act Amendment Act 1930, Stat. B.C. 1930 c. 34 s. 17). Export business was unrestricted and at the date of the Agreement the Respondents were doing some, but not much, business with China.

p. 217, l. 4. p. 220, l. 4. p. 16, l. 40. p. 218. p. 221. p. 17, l. 43.

7. In the year 1927 the officers of the Respondents and the Canadian Brewing and Malting Company (referred to in paragraph 5 above) were the same. Practically all the shares in both companies were held by a holding company known as the British Columbia Breweries (1918) Limited, which never held any brewer's licence.

p. 201. p. 95, l. 40. p. 94, l. 23. p. 202. p. 205.

8. In the same year the Directors of the Appellants were three in number, Koichiro Sanmiya, a Japanese (who was also Secretary), F. A. Jackson (President) and S. N. Wilson. Of the number of shares that had been issued, namely 4,010. Sanmiya and his wife held 50 and 1,935 respectively. Jackson held 854, Wilson 1,141 and another shareholder 30.

9. In these circumstances negotiations for the Agreement were entered into by Reifel on behalf of the Respondents and Sanmiya as acting on behalf of the Appellants. On 5th December, 1927, there was a meeting in the office of Messrs. Pattullo and Tobin, the Respondents' Solicitors, at which were present Reifel, Sanmiya and Colonel Tobin of the firm of Pattullo & Tobin. The Agreement which was originally prepared by Colonel Tobin in draft form in four copies was as follows :— Record. p. 24, l. 8 *et seq.* p. 24, l. 40. p. 36, l. 6. p. 36, l. 24.

" This Agreement made the 5th day of December, A.D. 1927.

" Between : pp. 232 and 233.

" Vancouver Malt & Sake Brewing Company Limited whose " registered office is situate in the City of Vancouver, Province " of British Columbia, hereinafter called the ' Vendor '

" of the first part

" and

" Vancouver Breweries Limited, a body corporate having its " registered office at the said City of Vancouver, its successors " and assigns, hereinafter called the ' Purchaser '

" of the second part.

" Whereas the Vendor is the holder of a brewer's licence under the " Excise Act and is engaged in the manufacture of Sake in the Province " of British Columbia.

" And whereas the Purchaser is desirous of purchasing from the " Vendor the goodwill of the said brewer's licence and any renewal " or renewals thereof so far as the same relates to the manufacture and " sale of beer, ale, porter, or lager beer.

" Now therefore this Agreement witnesseth that in consideration " of the premises and of the sum of $15,000.00 now paid by the Purchaser " to the Vendor (the receipt whereof is hereby acknowledged) the " Vendor has bargained, sold, transferred and assigned unto the " Purchaser, and does hereby bargain, sell, transfer and assign to the " said Purchaser all its right, title, interest, claim and demand in, to " or out of the goodwill of the said brewer's licence or any renewal or " renewals thereof, except insofar as the same relates to the manu- " facture, sale and distribution of Sake.

" And the Vendor for itself, its successors and assigns covenants " and agrees with the Purchaser that during a period of Fifteen (15) " years from the date hereof it will not engage in nor carry on the " business of manufacturing, brewing, selling or disposing of beer, ale, " porter or lager beer, and will not brew, manufacture or sell any " article or articles made in imitation thereof other than Sake, either " by itself or through its servants or agents or otherwise.

" And the Vendor further covenants that if at any time it shall " sell its licence to brew or any renewal or renewals thereof any such " sale shall be made subject to the foregoing conditions.

" And the Vendor further covenants that at no time during the " said period of Fifteen (15) years will it be concerned directly or " indirectly either as principal, agent, manufacturer, servant, financier

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" or otherwise in any brewing business other than that of Sake, and in " event of any breach of the covenants herein contained will pay to " the Purchaser the sum of $15,000.00 to be recoverable upon every " breach of this covenant as agreed in liquidated damages.

" In witness whereof the parties hereto have set their hands and " seals.

" The Corporate Seal of the " party of the first part " was hereto affixed in " the presence of :	Vancouver Malt & Sake Brewing Company Limited per K. SANMIYA, Director.
(L.S.)	per FRANK A. JACKSON, Director.
" Signed sealed and delivered " in the presence of : " H. S. TOBIN.	Vancouver Breweries Limited. per HENRY REIFEL, Director.
(L.S.)	M. MARLING, Director."

p. 24, l. 37. p. 36, l. 32. p. 96, l. 12 *et seq.*

10. The four copies were placed before the meeting and, after some discussion, signed by Reifel and Sanmiya. Sanmiya then left the office to go to Jackson's office. He put two copies of the Agreement before Jackson, who had no previous knowledge of the negotiations. Jackson signed them and the Appellants' seal was affixed to both copies. Sanmiya then returned with them to Colonel Tobin's office and handed them to him, and the seal of the Respondents was affixed to them on the following day. Upon Sanmiya's return from Jackson's office he was paid by Reifel the 15,000 dollars mentioned in the Agreement, the money being subsequently expended in the Appellants' business. No enquiry was made by Reifel or Tobin or anyone else on behalf of the Respondents as to whether the Agreement had been duly executed in accordance with the Appellants' Articles of Association.

p. 41, l. 39. p. 42, l. 1. p. 50, l. 29. p. 98, l. 36.

11. In this connection it is material to refer to the relevant Articles of Association of the Appellant Company governing the proceedings of the Board (in whom was vested the management of the Company's business) and the affixation of the seal. They were as follows :—

p. 151, l. 20.

" 91. The Directors may meet together for the dispatch of business " adjourn and otherwise regulate their business as they think fit and " may determine the quorum necessary for the transaction of business. " Until otherwise determined two Directors shall form a quorum. A " Director interested is to be counted in a quorum notwithstanding " his interest. A Director may at any time and the Secretary upon the " request of a Director shall convene a meeting of the Directors. It " shall not be necessary to give to any Director whilst out of British " Columbia notice of a meeting of Directors but where such Director is " represented by a proxy appointed under Clause 92 hereof due notice " of such meeting shall be given to such proxy either personally or by " sending the same through the mail addressed to him at his last " known place of address in the Province of British Columbia.

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" 92. A Director may appoint any person to act as his proxy at " meetings of Directors, and to sign resolutions under Clause 99 hereof p. 151, l. 39.
" and such appointment must be made in writing under the hand of
" the appointer and may at any time be revoked in like manner and
" may be general or for a specified period or for specified meetings
" or for specified resolutions and notice of every such appointment or
" revocation must be given to the Company and the appointee need
" not be a Director or member of the Company but he must furnish
" the Company with his address in British Columbia. If the appointee
" be another Director of the Company he shall have the right to vote
" on such proxy as well as in his individual quality as Director and in
" determining if a quorum of Directors is present at any such meetings
" every Director represented by proxy shall be deemed to be personally
" present.

* * * * * *

" 96. The Directors may delegate any of their powers to Com- p. 152, l. 25.
" mittees consisting of such member or members of their body as they
" think fit, any Committee so formed shall in the exercise of the powers
" so delegated conform to any regulations that may from time to time
" be imposed on it by the Directors.

* * * * * *

" 106. The Directors shall forthwith procure a common seal to p. 157, l. 12.
" be made for the Company and shall provide for the safe custody
" thereof. The seal shall not be affixed to any instrument except by
" the express authority of a resolution of the Board of Directors, and
" in the presence of at least one Director and of the Secretary or such
" other person as the Directors may appoint for the purpose and that
" one Director and Secretary or other person as aforesaid shall sign
" every instrument to which the seal of the Company is so affixed in
" their presence."

12. No meeting of Directors of the Appellant Company was ever held p. 97, ll. 6-32.
to consider the making of the proposed Agreement, nor was any resolution p. 53, l. 10.
ever passed approving of it or authorising the affixation of the Company's seal thereto. The Agreement was not communicated to the other share- p. 97, l. 24.
holders by Sanmiya and Jackson either before or after being entered into.

13. The third Director, Wilson, who held 1,141 shares in the Appellant p. 49, l. 43.
Company at the time, had been absent from British Columbia and living p. 50, l. 1.
in San Francisco since 1924. Before leaving he had however given a full p. 81, l. 28.
power of Attorney or proxy to his uncle, Norman, a farmer in British p. 83, l. 16.
Columbia, authorising him during Wilson's absence to exercise all powers p. 212.
and privileges which Wilson enjoyed " as to voting and having a Director's
say in the management of the Company." It was stated by Norman in
his evidence at the trial that Sanmiya knew of the existence of the power p. 89, l. 38.
before Wilson left British Columbia. Wilson, he said, had introduced them
to each other before he left, and he (Norman) used to see Sanmiya two or p. 89, l. 27.
three times a month in connection with the Company's business. No p. 90, l. 14.
notice was however given to Wilson or Norman of any Directors' meeting p. 83, l. 43.

Record. p. 97, l. 24. p. 90, l. 18. p. 50, l. 15.

to consider or approve of the Agreement or of any intention to execute it at all.

14. The Appellants submit that in these circumstances the Agreement was never executed in such a way as to be binding on them, since no Board resolution was ever passed authorising the making of the Agreement or the affixation of the Seal thereto, as was required by the Articles, and in a transaction so much out of the ordinary course of business as the Agreement the Respondents were not entitled to rely on any presumption that the necessary resolution had been passed or the seal duly affixed.

15. As to the unreasonableness of the restraint of trade imposed by the Agreement, the Appellants submit that it is clear from a consideration of the Excise Act (R.S. Canada 1927 c. 60) and on general principles that an Excise licence cannot itself be assigned in whole or in part and they respectfully point out that the " Goodwill " of such a licence (which is what the Respondents purported to acquire from the Appellants under the Agreement) is a term without content or meaning. Moreover, the term could in any event have no meaning as applied to the Appellants' licence so far as it related to the manufacture and sale of beer, ale, porter or lager beer, since the Appellants had never manufactured or sold such beverages.

16. The Appellants therefore submit that the covenants contained in the Agreement are void in any event, since they are covenants in gross against competition and, apart from that, are altogether beyond anything that was shown to be required for the protection of the Respondents' business. Moreover it is clear that they were aimed at securing for the Respondents a monopoly in the sale of beer, ale, porter and lager beer. In this connection it is material to refer to the evidence of Reifel when examined for Discovery in the action.

p. 80, l. 42.

" 153. Q. * * * * Then I take it, Mr. Reifel, the purpose " really of entering into this Agreement with the Defendant was to " eliminate any competition by them, was it not ?—A. Well, there " was no competition, but then, anyhow——

" 154. Q. There was not any, I know ; but you wanted to eliminate " the possibility ?—A. The possibility for somebody else coming along, " because there was no competition as far as the Japanese were con- " cerned. He never had any idea—I don't think he knew he had a " brewery licence.

" 155. Q. But the object of the Agreement was to prevent the " possibility of any competition by that company ?—A. Not by that " company, but they may sell out.

" 156. Q. It could not affect anybody else. That must have been " the purpose of it, was it not ?—A. Yes.

* * * * * *

" 158. Q. And you were paying $15,000 for the purpose of pre- " venting that company from competing with you ?—A. Yes."

17. The provisions of ss. 496, 498 of the Criminal Code of Canada (R.S.C. 1927 c. 36) are as follows :— Record.

" Section 496. A conspiracy in restraint of trade is an agreement " between two or more persons to do or procure to be done any unlawful " Act in restraint of trade."

" Section 498. Every one is guilty of an indictable offence and " liable to a penalty not exceeding four thousand dollars and not less " than two hundred dollars or to two years imprisonment, or, if a " corporation, is liable to a penalty not exceeding ten thousand dollars " and not less than one thousand dollars, who conspires, combines, " agrees or arranges with any other person or with any railway, steam- " ships, steamboat or transportation company.

" (A) to unduly limit the facilities for transporting, producing, " manufacturing, supplying, storing or dealing in any article or com- " modity which may be a subject of trade or commerce ; or

" (B) to restrain or injure trade or commerce in relation to any " such article or commodity ; or

" (C) to unduly prevent, limit or lessen the manufacture or produc- " tion of any such article or commodity, or to unreasonably enhance " the price thereof ; or

" (D) to unduly prevent or lessen competition in the production, " manufacture, purchase, barter, sale, transportation or supply of any " such article or commodity or in the price of insurance upon person " or property.

" 2. Nothing in this section shall be construed to apply to com- " binations of workmen or employees for their own reasonable pro- " tection as such workmen or employees."

18. Sanmiya died in the year 1930 or 1931 and in the month of September, 1931, all the issued shares in the Appellant Company were acquired by a purchaser, Hewer. It is not disputed that before acquiring the shares Hewer had seen a copy of the Agreement and knew of its terms. p. 50, l. 11 pp. 237-240. p. 63, l. 11. *et seq.*

19. On 13th February, 1932, the Appellants wrote a letter to the Respondents stating that they were advised that the Agreement was illegal and void and that they would contest its validity at all times. By the same letter they offered by way of compromise to repay the 15,000 dollars which had been paid to the Appellants at the time of the Agreement in consideration of a formal release from it. This offer was rejected by the Respondents, and on 8th March, 1932, the Writ was issued by them in this action against the Appellants. pp. 246-247. p. 2, l. 10.

20. By their Statement of Claim delivered on the same day as the issue of the Writ the Respondents alleged the making of the Agreement and the Appellants' intention to disregard its terms and claimed (1) a Declaration that it was valid and subsisting and enforceable against the Appellants; and (2) an Injunction restraining them from acting in breach of its terms; or (3) alternatively a Declaration that the Respondents were assignees for value of the Appellants' licence or any renewals thereof so far as concerns p. 4.

Record. beer, ale, porter or lager beer, or that the Appellants held such licence or renewals in trust for the Respondents.

21. The Defence (as amended) was delivered on 18th May, 1932. In pp. 5-8. it the Appellants raised a number of defences which may be summarised as follows :—

(A) The Agreement was altered subsequent to execution in a material particular, namely by the substitution of the Respondents' name therein as a party thereto in place of the name of British Columbia Breweries (1918) Limited, without the Appellants' knowledge and consent. The learned trial Judge found as a fact that this was not so, and the Appellants do not now seek to raise this defence.

(B) The Agreement was illegal and void as contrary to the Policy of the Excise Act in that it purported to traffic in the privileges granted by a licence.

(C) The Agreement was illegal and void as contravening the provisions of Sections 496 and 498 of the Criminal Code of Canada in that it was designed to prevent and lessen competition in the manufacture, purchase and sale of articles which are a subject of trade or commerce.

(D) The Agreement was illegal and void as being in unreasonable restraint of trade and tending to a monopoly.

(E) The Agreement was not authorised by resolution of the Appellant Company or its Directors.

(F) The Agreement was ultra vires both the Appellants and the Respondents.

22. The Respondents delivered a Reply on 29th March, 1932. In p. 13. it they alleged that the Appellants had only obtained their licence on the faith of a promise given to the Attorney-General of the Province that they would only use it for the purpose of brewing Sake and no other beverage. They also pleaded that whether or not the Agreement was authorised by resolution of the Appellant Company or its Board, they were not concerned to inquire whether it was so authorised or not.

23. The action was heard by Mr. Justice D. A. McDonald in the Supreme Court of British Columbia on 1st, 2nd, 6th and 7th June, 1932. The learned Judge delivered his Judgment at the conclusion of the argu- p. 119 A. ment on the 7th June, 1932. He repeated the finding that he had made in the course of the hearing that the Agreement was not altered after it had been executed by the Appellants and stated that in his view there were no merits in the defence and that the present holders of the shares in the Appellant Company had no equity in their favour, since they had bought their shares knowing of the existence of the Agreement. The learned Judge did not give a reasoned judgment, but said that in his opinion no question of public policy arose as a defence to the action and that he was not only impressed but overwhelmed by the arguments advanced by the Counsel for the Respondents, and he gave judgment for the Respondents with costs accordingly.

24. By the Order of the Court dated 7th June, 1932, it was declared that the Agreement was a valid and subsisting agreement and enforceable by the Respondents against the Appellants and that the Appellants were liable to perform and observe all the covenants on their part therein contained, and it was ordered that the Appellants be restrained from engaging in and carrying on the business of manufacturing, brewing, selling or disposing of beer, ale, porter or lager beer for and during the remainder of the period of fifteen years from the fifth day of December, 1927, and the Appellants were ordered to pay the Respondents' costs. Record. p. 119 C.

25. On 29th June, 1932, the Appellants gave notice of appeal from the judgment of the learned Judge, and the appeal was heard by the Court of Appeal (MacDonald C.J.A. and Martin, Galliher, McPhillips and M. A. MacDonald JJ.A.) on the 10th, 14th, 15th, 16th and 17th of November, 1932. p. 119 D.

26. The learned Chief Justice of Appeal and Martin Galliher and M. A. MacDonald JJ.A. were in favour of dismissing the appeal and McPhillips J.A. of allowing it. The Appeal was accordingly dismissed with costs by Order of the Court of Appeal dated 27th January, 1933, upon which day the judgments of the Court were delivered. p. 119 A.A.

27. McPhillips and M. A. MacDonald JJ.A. were the only members of the Court who delivered reasoned Judgments. Both Judges accepted the finding of fact of the trial Judge that the Agreement had not been altered after execution and were of opinion that it should not be disturbed. MacDonald J.A. was of the opinion that the case fell within the rule laid down in *The Royal British Bank* v. *Turquand*, 6 E. & B. 325, and that the Appellants could not set up a defence that the Agreement had been invalidly executed. He did not consider that the Agreement could be regarded as an enforceable contract of purchase and sale, since the licence could not be assigned and there was no goodwill to assign, but thought that nevertheless in considering the covenants the legal principles applicable to a sale and purchase should apply. In his view, upon the evidence, no monopoly of any sort was or was likely to be created: the onus of showing that the Agreement was calculated to create a monopoly or unreasonably to enhance prices lay on the Appellants and they had not discharged it. Finally, he was of opinion that the Agreement was not invalid as restricting the corporate powers of the Appellants, and that there had been no breach of any sections of the Criminal Code or the Combines Investigation Act (R.S. Canada 1927 c. 26). MacDonald C.J.A. and Martin and Galliher JJ.A concurred in this judgment. p. 119 G. p. 119 N. p. 119 R., l. 25. p. 119 V., l. 33. p. 119 Y., l. 1. p. 119 Y., l. 18. p. 119 Z., l. 25.

28. McPhillips J.A. was also of the opinion that the Agreement should be taken to have been well executed, on the authority of the case of *The Royal British Bank* v. *Turquand* supra, although he subsequently expressed doubts whether in view of the very special nature of the Agreement "practically parting with the major part of the corporate powers," the principle of that case ought to be applied, since the principle related to acts in which Directors would have power normally to act for the Company. p. 119, G. p. 119 G., l. 17. p. 119 G., l. 37.

Record. p. 119 H., l. 9. However, he considered the Agreement in any event unenforceable. It was an illegal transaction, not really the sale of the goodwill of a business at all, but an unfair and oppressive restraint unduly restrictive of trade aimed at bringing about a monopoly and contrary to public policy. Moreover it was a contract with the object of restricting competition and establishing a monopoly, an agreement unduly to prevent or lessen competition within p. 119 M., l. 37. the meaning of Section 498 of the Criminal Code of Canada, and as such unenforceable between the parties. In his opinion the action ought to be dismissed and the Appeal allowed.

29. The Appellants submit that the Appeal ought to be allowed and the Judgments of the trial Judge and the Court of Appeal ought to be reversed and the action dismissed with costs for the following (among other)

REASONS

1. Because the Agreement was never executed in such manner as to be binding upon the Appellants and the Respondents were not entitled in the circumstances to assume without inquiry that it had been duly executed.
2. Because the Agreement constituted an unreasonable restraint of trade, and was therefore void.
3. Because the Agreement was aimed at creating a monopoly and eliminating competition, and was therefore illegal and void.
4. Because the Agreement constituted an offence under Section 498 of the Criminal Code of Canada as aimed at restraining or injuring trade or commerce in relation to beer, ale, porter and lager beer being articles or commodities the subject of trade or commerce or unduly preventing or lessening competition in the production, manufacture, sale or supply of such articles or commodities or otherwise violating the provisions of that section, and was therefore illegal and void.
5. Because the Agreement constituted an attempt on the part of the Respondents and the Appellants to defeat the provisions of the Excise Act with regard to the issue of Excise Licences, and was therefore illegal and void.

WILFRID GREENE.
CYRIL RADCLIFFE.

In the Privy Council.

No. 41 of 1933.

On Appeal from the Court of Appeal of British Columbia.

BETWEEN

VANCOUVER MALT & SAKE BREWING COMPANY LIMITED (*Defendants*) *Appellants*,

AND

VANCOUVER BREWERIES LIMITED - - (*Plaintiffs*) *Respondents*.

CASE FOR THE APPELLANTS.

BLAKE & REDDEN,
17, Victoria Street,
S.W.1.