BERNARD CONNORS (PLAINTIFF) .....APPELLANT;

AND

CONNORS BROS., LTD., AND LEWIS CONNORS & SONS, LTD. (DEFENDANTS) ..... RESPONDENTS.

1938

* May 16, 17

* Dec. 19.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Contracts—Covenant in restraint of trade—Whether binding—Principles applicable — Nature of covenant — Reasonableness — Circumstances — Onus.

Both respondents, Connors Bros. Ltd. and Lewis Connors & Sons Ltd., packed and sold sardines and other fish in the Bay of Fundy area in New Brunswick. By an agreement of June 9, 1925, Connors Bros. Ltd. agreed to purchase on demand within a certain time appellant's shares in Lewis Connors & Sons Ltd. Appellant was engaged as manager of the latter company. By an agreement of October 2, 1926, appellant sold his shares in Lewis Connors & Sons Ltd. to Connors Bros. Ltd., and his employment as manager was terminated. In this agreement, and in the earlier agreement in practically the same

(1) (1914) 49 Can. S.C.R. 595.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

terms, appellant covenanted that he would not "directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada." In April, 1937, appellant claimed that said covenant was not binding, being such as should not be enforced in restraint of trade, and took proceedings, by way of originating summons, to have the question determined.

Held (reversing judgment of the Supreme Court of New Brunswick, Appeal Division, 13 M.P.R. 68, and judgment of Baxter C.J., 12 M.P.R. 102) (Crocket and Kerwin JJ. dissenting): The said quoted covenant should be declared to be unenforceable.

Per The Chief Justice, Davis and Hudson JJ.: A covenant in restraint of trade is *prima facie* invalid; the onus is on the person who seeks to enforce it to show that it is valid—one which was reasonably necessary for his protection at the time when it was entered into (and is not otherwise contrary of public policy). The nature of the business, the position of the covenantor, and the scope of the covenant must be considered. In the present case the appellant, brought up from boyhood in the sardine business, was only 37 years of age at the date of the covenant, which was restrictive for his lifetime. Upon all the facts and circumstances in evidence (and assuming that the words "directly or indirectly engage in the sardine business" are capable of precise definition and are not so vague as to be void for uncertainty), the respondents had not shown that the terms of the covenant could pass the test of reasonableness as between the parties.

Vancouver Malt v. *Vancouver Breweries,* [1934] A.C. 181, at 189-190, and *Gilford Motor Co.* v. *Horne,* [1933] 1 Ch. 935, at 958, referred to.

Per The Chief Justice: In exacting the stipulation, the controlling shareholders of Connors Bros. Ltd. were not chiefly applying their minds to the protection of the business of Lewis Connors & Sons Ltd. or of themselves as purchasers of shares in that company; their aim was to eliminate competition and get control of the business of Canadian sardines in themselves through Connors Bros. Ltd. and it was the business thus controlled with respect to which they were protecting themselves; therefore the agreement itself provides no evidence of serious weight as to its reasonableness in respect to the protection of the business of Lewis Connors & Sons Ltd. It was incumbent upon respondents to show clearly—and this they failed to do—facts from which it could be determined (as a question of law) that the comprehensive restriction was reasonably necessary to protect the interest acquired. (As ancillary to a contract of employment, the stipulation, on its face, was clearly unreasonable).

Vancouver Malt v. *Vancouver Breweries,* [1934] A.C. 181, at 190-191; *British Reinforced Concrete Co. Ltd.* v. *Schelff,* [1921] 2 Ch. 563, at 574-576, and other cases, referred to.

The Chief Justice also discussed (but expressed no final opinion upon) the question as to detriment to the public interest. Having regard to ss. 2 (1) (*b*), 2 (1) (*c*) (v) (vi) and 32 of the *Combines Investigation Act* (R.S.C., 1927, c. 26) (s. 498 (*c*), *Cr. Code,* also referred to), it may not be that enhancement of prices is the only relevant form of public detriment in this country.

Per Crocket and Kerwin JJ. (dissenting): Appellant's covenant was not one in gross but was one to be gauged by the principles applicable to a covenant exacted by the purchaser of the good-will of a business. (These principles discussed, and cases cited. *Nordenfelt's* case, [1894]

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A.C. 535, is applicable to the present case). In the circumstances of the case, the restraint gave to Connors Bros. Ltd., with respect to the business and good-will purchased by it, nothing more than reasonable protection against something which it was entitled to be protected against. In no respect (upon the evidence) could the operation of the covenant be said to be injurious to the public. Appellant is barred from engaging in the sardine business in Canada as owner, in partnership with others or as a shareholder of an incorporated company engaged in such business in Canada. (It was held inadvisable to answer in the present proceedings a question raised by the originating summons, but not answered in the courts below, as to whether appellant was barred from working at that business in Canada as an employee).

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1) dismissing his appeal from the judgment of Baxter C.J. (2) deciding against him certain questions raised for determination upon an originating summons, issued on appellant's application, for an interpretation and construction of, and a declaration as to the rights of the parties herein under, a covenant contained, in practically the same terms, in each of two agreements in writing; which covenant the appellant claimed was not binding upon him, being such as should not be enforced in restraint of trade. The covenant in question (as contained in each agreement) is set out, and the material facts and circumstances sufficiently appear, in the judgments now reported. Special leave to appeal to this Court was granted by the Appeal Division of the Supreme Court of New Brunswick. The appeal to this Court was allowed, the judgments below set aside, and judgment directed to be entered declaring that the covenant in question, in so far as it prohibits the appellant from engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada, is unenforceable; appellant to have his costs throughout. Crocket and Kerwin JJ. dissented.

J. H. Drummie for the appellant.

C. F. Inches K.C. and *A. N. Carter* for the respondents.

THE CHIEF JUSTICE.—I concur in the reasons as well as in the conclusion of Mr. Justice Davis.

It is well settled that, at common law, all contracts, covenants and stipulations in restraint of trade of themselves are contrary to public policy and therefore void. If

(1) 13 M.P.R. 68. (2) 12 M.P.R. 102.

that is a complete description of the transaction it is contrary to public policy and the courts will not enforce it. This appears, not to be upon the ground that the common law regarded such arrangements as necessarily harmful to the public interest, but because the policy of the common law has always been that the courts should not enforce them unless they can be justified by reason of special circumstances (*Morris* v. *Saxelby*) (1). The onus of proving the facts upon which such justification rests is upon the party who alleges justification. Once the facts are ascertained, the question of reasonableness is a question of law for the court.

It would seem to be involved in the general principle thus stated (*McEllistrim* v. *Ballymacelligot* (2), *Vancouver Malt and Sake Brewing Co. Ltd.* v. *Vancouver Breweries, Ltd.* (3)) that a "bare covenant not to compete," to quote from Lord Macmillan's judgment in the last mentioned case at p. 190, will not be enforced. "Covenants restrictive of competition," still quoting from the same passage,

> which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract or arrangement effective.

As regards the stipulation in the agreement of June, 1925, the respondents, as their principal ground of justification, take their stand upon the proposition that this stipulation is ancillary to a contract for the sale and purchase of shares in Lewis Connors & Sons, Ltd. (hereafter referred to under the designation "Lewis Connors") between the appellant and the respondents Connors Bros. In their factum the respondents state their position thus:

> The principle clearly established by this case [the *Nordenfelt* case (4)] is that where a stockholder upon transfer of his stock, binds himself not to compete with the corporation, the agreement is generally enforced on the ground that ownership of stock carries with it an interest in the good-will of the business, and that the covenant is reasonably necessary to protect the good-will.
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> The suggestion was made by the appellant in the Court below that the covenants under discussion in this case were merely restraints on competition (i.e., covenants in gross, so-called) and as such void as in *Vancouver Malt Co.* v. *Vancouver Breweries* (5) (where nothing was sold, and the covenant was consequently held invalid). The suggestion is simply contrary to the fact. The covenants in the case at bar formed part of contracts for the sale of shares in a business, as the covenant in

(1) [1916] 1 A.C. 688, at 706-707.
(2) [1919] A.C. 548, 562.
(3) [1934] A.C. 181, at 190-1.
(4) [1894] A.C. 535.
(5) [1934] A.C. 181.

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the *Nordenfelt* case (1), with which this case is on all fours. In that case Nordenfelt was selling shares in a company—not a controlling interest—as a part of the contract by which he covenanted not to compete. The good-will was treated as an interest in the shares and the covenant was held not to be "in gross" but as falling within the special category of restrictive covenants contained in contracts for the sale of a business.

In determining whether the restrictive covenants challenged in this case were reasonable as between the parties the very lenient rules governing contracts for the sale of a business must be applied as they have been applied by the learned Chief Justice.

I shall first deal with this contention.

Have facts been proved by the respondents which establish the proposition that this sweeping stipulation was "reasonably necessary to render" this contract for the transfer of shares "effective," or, to put it in other words, in order to enable the respondents to enjoy what they acquired under it? The restriction, as regards Canada, is unlimited both as to time and area. It is for the plaintiffs to show that the restriction in order to be "reasonably effectual" must be Dominion-wide (*Vancouver Malt* v. *Vancouver Breweries* (2).

The fact that the purpose of the McLeans, the controlling shareholders of Connors Bros., as was well understood by all parties, was to eliminate competition, not only by Lewis Connors but of the appellant and of his father personally, and to do this with the object of establishing a practical monopoly in the business of packing and selling Canadian sardines, is, to my mind, decisive on one point. In exacting the stipulation in question, they were not exclusively or chiefly applying their minds to the protection of the business of Lewis Connors or of themselves as purchasers of shares in Lewis Connors. Their aim was to get a monopoly in the business of Canadian sardines controlled by themselves through Connors Bros. and it was the business thus controlled with respect to which they were protecting themselves.

It follows, of course, that the agreement itself provides no evidence of serious weight as to the reasonableness of the arrangement in respect of the protection of the business of Lewis Connors. It cannot be said that there is any presumption that Connors Bros. were merely protecting what they were acquiring. They were getting for themselves, for their own business, protection against competition; and it is perfectly plain from the evidence that it

(1) [1894] A.C. 535. (2) [1934] A.C. 181, at 191.

was for this they were paying for the shares a price considerably above the market value, more than the shares themselves would have been worth.

In these circumstances, and such being the purposes and objects of the parties to the agreement, it was incumbent upon the respondents to show clearly that it was necessary for the protection of the interest they acquired in the Lewis Connors business to exact this comprehensive stipulation.

In June, 1925, when the agreement was made, it appears from the evidence that the only competition encountered by Canadian sardine packers in Canada was that arising from the import of Norwegian sardines. The French sardines, it may be assumed, being of a higher grade and fetching much higher prices, did not come into the same field. There were, according to the evidence, something like 30,000 cases of Norwegian sardines sold in the course of a year in the Dominion. The Lewis Connors Canadian business amounted to 26,000 odd cases in the year 1925. The only evidence as to the scope in point of territory of the Canadian business is that given in cross-examination by the appellant and the strongest statement that can be found in his evidence is in this question and answer:

Q. Is it fair to say that Lewis Connors & Sons, Ltd., were selling in all the provinces of Canada?

A. I think perhaps they were selling some in pretty near every province in Canada.

There are some other statements with regard to other countries extremely vague and of doubtful import which have really no bearing on the point immediately before us.

Now, let it be observed, first of all, that there is a very considerable territory in the Dominion of Canada which is not included in any province. There are the Yukon Territory and the North West Territories. There is not a word of evidence to indicate that the business of Lewis Connors extended into, for example, the Yukon Territory; and yet the covenant, as I read it, and according to the construction contended for by the respondents, would seem to exclude the appellant from acting as agent in Dawson for any concern other than Connors Bros. or Lewis Connors selling French or Norwegian sardines there.

But this is not the strongest point. This statement of the appellant cannot fairly be read as a positive affirmation that Lewis Connors were in 1925 or 1926 engaged in

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selling sardines in all the provinces of Canada. It is a hesitating statement "I think perhaps," and the scope of the area is defined as "pretty near." Clearly, it excludes one or more of the provinces, and there is nothing to indicate the province excluded. It may be British Columbia. It may be Quebec.

The Canadian business for 1936 was less than the Canadian business for 1925. Lewis Connors were entirely under the control of Connors Bros., all of the directors of the former being directors of the latter. The packing establishment of Lewis Connors was discontinued at the end of 1925, and thereafter all the packing for them was done by Connors Bros. It is clear enough that any considerable expansion of the business of Lewis Connors was not aimed at or expected. It follows that the appellant is by this stipulation excluded from business and employment which, so far as the evidence shows, there is no reason to suppose would be likely to injure the business of Lewis Connors.

But there is another consideration. This evidence of Bernard Connors speaks of "selling some" that "he thinks, perhaps" were sold in "pretty near every province in Canada." Now, six of the provinces extend over very wide territory. There is nothing to show that this indefinite "some" sold in, for example, some locality in the province of Ontario, would be affected by the employment of the appellant in some other far remote locality in another part of the province, and yet, strictly, the evidence leaves us at that point. It is consistent with the assumptions that there were no sales in one or more provinces and that in any given province business was limited to a single locality. The onus is on the respondents to establish the facts. They are in control of Lewis Connors. They have the books of Lewis Connors in their possession. It would have been in their power to adduce precise evidence as to the localities in which Lewis Connors were carrying on business in 1925 and 1926 and the extent of the business in each locality. Since, as the export and shipping manager of Connors Bros. says, the Lewis Connors customers of 1925 were retained, there could have been no difficulty in showing, not only the provinces in which they had customers, but the locality in each province to which their goods were shipped. Furthermore, there should have been no difficulty in showing localities in which retail sales took

place. These facts should have been adduced by the respondents as facts necessary to be considered in order to decide whether or not the restriction was a reasonable one, that is to say, reasonably necessary to make the contract for the sale of shares effective or, to apply Lord Parker's words (*Morris* v. *Saxelby* (1), *supra,* at p. 709) whether or not, if the plaintiff should engage at any time during his natural life anywhere in the Dominion of Canada directly or indirectly in the business of packing or selling sardines, "it would in all probability enure to the injury of" Lewis Connors or of Connors Bros. as purchasers of an interest in that business.

I quote as apposite the following passage from the judgment of Lord Blanesburgh (then Younger L.J.) in *British Reinforced Concrete Engineering Co. Ltd.* v. *Schelff* (2):

I should have thought that the law on this subject was clear. It is the business sold which is the legitimate subject of protection, and it is for its protection in the hands of its purchaser, and for its protection only, that the vendor's restrictive covenant can be legitimately exacted. A restrictive covenant by a grocer on the sale of his business in a country town, if it would be unreasonable and void when the purchaser was acquiring it as his sole business, does not become valid if the purchasers are, say, Messrs. Lipton, with branches everywhere. The point is perhaps most clearly brought out in those recent cases in the House of Lords in which the essential distinction between vendors' and employees' restrictive covenants has been so clearly laid down. Take, for instance, the justification for a wider vendor's covenant in Lord Shaw's speech in *Mason's* case (3): "If the contract, for instance, be for the sale of a business to another for full consideration or price, there may be elements going in the strongest degree to shew that such a contract—in so far as it restrains the vendor from becoming a rival of the business whose goodwill he has sold and which he has bargained he shall not oppose— * * * is enforceable, and, indeed, that declinature by the law to enforce it would amount to a denial of justice." Again in *Saxelby's* case (4) Lord Parker says: "In the *Nordenfelt* case (5), that which it was required to protect was the good-will of a business transferred by the covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on." He does not say "going to be carried on." Take again Lord Watson's observations in the *Nordenfelt* case (5): "I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and indefeasible right to start a rival concern the day after he sold. Accordingly, it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which

(1) [1916] 1 A.C. 688.
(2) [1921] 2 Ch. 563, at 574-576.
(3) [1913] A.C. 724, 737.
(4) [1916] 1 A.C. 688, 708.
(5) [1894] A.C. 535, 552.

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having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced. Whether—when the circumstances of the case are such that a restraint unlimited in space becomes reasonably necessary in order to protect the purchaser against any attempt by the seller to resume the business which he sold—a covenant imposing that restraint must be invalidated by the principle of public policy is the substance of the question which your Lordships have to consider in this appeal." Lord Herschell in the same case says (1): "I think that a covenant entered into in connection with the sale of the good-will of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser." In all these cases the business sold is treated as the subject of permissible protection; and similar judicial utterances could be indefinitely multiplied.

And in my judgment when the matter is looked at on principle these statements necessarily mean what they say.

The respondents also advance an argument, not very precisely stated, based upon some supposed relation between the subject-matter of the stipulation and the appellant's connection with the respondents Connors Bros. while "he was interested in it as a shareholder, director and plant manager." In my view, it is not necessary to enquire into the question whether there is any "main transaction, contract or arrangement" disclosed by the evidence to which the stipulation in question could be said to be "ancillary" and to which this particular argument can apply. In the pertinent sense, on the face of it, it appears to me to be plain that, as ancillary to a contract of employment, the stipulations under consideration are, to borrow once more a phrase of Lord Macmillan's in *Vancouver Malt Co.* v. *Vancouver Breweries* (2), "out of all reason".

I am also far from satisfied that it was necessary for the protection of the Lewis Connors business outside of Canada to prohibit the appellant engaging in the sardine business in his own name in any part of the world for a period of ten years. In 1925, the foreign sales of sardines by Lewis Connors amounted to a little over 26,000 cases. The sales in the Dominion of Canada for the same year amounted to a few hundred cases more. In 1936, the foreign sales had increased by about 5,000 cases; the Canadian sales having been diminished by about 1,000 cases. We have no figures for 1935. In view of these figures, I find myself unable to accept the proposition that the prohibition of the use by the appellant of his own name

(1) [1894] A.C. at 548. (2) [1894] A.C. 181, at 191.

during the period of ten years succeeding April, 1925, in any single locality outside of Canada in any sardine business was necessary for the protection of this very limited foreign business of Lewis Connors.

I may also add that I think the evidence falls far short of establishing facts sufficient to support the conclusion that such a restriction was necessary for the protection of the foreign trade of Connors Bros. This provision with regard to the use of the name "Connors" would appear to be severable; but the unnecessarily sweeping character of it points to the conclusion that the parties were not really applying their minds to the question whether or not the restriction was one which their legitimate interests required.

There is another most important consideration. I am inclined to think that the evidence establishes detriment to the public interest. The aim was admittedly to create a monopoly in the packing of Canadian sardines and there appears to be no doubt that it was successful. I am not sure that, having regard to sections 2 (1) (*b*) and 2 (1) (*c*) (v) and (vi) and section 32 of the *Combines Investigation Act* (R.S.C., 1927, ch. 26), enhancement of prices is the only relevant form of public detriment in this country. The policy of the law as manifested by those sections and section 498 (*c*) of the *Criminal Code* seems to condemn restrictions upon competition even in the case of transactions of this character, that is to say, where an interest has been acquired in a business quite independently of the effect of the transaction upon prices. I do not pursue this topic further and I express no final opinion upon the point in the absence of argument.

It has been held by this Court (*Weidman* v. *Shragge*) (1), that, in considering whether an agreement in restraint of trade falls within section 498 of the *Criminal Code* as unduly preventing or lessening competition, the fact that the agreement is reasonable from the point of view of the parties, is not conclusive; and in that particular case it was held that the agreement was invalid. So, in applying section 32 of the *Combines Investigation Act,* it is by no means clear that reasonableness as between the parties concludes the question whether or not a combine is "likely

(1) (1912) 46 Can. S.C.R. 1.

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to operate against the interest of the public, whether consumers, producers or others."

I should add that I do not understand that the learned Chief Justice of New Brunswick, in discussing the topic of injury to the public, is suggesting that enhancement of price is the only pertinent form of injury. In speaking of enhancement of price, I have in mind the explanation in the *Adelaide Steamship Company's* case (1) of the phrase "pernicious monopoly" employed by Bowen L.J. in *Nordenfelt's* case (2) as a monopoly having the effect of increasing prices.

The judgment of Crocket and Kerwin JJ. (dissenting) was delivered by

KERWIN J.—The appellant is Bernard Connors and the respondents are Connors Bros., Limited, and Lewis Connors and Sons, Limited. The proceedings were commenced by an originating summons issued by the appellant under Rule 54A of the Supreme Court of New Brunswick for the determination of three questions of interpretation, which the appellant alleged arose under covenants contained in two certain agreements dated respectively June 9th, 1925, and October 2nd, 1926. The three questions submitted are as follows:

(*a*) Whether, upon construction of the provision written variously in the said agreements as "will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada" and "will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada" the said Bernard Connors, the covenantor mentioned in both agreements, is at the present time and shall be thenceforward barred from engaging in the sardine business in Canada as owner by himself or in partnership with others of such a business or as a shareholder of an incorporated company engaged in such business in Canada.

(*b*) Whether, upon construction of the words "will not directly or indirectly engage in" used in said covenants. the said Bernard Connors is barred at law from working at the sardine business in Canada as an employee of any person, persons, firm or corporation engaged in the sardine business in Canada.

(*c*) Whether, upon construction of the said covenants and particularly the following words contained therein "nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever,"

(1) *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co. Ltd.*, [1913] A.C. 781.

(3) *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt*, [1893] 1 Ch. 630, at 668.

the said Bernard Connors may at this time and thenceforward lawfully use the name of "Connors" in connection with the sardine business in Canada.

The Chief Justice of New Brunswick (1), before whom the motion came, determined that Question (*a*) should be answered in the affirmative and Question (*c*) in the negative. As to Question (*b*), the Chief Justice considered that there existed "a wide difference between the plaintiff working at a machine which seals the tins of sardines and superintending the operations of a new company," and in the exercise of the discretion given by the Rule, declined to give any answer. Upon appeal to the Appeal Division (2) his order was affirmed.

Evidence was led on behalf of both parties before the Chief Justice, and from it and the exhibits filed the relevant facts appear to be as follows.

Some years ago Lewis Connors, the father of the appellant, and Patrick W. Connors, an uncle, commenced a fish business in the Passamaquoddy area of the Bay of Fundy in the Province of New Brunswick. The undertaking thrived and in time it was transferred to Connors Bros., Limited. At an early age the appellant had entered the business and by 1923, when he was about thirty-five years of age, had been working in it for a considerable period. In that year the shareholders of Connors Bros., Limited, sold their holdings to A. Neil McLean and associates, who formed a new company bearing the same name. It is the latter company that is one of the respondents. Shortly after the consummation of this sale by the transfer of the assets of the old company to the new, Lewis Connors, the appellant and another son purchased a factory in the same area and, first as a partnership and later under the name of a company incorporated as Lewis Connors and Sons, Limited (the other respondent), carried on the same kind of business as Connors Bros., Limited. Some comment has been made as to the manner in which this business was conducted but it is unnecessary to deal with these strictures. It is important, however, to realize that Lewis Connors and Sons, Limited, packed and sold the same products as Connors Bros., Limited, consisting of kippered herrings, canned herrings, finnan haddies, clams, flaked fish, chicken haddies, and sardines. The most important

(1) 12 M.P.R. 102. (2) 13 M.P.R. 68.

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of these was the last named, and it is common ground that the Passamaquoddy area is the only place in the Dominion of Canada where sardines may be packed in a practical and economical manner.

Whether as a result of the ensuing competition or because, as A. Neil McLean testified, Lewis Connors approached him with a view of Lewis Connors and Sons, Limited, selling out to Connors Bros., Limited, negotiations ensued between the rival companies and as a result an option agreement dated April 30th, 1925, was entered into between Lewis Connors and the appellant, of the first part, and A. Neil McLean and Allan McLean, of the second part. At this time the issued capital stock of Lewis Connors and Sons, Limited, consisted of $50,000 preferred and $100,000 common stock, and under the agreement the Connors were to sell to the McLeans $25,000 preferred and $52,500 common stock in exchange for $25,000 preferred and $30,000 common stock of Connors Bros., Limited. In substance, the latter company was thus acquiring a controlling interest in Lewis Connors and Sons, Limited, but, by the purchase of a comparatively small number of shares, Lewis Connors and the appellant, together with Patrick W. Connors, might easily secure control of Connors Bros., Limited, and to obviate this a Voting Trust Agreement of May 23rd, 1925, was signed. It is not necessary to enter into the details of this trust agreement, but ultimately the option contained in the document of April 30th, 1925, was exercised and an agreement of June 9th of the same year, implementing the terms of the option agreement, was entered into between Connors Bros., Limited, of the first part, and Lewis Connors and the appellant, of the second part. This agreement provides: (1) That with reference to the remaining outstanding capital stock of Lewis Connors and Sons, Limited ($25,000 preferred and $47,500 common), Connors Bros., Limited, would at any time within five years from January 1st, 1926, and on demand from any of the stockholders of Lewis Connors and Sons, Limited, who at the time of such demand held any part of the remaining outstanding issued capital stock of Lewis Connors and Sons, Limited, purchase the holdings of such stockholders so making such a demand on the basis of $35,000 cash for $72,500 capital stock. (2) That Connors Bros., Limited, should relieve and discharge Lewis Connors

and the appellant from all personal liability with respect to the bank account of Lewis Connors and Sons, Limited. (3) That a measure of co-operation between the two companies, which is not of importance in the present inquiry, should exist.

(4) The said Lewis Connors and Bernard Connors agree with said Connors Bros., Limited, that they will not either directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada, nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada, or elsewhere, nor, for a period of ten years from the 30th day of April, 1925, use the name of Connors in connection with the sardine business in any country whatsoever.

This is one of the covenants, the construction of which is sought and the legality of which is impugned.

By another agreement bearing even date Lewis Connors and Sons, Limited, engaged the appellant for five years as manager, the salary being guaranteed by Connors Bros., Limited.

The appellant commenced his duties as manager of the factory in West Saint John and, when the business was transferred to Black's Harbour, he went there but was not satisfied. Disputes had arisen between the appellant and the two companies and finally by an agreement of October 2nd, 1926, between the appellant, of the first part, Lewis Connors and Sons, Limited, of the second part, Connors Bros., Limited, of the third part, and the two McLeans, of the fourth part, the appellant sold his 172 shares of the capital stock of Lewis Connors and Sons, Limited, to Connors Bros., Limited, for $11,416, and his employment agreement was ended by mutual consent. By clause 3, which is the second covenant, the construction and legality of which is in question:

The party of the first part also agrees with the said parties of the second and third parts that he will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada or elsewhere, nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with sardine business in any country whatsoever.

The terms of clause 5 may be more conveniently referred to when dealing with the appellant's contention that in any event he was, by it, released from the burden of the restrictive covenant contained in the agreement of June 9th, 1925.

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Within a comparatively short time after the execution of the agreement of October 2nd, 1926, the appellant commenced a fish business under the name of Harbour Packing Company, which he subsequently had incorporated. Still later he started a business under the name, "The B. Connors Fish Company," also subsequently incorporated. Throughout this period, the appellant and these companies were dealing in all the products already mentioned, except sardines. Lewis Connors died in 1934. In the meantime the respondents had continued their operations, of which the packing and merchandizing of sardines was the larger and more important part. On April 15th, 1937, the appellant intimated that he considered the two restrictive covenants not binding upon him and asked for a formal release. Upon this being refused, the present proceedings were commenced.

The question immediately arises as to the principles upon which the restricting covenant contained in the agreement of June 9th, 1925, is to be construed. Are the rules applicable to a covenant exacted by the purchaser of the good-will of a business to be applied? It was argued that the business sold was one belonging to Lewis Connors and Sons, Limited, and that the agreement by the appellant was intended to prevent competition *per se* and is, therefore, invalid. Such a contention was advanced in *Nordenfelt's* case (1), and was rejected. There, Nordenfelt had previously transferred his business to a limited company and it was upon the sale of the business by the latter to the respondent that the personal covenant of Nordenfelt was insisted upon. The Court treated the position on the same footing as if the obligations of the covenant had been undertaken in connection with the direct transfer by Nordenfelt to the purchaser. It is true that he was the only one interested in the original business, but without determining how far that principle is to be extended, it is, in my view, applicable to the circumstances of the present case.

The appellant was an active participant in the business, as well of the first Connors Bros. company as of Lewis Connors and Sons, Limited. He was a shareholder, to a substantial extent, in each company and took an active

(1) [1894] A.C. 535.

part in the negotiations leading to the sale by the latter company to Connors Bros. Limited. He secured his proportion of the preferred and common stock of Connors Bros. Limited, in exchange for his holdings in Lewis Connors and Sons, Limited, and an agreement by Connors Bros. Limited, to purchase, for cash, his share of the remaining outstanding capital stock in the event of his desire to sell. Furthermore, he was one of the guarantors of the bank account of Lewis Connors and Sons, Limited, and from this liability he was relieved in pursuance of the agreement of June 9th, 1925.

Upon this narrative I conclude that the appellant's covenant is not one in gross but, on the contrary, is one to be gauged by the principles mentioned. These are now well settled. Lord Macnaghten sets them out at page 565 of the *Nordenfelt* case (1) in these words:

> The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.

His judgment was not authoritatively approved until *Mason's* case (2), and its full effect was not explained until *Morris* v. *Saxelby* (3). In the latter case (4) Lord Atkinson quoted with approval that part of Lord Macnaghten's judgment in the *Nordenfelt* case (5) set out above, and at the conclusion of the passage pointed out that Lord Macnaghten had used the plural, "parties concerned," in the earlier portion of the passage, meaning to include both the covenantor and covenantee,—

> while in the latter portion of the passage he merely speaks of "protection" being given to the covenantee, which does not injure the public. But in the opening lines of the passage he had already said that the individual (here the covenantor), as well as the public, have an interest in freedom of trading.

(1) [1894] A.C. 535.
(2) *Mason* v. *Provident Clothing & Supply Co. Ltd.*, [1913] A.C. 724.
(3) [1916] 1 A.C. 688.
(4) [1916] 1 A.C. at 699-700.
(5) [1894] A.C. 535, at 565.

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Lord Atkinson continues:—

> If it be assumed, as I think it must be, that no person has an abstract right to be protected against competition *per se* in his trade or business, then the meaning of the entire passage would appear to me to be this. If the restraint affords to the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests, but notwithstanding this the restraint may still be held to be injurious to the public and therefore void; the onus of establishing to the satisfaction of the judge who tries the case facts and circumstances which show that the restraint is of the reasonable character above mentioned resting upon the person alleging that it is of that character, and the onus of showing that, notwithstanding that it is of that character, it is nevertheless injurious to the public and therefore void, resting, in like manner, on the party alleging the latter.

Lord Parker of Waddington, with whom Lord Sumner agrees, phrases the matter in a slightly different form but the substance is the same.

In *Atwood* v. *Lamont* (1), Lord Justice Younger (with whom Lord Justice Atkin agreed) points out that it had been established by the House of Lords that it is for the covenantee to show that the restriction sought to be imposed upon the covenantor goes no further than is reasonable for the protection of his business and that the restraint must be reasonable not only in the interests of the covenantee but in the interests of both contracting parties.

In *Fitch* v. *Dewes* (2), Lord Birkenhead, at page 163, states:

> The Courts have been generous in elucidating these matters by the enunciation of general principles in the course of the last few years, and I am extremely anxious not to carry this process further to-day; therefore I say plainly and, I hope, simply, that it has for long now been accepted that such an agreement as this, if it is impeached, is to be measured by reference to two considerations: first, is it against the public interest? and, second, does that which has been stipulated for exceed what is required for the protection of the covenantee? It might perhaps be more properly stated, as it has sometimes been with the highest authority stated, does it exceed what is necessary for the protection of both the parties?

The Lord Chancellor proceeds to point out that in that case there was required only the consideration of the earlier question.

Coming then to the covenant of June 9th, 1925, the first part provides that so far as the appellant is concerned he "will not either directly or indirectly engage

(1) [1920] 3 K.B. 571. (2) [1921] 2 A.C. 158.

in any other sardine business whatsoever in the Dominion of Canada," that is, other than the sardine business of Lewis Connors and Sons, Limited, as manager of which company he was engaged for a period of five years. On the construction of this sentence, "business" must include packing as well as selling, and in my opinion the restraint affords to Connors Bros., Limited, with respect to the business and good-will purchased by it, nothing more than reasonable protection against something which it was entitled to be protected against. The courts have uniformly refrained from setting out what restriction in point of area or time may be reasonable, and have left these questions to be determined upon a consideration of the circumstances in each particular case. In the present instance, as I have already mentioned, the packing of sardines in Canada is concentrated in the Passamaquoddy area, and, in my view, it cannot be said to be unreasonable that the appellant should agree not to pack sardines in the Dominion. Sardines were sold by Lewis Connors and Sons, Limited, throughout the world as well as in every province of Canada. And again I hold that the respondents were entitled to accept from appellant a covenant limited to not selling them in Canada. The appellant is not prevented from packing or selling other fish in Canada or elsewhere and as a matter of fact has done so since shortly after October of 1926. This last consideration, to my mind, is conclusive in determining that the covenant is not too wide in point of time, even remembering that the appellant was about thirty-seven years of age in 1925.

The evidence is that the price of the sardines to the public has not been increased but, on the contrary, has probably been lowered. The record also discloses that the price paid to the fishermen has not decreased. There is, of course, nothing to prevent anyone else engaging in the sardine business in Canada and I cannot see that the operation of the covenant may be said to be injurious to the public in any respect.

It is then contended that the appellant was relieved of his obligations under this covenant by the release contained in clause 5 of the agreement of October 2nd, 1926. That clause is in the following terms:

> The parties of the second, third and fourth parts hereby release the said party of the first part (the appellant) from all claims and demands of every nature and description which they or either of them have or

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which hereafter they or either of them may have against the party of the first part by reason of anything to the date of these presents including but without limiting the generality of the foregoing any claims by reason of any shortage in inventory alleged misrepresentation or for alleged improper conduct of the party of the first part in connection with the business of the said Lewis Connors & Sons, Limited, or the purchase of an interest therein or stock thereof.

I am inclined to think that the proper construction of this clause is that it refers only to what the appellant may have done down to the date of the agreement and not to anything that he may have previously agreed to do or refrain from doing. It is significant that the employment agreement was ended by a separate clause. In any event, the insertion of clause 3 in the agreement of October 2nd, 1926, makes it clear that it was never intended that the appellant should be released from the earlier covenant.

This conclusion renders it unnecessary to consider the terms of that clause, 3, and we are left, therefore, with the question as to whether the appellant is barred for life from engaging in the sardine business in Canada, as owner only. It is perhaps unnecessary to say that he is prevented from so engaging in partnership with others and I think that the Chief Justice of New Brunswick arrived at the proper conclusion that the appellant is also prevented from engaging in such business as a shareholder of an incorporated company engaged in such business in Canada.

So far as Question (*c*) is concerned, the name "Connors" has been registered in Canada as a trade mark in connection with the sale of Fish and Fish Products and such trade mark is now owned by Connors Bros., Limited. It is obvious, therefore, that the appellant may not use that name in connection with the sardine business.

Irrespective of the difficulty in the appellant's way in securing an answer to Question (*b*), in view of the fact that the Chief Justice in the exercise of the discretion conferred by Rule 54A declined to express an opinion, and of the fact that the Judges in the highest Provincial Court agreed with him, I entertain no doubt that for the reasons given by the Chief Justice, it would be inadvisable to give any opinion unless and until the appellant undertakes to act in some form of employment for some person or corporation engaged in the sardine business in Canada.

The appeal should be dismissed with costs.

The judgment of Davis and Hudson JJ. was delivered by

DAVIS, J.—On June 9th, 1925, the appellant, then a man of 37 years of age, who had been brought up from boyhood in the sardine business with his father and uncle, sold his shares in the respondent company Lewis Connors & Sons, Limited, to the respondent company Connors Bros., Limited, and with his father entered into the following covenant in an agreement with the respondent Connors Bros., Limited:

> The said Lewis Connors and Bernard Connors agree with said Connors Bros., Limited, that they will not either directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada, nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada, or elsewhere, nor, for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever.

The appellant thereupon entered the employ of Lewis Connors & Sons, Limited, but on October 2nd, 1926, disputes having arisen between the parties, the engagement of employment was terminated upon the terms of a further agreement in writing of that date. That agreement contained the following covenant:

> The party of the first part (i.e., the appellant) also agrees with the said parties of the second and third parts (i.e., Lewis Connors & Sons, Limited, and Connors, Bros., Limited) that he will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada or elsewhere, nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever.

Subsequent to the expiration of the ten-year period from the 30th of April, 1925, referred to in the said clause of the agreement, the appellant desired to engage in the sardine business in Canada and addressed a letter on April 15th, 1937, to the respondent Connors Bros., Limited, in which, after referring to the two covenants above set forth, he said:

> I wish to point out to you that I do not consider the provisions cited above to be binding as agreements in restraint of trade. I have no desire to use or intention of using the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, but I do desire to engage in and work at the sardine business in Canada and/or elsewhere and it is also my desire to use the name of "Connors," if I so choose, in connection with the sardine business in Canada or elsewhere.

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If the agreements I have cited above are good and valid agreements enforceable at law or in equity, I neither desire nor intend to violate them. It has occurred to me that you may consider them enforceable and, should I engage in the sardine business in Canada, you may take steps to restrain me from doing so or, after I have done so, sue me for damages for breach of contract. Naturally I have no desire to make plans for or invest capital in a business I may be restrained from carrying on at great cost and inconvenience to me.

Accordingly I would ask you to accept this letter as notice of my intention to engage in the sardine business in Canada and/or elsewhere and to use, if I see fit, the name "Connors" in connection with the sardine business in Canada or elsewhere, my activities in these respects to start as soon as possble after this date. I would therefore ask you to advise me on or before April 26th, 1937, whether you consider the above agreements, or either of them, enforceable and intend to hold me to them, that is to say, prohibiting me from engaging in the sardine business in Canada for all time. It may well be that you consider the period of twelve years, which has since elapsed, sufficient restraint in point of time so far as your purposes are concerned. If that is the case, I should be pleased to have you advise me accordingly, and to receive from you a release from the said agreements.

If I do not hear from you in the time suggested, or if I do not secure a release from the said agreements, or if you advise me that you intend to treat the agreements as enforceable, I shall feel that I am entitled to ask the Chancery Court for directions on the agreements mentioned in order that I may know whether I can legally enter this business. For that purpose, I am advised, I shall be forced to make you party to an application by way of originating summons for a court construction of and declaration on the agreements mentioned so far as they apply to my engaging in the sardine business along the lines I have in mind.

The solicitors for Connors Bros., Limited, and Lewis Connors & Sons, Limited, replied under date of April 24th, 1937, that they had been instructed to inform the appellant that their clients

consider the provisions of the contracts quoted in your letter to be legally binding upon you in every respect, and that they have no intention whatever of releasing to you, or abandoning in any way their rights under these agreements.

On the 27th of April, 1937, the appellant commenced these proceedings for an interpretation of the covenants and for a declaration of the rights of the parties thereunder and propounded for the Court the following questions for determination:

(*a*) Whether, upon construction of the provision written variously in the said agreements as "will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada" and "will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada," the said Bernard Connors, the covenantor mentioned in both agreements, is at the present time and shall be thenceforward barred from engaging in the sardine business in

Canada as owner by himself or in partnership with others of such a business or as a shareholder of an incorporated company engaged in such business in Canada.

(*b*) Whether, upon construction of the words "will not directly or indirectly engage in" used in said covenants the said Bernard Connors is barred at law from working at the sardine business in Canada as an employee of any person, persons, firm or corporation engaged in the sardine business in Canada.

(*c*) Whether, upon construction of the said covenants and particularly the following words contained therein "nor for a period of ten years from the 30th day of April, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever," the said Bernard Connors may at this time and thenceforward lawfully use the name of "Connors" in connection with the sardine business in Canada.

This course of proceeding by way of originating summons was taken pursuant to Order 54A of the New Brunswick *Judicature Act*. The matter came on for hearing before Chief Justice Baxter in the Chancery Court of New Brunswick and in his judgment delivered on August 24th, 1937 (1), the learned Chief Justice of New Brunswick answered question (*a*) in the affirmative, declined to answer question (*b*) and answered question (*c*) in the negative, and ordered the appellant to pay the costs of the application. The plaintiff then appealed to the Appeal Division of the Supreme Court of New Brunswick, at the November Sittings in 1937, and, after taking time to consider, the Appeal Court (2) dismissed the appeal with costs on February 8th, 1938, written judgments being delivered by Grimmer J. and LeBlanc J. The appellant on February 18th, 1938, obtained special leave from the Appeal Division of the Supreme Court of New Brunswick to appeal to this Court and brought on the appeal for hearing in due course.

It is always unsatisfactory to deal with questions of this kind in the abstract without concrete facts being in issue. Take, for instance, the questions whether the appellant is barred from engaging in the sardine business in Canada "as owner by himself" or "in partnership with others" of such a business or "as a shareholder" of an incorporated company engaged in such business in Canada or "from working at" the sardine business in Canada as "an employee of" any person, persons, firm or corporation engaged in the sardine business in Canada.

(1) 12 M.P.R. 102. (2) 13 M.P.R. 68.

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In the view that I have arrived at, it is unnecessary to consider, if indeed the Court would be justified in determining, the detailed propositions involved in the submitted questions.

The agreement of October 2nd, 1926, which contains the secondly above-recited covenant, terminated the employment of the appellant with the respondent Lewis Connors & Sons, Limited, for a five-year term from June 9th, 1925, at a salary of $5,000 a year under an agreement of June 9th, 1925, that had been made as part of the bargain for acquiring the shares of the appellant and his father in Lewis Connors & Sons, Limited. By the said agreement of October 2nd, 1926, the respondents expressly released the appellant "from all claims and demands of every nature and description which they or either of them have or which hereafter they or either of them may have against" the appellant "by reason of anything to the date of these presents * * *" but a new covenant was taken from the appellant in substantially the same words as the covenant in the earlier agreement. I will assume in the respondents' favour, what I do not think it necessary to decide, that the latter clause was intended merely to repeat and confirm the covenant in the earlier agreement and is to be treated, if in law there is any difference in the application of the principles respecting covenants in restraint of trade, as a covenant with the vendor of shares of a business rather than a covenant by an employee in favour of his employer.

The main question in this case is whether the provision against engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada, during the entire lifetime of the appellant, is too wide to be enforceable. The answer to that question depends upon whether, in the particular facts of the case, the covenant was reasonably necessary for the protection of the business carried on by the covenantees at the time when it was entered into. The court, in order to determine the question, must consider three things: the nature of the business, the position of the covenantor, and the scope of the covenant. The question of the validity of covenants in restraint of trade has been considered many times in recent years and in more than one case the House of Lords has laid down the principles applicable to such covenants. It is quite

unnecessary to attempt to repeat them. One principle is perfectly clear and that is, that in approaching such questions the court must bear in mind that a covenant which is in restraint of trade is *prima facie* invalid and that the onus is on the person who seeks to enforce it to show that it is a valid covenant—a covenant which is reasonably necessary for the protection of his business and is not otherwise contrary to public policy. I need only, I think, refer to the language of Lord Macmillan in *Vancouver Malt* v. *Vancouver Breweries* (1):

> The law does not condemn every covenant which is in restraint of trade, for it recognizes that in certain cases it may be legitimate, and indeed beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser. But when a covenant in restraint of trade is called in question the burden of justifying it is laid on the party seeking to uphold it. The tests of justification have been authoritatively defined by Birkenhead, L.C., in these words: "A contract which is in restraint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public. * * * Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive": *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society, Ltd.* (2).

Lord Hanworth, M.R., in *Gilford Motor Co.* v. *Horne* (3), referring to page 475 of 1 Smith's Leading Cases, 13th ed., dealing with the *Nordenfelt Co.'s* case (4), said that the true view is

> that any restraint, whether general or partial, is *prima facie* invalid, but may be good if the circumstances of the case show it to be reasonable.

The covenant here in question, like all such covenants, must be considered with regard to the surrounding circumstances. The appellant, a young man brought up in the sardine business since 14 years of age, was at the age of 37 years restrained during his lifetime from directly or indirectly engaging in any sardine business whatsoever in the Dominion of Canada. My conclusion upon the evidence is, assuming that the words "directly or indirectly engage in the sardine business" are capable of precise definition and are not too vague as to be void for uncertainty (the very questions submitted to the court indicate the uncertainty of the meaning to be attributed to the words), that the respondents have not shown that the

(1) [1934] A.C. 181, at 189-190.
(2) [1919] A.C. 548, 562.
(3) [1933] 1 Ch. 935, at 958.
(4) [1893] 1 Ch. 630.

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terms of the covenant can pass the test of reasonableness as between the parties. Nothing really turns upon the prohibition against the use of the brands of either of the respondents because the appellant would have no right to use the brands of these companies without leave or licence. The prohibition against the use of the name "Connors" in connection with the sardine business was limited for a period of ten years, which has since expired.

In my opinion the appeal should be allowed and the judgments below set aside and it should be declared only that the covenant in so far as it prohibits the appellant from engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada is unenforceable.

The appellant should have his costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *J. H. Drummie.*
Solicitors for the respondents: *Inches & Hazen.*