9, 1934

No. 41 of 1933.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

BETWEEN

VANCOUVER MALT & SAKE BREWING COMPANY LIMITED (Defendant) - - - *Appellant*

AND

VANCOUVER BREWERIES LIMITED (Plaintiff) - *Respondent.*

RESPONDENTS CASE.

Respondent's Case.

RECORD.

1. This is an appeal from a Judgment of the Court of Appeal of British Columbia dated 27th January, 1933, affirming (McPhillips, J.A., dissenting) the Judgment of the Trial Judge. p. 119, AA. p. 119, C.

2. The Appellant and Respondent are companies incorporated under the Companies Act of British Columbia respectively, on the 11th July 1923 and on the 7th November 1912. p. 164. p. 126.

3. The Appellant and the Respondent were empowered inter alia to carry on the business of brewers. p. 128. p. 120.

4. The Appellant was incorporated primarily to take over and carry on the business of a maltster and did in fact carry on such business from its incorporation until the 16th October 1931. p. 127, l. 28. p. 71, ll. 24-33. p. 60, qq. 177-179.

5. The Appellant was also authorised to carry on in addition to the businesses of maltsters and brewers various other businesses. p. 128, l. 6.

6. No one could carry on business in Canada as a brewer without first obtaining a brewer's licence under the Dominion Excise Act, Ch. 60, R.S.C., 1927. Under this Act a person desiring a licence made an application therefor and it was within the sole discretion of the Minister of National Revenue whether or not the said licence should issue.

p. 57, qq. 118-125. p. 72, l. 40 to end. p. 167, ll. 10-13, ll. 30-38. p. 168, l. 5 to end. p. 169, ll. 8-20.

7. At all material times it was the established practice of the Minister of National Revenue not to issue a licence without the consent of the Attorney-General of British Columbia.

8. The Appellant was desirous of obtaining a licence to brew sake. Under the Excise Act this could only issue in the form of a general brewer's licence. In order to obtain the consent of the Attorney-General of British Columbia thereto the Appellant wrote to the Attorney-General in July 1923 that the Appellant had just been incorporated and had been assured by G. A. Allen, Collector of Customs for the Dominion of Canada at Vancouver, B.C., that if the consent of the Attorney-General were obtained a brewer's licence would be issued by the Dominion to the Appellant and represented that it had been excluded from its memorandum (although this does not appear to be true in fact) power to brew beer, and that it would only brew sake.

p. 185, ll. 24-28.

p. 58, q. 140. p. 72, l. 44 to end.

9. The Attorney-General of the Province of British Columbia apparently communicated direct with the Minister of National Revenue with reference to the Appellant's application.

p. 190.

10. A brewer's licence dated the 14th of February 1924 without any express restrictions endorsed thereon was issued to the Appellant on a collateral understanding or agreement that it was not to engage in the manufacture of anything except sake.

pp. 188 and 189.

p. 24, l. 10.

11. About a year prior to the 5th December 1927, the Appellant did not have sufficient capital to carry on and approached the Respondent asking it to go into partnership with it in the brewing of sake. The Respondent did not agree to this.

p. 27, ll. 3-8.

12. On or about the 5th December 1927 the Appellant told the Respondent that it never had any intention of brewing beer.

p. 232.

13. On the 5th December 1927 the Appellant and the Respondent entered into the agreement (Exhibit 12) the subject of this litigation. The agreement was in writing and under the seals of both companies. It provided for the sale to the Respondent of the Appellant's interest in the licence save as to the manufacture of sake and contained a restrictive covenant by the Appellant not to manufacture or sell beer etc. for fifteen years. The Respondent paid to the Appellant the consideration of $15,000.00 which was used by the Appellant to pay its debts and to purchase some tanks.

p. 26, ll. 28-31. p. 49, qq. 21-24. p. 28, l. 25. p. 50, qq. 43-44.

p. 50, q. 42.

14. The Appellant never at any time brewed beer.

15. On the 15th September 1931 I. B. Hewer entered into an agreement with Morio Sanmiya, Frank A. Jackson and the Appellant, whereby the said Hewer obtained an option to purchase all the shares issued by the Appellant and the said Hewer completed the purchase of the said shares and obtained control of the said Appellant on or about the 16th October 1931. p. 237. pp. 179-181.

16. In May 1931 the said Hewer knew all about the said agreement of the 5th December 1927. p. 52, qq. 59-71.

17. On the 27th October 1931 the Respondent by its solicitors notified Hewer of the Agreement of the 5th December 1927 and said that any attempt to use the brewer's licence for any purpose other than the manufacture of sake would be resisted by the Respondent who would take legal steps to enforce its rights. p. 243.

18. On the 13th of February 1932, the Appellant notified the Respondent that it was advised that the agreement of the 5th December 1927 was illegal and that it was the Appellant's intention to exercise all the privileges granted to it by its licence regardless of the Agreement of the 5th December 1927, and to immediately proceed with the erection of a plant for that purpose. p. 246.

19. The Respondent commenced this action on the 8th of March 1932, claiming a declaration that the Agreement of the 5th December 1927 was valid and binding and that the Appellant was liable to perform and observe the covenants on its part therein contained and for an injunction to restrain the Appellant from carrying on the business of brewing beer, ale, etc., and from brewing anything other than sake, and for a declaration that the Respondent was the assignee for value of the brewer's licence referred to in said agreement in so far as the same authorised the manufacture and sale of beer, ale, etc., or alternatively that the Appellant held the said licence and all renewals in trust for the Respondent so far as the same authorised the sale and manufacture of beer, ale or lager beer. p. 4.

20. The Appellant set up the following defences—

(A) The agreement of the 5th December 1927 was not binding on the Appellant because there had been no meeting of the Directors of the Appellant to authorise the entering into or affixing of the seal of the Appellant to the agreement in question and alternatively that the said agreement had been altered in a material manner after the execution thereof by the Appellant without its knowledge or consent. p. 5.

(B) That the said contract was illegal because it was in restraint of trade, and

(C) That the said contract was ultra vires of the Appellant.

21. The learned Trial Judge held as a fact that the Agreement
p. 119, A. had not been altered and that the authorisation as to the affixing of the seal was one of indoor management and the Respondent was entitled to rely upon all necessary things having been done by the Appellant, that the Agreement was not in restraint of trade, that it was intra vires of the two companies, and that the Appellant had no equity in its favour.

p. 119, AA. 22. The Appellant appealed to the Court of Appeal and its appeal was dismissed on the 27th January 1933, Mr. Justice McPhillips dissenting.
pp. 119, G, 119, N. Only three of their Lordships delivered Reasons for Judgment. All five Judges of the Court of Appeal held that there had been no alteration of the Agreement of the 5th of December 1927. The Majority of the Court held that the affixing of the Seal to the Agreement in question was a matter of indoor management.

pp. 173, 175 and 176. 23. Although the articles of the Appellant provided that the number of Directors should not be less than two or more than nine, from
p. 151, l. 26. year to year only three Directors were elected. The Quorum was two.

p. 49, q. 17. 24. At the time of making the said Agreement, namely the 5th of
p. 92, l. 44. December 1927 the Directors were Sanmiya Jackson and Wilson. Wilson
p. 81, l. 28. had been elected a Director in 1924 but in November 1924 left British
p. 50, ll. 24-25. Columbia for California and never came back.

p. 151. 25. Article 92 of the Articles of Association of the Appellant is as follows :—

> " A director may appoint any person to act as his proxy at meetings of Directors, and to sign resolutions under Clause 99 hereof 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 meeting every Director represented by a proxy shall be deemed to be personally present."

p. 151. Article 91 of the Appellant provides in part as follows :—

> " 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."

26. Prior to the said Wilson leaving British Columbia he gave to one Norman a power of attorney (Exhibit 29) as follows :— p. 212.

"I herewith make and appoint you my lawful attorney during my absence to the United States insofar as the business of the Vancouver Malt & Sake Brewing Co. Ltd. is concerned. Such Power of Attorney to constitute all the powers and privileges I now enjoy as to voting and having a director's say in the management of the Company. You will have unqualified power to do and act as you see fit with my holding in the above Company."

27. The Appellant alleges that Exhibit No. 29 constituted Norman the proxy of Wilson pursuant to Article 92 and he was thereby entitled to notice of any meeting of directors pursuant to Article 91 and that as no notice was given to Norman no valid meeting of directors could be held and therefore there was no proper authorization for the execution of the agreement of 5th September 1927.

28. The Respondent says that Exhibit 29 was of no effect because—

(A) No notice of it was ever given to the Appellant ;

(B) The said Norman never furnished his address in British Columbia to the Appellant as required by said Article 92.

(C) It does not purport to be a proxy.

29. The only evidence as to what was done in regard to Exhibit 29 is that of Norman who was asked and said in reply—

Q. Did you show that document to anybody in connection with the Company ? p. 89, l. 39.

A. I am not sure about that. Sanmiya knew I had it all the time. I would not swear that I showed it to him but I told him I had it and I believe he took my word for it.

30. Although meetings of Directors were held from 1924 on, Jackson never knew that the alleged Power of Attorney had been given. It is therefore submitted that Wilson being out of the Province at all material times and not having left a proxy, and Article 92 not having been complied with as hereinbefore mentioned, the remaining Directors Sanmiya and Jackson were the only ones entitled to a notice of meeting of Directors. p. 52, qq. 76-78. p. 53, qq. 79-81.

p. 149. p. 154. 31. Article 77 of the Appellant provided that the business of the Company should be managed by the Directors and Article 104 provided that the management of the business of the Company should be vested in the Directors, who, in addition to the powers and authorities conferred by the said article or otherwise expressly conferred, might exercise all such powers and do all such acts and things as might be exercised or done by the Company and which were not thereby or by statute expressly directed or required to be exercised or done by the Company in general p. 155. meeting. By Article 105 (L) the Directors had power to determine who should be entitled to sign contracts on behalf of the Company and by p. 157. Article 105 (R) the Directors might without prejudice to the general powers conferred by said Article 104, enter into such contracts on behalf of the Company as they might consider expedient for the purposes of the Company. p. 152. By Article 96 the Directors might delegate any of their powers to committees consisting of such members of their body as they might think fit. Further, p. 153. Article 99 of the Appellant provided that a resolution in writing signed by all the Directors then resident in British Columbia should be as valid and effectual as if it had been passed at a meeting of the Directors duly called and constituted.

p. 53, qq. 83-90. 32. The seal of the Appellant to the Agreement of the 5th of December 1927 was affixed in the presence of Sanmiya and Jackson as Directors. Jackson was the President of the Company and Sanmiya was p. 165, ll. 27-30. the Secretary and Treasurer, and therefore the seal was affixed in the presence of those whom the Directors might authorize to affix the same p. 157. pursuant to Article 106 of the Appellant.

33. Under these circumstances the Respondent submits that the proper authorization for the affixing of the seal was indoor management and the Respondent was not concerned with the regularity thereof. See *The Royal British Bank* v. *Turquand* (1856) 6 El. & Bl. 327, at pp. 330–331, *Mahoney* v. *Liquidator of East Holyford Mining Co.* (1875) L.R. 7 H.L. 869, at pp. 889, 890, 893 and 894 ; *Pacific Coast Coal Mines* v. *Arbuthnot* (1917) A.C. 607, at p. 616.

34. Further the Respondent submits that the Agreement of the 5th of December 1927, was one which if made between private persons would be by law required to be in writing signed by the party to be charged therewith and therefore was one which could be made on behalf of the Appellant in writing signed by any person acting under its authority, express or implied (Revised Statutes of British Columbia (1924) Chapter 38, Section p. 53, q. 92. 127). Sanmiya was the real manager of the concern. No minutes of meeting of Directors were kept between 1924 and 1931, the reason being that the affairs of the Appellant were not progressing very favourably and that Jackson p. 53, q. 82. was not getting any money and was not taking a very great interest in it.

Sanmiya therefore was really conducting the affairs of the Appellant and he and Jackson signed the Agreement of the 5th December 1927. It was not necessary that the Appellant's seal should be affixed thereto.

35. The Power of the Appellant Company to make the agreement is given in its Memorandum of Association. Particular reference is made to the following sections : Sections (D), (J), (S) and (Z). Ex. 3, p. 127.

36. The powers of the Respondent Company to make the agreement are found in its Memorandum of Association (Exhibit 2), Clause 3 (C), (T) and (FF). p. 120.

10 37. The Appellant further alleged that the Agreement had been materially altered by Respondent subsequent to execution by the erasing of the name " British Columbia Breweries (1918) Ltd." and the substitution of the Respondent's name therefor without Appellant's consent. This charge was positively denied by the witnesses Henry Reifel a director of the Respondent Company and Lt.-Col. H. S. Tobin the Respondent's solicitor who prepared the document and witnessed the execution by that Company. This question of fact was unanimously determined in favour of the Respondent. Particular reference is made to the findings of the Trial Judge at pages 101 and 119a, and the judgment of Mr. Justice Macdonald
20 of the Court of Appeal at page 119o. p. 5, l. 30.

38. The Appellant also alleged that the agreement was illegal and unenforceable, as being in restraint of trade, and contrary to public policy. p. 7, l. 1.

39. This general allegation was based on three grounds :—

(A) The agreement contravened the Common Law Rule as to agreements in restraint of trade ;

(B) It was in violation of Sections 496 and 498 of the Criminal Code, Revised Statutes of Canada, 1927, Chapter 36.

(C) The agreement constituted a combine within the meaning
30 of the Combines Investigation Act, Revised Statutes of Canada, Chapter 26.

40. In dealing with these allegations it will be necessary to consider each of the two material paragraphs of the agreement, Exhibit 12. p. 232.

First, the clause by which the Appellant (Vendor) " bargained, sold, transferred and assigned unto the purchaser all its right, title and interest, claim and demand in, to or out of the good will of the said brewer's licence, or any renewal or renewals thereof, except in so far as the same relates to the manufacture, sale and distribution of Sake."

p. 24, l. 20. 41. The words " good will " are not apt words ; but the meaning is obvious. The words " benefit, advantage or use " would have been more apt. The agreement should be interpreted in accordance with the intention of the parties. The words " good will " are really superfluous.

42. The agreement therefore clearly assigned the vendor's right, title and interest in and to the brewer's licence, save as to the manufacture of Sake.

43. There is nothing in the Excise Act, Chapter 60, Revised Statutes of Canada, 1927, against an assignment of a brewer's licence. The licence is for specified premises and is not personal in the sense that the licensee requires any special qualifications. See Sections 10 to 20. Neither the Act nor the licence imposes any obligation on the licensee to exercise the rights conferred by the licence. The federal licensing authorities have given sanction to the assignment to the extent of pp. 249-250. forbidding, by endorsement on the licence (Exhibit 19), the Appellant on pain of cancellation to brew beer till this litigation has been concluded.

It is submitted that it is not contrary to public policy or to the spirit of the Act for the licensee to give to another company the right to brew beer under the licence. It is true that the company so authorised might have to operate in the licensed premises, and in the name of the licensee. It is also true that in addition to the right secured under the licence, arrangements would have to be made for the use of the premises. Unless such arrangement was made the company's right would be an incomplete one. So far as it goes, however, the assignee has a property right.

44. It is submitted therefore that the Respondent's right to an injunction exists independently of any restrictive covenants, express or implied. The right is to restrain the Appellant from using the Respondent's property. This right involves no question of restraint of trade. The Appellant is not violating a covenant not to compete under a new licence, but is improperly using that which it has sold.

45. In the case of *British Concrete Co.* vs. *Schelff*, 1922, 91 L.J. Ch. 114 ; 1921, 2 Ch. 563, the defendant had sold a business and a patent to the plaintiff and had given a negative covenant. Younger, L.J., at page 127, Law Journal Reports, page 580 Law Reports, said :—

> " It is true that the transfer of the patent ipso facto precluded the covenantors from carrying on without the licence of the plaintiffs the only business in which they had ever engaged."

46. Even though a court of equity cannot give specific performance to perfect the Respondent's title, it will restrain the Appellant from acting in derogation of its own grant; or of denying that the agreement gives rise to a trust in favour of the Respondent.

Lord Strathcona Steam Ship Co. vs. *Dominion Coal Company*, 1926, A.C., at 123; (1926) 95 L.J. P.C., at 77.

Tailby vs. *Official Receiver* (1888) 13 A.C. 523; (1889) 58 L.J. Q.B. 75.

Herbert Morris Ltd. vs. *Saxelby* (1916) 85 L.J. Ch., at 220; 1916 A.C., at 713.

47. *Second*: Considering the restrictive covenant. p. 232.

A.—In relation to the Common Law Rule:—

The reasons that covenants in restraint of trade were held to be unenforceable were enunciated by Lord Macclesfield in *Mitchell* vs. *Reynolds* (1712) 1 P. Wms. 181.

"The true reasons of the distinctions upon which the judgments in these cases of voluntary restraints are founded are—

First: The mischief which may arise from them to the party by the loss of his livelihood and the subsistence of his family;

Second: To the public by depriving it of a useful member;

And the third reason: From corporations who are perpetually labouring for exclusive advantages in trade and to reduce it into as few hands as possible, as likewise from masters who are apt to give their apprentices much vexation on this account and to use many indirect practices to procure such bonds from them lest they should prejudice them in their custom when they come to set up for themselves."

See also Lord Atkinson:

Morris vs. *Saxelby* (1916) 85 L.J. Ch., at 215; 1916 A.C., at 698.

48. *Mitchell* vs. *Reynolds* was a case of master and servant; as to such cases it has been said:—

"When the controversy is as to the validity of an agreement, say for service, by which someone who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain."

Lord Haldane in *North Western Salt Co.* vs. *Electrolytic Alkali Co.* (1914) 83 L.J., K.B., at 535; 1914 A.C. at 471.

49. In the case at bar the covenant was not made by an individual, but by a corporation, so that the first two rules enunciated by Lord Macclesfield have no application.

50. The Appellant however asserts that as it was not operating a business of manufacturing or selling beer the covenant is one in gross and contrary to public policy.

It is submitted this contention is not sound because—

(A) A covenant in gross is bad only when it contravenes the rules in *Mitchell* vs. *Reynolds* cited above. As said by Lord Atkinson in *Saxelby's Case*, 85 L. J. Ch. at p. 217 ; (1916) 1 A. C., at p. 701 :—

> " The principle is this : Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the state of his labour, skill or talent by any contract that he enters into."

It is submitted that this principle does not apply to a corporation. Particularly it does not apply to the Appellant Corporation.

pp. 26, 27 and p. 99, l. 15. The Appellant had neither skill nor talent.

p. 57 and pp. 186 and 189. It was not equipped for the manufacture of beer and had no funds. It had no intention of brewing beer and had obtained its licence on the express stipulation given to the authorities that

p. 72. it would not brew beer.

(B) The rule does not apply when a portion only of the covenantor's business is affected.

Palm Olive Co. vs. *Freedman* (1928) 97 L.J. Ch., at 43 ; 1928, 1 Ch. at 272.

Particularly is this so if it forgoes only that which it has never undertaken, and did not have in contemplation. Here the Appellant was

p. 28, l. 25. not only left free to pursue its business as then operated, but by the contract was put in funds to make its continuance possible.

51. It is submitted that the case comes within the category of commercial agreements as considered by Lord Haldane in *North Western Salt Co.* vs. *Electrolytic Alkali Co.* (1914) 83 L.J. K.B. at 535 ; 1914, A.C., at 471. " When the question is one of commercial agreement for regulating their trade relations entered into between two firms or companies the law adopts a somewhat different attitude "—(than in cases between master and servant)—" it still looks carefully to the interests of the public but it regards the parties as the best judges of what is reasonable as between themselves."

52. It is submitted that considered in the category of commercial agreements between two corporations the restrictive covenant has none of the characteristics which make such agreements void or unenforceable.

53. (A) The agreement is not unreasonable as between the parties.

The parties are to be the best judges of what is reasonable between themselves.

North Western Salt Case cited above in paragraph 51. Considered from the standpoint of the Appellant the contract was highly beneficial.

They had obtained the licence on the express undertaking not to brew beer. Not only were they under a moral obligation to carry out this undertaking, but its violation might result in the cancellation or non-renewal of the licence.

The company had no equipment or facilities for the manufacture of beer and had no money. The company was left free to pursue the only business it ever contemplated—making Sake. pp. 26, 27 and p. 99, l. 15.

The $15,000.00 received was intended to be used for fixing up its plant and paying debts and was in fact so used. p. 28, l. 25. p. 50, l. 29, and p. 98, l. 36.

From the standpoint of the Respondent the covenant was desirable because there were already 10 breweries in the Province, as well as outside competition, so that the breweries were only operating from 30 to 60 per cent. capacity. There was only one purchaser in the Province—the Government of the Province through its Liquor Control Board. Revised Statutes B.C. 1924, Ch. 146. The declared purpose of securing the covenant was to prevent further competition in the already overcrowded field. pp. 17 to 22, and p. 28. p. 21, l. 47. p. 22, l. 1. p. 28, l. 28.

54. (B) The agreement is not unreasonable in the interests of the public.

The public suffers nothing from the failure of a corporation to do that which the Attorney-General and the licensing authorities, acting in the public interests, have stipulated by a secured undertaking shall not be done.

There is no public disadvantage in having an incorporated company like the Appellant restricted in its operations. The same shareholders could turn out a new corporation with identical powers in two days' time. The obvious reason why this was not done is that a brewer's licence could not be obtained. If public policy required more brewers, there is no limit to the licences which could be issued.

55. It is submitted as apparent that the reason for the conduct of the Appellant is that the real Appellants (the new shareholders) have taken this method, by acquiring the shares of the Sake Company, to " edge in " and secure a licence which otherwise would be denied to them. It is conceivable that the Federal Department might countenance a waiver of the restrictions against the present licence (provided this litigation is out of the way) when they could not be persuaded to issue a new licence.

56. The general law favouring freedom of trade as a rule of public policy has no application to the manufacture and sale of beer. The general trend of public policy in Canada, as indicated by legislation, is to regard intoxicating liquor as a commodity which should be restricted in its use and not allowed to be freely produced or sold.

See also Lawrence, L.J., in *Palm Olive Co.* vs. *Freedman* (1928) 97 L.J. Ch. at 48 ; 1928 1 Ch. at 281.

57. The burden of proving that the agreement is unreasonable in the interests of the public, or that it tends to unduly enhance prices or create a pernicious monopoly is on the one attacking the agreement.

North Western Salt Case, supra, at pages 534 and 540, Law Journal Reports, and at pages 470, 480 Law Reports.

58. The agreement on its face raises no presumption of illegal monopoly. See Lord Haldane's speech in the *North Western Salt Case*, supra, at page 536, Law Journal Reports, and page 473 Law Reports quoting Lord Justice Lindley in *Nordenfelt* vs. *The Maxim-Nordenfelt Guns and Ammunition Co.*

The Appellants offered no evidence. The evidence for the Respondent as already mentioned showed that there was no monopoly.

The provisions of the Liquor Control Act has confined the purchase of liquor to the Liquor Control Board, which is under the Department of the Attorney-General. Revised Statutes B.C. 1924, Ch. 146. By arrangement with the Federal authorities brewers' licences are only issued when sanctioned by that official. If the Attorney-General found any tendency to unduly restrict competition or enhance prices in the Province, his consent to more licences would cure the evil at once.

59. B.—Does the agreement violate the provisions of Sections 496 and 498 of the Criminal Code ?

(1) The agreement cannot be illegal by reason of these Sections of the Code unless the parties to it could have been convicted if an indictment had been brought against them under this Act. The burden of proof lay upon the Appellant and was not discharged :

Attorney-General of Australia vs. *Adelaide Steamship Co.* (1914) 83 L.J. P.C. at 91 ; 1913 A.C. at 796.

(2) The offence constituted by the Statute is not an agreement merely to prevent or lessen competition but an agreement *to unduly prevent or lessen competition*, and there was no evidence to support the charge that the agreement was such an offence.

(3) There was no offence against the section unless there was an intent on the part of both parties to it whilst still remaining in business to agree to unduly prevent or lessen competition ;

(4) The Criminal Code can have application only to articles of commerce *in which there can be free traffic* and not to articles the manufacture of which is regulated by the Dominion Government and confined to persons or corporations to whom it chooses to grant the rights of manufacture in the form of a licence.

60. C. Is the agreement a violation of the Combines Investigation Act, Revised Statutes of Canada, ch. 26 ?

Section 32 makes it an indictable offence to form or operate a Combine *to the detriment of the public* which results from an agreement which has or is designed to have the effect of preventing or lessening competition or controlling production or manufacture. The burden of proof that there had been or was likely to be any detriment to the public was upon the Appellant who adduced no evidence to discharge that burden.

61. The Appellant further contended that the restrictive clause was too wide because it was unlimited as to territory.

62. The Respondent submits that covenants restricting trading in foreign countries are not contrary to public policy.

Nordenfelt Case (1894) 63 Law Journal at 915 ; 1894 A.C. at 550.

The Respondent submits that the Judgment of the Trial Judge and the Court of Appeal should be affirmed and the appeal dismissed for the following amongst other

REASONS.

(1) BECAUSE the Agreement, Exhibit 12, was duly executed by the Appellant, or, alternatively was duly executed as between the Appellant and Respondent, and was not ultra vires of either party.

(2) BECAUSE the Agreement, Exhibit 12, was not altered materially subsequently to its execution.

(3) BECAUSE the Excise Act, C. 60, Revised Statutes of Canada, 1927, contains nothing prohibitive of holders of Brewers' licences granted thereunder contracting in respect thereof or assigning the same or any privileges granted thereby and the Agreement was an effective assignment to the Respondent of all Appellant's rights which purported to be assigned thereby, or, alternatively because the Agreement sued on was binding in equity on the Appellant and constituted the Appellant a trustee for the Respondent of all such rights.

(4) BECAUSE the Agreement was not a conspiracy in restraint of trade or an agreement to unduly prevent or lessen competition within the meaning of Sections 496, 498 of the Criminal Code, Chapter 36 of the Revised Statutes of Canada, 1927.

(5) BECAUSE the Agreement was not the formation or operation of a Combine within the meaning of Sections 2 and 32 of the Combines Investigation Act, Chapter 26 of the Revised Statutes of Canada, 1927.

(6) BECAUSE the Agreement and the covenants contained in it were not unenforceable as being in restraint of trade and unreasonable in the interests of the parties or the public, and in any case the rule as to restraint of trade so far as concerns the interests of the parties has no application to a restraining covenant entered into by an incorporated Company.

(7) BECAUSE the reasons given by the learned Trial Judge and by the learned Judges of the majority in the Court of Appeal were right.

J. W. DE B. FARRIS.

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