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INSTITUTE OF ADVANCED LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

In the Privy Council.

No. 54 of 1939.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

CONNORS BROS. LIMITED AND LEWIS CONNORS & SONS LIMITED - - *(Defendants)* Appellants

UNIVERSITY OF LONDON
W.C.1.
-7 JUL 1953
INSTITUTE OF ADVANCED LEGAL STUDIES

AND

BERNARD CONNORS - - - - - *(Plaintiff)* Respondent.

RECORD OF PROCEEDINGS.

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In the Privy Council.

No. 54 of 1939.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Between

CONNORS BROS. LIMITED AND LEWIS CONNORS & SONS LIMITED - - (*Defendants*) *Appellants*

AND

BERNARD CONNORS - - - - - (*Plaintiff*) *Respondent.*

RECORD OF PROCEEDINGS.

No. 1.

Originating Summons.

In the Supreme Court of New Brunswick (Chancery Division).

No. 1. Originating Summons, 27th April, 1937.

IN THE SUPREME COURT (CHANCERY DIVISION).

Between

BERNARD CONNORS - - - - - - - *Plaintiff*

and

(L.S.)

CONNORS BROS., LIMITED, and LEWIS CONNORS & SONS, LIMITED - - - - - - - - *Defendants.*

10 Let the above named defendants within ten days after the service of this summons upon them, inclusive of the day of such service, cause an appearance to be entered for them to this summons, which is issued on the application of Bernard Connors of the City of Saint John in the City and County of Saint John and Province of New Brunswick for an interpretation and construction of and a declaration as to the rights of the Plaintiff and Defendants herein under the following covenants contained in two certain agreements in writing, the first dated the ninth day of June, A.D. 1925, and made between Connors Bros., Limited, of the first part and Lewis

In the Supreme Court of New Brunswick (Chancery Division).

No. 1. Originating Summons, 27th April, 1937—*continued.*

Connors and Bernard Connors of the second part ; and the second dated the second day of October, A.D. 1926, and made between Bernard Connors of the first part, Lewis Connors & Sons, Limited, of the second part, Connors Bros., Limited, of the third part, and Neil McLean and Allan McLean of the fourth part, the covenant contained in the first mentioned agreement being in the words, letters and figures following, viz. :—

(Sgd.) SMITH.

"(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."

and the covenant contained in the second mentioned agreement being in the words, letters and figures following, viz. :—

"(3) 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 the sardine business in any country whatsoever."

for the determination of the following questions :—

(*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.

And for a declaration as to the rights of the said Plaintiff and Defendants under and by virtue of the said covenants.

Dated this 27th day of April, A.D. 1937.

(Sgd.) JOHN B. M. BAXTER,
Chief Justice New Brunswick.

In the Supreme Court of New Brunswick (Chancery Division).

No. 1. Originating Summons, 27th April, 1937—*continued.*

10 This summons was taken out by J. H. Drummie, whose place of business and address for service is No. 50 Princess Street, Saint John, N.B., solicitor for the above named Bernard Connors, Plaintiff.

The defendants may appear hereto by entering an appearance either personally or by solicitor with the Registrar of the Court, Fredericton, N.B., and delivering a copy to J. H. Drummie, Plaintiff's Solicitor.

N.B.—If the Defendants do not enter an appearance within the time and in the manner above mentioned, such order will be made and proceedings taken as the Judge may think just and expedient.

No. 2.

20 **Affidavit of Bernard Connors.**

No. 2. Affidavit of Bernard Connors, 26th April, 1937.

IN THE SUPREME COURT (CHANCERY DIVISION).

Between BERNARD CONNORS ... ... *Plaintiff*

and

CONNORS BROS., LIMITED, and LEWIS CONNORS & SONS, LIMITED ... ... *Defendants.*

I, BERNARD CONNORS, of the City of Saint John, in the City and County of Saint John, in the Province of New Brunswick, Manager, make oath and say as follows:

1. That I am the plaintiff in this action and have personal knowledge of
30 the matters herein deposed to.

2. That Connors Bros., Limited, and Lewis Connors & Sons, Limited, the above named defendants, are duly incorporated companies each having its chief place of business at Black's Harbor, in the County of Charlotte in the Province of New Brunswick.

3. By agreement in writing dated April 30, 1925, and made between Lewis Connors and Bernard Connors of the first part and Neil McLean and Allan McLean of the second part, the parties of the first part agreed to sell and the parties of the second part agreed to buy a controlling interest in Lewis

In the Supreme Court of New Brunswick (Chancery Division).

No. 2. Affidavit of Bernard Connors, 26th April, 1937—*continued.*

Connors & Sons, Limited, such interest comprising $25,000.00 shares of preferred and $52,500.00 shares of common stock of that company, on conditions including *inter alia* the delivery to the parties of the first part of $25,000.00 preferred and $30,000.00 common stock of Connors Bros., Limited; an agreement by Connors Bros., Limited, to purchase the balance of the stock of Lewis Connors & Sons, Limited, within a fixed period; to arrange for a contract whereby Lewis Connors & Sons, Limited, would employ Bernard Connors for five years at a salary of $5,000.00 per annum; the said agreement of April 30, 1925, to be conditional upon acceptance and ratification by Connors Bros., Limited. 10

4. That the said agreement of April 30, 1925, was accepted and ratified by the said Connors Bros., Limited, and in an agreement in writing dated June 9, 1925, and made between Connors Bros., Limited, of the first part and Lewis Connors and Bernard Connors of the second part (a true copy of which is hereto annexed and marked "A") (Record pages 181–182) there is contained *inter alia* the following clause numbered (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., 20 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."

5. That the said agreement of employment of Bernard Connors by Lewis Connors & Sons, Limited, was terminated by an agreement in writing dated October 2, 1926, and made between Bernard Connors of the first part, Lewis Connors & Sons, Limited, of the second part, Connors Bros., Limited, of the third part, and Neil McLean and Allan McLean of the fourth part (a true copy of which is hereto annexed and marked "B") (Record pages 30 186–187) and in this said agreement there is contained the following clause numbered (3):

> "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 the sardine business in any country whatsoever." 40

6. That I am desirous of becoming identified, in association with other persons, with a business which will embrace, among other things, the packing and selling of sardines in the County of Charlotte, in the Province of New Brunswick.

7. That I do not desire to engage in the sardine business in breach of the covenants hereinbefore referred to if the same are enforceable against me at law.

8. That I have been advised and I verily believe that the said covenants are such as should not be enforced in restraint of trade because they were and are not reasonably necessary, to the extent of the restraint purporting to be imposed, to the protection of the defendants in their business, and further that the exercise of restraint upon me at this time by the defendants could be only in the nature of an effort to stifle or prevent lawful competition.

10 9. That by letters written by me and mailed postage prepaid and registered on April 15, 1937, to Connors Bros., Limited, and Lewis Connors & Sons, Limited, at Black's Harbor aforesaid, I expressed to those companies my intention of entering the sardine business and requested a release from the said agreements, if they considered the same enforceable, and I notified the said companies that, unless I obtained such release or in the event of their ignoring my notice, I intended to apply for an Originating Summons after April 26, 1937, and that I have obtained no such release from defendants.

10. That I am desirous, before engaging in the sardine business as aforesaid, of obtaining from this Honourable Court an interpretation of the 20 legal incidents of the said covenants and a declaration as to the rights of the parties under the same, and for these purposes I am desirous that an Originating Summons should issue from this Honourable Court and I have instructed my solicitor, Mr. J. H. Drummie, to make application to that end.

Sworn to at the City of Saint John, in the City and County of Saint John, in the Province of New Brunswick, this 26th day of April, A. D. 1937. } (Sgd.) BERNARD CONNORS.

Before me,

(Sgd.) D. GORDON WILLET.

30 A Commissioner for taking affidavits to be read in the Supreme Court.

In the Supreme Court of New Brunswick (Chancery Division).

No. 3.
Proceedings
15th June,
1937.

No. 3.

Proceedings.

SUPREME COURT OF NEW BRUNSWICK

CHANCERY DIVISION.

BERNARD CONNORS, - - - - - - *Plaintiff*

v.

CONNORS BROS., LIMITED, and LEWIS CONNORS & SONS, LIMITED, *Defendants.*

Court opened Tuesday, June 15th, 1937, at 11 a.m.

Appearances : 10

J. H. DRUMMIE, for the plaintiff.

C. F. INCHES, K.C., for the defendants.

A. N. CARTER of counsel.

Carter says that Order 54-A deals with question of construction and cites 81 L. T., 811, but can go into questions of fact. Drummie cites *Mason* v. *Schupisser*, 81 L. T., 147. Point reserved.

It is admitted that on 27th April, 1937, the originating summons was served and that all parties appeared.

Drummie puts in evidence :

No. 1. Agreement 9th June, 1925, Bernard Connors and Lewis 20 Connors & Sons, Limited.

No. 2. Agreement 2nd October, 1926, Lewis Connors & Sons, Limited, first part; Connors Brothers, Limited, second part; Lewis Connors, third part; A. Neil MacLean and Allan MacLean, fourth part.

No. 3. Agreement 9th June, 1925, Connors Brothers, Limited, first part; Lewis and Bernard Connors, second part.

No. 4. Agreement 30th April, 1925, Lewis and Bernard Connors, first part; A. Neil MacLean and Allan MacLean, second part.

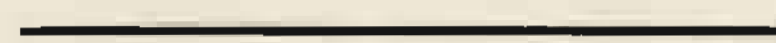
No. 5. Agreement 2nd October, 1926, Bernard Connors, first 30 part; Lewis Connors & Sons, Limited, second part; Connors Brothers, Limited, third part; Neil MacLean and Allan MacLean, fourth part.

No. 6. Letter 15th April, 1937, Bernard Connors to Connors Brothers, Limited, and copy to Lewis Connors & Sons, Limited.

No. 7. Letter 24th April, 1937, Inches and Hazen to plaintiff.

Drummie asks construction of covenants in originating summons contained in No. 3 and No. 5.

Court adjourned to Wednesday, June 16th, 1937, at 11 a.m.



No. 4.

Proceedings.

Opening of Proceedings on June 16th, 1937

Saint John, N. B., June 16th, 1937.

Court Opened at 11 a.m.

Mr. DRUMMIE, on behalf of the plaintiff, opened the case to the Court as follows :

My lord, I think at the close of the hearing yesterday, I suggested that I would call the plaintiff to give evidence in this case. Before doing so, I would like to particularly refer your lordship to the case of *Morris* v. *Saxelby* (1916) A. C., pp. 700 and 760; also *Atwood* v. *Lamont* (1920) 3 K. B., at pp. 587 and 588, where in the first case the House of Lords and in the second case the Court of Appeal laid down that all these restraints of trade are thus *prima facie* invalid and the *onus* of proving those special circumstances is on the covenantee, who is upholding them. I contend that any evidence that might be adduced to assist your lordship in coming to a proper construction of these covenants as to the question of reasonableness, which is a question of law and not of fact, any questions touching upon the matter of reasonableness are questions which should be introduced by the covenantees. I do not wish to assume any burden as to establishing either reasonableness or unreasonableness.

The COURT : Then you want to rest where you are ?

Mr. DRUMMIE : I think I am justified in doing so but wish to place all the circumstances of the case before the Court to the Court's satisfaction. The Court is entitled to call any evidence that may assist the Court in arriving at the sufficiency of this question of reasonableness. My client is perfectly willing to give evidence as to the surrounding circumstances leading up to the execution of these documents and I am quite willing to put him on the stand to tell those circumstances to assist the Court but his opinions are no good on these questions of reasonableness as a matter of law; although I am willing to put Mr. Connors on the stand now or later.

The COURT : I do not ask you to put him on. I do not wish you to split your case, for one thing. The order of principle is that agreements of this kind are not looked on favourably and yet circumstances may justify them. I take it you are just resting at this point.

Mr. CARTER : My lord, before your lordship rules on this point, I think there are some considerations that should be called to your attention. Our very definite position is that the covenants which your lordship has been asked to rule upon are included in the agreement contracts for the sale of a business. And the just attitude of the Court towards contracts of that sort is that the parties are the best judges of their reasonableness. Now that appears in various cases and undoubtedly in *Palmolive Company* v. *Freedman* (1928) 1 Ch., at 264, Court of Appeal, where Lord Hanworth, the Master of

In the Supreme Court of New Brunswick (Chancery Division).

No. 4. Proceedings, 16th June, 1937—*continued.*

the Rolls, said that it has been said many times that commercial men are the best judges of what is reasonable between them; and in *North Western Salt Co., Ltd.* v. *Electrolytic Alkali Co.* (1914) A. C., 461 at p. 471, Lord Haldane says: "But when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between them." There is no reason why that should not apply to a man like Mr. Connors to the same effect. In *English Hop Growers* v. *Dering* (1928) 2 K. B., Lord Justice Sankey expresses himself similarly at p. 187. In Smith's Leading Cases the whole matter is summed up in these words, 13th Ed., Vol. 1 at p. 481 : "Indeed it is probably correct to say that once it is shown that a substantial good will has changed hands the covenantee has discharged his duty of proof and it will thereafter be for the purchaser to show that the contract is unreasonable;" and he cites the *Nordenfelt* case and *Atwood* v. *Lamont*.

We find on examining these different agreements put in evidence that a very substantial good will has changed hands. I may say, my lord, that in order to get a proper appreciation of this whole transaction which has taken place, between Bernard Connors and Connors Brothers, Limited, particularly, it is necessary to treat the thing from the very inception and for that there is an excellent precedent in the *Nordenfelt* case (1894) A. C., 535. Perhaps I can best illustrate by referring your lordship to the facts of that case and showing the general attitude of the Court to a case such as this. Nordenfelt was a very eminent manufacturer and inventor of explosives and weapons of war. In March, 1886, he incorporated a limited liability company which was to take over his business with the business assets and liabilities. He made an agreement to sell the good will of his business to that company. He received consideration for the sale of his private business to this company. Two years later this company sold that business to the respondent company—to a new company—and it was in those circumstances that Nordenfelt, who was merely a shareholder of the company, entered into a contract not to compete with the new purchaser. He argued that the real sale was by the first incorporated company to the new company and that he really did not participate in the sale because he had already sold to the first company but the House of Lords said : "We will have to look at this thing in a very much more general way than that. We have to treat the thing as though the business which was sold to the respondent company had been the business of Nordenfelt throughout." Lord Herschell says at p. 541 : "My lords, in view of these facts, I think the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the goodwill of the appellant's business and with the object of protecting it."

That appears throughout. They do not confine themselves to the single last transaction but they regard all the circumstances leading up to it and similarly in this case we find that these respective covenants first appear

In the Supreme Court of New Brunswick (Chancery Division).

No. 4. Proceedings, 16th June, 1937—continued.

in the agreement made between Bernard Connors and Lewis Connors—that they gave an option to Neil MacLean and Allan MacLean on April 30th, 1925. It was an agreement made between the parties stated for the sale of half the issued par preferred stock $25,000.00 and a majority interest of common stock issued $52,500.00. The balance Lewis Connors and Bernard Connors agreed to sell to Neil MacLean and Allan MacLean and they, in turn, agreed to procure a contract to be executed by Connors Brothers, providing that Connors Brothers will at any time within five years and on demand from any of the stockholders of Lewis Connors & Sons buy 10 their holdings at a certain price of $35,000.00 for the outstanding capital stock. You will see how the continuity of the thing is carried on. Then there was some provision with regard to the employment of Lewis Connors and Bernard Connors but they are not important at this stage. Then there was the agreement that Allan MacLean and Bernard Connors should be a committee to arrange with the Bank of Nova Scotia for the financing of the said Lewis Connors & Sons; and Connors Brothers Limited, will contract with Lewis and Bernard Connors to relieve them from all personal liability in respect to the account of Lewis Connors & Sons with the Bank of Nova Scotia of the first of June, 1926.

20 With regard to the disposal of the pack of Lewis Connors & Sons, Limited, clause 9 is important: " All parties hereto agree to work together for the benefit of the stockholders of Connors Brothers and Lewis Connors & Sons, Limited, and will not, either directly or indirectly, engage in any sardine business whatsoever in the Dominion of Canada, nor directly or indirectly, use the name of Connors Brothers in connection with the sardine business whatsoever." That was the first agreement. Then the next one was the agreement of June 9th, 1925.

The Court: This was a way of working it out. Some financial responsibility was undertaken.

30 Mr. Drummie: I don't think there is any proper assumption of financial difficulty.

Mr. Inches: Mr. Connors can go on the stand and we will ask him.

Mr. Carter: This business of Lewis Connors & Sons, Limited, was a partnership consisting of Lewis Connors and Bernard Connors and Edward Connors. Then it was for the sale of that business when it became incorporated that this agreement was made.

Bernard Connors was a single shareholder. Then on June 9th there was this agreement—an agreement between Connors Brothers, Limited, with Lewis Connors and Bernard Connors. That is the one your lordship 40 is asked to pass upon. The said Lewis Connors and Bernard Connors agree that they will not engage in any sardine business whatsoever in the Dominion of Canada. Under this agreement made with Connors Brothers, Limited, it was a continuance of this other agreement—No. 3. There was a very substantial consideration passing. It was that Lewis Connors and Bernard Connors and the other shareholders of Lewis Connors & Sons, Limited, get a contract from Connors Brothers, Limited, whereby Connors

In the Supreme Court of New Brunswick (Chancery Division).

No. 4. Proceedings, 16th June, 1937—*continued.*

Brothers within five years would purchase all their stock for $35,000.00. They agreed—Lewis Connors and Bernard Connors—not to compete. There was also the agreement with reference to the employment of Bernard Connors and Lewis Connors—on the same date, I think.

Mr. INCHES : Just Bernard.

Mr. CARTER : Then you have the agreement of October 2nd, 1926, No. 5. And under that—that was, you might say, a two-fold agreement—under the first part you might say it has three different elements. It was the sale by Bernard Connors of 172 shares of the stock of Lewis Connors & Sons, Limited, to Connors Brothers. And there was an agreement of Connors 10 Brothers, Limited, not to press any claim in respect to any inventory, alleged misrepresentation or alleged improper conduct. There was an agreement of Connors Brothers, Limited, that they would pay $11,416.00 to Bernard Connors. A very substantial consideration for 172 shares of stock. Bernard Connors again repeats for the third time this undertaking that he would not engage, directly or indirectly, in the sardine business.

The COURT : For the third time ? Where were the other times ?

Mr. CARTER : I can give them to you by date. The first was the agreement between Lewis Connors and Bernard Connors to Neil MacLean and Allan MacLean under date of April 30th, 1925. 20

Mr. INCHES : That is No. 4.

Mr. CARTER : Then there is the one of October 2nd, 1926, which was made between Bernard Connors, Lewis Connors & Sons, Limited, Connors Brothers, Limited, Neil MacLean and Allan MacLean.

The COURT : That is No. 5.

Mr. CARTER : Yes, No. 5, dated October 2nd, 1936, between Bernard Connors and Lewis Connors & Sons, Limited, and Connors Brothers. Your lordship, I am merely confining myself now to these documents which are in evidence and I submit that they show that a substantial good will has changed hands and that we, therefore—that is, Connors Brothers, Limited 30 —have discharged their burden of proof insofar as the burden of proof is upon Connors Brothers, Limited, and it is now for the vendors to show that the contract is not an unreasonable one. I again point out to your lordship that the attitude of the Court is exemplified in the *Nordenfelt* case. The whole law rests on that case.

The COURT : I am going to ask some questions. You called my attention to Clause 9 in No. 4, dated April 30th, 1925. Then you follow with No. 5, 2nd October, 1926. That was followed by No. 3. I will start over again. Clause 9 of No. 4 is first. What do I find in No. 3 of 9th June, 1925 ? The next in order of time is the 9th June, 1925, in No. 3. What are you relying 40 on there ?

Mr. CARTER : There is the whole nature of the agreement which is set out. That is, that Connors Brothers agree to purchase all the outstanding issued shares of Lewis Connors & Sons, Limited, and included in the outstanding shares were shares owned by Bernard Connors, for a substantial

consideration during the five years succeeding. We say that stock represents a substantial good will in the company. In that there is Clause No. 4 containing a repetition of this alleged restrictive covenant.

The COURT: Then in No. 5, 2nd October, 1926—what is relied on there?

Mr. CARTER: There is the agreement by Bernard Connors to sell 172 shares held by him to Lewis Connors & Sons, Limited, and there is a repetition of the restrictive covenant which has already twice appeared and there is the consideration that Connors Brothers, Limited, agree to pay $11,416.00 to Bernard Connors on the purchase of the stock on the execution of these presents. I submit, your lordship, that that very definitely is an element of these documents; just on the face of them, without going into them. It shows there is a substantial good will.

The COURT: In the *Nordenfelt* case they were restricting the whole world and that was most unreasonable. What I have not got before me yet is a picture of the relative importance of these concerns with respect to the fishing industry.

Mr. CARTER: My point is that this is a contract for the sale of a business by the persons who owned it and that that contract should be treated by the Courts in a very much more favourable light unless there are special circumstances which seem to place restrictions upon a person's means of livelihood which are incorporated in a contract. In those circumstances, these very eminent judges say that commercial men are the best judges of what is reasonable between them. I think the Courts should regard the parties to such a contract as being in the best position to judge whether or not they are reasonable and that, therefore, we submit that one should not go any further than that so far as the burden of proof is concerned. We have discharged all that should be required of us, by just pointing out these things to your lordship.

The COURT: I appreciate the strength of what you put forward. I have only seen the outside of these documents and heard the references you have made to them. It would be impossible for me to pass upon this point without taking time to study the material. I do not think it matters a great deal by whom the evidence is introduced. It may not be mater.al in the end. It may not but I would like to be sure that I have before me the general picture of the circumstances under which the agreements were made. Therefore, I will let you give me that picture. I know you have got people here and it does not seem worth while to come back again. It is better to get through with it.

Mr. INCHES: May it please your lordship, I still feel, although I will admit that the matters are subject to grave doubt, that this application does not come within the ambit of Order 54-A but we are trying the case and I do not think that the same rules apply as in an ordinary trial, because, as I remember the rule, your lordship is to decide what evidence shall be given. My learned friend, without getting any decision whatever from the Court, as to what evidence shall be put in, puts in as much evidence as he thinks should

In the Supreme Court of New Brunswick (Chancery Division).

No. 4. Proceedings, 16th June, 1937—*continued.*

be put in and then he simply stops and says : " I have, practically through all these five documents—I have proved the execution of this contract and brought it down to date. Now I am perfectly willing to put on my client and let him give full evidence but I want to say now I am not bound by anything my client says." That is practically his argument. In this case there is a great amount of material as peculiarly within the knowledge of the plaintiff and which could be brought out in a proper way by the machinery provided for that purpose,—examination on discovery. I feel it is greatly in the interests of my client that we should have that evidence that we would get on discovery and I thought naturally my learned friend 10 was going to put his client on this morning. I was wondering how I could get his client on the stand and my learned friend suggested to me that I can ask to cross-examine him on the affidavits which he has made in this case. The statement in his affidavit, Clause 10, particularly : " I am desirous, before engaging in the sardine business as aforesaid, of obtaining from this Honourable Court an interpretation of the legal incidents of the said covenant and a declaration as to the rights of the parties under the same and for these purposes I am desirous that an originating summons should issue from this Honourable Court and I have instructed my solicitor, Mr. J. H. Drummie, to make application to that end." 20

The COURT : Is it not within your knowledge as much as in the knowledge of the plaintiff ?

Mr. INCHES : There is a tremendous amount—a considerable amount—of material which shows a conspiracy between Mr. Patrick Connors and Mr. Bernard Connors and also material which I have gathered within the last few days and which is not available with me today and of which I have not the original documents. A substantial portion of our case is peculiarly within the knowledge of Mr. Bernard Connors. I do not know where else to get the information.

Mr. DRUMMIE : May I ask that that last statement be stricken from the 30 record.

Mr. INCHES : I am prepared to prove it in this case.

The COURT : Have you any objection to having your witness examined ?

Mr. DRUMMIE : No.

The COURT : Then we will go ahead. Mr. Inches is going to examine on the affidavits. We do not need any further argument.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit.

No. 5.

Bernard Connors Cross-Examination on Affidavit.

BERNARD CONNORS, called as a witness, being duly sworn, testified as follows :

EXAMINATION by Mr. INCHES.

Q. Where do you live, Mr. Connors ?—*A.* Saint John.

Q. Where were you born ?—*A.* At Black's Harbour.

Q. In Charlotte County ?—*A.* Yes.

Q. You are the son of the late Lewis Connors ?—*A.* Yes.

10 *Q.* Who died leaving James Edward Connors, yourself (Bernard Connors) as all in his family ?—*A.* My mother.

Q. She is still living ?—*A.* Yes.

Q. She is Mary Jane Connors ?—*A.* Yes.

Q. Lewis Connors died about 1934, did he not ?—*A.* Yes.

Q. How old was he—seventy-five ?—*A.* Between seventy-four and seventy-five.

Q. He had a brother Patrick Connors ?—*A.* Yes.

Q. And Patrick died in January, 1928, didn't he ?—*A.* Yes.

Q. He was a few years younger than your father ?—*A.* Yes.

20 *Q.* These two men, your uncle and your father, were fishermen at Black's Harbour in early life ?—*A.* Yes.

Q. And they started—that is, they were fishermen—simply went out in boats and caught fish ?—*A.* Yes, as far as I know.

Q. Then they started in and salted fish and dried them ?—*A.* Yes, I think so.

MR. DRUMMIE : I do not quite see what this has to do with the contracts.

THE COURT : We will wait until they grow up. I think they are about twenty years of age now.

30 *Q.* We have got them in boats. We are all at sea. Then they started canning. Do you remember that ?—*A.* Oh, yes quite well.

Q. That was about 1890, was it not ?—*A.* I could not say definitely. Somewhere along then.

Q. They had been canning clams before they started canning sardines ? *A.* I just cannot recall whether they canned clams first or not.

Q. I suggest that they first canned blueberries, clams and scallops before they started canning sardines ?—*A.* Yes.

Q. And then they formed a partnership known as Connors Brothers ? —*A.* Yes.

40 *Q.* Do you know about what time that partnership was formed ? —*A.* I could not recall it.

Q. (BY THE COURT) : That is the two brothers ?

MR. INCHES : Yes, Lewis and Patrick.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit *—continued.*

Q. They exhibited their canned fish—their sardines—at the exhibitions, did they not ?—*A.* Yes.

MR. DRUMMIE : I do not wish to make a nuisance of myself but what this has to do with it, I cannot see. It is entirely irrelevant.

THE COURT : We are going down the road.

MR. DRUMMIE : I want to point out, my lord, that any evidence in regard to Connors Brothers has nothing to do with this case.

THE COURT : It cannot do you any harm.

MR. INCHES : In the exhibit which my learned friend put in yesterday he asks for permission to use the name of Connors. I am going to contend before this case is through that he has no right whatever to use the name of Connors.

THE COURT : Hurry along the road. Get through with the necessary questions.

Q. Do you remember the date they exhibited those sardines at the Saint John exhibition ?—A. No.

Q. Would you accept the date as 1895 ?—*A.* It might be. I could not recall.

Q. Just a minute. You, yourself, were born there and the first work you did was for Connors Brothers, was it ?—*A.* Yes.

Q. (By THE COURT) : How old are you ?—*A.* I am forty-nine.

Q. (BY THE COURT) : Then you were about seven years of age ? —*A.* Yes.

Q. When did you first go to work there ?—*A.* Around fourteen years of age.

Q. You worked continuously for Connors Brothers or a Company that was formed by Connors Brothers down to 1923 ?—*A.* Yes, with the exception of one year. Practically a year. Ten months.

Q. You became absolutely familiar with the sardine industry during your employment there ?—*A.* I just worked along with the others.

Q. You worked along sufficiently to have charge of a factory there ?—*A.* Yes.

Q. And there were just two factories ?—Yes.

Q. And you were superintendent of one of them ?—*A.* Yes.

Q. You also had charge of their office in Saint John for some time ?—*A.* One month.

Q. Do you remember the date that Connors Brothers, Limited, the old company, was incorporated ?—*A.* I cannot recall that date now.

Q. Will you accept 1901 as the date ?—*A.* Yes, I suppose so. The charter will show it.

Q. You became a shareholder in that company ?—*A.* Not at that time.

Q. But you became a shareholder in the company ?—*A.* Yes, in later years.

MR. DRUMMIE : He would be something like eleven years old.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Mr. INCHES : I asked him if he became a shareholder and he said " yes." I accept the answer.

Q. In 1923, who were the shareholders in that company ?—*A.* Which company ?

Q. The old company—Connors Brothers, Limited. I mean August, 1923, when they sold out ?—*A.* Patrick W. Connors, Lewis Connors, myself, Robert Thompson and John McDowell. I do not think there were any other shareholders.

Q. You have seen the original of that document ? (Showing witness 10 paper). This is a copy of a document. I have the original.

The COURT : Is it something in evidence ?

Mr. DRUMMIE : What is it, my lord ? Has it anything to do with this case ?

The COURT : He asks if he has seen this. The answer is " yes " or " no." —*A.* John McDowell had sold it.

The COURT : He asked if you had seen that document. Answer " yes " or " no."—*A.* I think I have seen this document before. It is quite a long one. Should I read it ?

The COURT : No. You know pretty well what it is about. You 20 recognize what it is about.

Mr. INCHES : I thought I had the original here, but I have it in my office.

The COURT : Are you going to have it put in ?

Mr. DRUMMIE : What is it, my lord ? Is it just to establish that a man named McDowell is not a shareholder on a certain date ? My lord, I do not know what this document is, but I object to it unless it has something to do with the Lewis Connors & Sons, Limited. We are concerned with nothing else here.

The COURT : I need to be informed of the circumstances surrounding 30 the sale. I admit it subject to objection.

(Offered in evidence and marked Exhibit A—Agreement dated August 25, 1923, between Lewis Connors and Patrick W. Connors, Robert Thompson and Bernard Connors, of the First Part ; Arthur E. Cox, Howard P. Robinson A. Neil McLean and Charles H. Easson of the Second Part.)

Mr. INCHES : I would like to summarize this agreement, if I may. It recites that Lewis Connors owns 1090 shares of Connors Brothers, Limited, Patrick W. Connors 1200 shares, Bernard Connors 100 shares and Robert Thompson 10 shares. It recites that the vendees, that is, the parties of the second part, intend to form a company to acquire as a going concern the 40 undertaking and business of Connors Brothers, Limited. You were a party to these negotiations ?—*A.* I signed them, I guess.

Q. Yes, you signed this document. And this agreement provides that you four shareholders gave an option to these four vendees whereby they purchased all the capital stock in Connors Brothers, Limited, in consideration

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

of the payment of $200,000.00 and $200,000.00 in first preferred shares of this new company to be formed at 7 per cent. That is correct ?—*A*. Yes.

The COURT : Was the agreement carried out ?

Mr. INCHES : Yes, the agreement was carried out.

Mr. DRUMMIE : May I have it on the record, my lord, that I object to all examination on it ?

The COURT : Yes, that goes without saying almost.

Q. You received that cheque in payment of your stock, did you not ?—(Showing witness paper). *A*. Yes.

Q. And also an equivalent amount of first preferred shares in the new company ?—*A*. Yes. 10

Mr. INCHES : I am offering in evidence a cheque of A. Neil McLean in favour of Bernard Connors, dated November 8th, 1923.

Q. (By the COURT) : You got the money ?—*A*. Yes.

Q. (By the COURT) : You got all the money that was coming to you under that agreement ?—*A*. Yes.

Q. (By the COURT) : And all the stock ?—*A*. Yes.

The COURT : What is the amount ? Put in all the details.

Mr. INCHES : The amount was $8,366.67 in cash. And when you got an equivalent amount of preferred stock ? 20

(Objected to by Mr. Drummie. Admitted subject to objection.)

Q. This preferred stock had equal voting rights in the company, did it not ?—*A*. Yes.

Q. And the result was that after this transaction went through you Connors people had 2,000 of preferred stock and the four vendees had 2,500 shares of the common. That is correct ?—*A*. Yes.

Q. There were $50,000.00 of the preferred left in the treasury ?—*A*. Yes.

Q. And the new company, was incoporated under the same name—Connors Brothers, Limited ?

The COURT ? That is the one of 1901—it is just the same thing 30

Mr. INCHES : It was a new company. The old company was incorporated by the Connors men in 1901. They sold their stock to the syndicate in August, 1923, and a new company was incorporated by the purchasers under the same name—Connors Brothers, Limited.

The COURT : The same name—that is extraordinary. What year ?

Mr. INCHES : That is August, 1923.

The COURT Were they both provincial charters ?

Mr. INCHES : Yes.

Q. This old company, Connors Brothers, Limited, conveyed everything they had, real and personal, to the new company, did they not ?—*A*. I think so. 40

Mr. INCHES : I would like to quote from this document. It is under date of November 1st, 1923, whereby that company sells to the new company

all the personal property and then there is this general clause : " All goods, chattels, monies, credits, debts, bills, notes, goodwill, things in action, contracts, agreements, securities, rights, powers, undertakings, franchises and all other necesssary assets."

The COURT : I suppose the whole point is that the goodwill was sold ?

Mr. INCHES : Yes and any trade marks in the use of the name and that sort of thing, my lord.

Q. You accept that as a fact, Mr. Connors ? That transfer was made ? *A*. Yes, I do not remember so very much but the idea was to sell the assets
10 of the company.

Q. (By the COURT). Just getting from one company into the other, I suppose ?—*A*. Yes.

Q. Mr. Connors, the partnership and the old company had established a world-wide trade, had they not ?—*A*. They established quite a trade. Quite a few countries.

Q. They were selling in every province in Canada, were they not ?—*A*. As I recall it, I think they were.

Q. What foreign countries were they selling in, to your recollection ?—*A*. To the best of my knowledge now New Zealand, Australia, Africa, British
20 West Indies, and possibly some other countries I cannot recall.

Q. Trinidad ?—*A*. That is part of the British West Indies.

Q. Straits Settlements ?—*A*. I really cannot recall the Straits Settlements.

Q. Mexico ?—*A*. Possibly Mexico.

Q. Belgium ?—*A*. Well, I do not remember. We sent the Belgium Government a shipment during the war but they never reached Belgium.

Q. Was it sunk ?—*A*. Yes.

Q. Were you selling in China ?—*A*. Not that I recall.

Q. In the United States ?—*A*. Yes, a few but the tariff was against us.

30 *Q*. Rhodesia ?—*A*. I included that in Africa.

Q. Germany ?—*A*. Yes.

Q. Jamaica ?—*A*. I included that in the British West Indies.

Q. Newfoundland ?—*A*. We sold a few shipments. It is hard to remember. It is twelve years ago.

Q. British Honduras ?—*A*. I do not remember.

Mr. DRUMMIE : My lord, I didn't hear. Is this the old company before the new was incorporated in 1923 ?—*A*. Yes.

Q. Ceylon ?—*A*. I don't recall.

Q. Well, now, the new company entered into a contract with your uncle,
40 Mr. Patrick Connors, whereby he was to work as manager for a period of five years at a salary of $10,000.00 a year. Is that correct ?—*A*. I was told that. I could not say.

Q. (By the COURT). You believe it ?—*A*. I think it is true.

The COURT : I do not think it is very important.

Mr. INCHES : I think it is, my lord. I am going to prove it.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors. Cross-examination on Affidavit —*continued.*

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Mr. DRUMMIE : I object very strenuously to it.

The COURT : Is this the contract ? I admit it subject to objection.

Q. You know your uncle's signature ?—*A.* I would say that was his signature. I never seen the contract before.

Q. You were a director of Connors Brothers, Limited, when this contract was in existence, were you not ?—*A.* I do not think I was.

Q. It is dated November 8th, 1923, and it is for five years.—*A.* May I read it ?

Mr. INCHES : Yes, of course.

Mr. DRUMMIE : I do not like making a nuisance of myself but I cannot help feeling—— 10

The COURT : I admit it all subject to objection.

Mr. DRUMMIE : I do not know what it has to do with the transaction, my lord.

Q. You became a director in 1926, did you not ? This is 1923.—*A.* I was not a director of Connors Brothers. I think Robert Thompson was at that time.

Q. You and Patrick Connors and Lewis Connors didn't become directors of Connors Brothers in 1926 ?—*A.* After the Lewis Connors & Sons transaction went through I believe I was put on the board. 20

Q. And Patrick Connors was manager of the company at that time ?—*A.* Yes, but that is 1923.

Q. (By the COURT). During the time you were a director he was acting as manager ?—*A.* Yes.

Q. That is your uncle's signature ?—*A.* Yes.

(Agreement dated November 8th, 1923, offered in evidence, subject to objection,—marked as Exhibit B.)

Q. Your father Lewis Connors, your brother Edward and yourself were practically out of jobs, were you not ?—*A.* Yes.

Q. And you immediately—I say immediately—started in to acquire the Booth factory in West Saint John ?—*A.* That would be the following year. Early during the following year. 30

Q. (By the COURT). The year following what ? It would be 1924 ?—*A.* Yes, after the selling out of Connors Brothers—early in the following year. Lewis Connors, Bernard Connors and myself and then we later incorporated the company.

Q. (By the COURT). You mean just Lewis Connors and yourself ?—*A.* Yes, started and then incorporated the company.

Mr. INCHES : May it please your lordship, I have a search at the office in my files of the West Saint John property. I think those are H. E. Wardroper's initials. It gives the history of this property at West Saint John. If my learned friend will let me— 40

The COURT : Do not go into that now. He swore it was in West Saint John. It doesn't matter if they had a good title to their property or not.

Mr. INCHES : It gives the date.

Q. The Booth Fishing Company acquired this property in West Saint John on April 3, 1918 ?—*A*. I do not know.

Mr. INCHES : I was wondering if my learned friend would accept that date April 3, 1918.

The COURT : He says in 1924, the year after the company was incorporated they started a factory in West Saint John, Lewis Connors and himself, and later they incorporated a company.

Mr. INCHES : I want to establish that their venture was a complete 10 failure.

The COURT : They themselves started the factory in West Saint John in 1924.

Q. You bought the factory from the Booth Company, did you not ?—*A*. Yes.

Q. They acquired this property during the war and put up an up-to-date sardine factory, did they not ?—*A*. I do not know.

Q. It was a new property.—*A*. It was a remodelled building.

Q. What date did you buy it from the Booths ?—*A*. I cannot give you the date.

20 *Q*. Will you accept February 5, 1924, that you and your father bought this from the Booths by way of assignment of lease ?—*A*. Yes.

Q. And that was not quite four months after you sold out your stock on November 1st ?—*A*. My father and uncle did the selling out and asked me to sign.

Q. Your family became the owner of $200,000.00 in cash and preferred stock. By February, you had laid part of that money out in the purchase of that Booth factory, did you not ?

Mr. DRUMMIE : Does he mean the witness or the Connors family, my lord ?

30 *Q*. You got about $19,000.00, didn't you ?—*A*. No. You want to know if I put that money into this new factory ?

Q. Yes.—*A*. No it was my father.

Q. Your father put the money in and you and your brother and mother got sufficient stock to give you three a controlling interest in it ?—*A*. The stock was split up.

Q. You got a large block of it ?—*A*. I think the same as my brother and sister.

Q. That was practically a gift from your father ?—*A*. I suppose it was.

Q. I put it to you, you were not the active mind in the starting of that 40 factory ?—*A*. Was I an active mind ?

Q. Yes.—*A*. My father didn't get put on the Board of Directors of the new company formed in Black's Harbour and my idea was he was dissatisfied and wanted to get a job to go to work again. That was my impression.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Q. He was at that time getting to be a fairly old man and did not have the business ability that he once had?—*A.* I would not like to say.

Q. Why mince matters? He was not in good business condition?—*A.* I would not like to say. He was much older.

Q. So you became the manager of this factory?—*A.* Yes.

Q. You and your father run the place as a partnership until fall of that year when you incorporated Lewis Connors & Sons, Limited?—*A.* Yes.

Q. That was around August, 1924?—*A.* I cannot recall the date. Perhaps you have the date there.

Q. Connors Brothers brand of sardines, Brunswick Brand, was the universal seller and most popular brand?—*A.* Yes. 10

Q. And it had been the brand that had been sold for a number of years?—*A.* Yes.

Q. You adopted—Lewis Connors, you and your father first, and then the company, got out a brand called Banquet Brand?—*A.* Yes.

Q. And in style you got this done up like Brunswick Brand?—*A.* It was a tin can.

Q. It was the identical fish you were selling?—*A.* Yes, the same sardine.

Q. I put it to you, in March, 1924, you went into Mexico and started to sell Banquet Brand, didn't you?—*A.* I cannot recall the date. We did sell in Mexico. 20

Q. Did you receive any objection from a man named Andrew Clark?—*A.* Yes.

Q. What was his objection?—*A.* He had a brand called Brunswick Brand registered in Mexico.

Q. You agreed to forego the selling of Banquet Brand after selling what you had on hand?—*A.* I do not recall. We had registered.

The COURT: Is this not getting pretty wide? How is that going to help me determine the compass of this agreement. 30

Mr. INCHES: I am coming to that.

The COURT: We are making considerable allowance for your lack of experience. As the years go on——

Mr. INCHES: I think you would have stopped me before but you know I generally lead up to something.

Q. You registered Banquet Brand in Mexico?—*A.* Yes, as I recall it.

Q. Did you take also Brunswick Brand of Connors Brothers and register it?—*A.* We may have. I have forgotten. In Mexico I believe the law is that the first registered is good.

Mr. DRUMMIE: With regard to the evidence which Mr. Connors has given relative to taking over the Brunswick Brand, I object to everything Mr. Inches has asked, my lord. 40

Q. Do you remember that document? (Showing witness paper).——Yes.

Q. What is it?—*A.* It is the registration of Banquet Brand sardines in Mexico.

Mr. INCHES: I do not want to clutter up the record——

The COURT: We will put it in.

Q. It was registered by Lewis Connors & Sons, Limited, on September 2, 1924?—*A.* Yes.

Q. On November 17, 1924, Lewis Connors & Sons, Limited, registered Brunswick Brand in Mexico?—*A.* Apparently they did.

Q. That was Connors Brothers universal seller that you registered there? —*A.* Yes.

Q. Why was it you took their brand?—*A.* As I remember—I do not recall the thing very clearly—it was our intention to register three or four brands there. I think there was another.

Q. Why did you take Connors Brothers brand—Brunswick—and registered it?—*A.* The company thought it was a good brand to sell there. But they never used it. I would not use it.

Q. In March of that year did you go into Jamaica and apply for the registration of Brunswick Brand there?—*A.* I do not recall that.

Q. What countries did you attempt in that year to register Brunswick Brand in?—*A.* I do not think any others. Only Mexico. I have forgotten about that as we did not use it. I would not use it.

Q. You have no recollection of having registered or attempted to register Brunswick Brand in Jamaica?—*A.* If we did, I do not recall it. It was just a matter of registering brands.

Q. This transfer—your father and yourselves transferred this partnership business of Lewis Connors & Sons to the company for $150,000.00 in stock of the company?—*A.* We transferred the shares of the company.

Q. And the $150,000.00 was converted into 50,000 preferred and 100,000 common?—*A.* I think so.

Q. You got how many shares out of that yourself?—*A.* I just cannot recall the number of shares, that I got.

Q. You had at least 172?—*A.* Yes.

Q. And a good many more?—*A.* Yes, more than that, I think.

Mr. DRUMMIE: What does "a good many more" mean?

Mr. INCHES: If he doesn't know, how would I know?

Mr. DRUMMIE: It is twelve years. How would he know?

Mr. INCHES: He has gone over those agreements with you. It is all set out. I can tell you when he had copies of the agreements.

Q. You don't know how many shares you had in Lewis Connors & Sons, Limited?—*A.* My sister and brother and I had about equal shares.

Q. Whatever you had, your sister and yourselves, you had the controlling interest?—*A.* I could not say that.

Q. (By the COURT). You do not know if the three had the controlling interest or not?—*A.* I do not know which three controlled. I think my father and mother and I controlled it.

Q. (By the COURT). Were there any people outside the family having shares?—*A.* No.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Q. I ask you if you—this new company—didn't write to the customers of Connors Brothers, Limited, throughout Canada and the world, telling them that you were the real Connors people and asking them to deal with you and buy your Brunswick and Banquet brands ?—*A.* As I recall, we issued a circular to trade in Canada. I cannot remember what was in the circular now. I would not have all to do with it. My brother had a lot to do with them.

Q. Your brother is J. Edward Connors ?—*A.* Yes.

Q. He is not a man of any physical ability, is he ?—*A.* I cannot remember what was in the circulars. The circulars would be sent out in the ordinary way. 10

Q. (By the COURT). Is it not a fact that the circulars appealed to people to buy from you and not from the other concern because you were the original Connors ?—*A.* I imagine we said we were the original and wanted to get the business.

Q. (By the COURT). You were trying to get all the business you could ?—*A.* Yes.

Q. You were quite highly successful, were you not ?—*A.* Well, I don't know. We sold, I think, around 40,000 cases in the first twelve months.

Q. And Connors Brothers were selling at that time about 100,000 were they not ?—*A.* I do not know. I think much more than that. 20

Q. Is it fair to say that Lewis Connors & Sons, Limited, were selling in all the Provinces of Canada ?—*A.* I think perhaps they were selling some in pretty near every province in Canada.

Q. Were they not selling in most of those foreign countries that you have mentioned Connors Brothers were selling in ?—*A.* I think they sold in the British West Indies—Australia—.

Q. Africa ?—*A.* They may have sold some there. I think some sales were made in Africa.

Q. I am going to ask you to look at that statement. (Showing witness paper) December 30, 1925. Then it is fair to say, is it not, that you were enabled by these circulars to sell in all the markets that Connors Brothers were selling in—as a general statement, is not that a fair one ?—*A.* Yes, I think our circulars were sent out to sell the sardines. 30

Mr. DRUMMIE : He cannot give any definite answer that those circulars resulted in sales.

Mr. INCHES : I didn't ask if they resulted in sales.

Q. (By the COURT). As a matter of fact, you were practically selling in all the countries in which Connors Brothers were selling in ? And did sell something in practically all the countries they sold in ?—*A.* Yes, we were trying to sell all we could. 40

Q. As a matter of fact, you under-sold Connors Brothers—your old prices—to such an extent that you were in bankruptcy ?—*A.* I would not say that.

Q. You got in such a condition that you approached Connors Brothers and asked them to assist you ?—*A.* I do not think I did.

Q. Have you knowledge that your father did?—*A.* He may have. I do not know how it came about.

Q. You were manager at the time?—*A.* Yes.

Court adjourned until 2.30 p.m.

Court resumed at 2.30 p.m. Mr. Bernard Connors takes the stand.

EXAMINATION BY MR. INCHES continued.

Q. Mr. Connors, we were talking about the extent of the business that Lewis Connors & Sons, Limited, were building up. Is that your signature to that letter? (Showing witness paper).—*A.* Yes.

10 (Letter from Lewis Connors & Sons, Limited, to Connors Brothers, Limited, dated October 8th, 1924, admitted in evidence as Exhibit C. Same objection by Mr. Drummie).

Q. In that letter you complain that Connors Brothers, Limited, are advertising that three out of four tins of sardines sold in Canada are packed by Connors Brothers and threatening to sue them if they repeat such statements. What proportion of the sardines sold in Canada was your company selling?—*A.* I cannot answer that question, right now. The Norwegian sales and our sales together, I thought, were more than they were advertising.

Q. In your letter to Connors Brothers, Limited, of April 15th, of this 20 year—Exhibit No. 6—you state "It is also my desire to use the name of Connors if I may choose in connection with the sardine business in Canada or elsewhere." Now you have already told about the early rise of Connors Brothers. This name "Connors" had acquired a distinctive meaning in connection with fish had it not? *A.* In some lines, I suppose.

Q. In what lines?—*A.* Particularly sardines.

Q. What other lines?—*A.* Particularly sardines.

Q. What other lines? You said some lines.—*A.* They might mean canned herrings. Canned herrings, I suppose.

Q. Kippered herring?—*A.* Yes.

30 *Q.* Finnan haddies?—*A.* Yes.

Q. Clams?—*A.* Yes, all the lines they pack.

Q. Flaked fish?—*A.* Yes.

Q. And Connors Brothers had been packing or selling those brands how many years—as long as you can remember?—*A.* Yes.

Q. You say that this word "Connors" had become identified with the sale of those products?—*A.* I would say yes along with other brands.

Q. But particularly with sardines?—*A.* Yes.

Q. That would be in those localities—Canada and those countries that you mention, would it not?—*A.* Sardines, yes. As far as I know, 40 the other items were not exported.

Q. Then your registration was only with reference to the sardines, was it not?—*A.* Yes.

Q. As a matter of fact, you have been engaged in selling other lines which you mention for some years last past, have you not?—*A.* Yes, clams and chicken haddies particularly.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit *—continued.*

Q. You incorporated the Harbour Packing Company when ?—*A.* 1927, I think it was.

Q. I have the Royal Gazette here and the date is April 27th, 1932. —*A.* Was it 1932 ?

Q. You will accept that date ?—*A.* Yes.

Q. How long was the Harbour Packing Company in business ?—*A.* They started in 1927. They were incorporated on that date.

Q. Is it still in business ?—*A.* No.

Q. When did it stop ?—*A.* Last year between February.

Q. That was your company, was it not ?—*A.* I would be a member. 10

Q. Was there any other capital in it outside of your mother and yourself ?—*A.* Not very much. Nothing to speak of.

Q. You put up a brand called Captain John Brand sardines, didn't you ? —*A.* We had a few packed under that label. We didn't pack.

Q. But you sold them ? They were your brands ?—*A.* Yes, we had a few cases.

Q. Was there a Captain John Brand of clams ?—*A.* Yes.

Mr. DRUMMIE : My lord, I am not certain if Mr. Inches is talking about Connors Brothers.

Mr. INCHES : I am talking about Harbour Packing Company. 20

Mr. DRUMMIE : I still do not see what it has to do——

Mr. INCHES : I am getting this evidence, my lord, because we have the witness telling us all the brands of fish and clams and whatnot that Connors Brothers packed and we have the restrictive covenant as to one of those commodities only and now we find that since 1927 his company has been dealing in these other kinds of fish. I want to show that he is not shut out at all from carrying on.

The COURT : The covenant itself would show that. You do not show very much by showing the activities of the Harbour Packing Company. If you are looking for an injunction, it might be material. You say the 30 covenant did exclude them and then you want to state what some of the things are they did.

Mr. INCHES : We are speaking about a question of responsibility now. This man was put out of business. We are showing that out of six different kinds of sea foods that Connors Brothers deal in he was only prohibited from selling five.

Q. You did put up sardines under the name of the Harbour Packing Company ?—*A.* The Matthews Canning Company.

Q. I am asking you, from 1927 to last year you were not running a Harbour Packing Company which was dealing in sardines ?—*A.* They did 40 handle a few which were packed by the Matthews Canning Company.

Q. Did you handle them ? When did you handle them ?—*A.* It was such a limited quantity—I think it was 1931 around there.

Q. Did you deal with any Ontario——?—*A.* I cannot recall the names now.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Q. You cannot recall any name ?—*A.* No.

Q. Does the name G. Coles & Company suggest anything to you ?—*A.* No. I remember William Coles.

Q. Do you remember that ?—*A.* Yes.

Q. They were one of your agents ?—*A.* Yes.

Q. They handled only sardines ?—*A.* They might have handled a few cases. I cannot say definitely if they did or not now.

Q. Do you know their letter heads ? (Showing witness paper.)—*A.* Yes.

10 *Q.* You recognize that ?—*A.* Yes.

Q. You identify that as a letter head of William G. Coles & Company ? —*A.* Yes.

Q. And they were advertising your products ?—*A.* Yes.

Mr. DRUMMIE : This witness cannot give any evidence as to what is in that document.

The COURT : The witness says the people just mentioned did sell something for them. They are apparently advertising their products. What does it amount to ?

Mr. DRUMMIE : The correctness of it might amount to something, my 20 lord.

The COURT : We have not yet got down to their request to advertise them.

Q. They were your agents ?—*A.* Yes.

The COURT : After all, I am not trying out an injunction case now. This seems to be an angle of it. He is restricted from handling sardines at all. That is your case. If you go on just a step further, you may help him very much. I do not think Mr. Drummie wants to stop you.

Mr. INCHES : May it please your lordship, that is the road I am on. I am leading up to the correspondence which I had threatening an injunction. 30 The way my learned friend argued this case was this—that we are on all fours. I am going to attack this man's *bona fides* before the case is over.

The COURT : From the standpoint, of this case, it does not matter if there is a violation of the covenant or not. I will allow you to examine him on his affidavits but I do not think I should allow that to go on so far as to get material for an injunction.

Mr. INCHES : In this regard they have already put in this Exhibit No. 5, —" That you consider the period of twelve years, which has since elapsed, sufficient restraint in point of time so far as your position is concerned." He is representing to us that he kept that covenant for twelve years. Now I am 40 trying to show that he has started to violate it. He says in 1931. How many years I do not know.

The COURT : He may have to abide by the covenant for his lifetime provided that the restriction is a reasonable one. But evidence that he has sold sardines in violation of the covenant is not evidence that the covenant is a reasonable one.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Mr. INCHES : The way I take it is that he considers it was a reasonable covenant for twelve years, but there is no reason why it should remain——

The COURT : You say it is a perpetual covenant ?

Mr. INCHES : Yes.

The COURT : I do not think, while I allow you a great deal of liberty in examining on his affidavits, I do not think we should go on in this line. It may be the means of accumulating evidence by which you can bring another action against him. I do not think you had better pursue it.

Q. In 1926—1925 or 1926—you sold Lewis Connors, Limited, to Connors Brothers, Limited, a control. Last year you wanted to—— 10

Mr. DRUMMIE : I object to the way my learned friend is putting this question, Mr. Connors did not sell to Connors Brothers.

The COURT : I suppose he participated in the sale. The fact is established.

Q. I ask you, in August—I withdraw the last question—whether or not you attempted to sell Harbour Packing Company, Limited, or an interest therein to Connors Brothers, Limited ?—*A.* And interest in Harbour Packing Company—I do not recall that.

Q. (By the COURT). You are asked if you tried to sell the Harbour Packing Company, or your interest therein, in August, 1933. Did you or did you not ?—*A.* I do not recall that. 20

Q. I will ask you to read that paragraph from your solicitors ? (Showing witness paper).—*A.* This says a 40% interest in Harbour Packing Company

Q. (By the COURT.) Do you wish to change your answer to the last question ?—*A.* After reading that—I offered 40% on condition that they would supply us cans from their can making plant.

Q. Why did you want them to buy an interest in your business ?—*A.* That is the only place you can buy sardine cans in Canada. I thought if they were willing to sell cans, it would be alright to use their cans. They might agree to it. 30

Mr. DRUMMIE : Speaking of solicitors, what solicitors are you talking about ? My lord, I would like your lordship to look at this letter before we start taking evidence about it.

The COURT : He made a statement entirely outside.

Mr. DRUMMIE : The letter is written without prejudice from one solicitor to another.

The COURT : After looking at the letter, it recalled it to his mind. He says now it was 40%. I will not admit that letter if it is offered. You need not worry about that.

Q. With regard to Exhibit No. 4, the agreement of April 30, 1925, between you and your father and the two MacLeans, what part of the 25,000 par value preferred and 30,000 par value common stock of Connors Brothers, Limited, did you receive ?—*A.* Would you repeat that ? 40

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued*.

Q. I am coming to the agreement of April 30, 1925—if you will remember—by this agreement for 25,000 preferred and 52,500 common of Lewis Connors & Sons, Limited, you and your father were to receive from the McLeans 25,000 preferred and 30,000 common of Connors Brothers, Limited. How much of that 25,000——?

The COURT : How can he answer that ? He cannot specify exactly. It was practically equally divided. Is that it ?

Mr. INCHES : What he said was this, my lord. His father got part, he and his brother and sister got one-half divided equally among them.

10 Mr. DRUMMIE : He didn't say that at all, my lord.

The COURT : He participated in it. No doubt about that.

Q. That left in the treasury of Lewis Connors & Sons, Limited, 25,000 preferred and 47,500 common—that was the stock which the McLeans were to get Connors Brothers to buy from the Connors shareholders over a period of years ?—*A*. Yes. The balance of 40 some per cent.

Q. It would be 47½% would it not ?—*A*. Yes, 40 odd.

Q. Having got that stock of Connors Brothers, the result was that with the preferred stock of Connors Brothers, which Patrick Connors family and your family had, and with the preferred stock of 25,000 preferred and a con-
20 siderable amount of common which the McLeans and their friends had, the voting power in the company was about equal—was it not—in Connors Brothers, Limited ?—*A*. Not much difference, as I remember.

Q. Under this agreement of April 30th which was optional in form and was subject to Connors Brothers, Limited, approving of the same, the McLeans had up to May 30th, 1925, to accept. I am just referring to the agreement which is in evidence. Before they would accept, however,—they did accept, did they not ? They accepted the option ?—*A*. Yes.

Q. But some days before they accepted, they pointed out to you that they must have a control for some years of the voting power, did they not ?

30 Mr. DRUMMIE: I object to that.

The COURT : What objection ?

Mr. DRUMMIE : He is examining from the agreement. The agreement speaks for itself.

The COURT : There must be something preliminary to acting upon it.

Q. This is your signature ?—*A*. Yes.

Q. You remember that voting trust agreement that was deposited with the Eastern Trust Company ?—*A*. Yes.

(Agreement dated May 23, 1925, between Bernard Connors of the first part ; A.Neil McLean and Allen McLean of the second part ; and the Eastern
40 Trust Company of the third part admitted in evidence—marked Exhibit D.)

Q. I want to ask you if you remember, in brief, this agreement ? You were to transfer 180 shares of Connors Brothers, Limited, stock, whether preferred or common, into the name of the Eastern Trust Company and Neil McLean and Allan McLean were to transfer a like amount between them ?—A. Yes.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Q. Which was 360 shares ?—*A.* Yes.

Q. And then the Eastern Trust Company were to give Allen and Neil McLean a power of attorney irrevocable for three years to vote the block of stock of 360 shares ?—*A.* Yes.

Q. In that agreement, I want to point out the clause which provided that if either party wanted to sell his shares during the three year period he must offer to the other party the stock for thirty days at the market price. You remember that provision ?—*A.* Yes.

Q. I also want to ask you if you remember the provision that Neil McLean would vote the stock in favour of employing you as manager at Black's Harbour for $7,500.00 a year if Patrick Connors should cease to be a member of the factory ?—*A.* I do not recall everything but I know it was stock put in trust.

Q. Then you, having given the McLeans control of the voting power in Connors Brothers, Limited, went ahead and fixed up the agreement on June 9th, 1925. Is that correct ?—*A.* I cannot recall the exact dates.

Q. That is the agreement that was put in evidence and which the Court was asked to interpret. Now you will admit that the signing of this agreement by the McLeans was conditional solely upon them getting that voting trust agreement out of you ?

Mr. Drummie : I object to that. The agreement was signed June 9th, 1925. The agreement is here for interpretation. He is asking that witness if it is not conditional upon something outside of it altogether. The agreement speaks for itself.

The Court : The agreement will speak for itself as far as it is an agreement. But there must be an agreement to bring it into force. To act upon it. I can say " Yes, I will sign that document " and bind myself to its provisions provided you give me something outside of it.

Mr. Drummie : Everything is expressed in the option. The June 9th agreement confirms the option.

Q. I will put the question another way. Didn't the McLeans or one of the McLeans tell you that they would not accept the option contained in the April 30th agreement until you had transferred this stock under the voting trust ?—*A.* I do not recall it.

Q. What lead up to you trusteeing the stock ?—*A.* I cannot explain that any more than he wanted to vote my stock and I was willing to give it to him.

Q. I am putting it to you right now. I consider this is practically the crux of the whole case right here. You cannot remember why you trusteed that stock and gave control to Connors Brothers, Limited ?—*A.* I do not recall.

Q. You cannot recall it ?—*A.* Not put to me that way.

Q. Then I ask you again if you can remember the things which lead up to your signing that voting trust agreement ?—*A.* I cannot recall that. I do not remember what lead up to it.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Q. (By the COURT). Surely it must be either with the purpose of letting somebody control the power of the company or it must have been to prevent somebody from doing it. One or the other was the object of the voting trust agreement.—*A.* I think they had control. I would still get the dividends but the votes would be no good to me.

The COURT : The votes would be outstanding in the hands of a third party. They would prevent one party from over-riding the other.—*A.* I didn't think it would do much harm to give them the votes on the stock.

Q. The Eastern Trust gave Neil McLean an irrevocable proxy to vote
10 the stock for three years ?

Q. (By the COURT). They wanted control ?—*A.* Yes.

Q. (By the COURT). You got the dividends anyway ?—*A.* Yes.

The COURT : I am trying to understand that agreement of June 9th.

Mr. INCHES : You will remember that Connors Brothers only purchased a little more than half of the stock. You will notice in the provision that the shareholders of Lewis Connors were going to get dividends.

The COURT : I understand.

Q. The agreements were entered into and you were manager at West Saint John. Is that correct ?—*A.* Yes.

20 *Q.* In that agreement there is the undertaking by Connors Brothers, Limited, to relieve you and your father from your personal liability on the bank loan. Do you remember how much that loan was ?—*A.* I do not recall the figures.

Q. Would $30,000.00 be approximate ?—*A.* It might be. I do not recall the figures.

Q. But they did ?—*A.* Yes, they relieved us.

Q. Do you see that letter ? (Showing witness paper).—*A.* Yes.

Q. You authorized Barnhill, Sanford & Harrison to send that letter ? —*A.* Yes.

30 (Letter of Barnhill, Sanford & Harrison to A. N. McLean and Allen McLean, dated December 15, 1925, with copies of letter from J. H. Driscoll and James T. MacCormack to Bernard Connors attached thereto admitted in evidence—marked Exhibit E—subject to Mr. Drummie's objection that it is irrelevant.)

Q. This was the 160 shares of Connors Brothers stock which had been transferred. Was it not mentioned in this letter ?—*A.* That was the stock in trust.

Q. And under the agreement—under the voting trust agreement—if you wanted to sell your shares you had to offer them to the McLeans first
40 at the market value. Is that it ?—*A.* Yes, that is what it says.

Q. That is right ?—*A.* Yes.

Q. Then to prove to the McLeans that 150 was the market value for the common and 163 a share was the market value for the preferred, you put in these—you sent them copies of these two letters from Driscoll and McCormack ?—*A.* Yes.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Q. And James T. McCormack was your father-in-law ?—*A.* Yes.

Q. Who is J. H. Driscoll ?—*A.* J. H. Driscoll, West Saint John.

Q. How did they come to write you those letters ?

(Objected to by Mr. Drummie).

Mr. INCHES : Here is common stock which I will submit at that time was not worth 20 and did not have a market price of 20 a share. Here was Connors Brothers preferred stock which could not have a market value of much more than par. Now he offers to sell the stock at what he says is the market value—160 for the preferred.

The COURT : Was there not a provision in this contract—the price at which it was to be sold ?

Mr. INCHES : The market price. To prove the market price he puts in these two letters.

The COURT : Supposing you went into all this thing to prove he was trying to commit a fraud and he just used these people to make the offer and all that. How would that help me to find the meaning of the covenant ?

Mr. DRUMMIE : It is part of the campaign that has been going on all day, my lord.

Mr. INCHES : It is leading up to the covenant of June, 1926. I am showing this Court what we paid for control of the business and for that covenant.

The COURT : All that I think I must restrict somewhere. I prefer not to go into that. What do you mean by the word " business " ?

Mr. INCHES : The controlling interest in Connors Brothers.

The COURT : Business of what ?

Mr. INCHES : The business the McLeans bought in 1923 for $400,000.00.

The COURT : What kind of business ?

Mr. INCHES : The fish business—selling at least six different brands of fish.

The COURT : I have not paid enough attention to the questions and answers. Before I get through, I want to know in connection with that paragraph 4. (Reads).

Mr. INCHES : That is in the agreement of April 30th.

The COURT : It carried through ?

Mr. INCHES : The word " other " is cut out. It was in June 9, 1925, but not in the October, 1926.

The COURT : What do you say to your covenant ? What are you relying on ;

Mr. INCHES : I am relying on all three.

The COURT : I shall want to know your contentions. Whether this man, the plaintiff, could not manufacture sardines within the Dominion of Canada, selling them outside the Dominion ? Do you contend that ? Or do you

simply contend that so long as he did not sell or attempt to sell in the Dominion of Canada, he could sell elsewhere ?

Mr. INCHES : He cannot do any business in Canada at all.

The COURT : I want to know whether you mean manufacturing or merchandising, or both ?

Mr. INCHES : I said putting up in tins and merchandising.

The COURT : This is not the time, perhaps, but I should like to have that discussed before the case closes. You will see the word " sardine " business appears in almost the last line in connection with the use of brands.

10 *Q*. I show you that cheque. (Showing witness paper.)—*A*. Yes.

Q. The McLeans accepted your offer for this stock ? (*Objected to by Mr. Drummie*).

Q. We have this trusteed stock in evidence—180 shares. Now I am asking you—you offered to sell this to the McLeans and they accepted your offer and got control of Connors Brothers ?—*A*. Yes.

Q. How much did they pay you for it ?—*A*. They paid me. This was paid me for the stock—$28,280.00. (Indicating cheque).

(*Objected to by Mr. Drummie. Allowed*).

Mr. DRUMMIE : This is Connors Brothers and not Lewis Connors & Sons.

20 Mr. INCHES : We are talking about the control now in Connors Brothers. It would be Connors Brothers stock.

Mr. DRUMMIE : We gave no restrictive covenant in regard to Connors Brothers, my lord. I do not know what that has to do with it.

Q. These sardines that Connors Brothers sold were put up by them and sold by them, were they not ?—*A*. The sardines packed by Connors Brothers ?

Q. Yes.—*A*. Yes.

Q. And Lewis Connors the same ?—*A*. Yes.

The COURT : Before Connors Brothers bought the whole thing out, there 30 was a pack put up by Lewis Connors was there ? Paragraph 3 contemplates doing it in that year and succeeding years.

Mr. INCHES : There is an agreement with Lewis Connors that if Connors Brothers found it was more economical at Black's Harbour that they would manufacture the pack of Lewis Connors & Sons there and that was done after the first year and Mr. Connors went down there to work. That is in the agreement.

Q. It was on December 29 that that cash was paid—1925 ?—*A*. The cheque was dated December 29th.

Q. December 31st ?—*A*. Yes.

40 *Q*. Mr. Connors, having parted with this controlling interest, as we call it, in Connors Brothers, Limited, you still made an attempt to get control of Connors Brothers, Limited, didn't you ?—*A*. I made an attempt ?

Q. Yes.—*A*. My uncle did.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Q. Your uncle, Patrick Connors? He was manager at the time? He was engaged by Connors Brothers, Limited, at a salary of $10,000.00 a year? —*A.* I believe he was a director.

Q. He was manager?—*A.* I do not know.

Q. He was Vice-President?—*A.* I am quite sure he was a director.

Q. You got together with him and your father and brother and tried to upset everything that had gone on in the past?

(*Objected to by Mr. Drummie*).

The COURT: How can his conduct determine the meaning of the covenants? 10

Mr. INCHES: I thought we were producing evidence as to reasonableness

The COURT: That would not make the covenant reasonable or unreasonable. It seems to me that you might fairly ask him whether he did not intend it to be a sale to Connors Brothers of all the assets, etc., of the Lewis Connors concern for the purpose of the acquisition of the entire sardine business by Connors Brothers and the elimination of competition.

Mr. INCHES: The elimination of Bernard Connors?

The COURT: The elimination of competition. From anybody. What I want to know is whether the witness will recognize that that was the general object. Then the only question to ask is "Has the object been sufficiently 20 expressed?" But as to whether he went behind somebody's back and tried to get an advantage he should not have doesn't seem to interpret the case at all.

Mr. INCHES: That is our whole case. We have shown that this man participated in getting $400,000.00 from my clients for the sale of a business. Whereas as soon as he and his father got that $200,000.00—they were the one Connors family—they wrote to all our customers in Canada and throughout the world and within the space of a year was packing nearly half as much as the parent company and they were cutting prices to such an extent that they were going into bankruptcy and it was really a question how long— 30 which company would go under first. He must have known his father was coming to us to save them and we drew up these agreements, undertaking to save them and why? If we buy out Lewis Connors & Sons, Limited, are they going to go out and do the same thing they did when we bought out Connors Brothers, Limited.

Mr. DRUMMIE: I know your lordship's mind will not be prejudiced by anything he says. I would like to know if he is going to produce evidence about all this?

The COURT: What I want to know is whether, no matter how reprehensible you may consider the client to be from a moral standpoint, 40 whether you can claim that the Court can force—or whether the law is that he is bound by his agreements but he is not bound by something that is not in the agreements and if in the drawing of the agreement you have left a loop hole.

Mr. INCHES: I do not know what better language could be used.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

The COURT: It must turn on that sort of thing surely. I will ask the witness myself:

Q. (By the COURT): Have you any other idea than that Connors Brothers were taking over your concern for the purpose of eliminating competition by your concern? They wanted to get you out of business to get a clear field?—*A.* Yes.

Q. (By the COURT): And paying you more money than your stock would be worth?—*A.* It might have been.

Q. (By the COURT): You thought so?—*A.* We thought the price 10 was fair.

Q. (By the COURT): Considering that you were to get out of business and stayed out of business?—*A.* Yes.

Q. (By the COURT): What gives you the idea you would like to go into the business now?—*A.* They insisted upon having this agreement signed and I at the time had legal opinion on it—that it was not binding—and I did not want to sign it at first but they insisted and after I had a consultation with my solicitors I was under the impression it was not binding and I was not giving them——

Q. (By the COURT): In other words, they were not getting what they 20 thought they were getting and not getting what they were paying for?—*A.* I thought they were trying to bind me as best they could.

Q. (By the COURT): Didn't they think they were providing for keeping you out of business?—*A.* Yes, they were trying to provide for keeping me out altogether.

Q. (By the COURT): You felt they were just a bit wrong about that and were not getting what they thought they were?—*A.* They might.

Q. (By the COURT). Was it or not?—*A.* I do not know what they thought they were getting.

Q. (By the COURT). We will repeat ourselves. Have you any doubt 30 what they thought they were getting? Have you any doubt?—*A.* Well, one of their directors told me he was not sure it would be binding.

Q. (By the COURT): That director was who?—*A.* B. M. Hill.

Q. When did Mr. Hill tell you that?—*A.* I cannot recall the date. It was during that time—of these negotiations. I do not know the exact date.

Q. Where did the conversation take place?—*A.* I cannot just recall exactly where it was. I think down in Mr. Hill's office—in one of his offices.

The COURT: Mr. Hill, like most of us lawyers, might very well have 40 the opinion that while it was desirable to have this restraint in the clause, it probably would not be effective. That would not affect the interpretation a particle.

Mr. INCHES: I am still trying to show that this was a reasonable agreement when Mr. Drummie interrupted. I say that after paying you——

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit. —*continued.*

The COURT: The proof that you wanted me to listen to of a reasonable agreement was evidence that he tried, with the aid of someone in the company, to swindle you.

Mr. INCHES: That all leads up to why he left Lewis Connors & Sons, Limited, and how the agreement of October 2nd happened to be signed.

Mr. DRUMMIE: If my learned friend would get the evidence and then give his speeches, we would get somewhere.

The COURT: I am not taking the speeches as evidence.

Mr. INCHES: I am submitting an argument as to why Mr. Connors should go on and give us some more evidence. 10

Q. Will you read that through and tell if you remember signing that agreement? (Showing witness paper). *A.* I do not think that an agreement like that was ever signed.

The COURT: He just asked you to read it through. You may ask questions.

Q. You read it through?—*A.* Yes.

Q. And you see you are mentioned as a party to it?—*A.* Yes.

Q. You do not remember signing it?—*A.* I never signed anything like that. I am quite sure.

Mr. INCHES: I am asking you to produce, Mr. Drummie, the agreement dated January, 1926, between Patrick W. Connors, Lewis Connors, Bernard Connors, J. Edward Connors, Mary J. Connors and Laura G. MacGowan, of which I interpret this is a copy. 20

Mr. DRUMMIE: I never even heard of it before.

WITNESS: I do not recall it.

Mr. INCHES: Do you think you can get an original from one of these parties to it?

Mr. DRUMMIE: He doesn't know if there is an original.

Mr. INCHES: You say you have not seen the original?

Mr. DRUMMIE: If I had, I would produce it. May I look at it again so I will know it if I see it? 30

Q. In 1926, you worked down at Black's Harbour, didn't you?—*A.* I was down there—yes. There was not much work to do.

Q. When you sold your stock in Lewis Connors & Sons, Limited, to Connors Brothers, Limited, the Connors Brothers had submitted to them a balance sheet, didn't they, of Lewis Connors & Sons, Limited?—*A.* What is that again?

Q. I am asking you if when Connors Brothers bought stock from Lewis Connors & Sons around April, 1925, you submitted to them a balance sheet audited by P. F. Blanchette?—*A.* Yes, that is the auditor's statement. 40

Q. You got Blanchette to make this statement. You were manager of the company?—*A.* The President got the statement.

Q. You agree that you have seen it?—*A.* Yes, I have seen it. Yes. He would show it to me.

(Balance sheet of Lewis Connors & Sons, Limited, April 30th, 1925, admitted in evidence—marked Exhibit F.)

Mr. DRUMMIE: My learned friend is making out that these negotiations were made by this man.

The COURT: I do not take it that way.

Q. You and your father carried on the negotiations?—*A.* Yes.

Q. You note in this balance sheet that under the manufactured stock you had two lots here amounting in value, the first one to $3,238.20 and the other lot $8,506.89?—*A.* The other lot is outside points.

Q. Yes, outside points. There was an Executive Committee or Board of Directors of Lewis Connors & Sons, Limited, of which you were a member in 1925?—*A.* Yes.

Q. Do you remember attending a meeting of the Directors in March when Mr. Hill, Mr. Neil McLean, Mr. Lewis Connors, Mr. Lingly and yourself were present?

The COURT: March when?

Mr. INCHES: March 2nd.

Mr. DRUMMIE: It must be 1926.

Q. Yes. 1926. Do you remember being present at that meeting when a discrepancy of goods was discussed?—*A.* I think there was.

Q. Do you remember or not?—*A.* Yes, there was some discussion.

Q. I put it to you, Mr. Hill asked you to explain the shortage in the inventory of 23,000 cases?—*A.* I do not remember the cases.

Q. But you remember discussing ——?—*A.* Yes, the shortage in cases.

Q. What was the price—the value—of those cases at that time?—*A.* Where they were on the floor—at that time they were not in cases. The shortage occurred in loose cans piled on the table.

Q. If they were, what would they be worth a case?—*A.* $2.75.

Q. Not $4.50?—*A.* Not, they were not cased then.

Q. I ask you if they did not put it to you that you were short between $8,000.00 and $9,000.00 worth of goods in your inventory and also put it to you that you were responsible to make up that deficiency?—*A.* They didn't tell me I was responsible.

Q. Do you remember them discussing the amount or value?

Mr. DRUMMIE: Since I am trying to protect this man's interests, may I know when this shortage was supposed to take place?

Mr. INCHES: It is a shortage in the inventory. The goods were not there.

Q. Then I am asking you if in March, 1926, it was not put up to you in this directors' meeting that that inventory was short in goods to the amount of $9,000.00 or $10,000.00?—*A.* I understood there was a shortage.

Q. How much?—*A.* I cannot recall.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued*.

The Court: If this plant, we will say, had gone into the sardine business against your interpretation of the covenant, you may bring an action for an injunction to restrain it. It seems to me that would be quite open to you to show that all the dealings of this man and his associates from the very start were one of fraud or attempted fraud. I am not saying this amounts to that but I think you might do that. Get your injunction. But here I do not see that you can go into that. You cannot ask me to give a more liberal interpretation of the words than they will properly bear.

Mr. Drummie: I may say, my lord, that from these suggestions of my learned friend about shortage one might gather that this man has done 10 something reprehensible.

The Court: I assume all that in his favour. It does not affect my dealing of the case.

Q. What business were you carrying on in 1926? Were you manufacturing sardines?—*A*. Yes.

Q. Haddies?

The Court: Ask what he was engaged in. If he was principal agent or accessory after the fact.

Q. What was Lewis Connors & Sons selling then?—*A*. Sardines. Canned sardines. 20

Q. What else?—*A*. That is all. Canned fish they manufactured.

Q. I asked what they were selling?—*A*. Selling sardines. They may have sold clams. A very small portion.

Q. Anything else? I am asking what they were selling?—*A*. Principally canned sardines.

Q. What else?—*A*. Possibly some clams. A small quantity of clams.

Mr. Drummie: My learned friend is asking from some records he has. It is twelve years since he worked for those people.

The Court: Mr. Inches has not found fault with the way the witness is giving his testimony. I have not found fault with it. We can proceed. 30

Mr. Inches: I am reading Clause 5 of the agreement of October 2nd, 1926, between you of the first part, Lewis Connors & Sons, Limited, of the second part, Connors Brothers, Limited, of the third part and the two McLeans of the fourth part. I am reading paragraph 5. (Reads). Having heard that clause read, I ask you what shortage in inventory, alleged misrepresentation or alleged misproper conduct is referred to?—*A*. I do not know. My solicitor wanted that in there. I do not know what they consider proper conduct or what I consider would be it.

Q. What was the shortage in inventory that was referred to?—*A*. They referred to a shortage in canned sardines which were loose lying on 40 tables.

The Court: It is quite obvious from the evidence what it refers to.

Q. This is the matter that was discussed at the directors meeting in March?—*A*. Yes.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Cross-examination on Affidavit —*continued.*

Q. What was the alleged misrepresentation ?—*A.* I didn't misrepresent anything.

Q. But your solicitor felt it should go in ?—*A.* He put it in.

The COURT : From an injunction action I would suggest that all this would develop. We are trying to find out the reasonableness of the ambit of this covenant.

Mr. INCHES : Then I ask for a dismissal of this suit. I feel, your lordship, that this has come to a point now where we are perhaps not allowed the same scope that would be allowed in an injunction proceedings.

10 The COURT : I wonder if this witness could tell, for instance, at the time of the making of the agreement the total production of sardines in Canada and the proportion manufactured by Connors Brothers and the proportion manufactured by Lewis Connors & Sons. Can somebody give that ?

Mr. INCHES : They were the same manufacturers—the two companies.

The COURT : And the proportion between them—were they really about one to four ? Can you tell me roughly what you think the proportion was at the time of the making of the agreement ?—*A.* Roughly, 160,000 cases a year. The total pack.

The COURT : How much Connors Brothers and how much yours ?—*A.*
20 40,000 West Saint John and 120,000 Black's Harbour.

Q. (BY THE COURT) : That amounts to 120,000 Connors Brothers and 40,000 yours ?—*A.* Yes.

Q. (BY THE COURT) : What would the consumption be in the Dominion of Canada ?—*A.* If I remember correctly, it is 50% of the pack.

Q. (BY THE COURT) : About one-half ?—*A.* Yes.

Q. (BY THE COURT) : In Canada I suppose the only thing in competition would be the French sardines and that would be small ?—*A.* The competition would be the Norwegian sardines.

Q. (BY THE COURT) : To what extent would outside sardines come into
30 this market in Canada ?—*A.* I would say roughly about 30,000 at that time.

Q. (BY THE COURT) : At that time—that is what I want. Then, one-half of your pack—I mean the pack of the two companies—that would be how many cases ?—*A.* 80,000 cases.

Q. (BY THE COURT) : About 80,000 plus 30,000 from the outside represents the Canadian market ?—*A.* Yes—I am just speaking from memory.

Q. (BY THE COURT) : Then if you really were excluding yourselves from competition you were shutting yourselves out of a market of about 30,000 cases at that time ?—*A.* Yes, in Canada.

Q. (BY THE COURT) : A market that I suppose would grow in proportion
40 to the population ? Could not grow much more. It might. That is the sort of thing I want, you see.—*A.* I would not have the exact figures. I am speaking from memory.

Mr. DRUMMIE : Possibly some other witness would know.

The COURT: No doubt.

Q. When you say 40,000 cases in 1926, when you sold the business averaged that?—*A.* As near as I can remember.

Q. How many were packed at West Saint John?—*A.* As near as I can recall 40,000 cases—approximately that. As near as I can remember. I am just speaking from memory.

Q. Mr. Connors, where else in Canada besides Charlotte and Saint John Counties in this province can sardines be procured economically by you?—*A.* As far as I know, the Bay of Fundy. Where they are caught in large quantities. 10

Q. That is the Passamaquoddy district, is it not? You cannot imagine a factory over in Digby?—*A.* They had caught some over there.

Q. Not in such quantities as to put up a large factory?—*A.* Nor a small factory.

Q. Any other parts of Canada that you can think of?—*A.* No—the Bay of Fundy.

Q. As a matter of fact, the sardine business is around Charlotte and Maine. You are not restricted from going into Maine and doing business there?—*A.* No.

Q. (BY THE COURT): This fish you call sardines—other people do not think that is a proper name for them—where else are they found in the world?—*A.* Norway. 20

Q. (BY THE COURT): That is the same kind of fish?—*A.* Very much the same. Japan, Norway, French sardines, Portuguese sardines and American sardines. There may be others.

Q. (BY THE COURT): Where are the American sardines?—*A.* Packed in Maine and in the Pacific Coast district and down on the United States coast.

Q. (BY THE COURT): Not on the Pacific coast in Canada?—*A.* No, the fish are too large. 30

Mr. INCHES: My examination on the affidavits is over.

The COURT: If you wish to ask some questions.

Mr. DRUMMIE: I want to ask a few questions.

EXAMINATION by Mr. DRUMMIE.

Q. Mr. Connors, referring to the negotiations which you have heard spoken of whereby the McLeans secured an option to buy a control in Lewis Connors & Sons, Limited, were you a party to the original negotiations?—*A.* Not to the original—no.

Q. You came into it later?—*A.* Yes.

Q. When did you first hear—or how—of these negotiations?—*A.* From my uncle. 40

Q. In April, 1925, who were the shareholders of Lewis Connors & Sons, Limited?—*A.* That is the original shareholders?

Q. In 1925?

The COURT: You think he got it wrong?

Mr. DRUMMIE: I think there was his mother.

Q. At that time, did you and your father own the control of Lewis Connors & Sons, Limited? *A.* No.

Q. You went to work for Lewis Connors & Sons on or about January 9, 1925, under this agreement?—*A.* Yes.

Q. You had the agreement with them. I think it is in evidence, my lord. The employment agreement. What were your duties, Mr. Connors?—*A.* I was factory superintendent.

10 *Q.* How long did you remain in their employ?—*A.* That is in the agreement.

Q. And the agreement itself was for five years?—*A.* Yes.

Q. How long did the company, that is, Lewis Connors & Sons, Limited, operate on the west side after Connors Brothers got control?—*A.* Just that season.

Q. What season?—*A.* The season they bought it out.

Q. What period of time?—*A.* From spring until fall.

Q. Then what took place?—*A.* They closed the place. They stopped operations there.

20 *Q.* (By the COURT): Did you stop because it was an exceptional run that year? Or was it the Booth people?—*A.* I think it was the Booth people.

The COURT: As a matter of fact, very few were caught after that.

Q. When the company moved its operations down to Black's Harbour, did you put up a new building to handle the production of Lewis Connors & Sons, Limited?—*A.* No.

Q. Did they take the help that was engaged here in Saint John down to Black's Harbour?—*A.* Just a few. I went down.

Q. You were the only one?—*A.* Yes.

30 *Q.* So that what took place down at Black's Harbour was that they merged the whole thing in one concern?—*A.* Yes.

Q. Did they keep separate packs for the two companies?—*A.* So far as I know, they did.

Q. You had nothing to do with that?—*A.* No.

Q. Were relations between you and your employers just prior to October 2, 1926, happy ones?—*A.* Well, I could not call them happy. I really did not know what I had to do. Not very much.

Q. Were you happy in your employment at that time?—*A.* No, I could not say I was very well satisfied.

40 *Q.* Did they pay you regularly?—*A.* They paid me until the last two months. They held it up.

Q. Did they give any reason for it?—*A.* No, not to me.

Q. So that when you signed this agreement of October 2, 1926, it was just a mutual agreement between you?

Mr. INCHES: It speaks for itself.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Re-examination on Affidavit—*continued.*

Mr. Drummie: That is the word, my lord. I am just speaking the words. He has covered a good deal of irrelevant and at the last a good deal of relevant ground. Now the agreement of October 2, 1926, refers to the fact that you then held 172 shares of the stock of Lewis Connors & Sons, Limited. Is that correct?—*A.* Yes.

Q. Did you sell those shares to Connors Brothers, Limited, at that time?—*A.* Yes.

Q. At that time, October, 2 1926, you were also a shareholder of Connors Brothers, Limited?—*A.* Yes.

Q. Was that company engaged in the sardine business at that time? —*A.* Yes. 10

Q. How long did you remain a shareholder of Connors Brothers, Limited, after October 2, 1926—roughly?—*A.* Between two and three years.

Q. Mr. Inches has suggested to you that before you sold out your company it was in an unfortunate condition. Is that correct?—*A.* No.

Q. (By the Court): I suppose you lost something in competition? —*A.* Yes, advertising and getting going.

Q. From the evidence given here as to the stock you got from Connors Brothers you were in pretty good shape to stand competition?—*A.* We got some money outside. 20

Q. This pack of sardines that was put up by Lewis Connors & Sons, when you were a shareholder of it, what size tin was packed at that time? —*A.* Just the regular size sardine.

Q. How much would that retail for?—*A.* Five cents.

Q. Is that the popular tin of sardines for consumption in Canada? —*A.* Yes.

Q. In April, 1925, how many companies, to your knowledge, were packing those five-cent tins?—*A.* Two. Connors Brothers, Limited, and Lewis Connors & Sons, Limited. 30

Q. So that when Connors Brothers, Limited, acquired control of Lewis Connors & Sons, Limited, they would have control of the packing of the so-called five-cent tin of sardines in Canada?—*A.* Yes.

Q. While you were employed by Lewis Connors & Sons, Limited, were there any special trade secrets confided in you by your employers while you were factory superintendent?—*A.* No special secrets.

Q. Did you have any direct communication with the customers of the company while you were superintendent?—*A.* No.

Mr. Drummie: Now, my lord, I would like to touch upon a matter which I objected to myself. Mr. Inches introduced this question. What type of sardines was it that was referred to in connection with the Coles people that Mr. Inches referred to?—*A.* Just the ordinary Canadian packed sardines—the small tin. 40

Q. Were they manufactured the way you used to manufacture them? —*A.* Practically the same.

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors. Re-examination on Affidavit —*continued.*

Q. What did you call them?—*A.* We called them clippers—packed sardine style.

Q. (By the COURT): When you did that you were engaging in a sardine business?—*A.* The same thing.

Q. Mr. Connors, the Court has asked you, I believe, one question: "Why do you want to go into the sardine business?" Have you ever been approached by any interest other than the parties represented in part to become engaged in the sardine business or the fish business with them? —*A.* Yes.

10 *Q.* That is, interests outside the parties represented in this transaction? —*A.* Yes.

Q. Who would like to have you identified in the sardine business?— *A.* Yes.

Q. Is that not your principal reason for wanting to go into the sardine business at this time?—*A.* Yes, the principal reason.

Q. I am referring to Exhibit No. 5. Clause 5, about which my learned friend spoke, says that parties of the 2nd, 3rd and 4th parts hereby release the said party of the 1st part "from all claims and demands of every nature and description which they or either of them have or which hereafter they
20 or either of them may have against the party of the first part by reason of anything to the date of these presents." What did you prohibit, Mr. Connors, by this word "anything"?

(Objected to by Mr. Inches).

The COURT: You might possibly give me some conversation antecedent to the making of the agreement and then ask me to interpret the agreement in the light of that.

Mr. INCHES: It is hardly a matter for this suit.

Mr. DRUMMIE: It concerns this suit, because there are three distinct covenants here.

30 The COURT: They cannot release him from a covenant that is written in the very same document and that is the one I have to interpret. It would not do for this witness to say how he interprets it. That is not enough.

Mr. DRUMMIE: I will withdraw the question and argue it later.

The COURT: It is five oclock. Do you want to go on to-morrow morning?

Mr. INCHES: May I find out what stage the case is in? I think from the authorities which my learned friend recited to-day the burden is upon us to prove a *prima facie* case of reasonableness. I submit that there could hardly be a more reasonable case from a *prima facie* standpoint than we have put forward. I would ask your lordship to rule we have made out a *prima facie*
40 case.

The COURT: I am just going to ask if you are through or not, or do you propose calling more witnesses?

Mr. INCHES: There is one question I would like to ask. After the evidence is in, may we wait for the stenographer's transcript?

In the Supreme Court of New Brunswick (Chancery Division).

Plaintiff's Evidence.

No. 5. Bernard Connors, Re-examination on Affidavit —*continued.*

The COURT: If you want to.

Mr. INCHES: I can make a better argument, I think, if I have the transcript.

Court adjourned until 10.30, June 17th, 1937.

June 17th, 1937, 10.30 a.m.

Court resumed.

Mr. INCHES: May it please your lordship, is it the ruling that burden is upon the defendant now to go on with the case? I think you made that ruling yesterday, and we immediately asked to cross-examine Mr. Connors.

The COURT: I do not know whether I exactly made that ruling. It might be that after—it might be difficult if Mr. Drummie just put in the documents. There would be no explanatory evidence. I do not think it matters very much which side the evidence comes from so long as I can see what are the surrounding circumstances. All of which is good reason for me not taking it up under this order. However, it is here and we may as well go through with it. 10

Mr. INCHES: I will call Mr. Neil McLean.

Mr. NEIL MCLEAN, called as a witness, being duly sworn, testified as follows:

Defendants' Evidence.

No. 6. Neil McLean, Examination.

No. 6. 20

Neil McLean, Examination.

Examined by Mr. INCHES.

Q. You reside in the City of Saint John?—*A.* I do.

Q. What is your position with reference to Connors Brothers, Limited?—*A.* President.

Q. You are the A. Neil McLean mentioned in those contracts put in evidence?—*A.* I am.

Q. It was around October, 1923—I think November 1, 1923—that you knew Connors Brothers took over the present Connors Brothers?—*A.* That was the date. 30

Q. You have heard Mr. Bernard Connors say that the word "Connors" had by long usage become identified with the fish business. Did your company take any steps with reference to that name?—*A.* We did. We registered it at Ottawa as a trade mark.

Q. Is that the trade mark that you obtained? (Showing witness paper).—*A.* Yes.

(Admitted as Exhibit G.)

Q. In that connection, you also registered another one, did you not?—*A.* Yes.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Examination—*continued.*

Q. On April 6th, 1925?—*A.* Yes.

(Admitted as Exhibit H.)

Q. I am showing you the Royal Gazette, which proves itself.

(Royal Gazette, June 10th, 1937, admitted in evidence as Exhibit I.)

Mr. DRUMMIE: For what reason?

Mr. INCHES: It is the incorporation of the Bernard Connors Fish Company, Limited. I ask you to admit it, Mr. Drummie.

Mr. DRUMMIE: Certainly—the application speaks for itself.

Mr. INCHES: He has been carrying on under the name of B. Connors
10 Fish Company for some years.

Mr. DRUMMIE: One year.

Mr. INCHES: It is the incorporation of that business.

Mr. DRUMMIE: My objection is the same as yesterday, that it is irrelevant.

The COURT: Objection will continue for whatever it is worth.

Q. I am going back to the time of Exhibit A—August 25th, 1923, where you and your associates took an option on the stock of shareholders of old Connors Brothers, Limited. How did you come to do that?—*A.* Through Mr. Lewis Connors who came to me previous to that and told me he was
20 getting tired of the business and would like to sell.

Mr. DRUMMIE: Was Bernard Connors there at the time? It is certainly not relevant to this issue—what Mr. Lewis Connors might tell Mr. McLean in 1923. His agreement was signed in 1925.

The COURT: This leads up the acquisition. I admit it subject to objection.

Q. Was there any conversation with reference to the financial state of the old company at that time?—*A.* Well, he told me he had been having some difficulties with the government over taxation and one thing and another in connection with business.

30 *Q.* What was the reason he wanted to sell?—*A.* He said he was getting old and getting tired of it. He said it was a big responsibility and told me—as President, I presume he spoke for the other shareholders—he said the shareholders wanted to sell.

Q. Why would he come to you in particular?—*A.* He was introduced to me first by Mr. Scovil. They had been old friends in Charlotte County.

Q. Then you did look into the matter and the result was that this agreement, Exhibit A, was signed?—*A.* That is correct.

Q. Mr. Patrick Connors was employed as manager for a period of five years according to the evidence that has been put in. Was anything done
40 in connection with Bernard Connors or suggested with reference to Bernard Connors?—*A.* He was offered a position with the new company.

Q. Would he take it?—*A.* No, he turned it down.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Examination—*continued.*

Q. Then you started in—this new company—and the agreements speak for themselves as to the amount of the consideration. When did you first come in contact with Lewis and Bernard Connors after that?—*A*. It was after they bought the Booth factory in West Saint John.

Q. You have heard Mr. Bernard Connors speaking about registering Banquet Brand and Brunswick Brand in Mexico?—*A*. Yes.

Q. Were these brands similar?—*A*. Yes, they were quite similar.

Q. The way they were packed?—*A*. Yes.

Q. You saw the letter head of Lewis Connors & Sons, Limited, used at that time?—*A*. Yes. 10

Q. Is that a letter head—what is that? (Showing witness paper). —*A*. That is a letter head of Connors Brothers.

(Copy of letter head of Connors Brothers, Limited, for comparison with Lewis Connors & Sons, Limited, admitted in evidence—marked Exhibit J.)

Q. Did Connors Brothers suffer any from the competition?—*A*. Yes, we considered it unfair competition.

Mr. Drummie: I object to that.

The Court: We are not trying out actual damages.

Q. Mr. Bernard Connors has explained the extent of the business they were doing. Whatever took place between you resulted in the purchase by Connors Brothers, Limited, of the majority stock interest in Lewis Connors & Sons Limited, did it not?—*A*. Yes. 20

Q. Who made the advance with regard to that contract?—*A*. Mr. Lewis Connors.

Q. Did he see you in that connection?—*A*. Yes.

Q. What took place between you?—*A*. We met one day and had a talk over the Mexican registration. We had received a letter from Lewis Connors & Sons forbidding us from using our brand in Mexico. I told Mr. Connors—I had known him a long time—that I thought that was very unfair. I thought it was unfair to take our brand and then forbid us from using it. It was done without his knowledge he said and he would take it right up with the office. He told me it was Mr. Bernard Connors who instigated the registration and that he did not think it was right so that started conversation between us and later he came back to see me on several occasions and said there was no money in fighting and wanted to know if there was some way we could get together. 30

Q. He said there was no money in fighting—were you fighting at that time?—*A*. I had told him we intended to take action. I considered this was thievery—taking our brands—and we intended to take legal action.

Q. Did you consult your solicitors?—*A*. We had consulted our solicitor. 40

Q. But you didn't take legal action?—*A*. No, our negotiations lead up finally to the sale.

Q. And this contract of—it was really an option contract of April 30th? —*A*. Yes, an option.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Examination—*continued.*

Q. With reference to paragraph 8 there where all parties agree to work together for the benefit of the stockholders of the two companies " and will not, either directly or indirectly, engage in any other sardine business whatsoever in the Dominion of Canada "—what other sardines were there besides Lewis Connors & Sons, and Connors Brothers, Limited ?—*A.* Practically none. There may have been a few cases put up outside.

The COURT : Do you think that might refer to existing businesses ?—

Mr. INCHES : Any business at all.

The COURT : I thought that would be wider.

10 *Q.* In what part of Canada can sardines be successfully manufactured in your opinion ?—*A.* The Passamaquoddy Bay area.

Q. Mr. Bernard Connors thought a small plant might exist over in Digby. What do you say to that ?—*A.* We have never known fish to be there more than a few weeks. There mightbe a school there. To put up any quantity, you have to have a large consistent quantity of fish in a good area. We operate from March to December and a few schools of fish would be of little use.

Q. What about the City of Saint John as a locality for a factory ?—*A.* A good deal of the fish would have to be brought a good distance down
20 the shore.

Q. Would distance militate against the success of the venture ?—*A.* It is a little more costly to freight them. I do not say but what a factory could be operated here. I do not think it would be as practical as——

Q. Mr. McLean, it was explained yesterday that after you got this option agreement which you had until May——

The COURT : You agree there was nothing on the Atlantic Coast and nothing on the Pacific Coast ?—*A.* No, no area.

Q. Then it was shown yesterday, Mr. McLean, that after you got this option and considered the matter, you realized that if Bernard and Lewis
30 Connors got this stock from Connors Brothers, Limited, that the Connors' interests would have the majority stock control in the company, did you not ?—*A.* Yes.

Q. Then you had negotiations with Bernard Connors leading up to the signing of the voting trust agreement ?—*A.* Yes.

Q. Who approached Mr. Connors ?—*A.* Mr. Connors wanted stock instead of cash.

Q. (By the COURT) : You mean Mr. Bernard Connors ?—*A.* Yes. I told Mr. Bernard Connors I would only go ahead with the option agreement provided we made that trust.

40 *Q.* He didn't want cash ?—*A.* No, he wanted stock.

Q. Did you offer cash ?—*A.* We would have paid cash.

Q. He wanted stock ?—*A.* Yes.

Q. What was your conversation with him with reference to signing this voting trust agreement ?—*A.* I told him I would only go ahead with the option provided that we made that trust agreement and put a certain amount

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. **Neil** McLean, Examination—*continued.*

of stock up for a number of years with the Eastern Trust Company and I was to get an irrevocable proxy on it. Had a lot of hard work in building the company up and didn't want to take chances in losing control.

Q. Having got that voting trust agreement, you accepted the option ?—*A.* Yes.

Q. Then the agreements of June 9th were entered into ?—*A.* Yes.

Mr. DRUMMIE : In that last question I suppose my learned friend means Connors Brothers accepted the option ?

The COURT : The option was accepted.

Mr. INCHES : The McLeans accepted the option. 10

Q. Now, Mr. McLean, you have heard Bernard Connors say that when this agreement was signed, the last agreement in October, that he had been told or advised by his solicitor that it was not binding upon him. When, if ever, did the question of an illegality of this clause—restrictive covenant—come to your attention ?—*A.* It was after they were all signed. I absolutely considered they were considered in good faith. It was a day or so after they were signed I heard Mr. Bernard Connors stating he didn't think they were binding.

Q. Did you take it up with your solicitors ?—*A.* Yes.

Q. Who did you consult ?—*A.* Messrs. Inches & Hazen. 20

Q. You had taken a contract agreement—option agreement—in April and on June 9th, you signed the agreement to buy out this stock. When was it that the fact came to your attention that the agreement in restraint of trade might be illegal ?—*A.* It was after the signing in June.

Q. Now as to the buying out of this stock which was trusteed with the Eastern Trust Company, what was the common stock of Connors Brothers, Limited, worth at that time—the market value in your opinion ?—*A.* It just had a nominal value. It was not listed anywhere. I think there were sales from $30.00 to $35.00.

Q. The preferred stock had a par value of 100 ?—*A.* It was callable 30 at par so it could not be worth much more than par. It could be called on three months notice.

Q. Mr. Bernard Connors at that time was manager of Lewis Connors & Sons, Limited ?—*A.* Yes.

Q. And you have heard him say that the next year, before the contract of October 2nd was signed, that Connors Brothers had kept back or Lewis Connors & Sons kept back two months salary from him ?—*A.* Yes.

Q. Have you any explanation for that ?—*A.* I gave no instructions whatever that he have any salary kept back.

Q. Was Mr. Bernard Connors active at that time ?—*A.* He was sick, 40 according to his father. He told me he was sick.

Q. I put in evidence the balance sheet of Lewis Connors & Sons, Limited. Where did you acquire that balance sheet ?—*A.* It was given us when we had negotiations to buy out the control.

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Defendants' Evidence.

No. 6. Neil McLean, Examination—*continued.*

Q. Is it fair to say that the price that you were paying for Lewis Connors stock was based on that statement?—*A.* Yes, that had an influence on it. The balance sheet always has quite an influence on the purchase of a business.

Q. Then you heard Mr. Connors say that you took up with him an alleged shortage in the inventory?—*A.* Yes.

Q. How much did the shortage amount to in value?

The COURT: Now, really, how can the existence or the conversation of a shortage affect the scope of the covenant?

Mr. INCHES: I am just leading up to the events—relating the events
10 that lead up to the signing of this agreement of October 2nd.

The COURT: Does it explain the language of the article that we are interested in? A few minutes ago, you questioned as to whether the witness had stopped payment of two months salary of Bernard Connors. Whether he did or did not—how is that going to help me say if this comes in the Nordenfelt class or the other class? It was suggested that Connors Brothers might have some more accurate information.

Mr. INCHES: I am going to put on Mr. Doone, who has more accurate figures which he has compiled from the books.

Q. You have heard Mr. Bernard Connors state that he made some
20 proposition to take an interest in the Harbour Packing Company. Did you do so?—*A.* He read a letter.

(Objected to by Mr. Drummie).

Mr. INCHES: I should have explained how this letter came out.

Mr. DRUMMIE: It is in regard to that letter of Gilbert & McGloan written without prejudice.

Mr. INCHES: Why do you say written without prejudice?

Mr. DRUMMIE: It is written right in it.

Mr. INCHES: Can't a man make an offer to sell a business to another and put at the bottom "This letter is without prejudice?"

30 The COURT: You need not bother. I think the offer to sell that business might be irrelevant to this. What I am rather interested in is the wording of this covenant designed to shut them out of certain activities. I would like to know how extensive that field was out of which they were shut. So far there seems to be nothing else of practical value in the Dominion of Canada. Mr. Neil McLean admits there might be a canning factory in Saint John. It might operate. Mr. Bernard Connors says Digby had a very small pack. I do not regard as of any importance being shut out of Digby, if he was shut out. The real thing in Canada seems to be in Passamaquoddy Bay. There may be a condition that only means merchandising in the sense of selling and
40 distributing and it may also be contended even to manufacturing. The distinction is rather important because I should like to find out whether the evidence is that they might not manufacture in Canada and send the goods elsewhere than in Canada because they were allowed to go in other parts of

the world under the terms of the covenant or does it mean that it was considered necessary for the protection of Connors Brothers business that there should be no invasion of the source of supply in Canada. To get at that is of more importance than some conversation about two months salary.

Mr. INCHES : I have shown that the Connors sold their business and their business I have proved was putting up sardines and selling them. My submission is that there is no doubt as to what sardine business means. We have shown that these people who sold this business, having an intimate knowledge of the business they sold, formed another company, used the same brands identical letter heads, wrote to the customers, and he admits they did, to buy from Connors Brothers, Limited—they not only sold Banquet Brand, their own brand, but they take steps to register Brunswick Brand in these foreign countries. I am going to ask Mr. McLean what did the competition of Lewis Connors & Sons, Limited, do to Connors Brothers ?

Mr. DRUMMIE : I object to the question.

The COURT : If the covenant did not prevent him from competing, it does not matter what damage it did.

Mr. DRUMMIE : There was no covenant with Connors Brothers in 1923.

Mr. INCHES : Suppose I can show this competition was absolutely ruinous to both companies and particularly to Connors Brothers, Limited.

WITNESS : It was very harmful and very confusing. They took our name and spelt it backwards and used it for all their cables and it was very confusing to foreign customers to have the two.

Q. How did it affect the profits ?—*A.* They went down. We sacrificed profits and we had a very considerable business in Mexico. They tried to tie us up there.

Q. What was the price of the Brunswick Brand and Banquet Brand in those days to the public ?—*A.* It was five cents and seven cents.

Q. What is it today ?—*A.* Five cents.

Q. I mean the buying out of Lewis Connors & Sons, Limited, has not affected the price to the public in any way ?—*A.* No.

Q. It is cheaper today than then ?—*A.* Yes.

Q. What was the effect on Lewis Connors & Sons, Limited, of this competition between the two companies ?—*A.* The balance sheet shows that we were losing money. Mr. Connors told me no money was coming on account of the competition that was going on.

Q. Lewis Connors and Connors Brothers are both in existence today ?—*A.* Yes.

Q. I ask you if they are not one of the most successful industries in the Province of New Brunswick ?—*A.* We consider them so.

Q. They do a world-wide trade ?—*A.* Yes.

Q. Will you tell me, please, to what extent you expanded since you have taken over ?—*A.* We have expanded steadily. Our pack is ——

Q. How is your pack today compared with when you bought out Lewis Connors & Sons, Limited ?—*A.* 200% or 300% more.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Examination—*continued.*

Mr. Drummie : Is he referring to the pack of Connors Brothers now ?

Mr. Inches : Yes.

Witness : Mr. Doone has the accurate figures.

Q. Have you made large expenditures down there ?—*A.* Yes.

Q. Why do you fear the competition of this particular man, Bernard Connors ?

Mr. Drummie : He has not said he does. I object.

A. From past experience.

The Court : From beginning to end I have heard of a lot of things but 10 didn't anybody do any talking beforehand of the making of this particular covenant ?

Mr. Inches : That covenant was talked over for hours between solicitors.

Q. I am taking Clause 8 of the agreement of April 30th, 1925. That is the agreement between the four of you. Four individuals. Where you all agree to work together.—*A.* Yes.

Q. Why was that inserted ?—*A.* Inserted from past experience we had.

The Court : I would rather know who talked about its insertion.—*A.* We all talked it over. Mr. Lewis Connors, Mr. Bernard Connors—had considerable negotiations over it. The final drawing of it was left with the 20 solicitors but it was all understood beforehand that this was to be signed in good faith.

Q. (By the Court) : was there any protest by Mr. Bernard Connors that the language of this was excluding them too much ?—*A.* Not to me, your lordship.

Mr. Inches : May it please your lordship, there is a document that I have left in my files at the office that I intended to bring this morning.

The Court : Do you want to run over and get it ?

Mr. Inches : I would like to. It is a proposal drawn up by Neil and Allen McLean and submitted to these two people.

30 Recess fifteen minutes.

Q. Look that over, Mr. McLean. It is twelve years since you have seen it. Do you recognize that document ? (Showing witness paper).—*A.* Yes.

Q. Do you remember seeing that document ?—*A.* Yes.

Q. Does that embrace the original proposals that were made ?—*A.* Yes.

(Proposal from Allen and Neil McLean to Lewis Connors and Bernard Connors admitted in evidence—marked Exhibit K).

Q. Can you remember where that was typed or not ?—*A.* No.

Q. Whose figuring is that on there ? From 1 to 17 in pencil.—*A.* Those 40 are my figures.

Q. I am calling your attention to clause 14, which I will read : " All parties entering into this agreement shall endeavour to work together in harmony for the benefit of the stockholders, and not to enter into any outside

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Examination—*continued.*

sardine business whatsoever, either directly or indirectly, in the Dominion of Canada, unless they all do so together, i.e., they must not have interest in other companies in Canada, or partnerships, or go into business for themselves, packing sardines, individually or independently, without the consent of all parties." That is the original proposal ?—*A.* Yes.

Q. And the clause finally assumed the shape as is shown in that agreement of April 30th ?—*A.* Yes.

Q. As a matter of fact, I was acting for you at the time, was I not? —*A.* Yes.

Q. And the present Judge Harrison for the Connors ?—*A.* Yes. 10

Q. Why did you consider it essential that Connors should not go into any packing business ?—*A.* From past experience and from the powerful effect of that special kind of competition.

Cross-examination.

CROSS-EXAMINATION by Mr. DRUMMIE.

Q. I have heard a good deal here about the apparently philanthropic efforts on your part to take care of the Connors family. What reason do you assign for this ?

MR. INCHES : I do not think there were any suggestions of philanthropy.

The COURT : Just let him answer the question.

A. After I once got interested in the business, I got in what I thought 20 was the best interest of the business and the shareholders.

Q. That is your answer to that question ?—*A.* Yes.

Q. Mr. McLean, you heard the evidence of Mr. Connors as to the pack of Lewis Connors & Sons, Limited, in 1925. Were those figures correct ? —*A.* Mr. Doone has the correct figures. If you will address that question to him.

Q. Perhaps you can answer the question for us. I do not know if Mr. Doone is going to be on the stand ?—*A.* I would have to refer to statistics.

Q. Can you say that they packed 10,000 cases or 50,000 ?—*A.* I know 30 they packed, I would say, 30,000 or 40,000 cases.

Q. How many cases do they pack now ?

The COURT : There is no good in guessing when we have the evidence in the room. You may be willing to have Mr. Doone suggest it and put it that way.

Mr. DRUMMIE : So long as some evidence is given to the extent.

Q. It has been suggested in the course of the counsel's questioning, both of you and Mr. Bernard Connors, that Lewis Connors & Sons, Limited, at the time you took it over, was bankrupt. Is that correct ?—*A.* Yes, I would say they were in a bankrupt condition. 40

Q. If that were the case, Mr. McLean, had you let the situation alone, they would have gone out of business ?—*A.* They might have got outside help.

Q. They might have gone out of business in a short time?—*A*. They might.

Q. And this competition would have been eliminated?—*A*. I would not say in a short time. Mr. Lewis Connors had capital to put in.

Q. Are you now trying to say they were not bankrupt?—*A*. The credit they were getting was on the name of Mr. Lewis Connors and Mr. Bernard Connors. They had a bank loan. It was guaranteed. We later assumed that guarantee.

Q. You do not say they were bankrupt or not?—*A*. I would say they
10 were heading for bankruptcy.

Q. If you had left them alone, in time the competition would have been eliminated?—*A*. They could have issued more stock and got more capital in.

Q. By the manner they were doing business, they would have been bankrupt, you think?—*A*. Ultimately.

Q. And then would have been out of the sardine business?—*A*. Unless they re-organized or something like that.

Q. What reason do you assign for the purchase of a bankrupt company for value such as you paid?—*A*. A company can go on for quite a while
20 and force another company to use considerable leeway with them.

Q. That is the reason you assign to buying the new company?—*A*. Yes.

Q. You told us a little while ago that Mr. Lewis Connors was getting old about this time?—*A*. He told me he was.

Q. How old?—*A*. Well along in the sixties.

Q. If he were in the early sixties, would that be an approximate estimate of his age at that time?—*A*. I think it was sixty some. I do not know his exact age.

Q. You would not say it was more than sixty-three?—*A*. He was sixty-three or sixty-four.

30 *Q*. You think that is old?—*A*. He told me his health was none the best and he was getting tired of it.

Q. You also told us the reason these negotiations were taking place was because Lewis Connors & Sons, Limited, were committing acts of thievery and so on and that is the reason you bought them out?—*A*. I told Mr. Lewis Connors I thought it was thievery and the pirating of our brands. Selling our own brands.

Q. That is the reason you bought them out?—*A*. That was part of the negotiations.

Q. I suggest that that was not the real reason at all. Do you still
40 think it is?—*A*. Mr. Connors seemed as anxious to sell. Seemed anxious to sell.

Q. Do you remember a meeting of the Board of Directors of Connors Brothers, Limited, on May 14th, 1925?—*A*. I cannot say that I do.

Q. Do you remember a meeting at which you were present when the Board of Directors were apprized of these negotiations and action was taken in authorizing you to take certain steps?—*A*. Yes, I think there was a meeting.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Cross-examination —*continued.*

Q. Do you remember actually that such a meeting was held and you were given instructions?—*A.* Yes, I think there was a meeting.

Q. Is it not a fact that it was pointed out to that meeting that the competition from the factory at West Saint John was so keen as to cause loss to Connors Brothers?—*A.* It may have been. The minutes are available.

Q. Is it a fact that reference was made there to price cutting between the two companies?—*A.* It would not be proper to say without looking at the minutes.

THE COURT: I think they are ready to produce the books. It is better than guessing. 10

Mr. DRUMMIE: I think he knows it.

The COURT: You know the way to get it. Are you asking him to read the minutes or what?

Mr. INCHES: He might read the whole resolution in the minutes.

WITNESS: "Minutes of meeting of Directors of Connors Bros., Limited, held at the offices of Inches, Weyman & Hazen, Room 23, Union Bank of Canada Building, Saint John, N. B., on Thursday, May 14th, A. D. 1925, at noon.

The following directors were present in person: A. Neil McLean, J. M. Scovil, B. M. Hill, J. M. Robinson, H. P. Robinson and P. W. Connors. 20

The president produced a telegram from Mr. C. H. Easson, acknowledging receipt of notice of the meeting, and expressing his inability to attend.

The president was in the chair.

Mr. Scovil acted as Secretary of the meeting.

The president said that the meeting was held to deal with a situation which had existed for some time, of vital importance, to the company. He called the attention of the meeting to the fact that for upwards of a year the competition from the factory of Lewis Connors & Sons, Limited, in West Saint John had resulted in a price cutting by the two companies, which was costing this company a very large loss of profit. In his opinion there were two alternatives, either to participate for another year or so in the price cutting, with a view to driving the company's competitor out of business, or to obtain a controlling interest in Lewis Connors & Sons, Limited. The President said the latter alternative was possible, and produced an offer from the Saint John Trust Company, Limited, offering to sell to this company $25,000.00 par value preferred stock and $52,000.00 par value common stock for $50,000.00 par value preferred stock of this company upon certain terms and conditions. This offer was read by the secretary and it was ordered that a copy of same be entered in the minutes. 30

The president produced a financial statement of Lewis Connors & Sons, Limited, recently prepared by Mr. P. F. Blanchet, and it was ordered that the said statement be made part of the minutes. 40

On motion of Mr. J. M. Robinson, seconded by Mr. B. M. Hill, it was unanimously resolved that the president be and he is hereby authorized and empowered to accept the said offer of the Saint John Trust Company, Limited,

on behalf of this company, provided he considers after examination of the financial affairs of the said Lewis Connors & Sons, Limited, that it is in the best interests of this company to do so, and that in the event of such acceptance, he is hereby authorized and empowered to make all arrangements and to have all contracts executed necessary to complete the transaction."

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Cross-examination —*continued.*

Q. So that I would take it that you were not buying Lewis Connors & Sons, Limited, as an investment but to eliminate this competition. Is that correct ?—*A*. We considered both.

Q. Just answer my question. Was it not your prime object to buy Lewis Connors & Sons, Limited, to eliminate competition ?—*A*. The kind of competition they were giving us.

Q. How long did you operate the factory at West Saint John after you took over the company ?—*A*. That season to the end of the season.

Q. Since that time where has the company operated ?—*A*. The manufacturing has been done at Black's Harbour. The shipping has been done chiefly from here.

Q. By the plant of Connors Brothers, Limited ?—*A*. Yes.

Q. Did you absorb all the help from the factory at West Saint John ? —*A*. No.

Q. Simply using the same employees that would be used by Connors Brothers ?—*A*. We gradually increased our employees.

Q. You speak of "we ?"—*A*. Connors Brothers, Limited.

Q. The employees of Connors Brothers are the Lewis Connors employees to all purposes ?—*A*. They have some employees.

Q. But the only original employee you took over was Mr. Bernard Connors ?—*A*. Mr. Lewis Connors.

Q. You didn't hire him as an employee ?—*A*. We paid him a salary as a consultant. Called on at times of meetings.

Q. So far as the development of the business of Lewis Connors & Sons is concerned since 1925, what would you say about that ?—*A*. It has been developed.

Q. To a large extent ?—*A*. Yes, it has been re-established and the balance sheet today shows a better state than in 1925.

Q. How does the business that you are transacting with regard to Lewis Connors differ in any way from Connors Brothers ?—*A*. It is an entirely separate company. They have their own agents, their own books and bank account and operate the same as any duly constituted company.

Q. Have they the same Board of Directors as Connors Brothers ?—*A*. Not exactly. They have five directors.

Q. Are those five directors directors of Connors Brothers, Limited ? —*A*. Yes.

Q. Actually, are the two companies, as a matter of fact, the same for practical purposes ?—*A*. No.

Q. What is the difference ?—*A*. They still have their own brands and sell through different agents—different places.

Q. Is that theoretical or actual ?—*A*. Actual.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Cross-examination —*continued.*

Q. Where do you get your sardines as the raw material?—*A.* From that Passamaquoddy Bay area.

Q. Are there plenty of sardines there?—We generally get enough to put up a pack.

Q. What was the pack of Connors Brothers, Limited—approximately only—in 1925? I do not want exact figures.—*A.* I could not tell exactly —within 10,000 or 20,000.

Q. Would it be 100,000?—*A.* I think so.

Q. What is it now? I am talking of Connors Brothers, Limited.—*A.* The figures are all there. 10

Q. Would it be 500,000?—*A.* No.

Q. Would it be 400,000? Would it be safe to say it was 400,000?—*A.* No.

Q. That would be pretty close?—*A.* They pack for Lewis Connors & Sons. It would be over 300,000.

Q. That is a splendid growth in ten years, is it not?—*A.* Yes.

Q. Could you if you had the equipment, pack 600,000 cases of sardines down there?—*A.* It could be done. Some years are better than others. Some years it is very difficult.

Q. I am asking if it could be done?—*A.* Yes. 20

Q. In other words, the sardines are there to accommodate a dozen factories?—*A.* Maine draws a considerable amount in that area. The bay is between Canada and the United States, and there is no special law. I would think there are as many fish on this side as on the other.

Q. I am not asking about the Maine coast. I am asking if there are sardines in these areas sufficient to accommodate a pack by a dozen companies if they wanted to go into it?—*A.* According to what years——

Q. Never mind the years. Is there or is there not?—*A.* I would not say so. Sardines come and go.

Q. Don't you know, as a matter of fact, that there are plenty of sardines 30 in that area to accommodate a number or more businesses?—*A.* There are quite a large number on the American side, yes, there is. There have been years when we found it very difficult to get enough for ourselves.

Q. When you speak about "enough for ourselves," you mean to make a tremendous profit?—*A.* We never made a tremendous profit.

Q. Does Connors Brothers own this company—Lewis Connors?—*A* They operate as an independent company.

Q. It is a syndicate of your own?—*A.* We own it and it operates entirely independent from us.

Q. So that between the two companies, you have control of the sardine 40 business in Canada?—*A.* Pretty much.

Q. Have you, or have you not?—*A.* Yes, we have.

Q. A monopoly of this industry in Canada?

The Court: You mean a practical monopoly?—*A.* Yes, a practical monopoly. In practice. It is open to anyone to go in business.

Q. Have there been any other sardine businesses operated in this Province since these agreements were made ?—*A*. Yes, there have been small companies.

Q. Are they still operating ?—*A*. Some of them are.

Q. Independently of anybody else ?—*A*. Yes, they are independent companies.

Q. Name some of them ?—*A*. H. W. Welch Company.

Q. Are they running independently at the present time ?—*A*. Yes.

Q. Have Connors Brothers, Limited, any interest in H. W. Welch 10 Company ?—*A*. Yes.

Q. To what extent ?—*A*. I think we have two directors on the board.

Q. That doesn't constitute an interest in the company ?—Do you own stock ?—*A*. Yes.

Q. How much ?—*A*. Over 50%.

Q. In other words, you have control of the H. W. Welch Company —*A*. Yes.

Q. So that is not independent ? They are subject to the control of Connors Brothers ?—*A*. Yes.

Q. So you would also control that company. Are there any other 20 companies packing sardines in this area ?—*A*. There are many companies on the Maine side.

Q. I am speaking of the Dominion of Canada ?—*A*. I do not know. They are starting up every once in a while.

Q. As a matter of fact, there are not any ?—*A*. I do not know. There might be some small kitchen packers.

Q. You would know of the sardine companies in this country of any size ?—*A*. I would know.

Q. You would watch them if they got dangerous. Is that correct ? *A*. I might and I might not.

30 *Q*. That seems to have been the policy of Connors Brothers, Limited, since the present organization went into business. Has it not been ?—*A*. Which policy ?

Q. To reduce the sardine industry in Canada from a number of interests into one if possible. Is that correct ?—*A*. Our records are there.

Q. Has that not been the policy of your company to get control of the sardine industry in Canada ?—*A*. Yes, we paid into these companies.

Q. That is your answer ?—*A*. That is not our permanent policy.

Q. It has been your policy ;

The COURT : Whether it is a policy or not, it is the thing you have done 40 and what you will do if another incident crops up depends upon conditions. It is not an unusual business.

Q. It was the real reason for the purchase of Lewis Connors & Sons ? —*A*. The reasons I have given.

Q. The real reason, is it not ?—*A*. One of the reasons.

Q. Was it the real reason or not ?—*A*. The real reason was the kind of competition they were giving.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6.
Neil McLean, Cross-examination —*continued.*

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Cross-examination—*continued.*

Q. And you wanted to get control of that business?—*A*. Yes, and Mr. Lewis Connors wanted to sell.

Q. You wanted to get the Connors family out of the picture, so far as the sardine business is concerned, for all time?—*A*. We did not ask them to sell their stock. They didn't make any objection to it. We didn't control it, that is true.

Q. You didn't want the Connors family actively identified with the sardine business in Canada for all time?—*A*. We were willing for them to be stockholders.

The COURT: It does not mean if it was the Connors family. It might have been anybody. 10

Q. I am referring to Exhibit G—my learned friend has asked you about this trade mark of Connors. You are familiar with the trade mark regulations, are you not?—*A*. I do not know the details.

Q. You know that you cannot register the name as such?—You know that?

The COURT: I do not care whether it is valid or whether it is not valid. I would rather not go into that. We have the same fact that they attempted to do the same thing in Mexico and it didn't strike me as a salient feature of this case. 20

Q. So that, I might put it to you in this way, when you bought out the controlling interest of Lewis Connors you were doing it to protect Connors Brothers, Limited?—*A*. I suppose your client knew that. That it was for the purpose of protecting Connors Brothers, Limited, or not.

MR. DRUMMIE: I do not know if he knew that or not.

Re-examination.

RE-EXAMINATION by MR. INCHES.

Q. You were asked if you were trying to put the Connors men out of business for all time?

(Objected to by Mr. Drummie.)

The COURT: When we hear the question, I will rule on the question. This is only preliminary. 30

Q. There is just one Connors man that has not been mentioned to any great extent. That is J. Edward Connors. Where is he?

MR. DRUMMIE: Mr. J. Edward Connors is not a party to these proceedings.

The COURT: You object to this on the ground that it is new and irrelevant. I think I will ask Mr. Inches not to pursue it.

Q. It was put to you by counsel that you had swallowed up a lot of sardine industries around here. When the syndicate purchased Connors Brothers in 1923, what factories were there here?—*A*. There was the Booth factory in West Saint John that was not operating. 40

Q. Were there any other factories?—*A*. None that I know.

Q. Apart from the Harbour Packing Company, what other sardine people have been operating along the coast besides the Welch people?

Mr. DRUMMIE : I object.

The COURT : That is what you were asking about. They got control of the others. It may be there have been some kitchen packing of sardines that he might not have heard of.

Q. You have been examined on these minutes, Mr. McLean, where you gave your opinion that there were two alternatives, either to participate for another year or so in price cutting with a view to driving the competitor out of business or buying the controlling interest in that company. Now, I put it to you, when you say " a year or so " did you or not anticipate by that 10 time that Lewis Connors would be totally bankrupt and by that time you would have made no purchase whatever ?—*A.* Yes.

Q. Is not that the fact ?

Mr. DRUMMIE : It is if you tell us it is. Mr. McLean's answers have been very helpful. I object to that question put that way.

The COURT : You have general objection to the whole thing.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 6. Neil McLean, Re-examination. *—continued.*

No. 7.

J. J. Hayes Doone.

No. 7. J. J. Hayes Doone. Examination.

J. J. HAYES DOONE, called as a witness, being duly sworn, testified as follows :

20 EXAMINATION by Mr. INCHES.

Q. Mr. Doone, you were with the old Connors Brothers, Limited, were you not ?—*A.* Yes.

Q. How many years before 1923 ?—*A.* I think I went there in 1921.

Q. After 1923 where were you ?—*A.* I was with the new company in 1923. I have been there continuously ever since.

Q. What is your occupation at the present time ?—*A.* I have charge of what is known as the export department. It takes all sales, sales promotion, correspondence, appointment of agents and, generally, the promotion of the business. And the shipping out, both in the foreign and domestic 30 field.

Q. In 1923, in August or in the fall, when the old company shareholders sold out, in what parts of the world were Connors Brothers dealing ?—*A.* In 1923 they were dealing in—of course, in Canada.

Q. All provinces ?—*A.* Yes. They were dealing in South Africa, New Zealand, Australia, Newfoundland—to a small extent there—Mexico, Jamaica, Trinidad, British Guiana, British Honduras and the West Indies Islands—the other West Indies Islands, including Montserrat, the Barbadoes, Bahamas, Bermuda, Antika. I think that fairly well covers it up to that period.

40 *Q.* Have you any statistics to show the number of cases packed by Lewis Connors & Sons and by Connors Brothers, Limited ?—*A.* We have

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 7. J. J. Hayes Doone, Examination—*continued.*

the statistics for that purpose but these statistics here are sales for the periods.

Q. That paper you have there is a document you have prepared yourself?—*A.* It was prepared under my direction.

The COURT: It is a sales statement? It would differ according to the pack?—*A.* Yes, they differ.

(Sales statement admitted in evidence—marked Exhibit L.)

Q. Just tell briefly what that table shows?—*A.* This table shows from the year 1924 to the year 1936 the sales of Lewis Connors & Sons, Limited, divided into foreign, showing foreign sales, domestic sales and total sales. 10 Both as respects cases and as respects value received. In addition to that, it shows the total sales of Connors Brothers, Limited, and Lewis Connors & Sons, Limited, and Quoddy Sea Foods, which is another company. It is only from 1934. It shows for a total sale from 1919 to 1936, both years inclusive.

The COURT: Just pick out the proportion of Connors Brothers and Lewis Connors & Sons, Limited, just anterior to the making of that agreement.

WITNESS: When was it made?

Mr. INCHES: June 19, 1925, and October, 1926.

The COURT: I only want it roughly. Take a pencil and work it out. 20 —*A.* As to cases in 1924, the percentage would be Connors Brothers, Limited, approximately 83%.

Q. Of what?—*A.* Of the total of Connors Brothers and Lewis Connors —Lewis Connors & Sons would be 17%.

The COURT: Then about foreign and domestic. Mr. Drummie wished it. What is the total being divided into—83% and 17%?—*A.* The total number of cases would be 159,487 cases. That is the total for 1924.

The COURT: Mr. Drummie wants to know the number of cases for Lewis Connors. How many foreign and how many domestic?—*A.* Might I ask about that question? You mean the percentage of the total foreign? 30

Mr. DRUMMIE: Applying your figures only to the pack of Lewis Connors, Limited, what percentage of that pack would be foreign and what domestic? Include the total amount of the pack.—*A.* Applying the figures to Lewis Connors & Sons only, the foreign sales would be approximately 25%. Of course, the domestic sales 75%.

The COURT: And the total sales of Lewis Connors & Sons would be what in cases?—*A.* Total cases is 27,367.

Mr. DRUMMIE: That is the year 1924?—*A.* Yes. That was from May, I think, until December. About eight months.

Q. They would not start to pack until May. 40

WITNESS: 6,930 would be the foreign cases. What else do you want?

Mr. DRUMMIE: I think for 1925.

The COURT: Do you want the figures for that?

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 7. J. J. Hayes Doone, Examination—*continued.*

Mr. DRUMMIE: Yes, the agreements were made in 1925.

The COURT: I wanted to get some idea of the size of the enterprise.

Mr. DRUMMIE: I think 1925 would be the better, my lord.

WITNESS: In 1925, Connors Brothers was 72½%. The total number of cases was 193,795. Lewis Connors & Sons 53,168 cases.

Mr. DRUMMIE: It was approximately 50/50 in 1925?

WITNESS: Yes, and the domestic was 26,796 cases.

The COURT: Now what?

Mr. INCHES: 1926 cases.

10 Mr. DRUMMIE: Those figures were for a full year?

WITNESS: Yes.

Mr. DRUMMIE: And the previous figures were for only a portion of a year?

WITNESS: Yes. For Connors Brothers, Limited, in 1926 their proportion of the pack would be approximately 82½% and the total number of cases in 1926 was 221,215. Lewis Connors & Sons, Limited, pack, which of course was included in that 221.215, was 38,901. Lewis Connors & Sons, Limited, 1926, the percentage of foreign sales would be 63%.

The COURT: Of the 38,901, 63% went into foreign sales.

20 *Q.* In 1924, Connors Brothers and Lewis Connors & Sons, Limited, were both manufacturing and selling?—*A.* Yes.

Q. In 1925, they were both manufacturing and selling? That was the year that the agreement of taking over was signed.—*A.* Yes.

Q. But then in 1926 the factory at West Saint John had been closed down?—*A.* Yes.

CROSS-EXAMINATION by Mr. DRUMMIE.

Cross-examination.

Q. I suppose under the working arrangements, Mr. Doone, that Connors Brothers, Limited, can assign any portion of its business to Lewis Connors & Sons, if it cares to, direct?—*A.* I do not hardly think that. They have 30 agents in all parts of the world. The agent sends in the order and, of course, it has to be supplied.

Q. If Connors Brothers, Limited, did not wish to fill an order in a certain place, they could direct the business? It could be done?—*A.* It could be, I suppose.

Q. During the last twelve years or so since the Lewis Connors & Sons, Limited, was taken over, you have secured to yourselves the customers of the company at that time?—*A.* I do not get that.

Q. I mean Lewis Connors & Sons, Limited, would have certain customers at that time. You have secured for yourselves those customers in 40 that time?—*A.* I cannot answer ——

Q. I mean you have had plenty of time to retain those customers?—*A.* Oh, yes, those customers were retained. I did not know if you mean by Lewis Connors or Connors Brothers.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 7. J. J. Hayes Doone, Cross-examination—*continued.*

Q. I mean by Lewis Connors.—*A*. Those customers are all retained. Lewis Connors & Sons supplied the same customers as they always did to a great degree.

Q. You didn't get my point. Lewis Connors & Sons, Limited, had certain customers in 1925. Has that company succeeded in retaining that connection during the last twelve years ?—*A*. Yes, pretty well.

Q. Added some new ones to it, no doubt ?—*A*. Yes, that is true.

Q. The real reason at the present time for the existence of Lewis Connors & Sons is the fact that the parent company would like to use their brands ?—*A*. Yes, I would say so. 10

Q. What would you say, without doing any more figuring, would be the pack of Connors Brothers last year ?—*A*. I haven't the total. The total pack. No, I have the total sales here.

Q. The total pack for 1936 for both companies was over 400,000 ?—*A*. Yes.

Q. Would it be safe to say that 80% of that pack was Connors Brothers ?—*A*. I think Lewis Connors & Sons had about 66,000 of it.

Q. Of that more than 400,000, 66,000 would be the pack of Lewis Connors & Sons, 1936 ?—*A*. Yes.

Q. You have lived in that part of the country ?—*A*. Yes. 20

Q. From your knowledge of the business, would you say that there were plenty of sardines in the Passamaquoddy waters in that area ? Perhaps I had better say that there is no doubt in the minds of any of the sardine packers that there is a very excellent sardine in those waters ?—*A*. Yes, an excellent supply of sardines. It varies, of course.

Q. But there would be plenty of room for sardine packing in that area for a number of companies ?—*A*. I would not like to go so far as to number the companies.

Q. You heard me ask Mr. McLean if there would be room for a dozen sardine factories in that area ? Would that be a conservative estimate ?— 30 *A*. I do not think there would be room on our side.

Q. For a dozen companies ?—*A*. I do not think.

Q. For ten ?—*A*. I do not know.

The Court : It would depend upon the size of the companies. Another thing, Mr. Doone, you have been increasing the take, but, of course, Mr. Drummie makes a point that there are greater quantities of sardines than you are taking and packing. But have you failed to supply the market ?—*A*. We have a little difficulty with it—yes.

The Court : But squarely is there a failure to supply the market ?—*A*. I do not think. 40

Mr. Drummie : You mean their market, my lord ?

The Court : I mean such market as they can reach. I mean, if you bring in more companies, it looks to me as if that would result in splitting up the existing market. I do not get any evidence of a demand for sardines that is not being met by the present organization.

Mr. DRUMMIE : The demands have been steadily increasing, so far as their plant and equipment will allow them to make.

The COURT : I do not think Mr. Doone has rejected orders or that sort of thing.

WITNESS : No.

Q. You would not say if you had two more factories there would be no demand to meet them ?—*A.* I do not like to comment on it.

COURT : Would it be that your sales would fall because of the competition ?—*A.* There is always that possibility.

10 The COURT : Suppose two other companies went in there and in one year you packed 400,000 and they each packed 400,000, would you expect to keep up your sales ?—*A.* There would not be the market.

Q. But there might be a market for two companies packing, say 25,000 each ?—*A.* There might be.

Mr. INCHES : You say 400,000 cases. That refers to sardines ?—*A.* No, not quite all. There are clams included in that. That is sea foods. That includes sardines, includes chicken haddies, it includes a small percentage of finnan haddies, a small amount of kippered herring and some scallops.

Mr. INCHES : How many cases of these varieties of sea foods, outside 20 sardines, did you sell last year ?—*A.* I can say between 5,000 and 6,000 cases. Chicken haddies the year before, I think, in 1935, were 13,000. I think about 7,000 last year. About 15,000 cases, large cases, of kippered snacks.

Mr. INCHES : Would I be wrong in saying that there were about 65,000 cases ?

WITNESS : Of scattered lines—yes, all of that.

Mr. INCHES : Do those cases include these other kinds of fish ?

WITNESS : Yes. In 1924, 1925 and 1926, of course, those scattered lines were not so material because sales were not so extensive.

30 Mr. INCHES : Is it not a fact that the big increase in your sales in the last few years are these other lines of sea foods ?

WITNESS : Yes, there has been a big advance in them.

Mr. DRUMMIE : My lord, would it be wise for Mr. Doone to prepare us the figures we really want ?

The COURT : Does anyone know the figures we want ?

Mr. INCHES : Mr. Drummie wants those figures only confined to sardines.

The COURT : If you want that, Mr. Doone will prepare that and send it in. You will accept it ?

40 Mr. DRUMMIE : We will look at it and put it in evidence. There is no point in keeping the Court waiting while we do a lot of figuring.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 7.
J. J. Hayes Doone,
Cross-examination.
continued.

The COURT : Mr. Doone can do as well home as here. Do you expect anyone else ?

Mr. INCHES : Not from the plaintiff. I rather anticipate that I will go on the stand but want to consult Mr. Carter in that regard. It is the construction of that agreement of October 2.

The COURT : You have gone rather too far in the case as counsel to go on the stand for anything else except definition of documents.

Mr. INCHES : Yes, I think so.

The COURT : I can say so with perfect freedom.

Mr. INCHES : There is just the one point. The one point of why I want to go on the stand is to corroborate Mr. McLean from my own office diary as to the date he consulted me with regard to this consolidation. 10

The COURT : It is not material.

Mr. INCHES : Then I will keep away.

The COURT : There is nothing more from either side at present ?

Mr. INCHES : Except Mr. Hill.

The COURT : You can bring him in at any time. Mr. Drummie, when do you want to go on ?

Mr. DRUMMIE : I have no more evidence. Unless something arises from Mr. Hill's evidence that I might want to rebut. If his evidence is purely rebuttal, that is another matter. 20

The COURT : I take it that all he will be called for is in regard to the statement said to have been made by him. I do not know what his opinion would be worth. It would not have any particular value. If, in the end, Mr. Inches calls him for any other purpose than that, then you will have a right to answer anything else. If he calls him for only that purpose, that ends it. In the meantime, I think it is of so little importance that you should fix a date and have your arguments ready. Then if Mr. Hill is available, he will not interrupt the argument very long.

Court adjourned until Friday, June 25, 1937, at 10.30 p.m. 30

Saint John, N. B., June 25th, 1937

Court resumed 10.30 a.m.

Mr. INCHES: Mr. Doone is here with that statement. I would like to put him on for a minute or two.

Re-examination.

Mr. DOONE takes the stand. EXAMINED by Mr. INCHES.

Q. After you gave your evidence with reference to the output of sales of sardines or fish by the cases, it transpired that you were including in it other fish other than sardines and you were to prepare a statement confining your computations to sardines only. Have you that statement ?—*A.* I have.

(Statement re output of sardines offered in evidence—marked Exhibit M.) 40

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 7. J. J. Hayes Doone, Re-examination—*continued.*

Q. I would like to ask this witness a question with reference to the employees of Lewis Connors & Sons, Limited, that were absorbed by Connors Brothers, Limited. Emphasis was laid on the fact, on more than one occasion that there was just one employee absorbed. What do you say to that statement?—*A.* That would not be correct. I know of some—in the vicinity of fifteen—around fifteen.

Q. You have gone over their names?—*A.* Yes.

Q. You know at least there were fifteen, at least?—*A.* Yes.

Q. There was evidence given as to the price to the public of sardines 10 today compared with 1926. Have you knowledge as to the prices paid to the fishermen for their fish, Mr. Doone?—*A.* The prices paid the fishermen —it has been maintained. In fact, I think they are getting a little better prices, on the average.

No. 8.

Burton M. Hill.

No. 8. Burton M. Hill, Examination.

Mr. BURTON M. HILL, called as a witness, being duly sworn, testified as follows:

EXAMINED by Mr. INCHES.

Q. Your name is Burton M. Hill?—*A.* Yes.

20 *Q.* Where do you reside?—*A.* In Montreal and St. Stephen.

Q. In 1923—in August—in the fall of 1923, what was your occupation? —*A.* Chief Highway Engineer of the Province of New Brunswick.

Q. Where was your residence at that time?—*A.* Fredericton.

Q. You were a director of Connors Brothers—of the present Connors Brothers—from the start?—*A.* Yes, from November, 1923.

Q. You had knowledge of the creation, first, of the partnership of Lewis Connors & Sons and then the company?—*A.* Yes.

Q. At page 68 of the evidence is a copy of a resolution passed by the directors of Connors Brothers on May 14th, 1925, seconded by you—by 30 B. M. Hill—that would be yourself?—*A.* Yes.

Q. That was the directors meeting called to consider the competition of Lewis Connors & Sons, Limited, and the President is noted as having stated at that meeting that in his opinion, there were two alternatives either to participate for another year or so in the price cutting—you were familiar as a director of Connors Brothers with the price cutting that was going on?—*A.* Yes.

Q. What was that price cutting, Mr. Hill? Who was cutting prices? —*A.* Lewis Connors & Company—Lewis Connors & Sons.

Q. With reference to the cost of manufacturing sardines at Black's 40 Harbour and at West Saint John by Lewis Connors & Sons, Limited, did you make any estimate in the difference of cost at all?—*A.* I did after I became manager of Lewis Connors & Sons, Limited. I estimated the cost to be from 50c. to 65c. more for Lewis Connors & Sons.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 8. Burton M. Hill, Examination—*continued.*

Q. What effect had this price cutting on Connors Brothers, Limited? —*A.* It forced them to meet the price and the net profit on a case of sardines is very small. We estimated around 25c. per case at that time. Therefore, a cut of 25c. a case would practically eliminate your net.

Q. What net profit do you count on now on a case of sardines?—*A.* I do not know. As your production comes up in volume, your net increases.

Q. I am showing you Exhibit No. 4—the agreement of April 30, 1925, between Lewis and Bernard Connors of the first part and the two McLeans. When did you first see that agreement, if at all, Mr. Hill?—*A.* At the directors meeting in May. 10

Q. At this directors meeting of Connors Brothers to which reference has just been made?—*A.* Yes.

Q. Had you had any discussion whatever with Mr. Bernard Connors about this agreement before it was signed?—*A.* None whatever.

Q. Did you discuss that agreement with anybody before it was signed? *A.* Not at all.

Q. Did you know it was going to be signed?—*A.* No.

Q. I am showing you Exhibit No. 3—agreement between Connors Brothers, Limited, and Lewis and Bernard Connors of June 9th, 1925. Did you ever see that agreement, Mr. Hill?—*A.* Yes. 20

Q. When did you see it first?—*A.* After it was arranged by Neil McLean.

Q. After it was signed?—*A.* I think it was signed.

Q. Did you discuss this contract with Mr. Bernard Connors in any way?—*A.* No.

Q. Between—there is the April—between April 30, 1925, and June 9, 1925—that is the interval between the two agreements—did you have any conversation with Bernard Connors whatever?—*A.* No.

Q. Where were you during those dates?—*A.* At Fredericton, Chief Engineer of the Province. I was too busy and that was left with Mr. Neil McLean and I seconded it. 30

Q. In 1925 there was an election?—*A.* Yes.

Q. And you ceased to be Minister of Public Works?—*A.* Yes.

Q. Did you establish any business relations with Connors Brothers or Lewis Connors & Sons?—*A.* With Connors Brothers in October, 1925.

Q. What position was that?—*A.* I made some investigations of other sardine plants in the States with a view to improving the production of the plant at Black's Harbour.

Q. But you said—you mentioned—that you did become President of Lewis Connors?—*A.* At the annual meeting January, 1926. 40

Q. Were your duties confined to President only?—*A.* I was managing director.

Q. At that time Bernard Connors was in the plant, was he not?—*A.* He was superintendent.

Q. I called Mr. Bernard Connors attention to a meeting of the executive of Lewis Connors & Sons, Limited, on March 2, 1926, when both you and he were present and I interrogated him about a shortage in the inventory that

was discussed at that meeting. Do you remember that discussion? —*A*. Yes.

Mr. DRUMMIE: Are we going into the shortage in the inventory?

The COURT: I think Mr. Hill was called for one thing. If it was confined to that, the thing would stop there. He could, of course, ask him about other matters. You would have the right to ask him about other matters. I do not see any particular relevance to this. We had everything about this shortage. If the thing appears in the instrument, what is the good of going into it?

10 Mr. INCHES: I am not trying to get this evidence in by subterfuge, but I do want to ask Mr. Hill some questions as to the credibility of Bernard Connors. I will refer to a statement on page ——

The COURT: How much of this case can possibly depend upon the credibility or incredibility of Bernard Connors? You have a covenant very extensive in its scope, which, I understand, is attacked by Mr. Drummie because it is too extensive. You have to some extent adduced evidence to show the circumstances under which that covenant was entered into—I presume to enable me to judge of the reasonableness of that covenant. If Mr. Bernard Connors—if you make out he was misrepresenting in relation 20 to some things, what good would it do?

Mr. INCHES: Well—

The COURT: You think I am right?

Mr. INCHES: I have never known you to be wrong, my lord.

Q. Well then, you became president in January, 1926, and your office was where?—*A*. West Saint John.

Q. How long did it remain there?—*A*. Until June.

Q. Where did you go then?—*A*. To Black's Harbour.

Q. Did Mr. Bernard Connors go, too?—*A*. Yes.

Q. I understand both of you were down there working in your positions 30 as general manager and superintendent of Lewis Connors & Sons, Limited? —*A*. Yes.

Q. I am showing you exhibit No. 2—that is the agreement of October 2, 1926—wait a minute—it is Exhibit No. 5. Agreement of October 2, 1926, whereby Bernard Connors ceased to be superintendent of Lewis Connors & Sons, Limited, and, in particular, I am calling your attention to the restrictive covenant in clause 3 of the agreement. Did you discuss paragraph 3 of that agreement with Bernard Connors in any way?—*A*. No.

Q. I notice this agreement is signed by you as President of Lewis Connors & Sons, Limited?—*A*. Yes. I discussed other things in the contract.

40 *Q*. I am referring to page 36 of the evidence, and in connection with this contract, to the Court Mr. Bernard Connors stated: "Well, one of their directors told me he was not sure it would be binding. *Q*. (By the Court): That director was who?—*A*. B. M. Hill." Did you ever discuss whether or not this clause was binding with Bernard Connors?—*A*. No, I think Mr. Connors is in error.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 8. Burton M. Hill. Examination—*continued.*

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 8. Burton M. Hill, Examination—continued.

Q. He is in error?—*A*. Yes.

Q. Did you ever have any doubt as to its binding force?—*A*. No.

Mr. DRUMMIE: My lord, this is a legal matter.

A. If I had any doubt as to its being binding, I certainly would not agree to the company paying a large sum of money.

Mr. DRUMMIE: I object to that answer.

The COURT: It doesn't make a particle of difference whether it is put in or not.

Q. Coming back to that meeting of Connors Brothers directors in May, 1925, where you discussed the purchase of Lewis Connors & Sons, Limited, stock. After you took over as President and General Manager of the company, did you have any occasion to form an opinion as to whether or not the company was solvent?—*A*. Yes.

Q. In your opinion, was that company solvent or not when Connors Brothers bought the controlling stock interest in it?—*A*. No, I would not consider it was.

Q. Upon what facts do you base that statement?—*A*. Their working capital was not sufficient to pay off the bank loan. They had a mortgage on their property.

Q. Did you supervise the payment of those bank loans?—*A*. Yes.

Q. What was the net result?—*A*. The liquidation of the inventories still left approximately $20,000.00

Q. Owing the Bank?—*A*. Yes, that is my recollection.

Q. Coming back to that resolution again of the directors which you seconded what was the general object of Connors Brothers, Limited, in purchasing that stock in Lewis Connors & Sons, Limited?—*A*. The general object, from my point of view, was to eliminate the competition of the Connors men, and to get the Connors people back into the company. As far as the general competition was concerned, it was not elimination, as anyone can establish a sardine plant.

Mr DRUMMIE: I didn't hear that.

WITNESS: So far as eliminating general competition, it doesn't establish that, as anyone can establish a sardine factory. I did consider the elimination of Connors of great value—any competition of great value to the company.

Cross-examination.

CROSS-EXAMINED BY MR. DRUMMIE.

Q. You feel that elimination of the Connors name from competition was the most important factor?—*A*. It should have been accomplished in the original purchase of Connors Brothers. Connors was known from one end of Canada to the other in the sardine business and it was the only Canadian company well known.

Q. It was also known all over the world?—*A*. No—a number of countries.

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 8. Burton M. Hill, Cross-examination —*continued.*

Q. We have had evidence here that this company does a world wide business ?—*A.* It does now.

Q. We also have evidence that it did then.—*A.* In a number of countries.

Q. You think that any sardine company other than yourselves—that is, Connors Brothers, Limited—engaging in the sardine business anywhere in the world would be confusing to you if it had the name " Connors" tacked on it ?—*A.* I would not say that.

Q. But you just told us—*A.* You mean in the export trade ?

10 *Q.* No, sardine trade ?—*A.* It would have an effect.

Q. With reference to this price cutting that has been mentioned, what you really mean by price cutting is that the other company was selling sardines lower than you were selling ?—*A.* Offering them lower.

Q. Why do you distinguish that as price cutting ? Would they not have a perfect right to put any price on ?—*A.* Yes.

Q. They put 5c. on them ?—*A.* If they cut below the cost.

Q. They sold the sardines for less than you people were selling for ?—*A.* Less than cost.

Q. How do you know what it was costing them ?—*A.* It certainly
20 was less than our cost.

Q. Are you basing your judgment on what you knew before you took it over or since ?—*A.* Since we had it.

Q. You would not know what it was costing them ?—*A.* Only by inference.

Q. You would not know ?—*A.* No.

Q. When you speak of price cutting, you really mean they were selling lower than yourself ?—*A.* Yes.

Q. You spoke of profits. It goes without saying that profits are to some extent governed by overhead ?—*A.* Yes.

30 *Q.* Was not the overhead of Connors Brothers in those days pretty heavy ?—*A.* Not as heavy as Lewis Connors & Sons in proportion to the number of cases.

Q. Kindly answer my question. Was not the overhead of Connors Brothers, Limited, pretty heavy in those days ?—*A.* No.

Q. Didn't they pay the executive officials of the company pretty high salaries ?—*A.* No.

Q. What would be a sample of some of the salaries—would anybody be getting more than $5,000.00 ?—*A.* I think Mr. Connors, as President, was getting $10,000.00 a year.

40 *Q.* All money that is paid out is really cost ?—*A.* Yes.

Q. Didn't Mr. McLean—Mr. Allen McLean—get pretty well paid ? —*A.* A small salary.

Q. Any bonuses ?—*A.* Not at that time.

Q. Subsequently that situation has occurred ?—*A.* Since the work became much larger.

Q. As a matter of fact, to your knowledge, was your bankers—the Bank of Nova Scotia were complaining about the salaries paid ?—*A.* The

In the Supreme Court of New Brunswick (Chancery Division).

Defendants' Evidence.

No. 8. Burton M. Hill, Cross-examination —*continued.*

Bank of Nova Scotia were not our bankers. They were Lewis Connors & Sons bankers.

Q. They were complaining after you took it over ?—*A*. Yes.

Q. Not being in a position to know who your bankers are——*A*. The Royal Bank.

Q. No complaints from the Royal Bank ?—*A*. No.

Q. The Bank of Nova Scotia was complaining about the overhead of Lewis Connors & Sons ?—*A*. Yes.

Q. Is it not a safe inference that if large salaries were paid officials in Lewis Connors & Sons that the same thing would apply in Connors Brothers ?—*A*. No, a new company had taken over Connors Brothers. 10

Q. Not in the days I am speaking about in 1925 and 1926.—*A*. In the fall of 1923.

Q. What of it—I am talking about 1925 and 1926.—*A*. The overhead was not very heavy. It was being curtailed.

Q. It was being curtailed ?—*A*. Yes.

Q. Has it since gone up considerably ?—*A*. Not in proportion to the output.

Q. But the salaries and that sort of thing ?—*A*. Naturally.

Q. You were selling sardines before the so-called price cutting took place at 7c. ?—*A*. Yes. 20

Q. You are now selling for 5c. a tin ?—*A*. Correct.

Q. The thing that was bothering Connors Brothers at that time was the loss of profits ?—*A*. What do you mean ?

Q. I just mean what the secretary incorporated in those minutes.—*A*. When the contract was made with Mr. Connors ?

Q. Yes.—*A*. They felt it would improve conditions if they purchased the plant.

Q. And keep on selling at 7c. ?—*A*. No, the price did not go up.

Q. It was a good thing for the public that Lewis Connors went into business.—*A*. Lewis Connors was wholesaling at nearly 5c. a tin when I took over. 30

Q. Presumably you were brought here to rebut a statement made by Mr. Connors about this October 2nd restrictive covenant. I agree with his lordship that it is not very relevant to this case. I think I would ask you if there were not many conversations at various places, including lawyers' offices and the plant, leading up to the agreement ?—*A*. Not on the first two agreements.

Q. I mean the last one ?—*A*. I discussed the last one.

Q. There were several discussions ?—*A*. Yes. 40

Q. Is it not possible, Mr. Hill, that you might——?

The COURT : I think Mr. Connors confined this to some period after the execution of the agreement. After he got the thing done. At page 36 : " I at the time had legal opinion on it—that it was not binding—and I did not want to sign it at first but they insisted and after I had a consultation with my solicitors I was under the impression it was not binding and I was not giving them—— *Q*. (By the Court) : In other words, they were not getting

what they thought they were getting and not getting what they were paying for ?—*A*. I thought they were trying to bind me as best they could.—*Q*. (By the Court) : Didn't they think they were providing for keeping you out of business ?—*A*. Yes, they were trying to provide for keeping me out altogether. *Q*. (By the Court) : You felt they were just a bit wrong about that and were not getting what they thought they were ?—*A*. They might. *Q*. (By the Court) : Was it or not ?—*A*. I do not know what they thought they were getting. *Q*. (By the Court) : We will repeat ourselves. Have you any doubt what they thought they were getting ? Have you any doubt ?—
10 *A*. Well, one of their directors told me he was not sure it would be binding. *Q*. (By the Court) : That director was who ?—*A*. B. M. Hill."

Q. When did Mr. Hill tell you that ?—*A*. I cannot recall the date. " It was during that time—of these negotiations. I do not know the exact date."

Mr. Drummie : That is what I asked him, my lord. The negotiations leading up to the last agreement in October.

Mr. Inches : Mr. Connors does not say what agreement it was.

Witness : I could not possibly have told him it was not binding.

Q. Is it not possible that actually you might have made a remark to
20 that effect ?—*A*. No.

Q. You are basing your statement on what you would or would not do as a matter of principle ?—*A*. It never entered my mind.

The Court : Suppose he did think, contrary to his testimony now, and did say it, contrary to his testimony now, how will that interpret the thing ?

Mr. Drummie : It will not. I feel I have not done anything to offset the attack made on Mr. Connors. I feel, having brought Mr. Hill here, I should cross-examine him on the thing they brought him here for.

The Court : That is your duty.

Court adjourned at 2.30 p.m.

30 I hereby certify that the aforegoing is a true copy of my shorthand notes taken in the aforegoing case, which I have transcribed to the best of my knowledge and ability.

Margaret McNair.

In the Supreme Court of New Brunswick (Chancery Division).

No. 9. Formal Judgment, 24th August, 1937.

No. 9.

Formal Judgment.

IN THE SUPREME COURT (CHANCERY DIVISION).

Tuesday, August 24th, 1937.

Before the HONOURABLE JOHN B. M. BAXTER, CHIEF JUSTICE.

Between

BERNARD CONNORS - - - - - - - - *Plaintiff*

and

CONNORS BROS., LIMITED, and LEWIS CONNORS & SONS, LIMITED - - - - - - - - *Defendants.* 10

This cause coming on for hearing on the fifteenth, sixteenth, seventeenth and twenty-fifth days of June last past, in the presence of Mr. J. H. Drummie, of counsel for the plaintiff, and Mr. C. F. Inches, one of His Majesty's Counsel, and Mr. A. N. Carter, of counsel for the defendants, upon an originating summons for an interpretation and construction of and a declaration as to the rights of the plaintiff and defendants herein under the following covenants contained in two certain agreements in writing, the first dated the ninth day of June, A.D. 1925, and made between Connors Bros., Limited, of the first part, and Lewis Connors and Bernard Connors, of the second part, and the second dated the second day of October, A.D. 20 1926, and made between Bernard Connors, of the first part, Lewis Connors & Sons, Limited, of the second part, Connors Bros., Limited, of the third part, and Neil McLean and Allan McLean, of the fourth part, the covenant contained in the first mentioned agreement being in the words, letters and figures following, viz.:—

> "(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, 30 "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;"

and the covenant contained in the second mentioned agreement being in the words, letters and figures following, viz.:

> "(3) 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 40

" 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 con- " nection with the sardine business in any country whatsoever;"

for the determination of the following questions :—

(*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.

And for a declaration as to the rights of the said plaintiff and defendants under and by virtue of the said covenants.

Whereupon, and upon hearing the evidence adduced as well for the defendants as for the plaintiff, and what was alleged by said counsel, the Court, having taken time to consider, doth answer question (*a*) in the affirmative, and question (*c*) in the negative, and doth decline to answer question (*b*).

And it is ordered that the costs of this application be paid by the plaintiff.

By the Court,

(Sgd.) H. LESTER SMITH,

Registrar.

In the Supreme Court of New Brunswick (Chancery Division).

No. 10. Reasons for Judgment of Baxter, C.J.

No. 10.

Reasons for Judgment of Baxter, C.J.

BAXTER, C.J.: Originating summons granted 27th April, 1937, for the construction of certain covenants contained in two agreements. The matter was heard at Saint John on the 15th, 16th, 17th and 28th June.

The history of the relations between the parties is material. Prior to 25th August, 1923, Lewis Connors, Patrick W. Connors, Robert Thompson and the plaintiff had been engaged in the fishing industry principally in the putting up of sardines in tins and marketing them. The name of "Connors" or "Connors Brothers" had become practically synonymous with the business of dealers in sardines as these fish are termed locally, although that possibly may not be their exact scientific designation. The business was quite extensive and was carried on by an incorporated company known as Connors Brothers, Limited, of which Lewis Connors at the date named owned 1090 shares, Patrick W. Connors 1200, Robert Thompson 10 and Bernard Connors 100. These parties then agreed with A. Neil McLean and other vendees to sell and transfer their shares of stock to the latter who, it was recited, intended to form a company with a view, among other things, to the acquisition of the undertaking and business of the said Connors Brothers, Limited. For this purpose, the agreement recites the vendees were to incorporate a company under The New Brunswick Companies' Act with a capital stock of $500,000.00 divided into 5,000 shares of $100.00 each, of which 2,500 were to be 7% preference shares and the balance to be common or ordinary shares. The company so to be formed was to issue bonds secured by a trust mortgage upon the undertaking of the company to the amount of $250,000.00. The vendees were to use the profits from the sale of these bonds as follows: $200,000.00 was to be paid to the vendors in proportion to the number of shares they held as above set forth and the balance, namely, $50,000.00, less certain expenses, was put back in the business of the company. The vendors were to receive and accept $200,000.00 par value of preferred stock to be divided among them in proportion to the number of shares they held in Connors Brothers, Limited. The balance of the preferred shares was to be sold by the vendees and the proceeds of the sale, less expenses, were to be put into the business of the company. The vendees were to own the common stock which was of a par value of $250,000.00. The agreement was by way of option which expired on 10th October, 1923, and prior to that time was taken up by the vendees.

The new company, by agreement made 8th November, 1923, with Patrick W. Connors, covenanted to employ him as manager for a period of five years from that date at a salary of $10,000.00 a year. He was to serve the company in that capacity and to devote his entire time and energy exclusively to the company's business. He had authority to hire and discharge all factory employees of the company employed at Black's Harbour in connection with the company's sardine factories, including office help employed in the factories and in the manager's private office.

In the Supreme Court of New Brunswick (Chancery Division).

No. 10. Reasons for Judgment of Baxter, C.J.—*continued.*

The new company, it will be noted, had the same name as the old one. Scarcely had the reorganization been completed when early in 1924 Lewis Connors, the plaintiff's father, and the plaintiff started in to acquire the Booth Factory in West Saint John and incorporated a company under the name of Lewis Connors & Sons, Limited. The plaintiff became manager of this company which put up sardines under the name of " Banquet Brand." The new company did about all it could to get the business away from the old company and as the plaintiff says, " I imagine we said we were the original and wanted to get the business." They were selling in all the 10 provinces of Canada and practically in every country in which Connors Bros. had sold sardines.

Connors Bros., Ltd., had not taken any covenant against interference upon their acquisition of the original business. They were faced with what from the evidence was severe competition and which was carried on by means not at all creditable to the plaintiff and his father. Under the circumstances, it is not surprising to find that an agreement was made, dated 30th April, 1925, between Lewis Connors and Bernard Connors of the one part and Neil McLean and Allen McLean of the second part by which the Connors agreed to sell and the party of the second part agreed to buy $25,000.00 par value 20 preferred stock and $52,500.00 par value common stock of Lewis Connors & Sons, Limited. The agreement also provided that with reference to the remaining outstanding issued capital stock of Lewis Connors & Sons, Limited. $47,500.00 par value common stock and $25,000.00 par value preferred stock, the parties of the second part would procure a contract to be executed by Connors Brothers, Limited with the stockholders of Lewis Connors & Sons, Limited, containing provisions that Connors Brothers, Limited, would at any time within five years from the 1st January, 1926, and on demand from any of the stockholders of Lewis Connors & Sons, Limited, being stockholders at the time, purchase the holdings of such stockholder on the basis of 30 $35,000.00 cash for $72,500.00 capital stock, either preferred or common. In case of purchase, the certificate was to be deposited with a trustee to be approved of by Connors Brothers and held in trust for them until the purchase would be concluded. The parties of the second part also agreed that Connors Brothers, Limited, should execute a contract with Lewis Connors guaranteeing him a salary of $15,000.00 for five years from the time of its making for his services to Connors Brothers, Limited, and an equal sum per annum for his services to Lewis Connors & Sons, Limited. These amounts were to be payable whether Lewis Connors & Sons, Limited, operated a factory or not. Arrangements were made with the Bank of Nova 40 Scotia to relieve and discharge the two Connors from all personal liability in respect to the account of Lewis Connors & Sons, Limited. There was also a provision for maintenance of a pack in each year by Lewis Connors & Sons, Limited. The 9th paragraph of this agreement is material. It is as follows : " All parties hereto agree to work together for the benefit of the stockholders of Connors Brothers, Limited, and Lewis Connors & Sons, Limited, and will not either directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada nor, directly or indirectly

In the Supreme Court of New Brunswick (Chancery Division).

No. 10. Reasons for Judgment of Baxter, C.J.—*continued.*

use the brands of either Connors Brothers, Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada or elsewhere nor for a period of ten years from the date hereof use the name of Connors in connection with sardine business in any country whatsoever."

By another paragraph Bernard Connors was to be employed by Lewis Connors & Sons, Limited, in the management of its factory for five years from the date of the contract at $5,000.00 per annum, which contract was to be guaranteed by Connors Brothers, Limited.

Next follows another agreement of 23rd May, 1925, between the plaintiff of the first part, the McLeans of the second part and the Eastern Trust Company of the third part. It recites that the parties of the first and second parts were shareholders in Connors Brothers, Limited, and had agreed to transfer 360 shares of the capital stock of that company to the trustee to the intent that the stock should be voted in one block by A. Neil McLean after consultation with the other parties to the agreement. The agreement was expressed to be on the condition that McLean would vote the stock under proxy to him in support of the carrying out of the agreement between Lewis Connors and Bernard Connors and the McLeans bearing date 30th April, 1925; and also that if Patrick W. Connors should cease to manage the sardine factory of Connors Brothers, Limited, that the McLeans would give their support to obtaining the position for Bernard Connors at a salary of at least $7,500.00 per year and also that the said Neil McLean would vote the stock in favour of continuing the operation of the factory of Lewis Connors & Sons, Limited, so long as the same is being operated at a profit and will also vote in favour of Lewis Connors and Bernard Connors as directors of Connors Brothers, Limited.

Then comes the agreement dated 9th June, 1925, between the plaintiff of the first part, Lewis Connors & Sons, Limited, of the second part, and Connors Brothers, Limited, of the third part by which the plaintiff agreed to work for Lewis Connors & Sons, Limited, under direction of a board of directors in the capacity of manager of the company's sardine factory in the City of Saint John for a period of five years from date. Lewis Connors & Sons, Limited, mutually agreed to employ him for the term mentioned at $5,000.00 per year and Connors Brothers, Limited, guaranteed the payment of this amount.

Then followed another agreement of 9th June, 1925, between Connors Brothers of the first part and Lewis and Bernard Connors of the second part. This recites that there was then issued and outstanding $100,000.00 par value common stock and $50,000.00 par value preferred stock of Lewis Connors & Sons, Limited, and by contract of 30th April, 1925, that Connors had agreed to sell to the McLeans $25,000.00 par value preferred stock and $52,500.00 par value common stock of Lewis Connors & Sons, Limited. The agreement witnessed that with reference to the remaining outstanding issued common stock of Lewis Connors & Sons, Limited, Connors Brothers, Limited, would at any time within five years from the 1st January, 1926, and on demand

from any then stockholder of Lewis Connors & Sons, Limited, purchase the holdings of such stockholder on the option mentioned in the previous agreement. The fourth paragraph of this agreement is important. It is as follows: "The said Lewis Connors and Bernard Connors agree with the said Connors Brothers, 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 either of Connors Brothers, Limited, or Lewis Connors & Sons, Limited, in the Dominion of Canada or elsewhere nor for a period of ten years from the 30th April, A. D., 1925, use the name 10 of Connors in connection with the sardine business in any country whatsoever."

In the Supreme Court of New Brunswick (Chancery Division).

No. 10. Reasons for Judgment of Baxter, C.J.—*continued.*

Then on the 2nd October, 1926, an agreement was made between Bernard Connors of the first part, Lewis Connors and Sons, Limited, of the second part, Connors Brothers, of the third part and Neil McLean and Allen McLean of the fourth part. The object of this agreement was to terminate the employment agreement of the plaintiff and to arrange disputes between the parties. The plaintiff agreed to transfer to the McLeans the 172 shares being all the shares held by him in Lewis Connors & Sons, Limited; also to release the parties of the second and third parts from all claims and demands which 20 he had against them arising out of the employment agreement which he agreed should be terminated. The parties of the second, third and fourth parts release the plaintiff 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 party of the first part by reason of anything to the date of these presents. This language is exactly similar to the general words used in the second paragraph where there is a reciprocal release.

The third paragraph of this document is as follows: "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 30 in the Dominion of Canada nor directly or indirectly use the brands of either Connors Brothers, Limited or Lewis Connors & Sons, Limited, in the Dominion of Canada or elsewhere for over a period of ten years from the 30th April, 1925, use the name of Connors in connection with sardine business in any country whatsoever."

The other agreement of the same date is between Lewis Connors & Sons, Limited, of the first part and Connors Brothers of the second part, Lewis Connors of the third part and the McLeans of the fourth part. It recites the agreement of the plaintiff and a copy thereof is attached. The parties of the first, second and fourth parts release Lewis Connors from any 40 claims or demands that they might have against him by reason of any alleged shortage in inventory, misrepresentation or other improper conduct in connection with the business of Lewis Connors & Sons, Limited, for the purchase of an interest therein or stock thereof. It was mutually agreed that nothing in the agreement of the same date, marked "A" should release or discharge Lewis Connors from liability under the contracts, agreements and covenants on his part to be performed contained in the agreement of 30th April, 1925.

In the Supreme Court of New Brunswick (Chancery Division).

No. 10. Reasons for Judgment of Baxter, C.J.—*continued.*

The paragraph particularizes "the general release of the said Bernard Connors from all claims" but is not to operate as a release or discharge of any liability on the part of Lewis Connors.

Referring then to the agreement of 9th June, 1925, which contains the following covenant :—

> "(4) The said Lewis Connors and Bernard Connors agree with "the 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."

And to the further agreement of 2nd October, 1926, containing the following covenant :—

> "(3) 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 the sardine business in any country "whatsoever."

I am asked upon originating summons to determine the following questions :—

> "(*a*) Whether, upon construction of the provisions 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 agree- "ments, 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 thence forward lawfully use the name of 'Connors' in
" connection with the sardine business in Canada."

The plaintiff contends that as a minority stockholder he could not himself sell the goodwill of a business. I think this is entirely disposed of by consideration of the facts in the *Nordenfelt* case (1894) A. C. 535. There the covenant bound Nordenfelt personally yet when he executed it he was 10 the managing director of the Nordenfelt company in which he held stock. He did not own the business of the company nor any of its assets yet it was not held to be a covenant in gross. In 1886 Nordenfelt put his business into a limited liability company. That company purchased his goodwill and got from him a covenant against competition. Then in 1888 this company and the Maxim Company made an agreement for amalgamation, one of the terms being that the Nordenfelt company would procure Nordenfelt to enter into an agreement which was afterwards embodied in an instrument of September, 1888, which contained the covenant against competition by him and was, of course, executed by him. The parallel is so complete that nothing 20 more need be said.

The plaintiff also contends that the release from all claims and demands in the agreement of 2nd October, 1926, releases the covenants of 30th April and 9th June, 1925. It is enough to read the paragraph to see that it is a release of " claims and demands " but does not extend to the subject of covenants, the implementing or breach of which had not then caused any contention. The claim and demands released are those which the parties of the second, third and fourth parts " have or 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." How I can extend this to things which may be breaches 30 of the covenant but have not yet come into existence when the precise language of the covenant limits the release to things antecedent to the 2nd October, 1926, it is impossible for me to see nor do I think there is anything in the plaintiff's contention that the reference to " this general release of the said Bernard Connors from all demands " carries it any further. It is not claims but covenants with which we are dealing here.

The principles applicable to this class of cases are as follows: A bare covenant not to compete, unrelated to any other contract, is void.

Prima facie a contract not to compete is void as against public policy. The presumption may be repelled by the covenantee, upon whom the burden 40 of doing so lies, by showing that the contract is (*a*) reasonable as between the parties, (*b*) consistent with the interests of the public. It is not necessarily unreasonable for a seller of the goodwill of a business to eliminate himself from the sphere of competition. If the elimination is greater than the protection reasonably required, then it is, of course, unreasonable as between the parties, *Nordenfelt case, ante; Morris case,* 1916, A. C. 688, *Atwood* v. *Lamont* (1920) 3 K. B. 571.

In the Supreme Court of New Brunswick (Chancery Division).

No. 10. Reasons for Judgment of Baxter, C.J.—*continued.*

There can be no better mode of approach than by the question put in *McEllistrim* v. *Ballymacelligott Co.*, 1919, A. C. 548 at 563 : "What was it against which the respondents were reasonably entitled to protect themselves ? " In the present case it is the retention or exercise of the goodwill of the business of Lewis Connors & Sons, Ltd., coupled, as in the *Nordenfelt* case, with the elimination of competition with that business by certain individuals of whom the plaintiff is one. For the purchasers to buy the mere physical assets without it, in the light of their experience, would be nonsense.

Where was it that the Connors people could do injury to the goodwill with which they had parted ? Surely wherever the business had been carried on. And they had carried it on in each of the provinces of Canada. Considering that there can be no legal hindrance of trade between the provinces under our constitution, it is obvious that to exclude one or more provinces from such a contract as this would simply be to enable the vendors to sell their goods in some excluded territory which goods might be shipped from thence into territory included in the covenant, thus violating the spirit but not the letter of the obligation. In dealing with the area of restriction, the rule seems to be that laid down by Lord Macnaghten in the *Nordenfelt* case at p. 566 where he says that " the Court ought not to hold the contract void unless the defendant ' made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed ' if the proposed restriction were upheld " and where, referring to *Whittaker* v. *Howe*, 3 Beav. 383, he also says : " There is a homely proverb current in my part of the country which says you may not ' sell the cow and sup the milk.' "

Therefore, I do not think that the area of restriction in the present case is too wide nor that the restraint of the covenant is, under all the circumstances, other than reasonable between the parties. Then comes the question of whether the restraint is consistent with the interests of the public.

Lord Parker in *Morris case*, 1916, A. C., 688, at p. 707, thinks that the onus of so showing should lie on the party alleging it. The only evidence before the Court is to the effect that the price of sardines to the public has not been increased but somewhat lessened since the making of this contract. There is not a syllable of testimony to show any injury to the public and I find that there has not been any. Nor can it be said that Lewis Connors & Sons, Ltd., is not now carrying on business. The record shows just what has been done by both companies for some years. No doubt the restriction operates in favour of Connors Bros., Ltd., but that does not detract from its validity for the protection of Lewis Connors & Sons, Ltd. There is also no doubt in my mind but that the words " will not directly or indirectly engage " include engaging by the plaintiff himself as owner or in partnership with others or as a shareholder of an incorporated company engaged in such business in Canada.

The answer to (*a*) will, therefore, be yes.

It may be that the second question can be efficiently answered by the observation of Kekewich, J. in *Pearks, Ltd.* v. *Cullen* (1912), 28 T. L. R., 371,

where he says : " I think it means that he should not go and do that within these limits which he until then was doing in the employment of these persons here ; " but I think I must dispose of the branch of the case in another way. The word " employee " is a very wide term. It may embrace anything from a general manager of a business to one who is engaged in some mere routine occupation. By O. 54, a, Rule 4, I am not obliged to determine any question of construction if in my opinion it ought not to be determined on originating summons. Such is my opinion with reference to this question which is too hypothetical to admit of any answer which would not be subject to many qualifications. I think the only satisfactory way of determining the question is when the plaintiff undertakes to act in some form of employment for some person or corporation engaged in the sardine business in Canada. Without professing to decide anything, I can see a wide difference between the plaintiff working at a machine which seals the tins of sardines or superintending the operations of a new company. I cannot, with the material before me, grade the possible occupations which the plaintiff may undertake into exhaustive categories and provide an answer in respect to each of them, and as pointed out by Jessel, M. R., in *Curtis* v. *Sheffield*, 21 Ch. D. 1, the Court does not as a rule decide as to future rights. See also the remarks of Kekewich, J. in *In re Harman ; Lloyd* v. *Tardy*, 1894, 3 Ch. 614, at the end of his judgment as to the necessity of questions being specific. I, therefore, decline to answer question (*b*).

The remaining question is based upon a portion of the covenant, the force of which is spent as the period of ten years has elapsed. Having decided that under question (*a*) the plaintiff cannot engage directly or indirectly in any sardine business whatsoever in the Dominion of Canada, I do not see how it is possible for him to lawfully use any name in connection with that business. The answer to (*c*) is, therefore, No.

I may add that I have entertained grave doubts as to the propriety of proceeding under O. 54 a. It is true that there is a written instrument but I can find no instance of an instrument of this character having been dealt with under this procedure. All the instances I have seen have had some relation to property. In what is the plaintiff "interested ? " Certainly not in any species of property. He is interested in getting rid of an onerous covenant which he has executed. He could not come into Court and claim any species of property under this instrument. It does not seem to fall within what Stirling. J.,was dealing with in *Mason* v. *Schupisser*, 81 L. T. 147. However, the parties have proceeded with the matter and, so far as my opinion is concerned, they have probably got it with less expense than would have been incurred in any other way. I may say that upon a similar future application I shall not feel myself bound to act merely because of having acted upon this application.

The plaintiff must pay the costs of this application.

In the Supreme Court of New Brunswick (Appeal Division).

No. 11. Notice of Appeal, 1st September, 1937.

No. 11.

Notice of Appeal.

Take Notice that the above named plaintiff intends to appeal and does hereby appeal to the Appeal Division of the Supreme Court of New Brunswick from the decision given and judgment entered on the hearing of this action before the Honourable John B. M. Baxter, Chief Justice of New Brunswick, in the Chancery Division of the Supreme Court, at the City of Saint John, in the Province of New Brunswick, on the 24th day of August, A. D. 1937, whereby, upon three questions submitted on originating summons for the construction of certain covenants contained in two agree- 10 ments, the learned Chief Justice answered question (*a*) in the affirmative and question (*c*) in the negative and declined to answer question (*b*), and it was ordered that the plaintiff pay the costs of the application; and that the plaintiff will, at the next sittings of the Court of Appeal to be held on the second Tuesday in September, A.D. 1937, move to have questions (*a*) and (*b*) answered in the negative and question (*c*) answered in the affirmative, and to have judgment entered for the plaintiff.

Dated the first day of September, A. D. 1937.

(Sgd.) J. H. DRUMMIE,
Plaintiff's Solicitor. 20

To: The Defendants and to Messrs.
Inches & Hazen, their Solicitors.

No. 12. Formal Judgment, 8th February, 1938.

No. 12.

Formal Judgment.

IN THE SUPREME COURT
(Appeal Division).

February Session, 2 George VI,
Tuesday, February 8th, 1938.

ON APPEAL FROM THE CHANCERY DIVISION.

Between

BERNARD CONNORS - - - - - - - - *Plaintiff*

and

CONNORS BROS., LIMITED; and LEWIS CONNORS & SONS, LIMITED - - - - - - - - - *Defendants.*

Upon hearing, on November 18th last, Mr. J. H. Drummie, of counsel for the plaintiff, in support of an appeal from the judgment of Chief Justice Baxter, and upon hearing Mr. C. F. Inches, one of His Majesty's Counsel, and Mr. A. N. Carter, of counsel for the defendants, contra, the Court, having taken time to consider, DOTH NOW ORDER that the said appeal be dismissed with costs.

By the Court,

(Sgd.) H. LESTER SMITH,
Registrar.

No. 13. Reasons for Judgment: (a) Grimmer, J. (Fairweather, J., concurring).

No. 13.

Reasons for Judgment.

The judgment of the Court, Grimmer, LeBlanc and Fairweather, JJ. was delivered by:

GRIMMER, J.: This is an appeal from the decision of Baxter, C. J., sitting in Chancery upon an originating summons taken out by the plaintiff for the determination of certain questions, which are fully and at length set out in his very complete and exhaustive judgment as now reported in Volume 12, Maritime Provinces Reports at pages 102 *et seq.*

There is no dispute as to the facts. The authorities relied upon by the respective Counsel and the learned Chief Justice are fully set forth and stated in the above cited report. No new or additional arguments were presented to this Court and I am of the opinion that the judgment of the learned Chief Justice is correct. The appeal should be, and is therefore dismissed with costs.

Appeal dismissed.

(b) LeBlanc, J.

LEBLANC, J.: In his evidence the plaintiff said that he had legal advice and that when he signed the document which he now attacks, he did not think that it was binding on him. Evidently his opinion was that the defendants were not getting from him what they were expecting when they paid him the money. That statement of the plaintiff, as much as anything else that has been urged, has decided me to concur in the dismissal of the appeal. A court should be very slow to help a man get rid of an agreement entered into voluntarily under such circumstances.

In the Supreme Court of New Brunswick (Appeal Division).

No. 14. Order granting special leave to appeal to Supreme Court of Canada, 18th February, 1938.

No. 14.

Order granting special leave to appeal to Supreme Court of Canada.

IN THE SUPREME COURT
(Appeal Division)

February Session, 2 George VI,
Friday, February 18th, 1938.

Between

BERNARD CONNORS - - - - - - - - *Plaintiff*

and

CONNORS BROS., LIMITED, and LEWIS CONNORS & SONS, LIMITED - - - - - - - - *Defendants.*

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Upon hearing, this day, Mr. J. H. Drummie, of counsel for the plaintiff, in support of a motion for special leave to appeal to the Supreme Court of Canada, and upon hearing Mr. C. F. Inches, one of His Majesty's Counsel, of counsel for the defendants, contra, the Court DOTH NOW ORDER that such special leave be granted.

By the Court,

(Sgd.) H. LESTER SMITH,
Registrar.

In the Supreme Court of Canada.

No. 15. Notice of Appeal, 22nd February, 1938.

No. 15.

20

Notice of Appeal.

Take Notice, that the above named plaintiff hereby appeals to the Supreme Court of Canada from the judgment, order or decision pronounced and entered in this cause by this Court on the eighth day of February, A.D. 1938, whereby it was ordered that the appeal of the plaintiff be dismissed with costs.

Dated the twenty-second day of February, A.D. 1938.

(Sgd.) J. H. DRUMMIE,
Plaintiff's Solicitor.

To: The above named Defendants and
To: Messrs. INCHES & HAZEN, their Solicitors.

30

In the Supreme Court of Canada.

No. 16. Bond on Appeal, 23rd February, 1938.

No. 16.

Bond on Appeal.

TORONTO GENERAL INSURANCE COMPANY.
Toronto, Canada.

Bond No. 3J0320 Amount $500.00

Know all men by these Presents, that Toronto General Insurance Company is held and firmly bound unto Connors Bros., Limited, and Lewis Connors & Sons, Limited, each of Black's Harbor, in the County of Charlotte, in the Province of New Brunswick, in the penal sum of Five Hundred
10 Dollars ($500.00) of lawful money of Canada, to be paid to the said Connors Bros., Limited, and Lewis Connors & Sons, Limited, their successors and assigns, for which payment well and truly to be made the said Toronto General Insurance Company binds itself, its successors and assigns, firmly by these presents.

Sealed, with its seal and dated the twenty-third day of February, A.D. 1938.

Whereas, a certain action was brought in the Chancery Division of the Supreme Court of New Brunswick by Bernard Connors against the said Connors Bros., Limited, and Lewis Connors & Sons, Limited,

20 And Whereas, judgment was given in the said Court against the said Bernard Connors, who appealed from the said judgment to the Appeal Division of the Supreme Court of New Brunswick,

And Whereas, judgment was given in the said action by the said Appeal Division of the Supreme Court of New Brunswick against the said Bernard Connors on the eighth day of February, A.D. 1938,

And Whereas, the said Bernard Connors desires to appeal from the said judgment of the Appeal Division of the Supreme Court of New Brunswick to the Supreme Court of Canada, and has applied to and obtained leave from the Appeal Division of the Supreme Court of New Brunswick on the eight-
30 eenth day of February, A.D. 1938, to appeal from the said judgment to the Supreme Court of Canada,

Now the Condition of this obligation is such that if the said Bernard Connors shall effectually prosecute his said appeal and pay such costs and damages as may be awarded against him by the Supreme Court of Canada, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, the said Toronto General Insurance Company has caused these presents to be sealed and executed by its proper officer in that behalf the day and year first hereinbefore written.

(Sgd.) TORONTO GENERAL INSURANCE COMPANY.
40 E. S. WRIGHT [l.s.]
Attorney-in-fact.

Signed, sealed and delivered in the presence of
(Sgd.) J. PRESTON CLARK.

Approved 7th March, /38.
(Sgd.) J.B.M.B.,
C.J.

In the Supreme Court of Canada.

No. 17.
Order settling Case on Appeal, 7th March, 1938.

No. 17.

Order settling Case on Appeal.

Upon hearing Mr. J. H. Drummie for the above named appellant and Mr. C. F. Inches, K.C., for the above named respondents, and it being made to appear to me that the said appellant has been granted special leave to appeal to the Supreme Court of Canada, has given notice of appeal from the judgment in this cause, and has given security to the extent of Five Hundred Dollars ($500.00) to my satisfaction that he will effectually prosecute this appeal and pay such costs and damages as may be awarded against him by the Supreme Court of Canada, I do hereby approve the said security and bond on appeal, and allow the appeal herein, and, both parties consenting, do order that the following shall constitute the case on appeal :

(1) Originating Summons.

(2) Affidavit of Bernard Connors in support.

(3) Trial Judge's notes of hearing June 15, 1937, when no stenographer present.

(4) Stenographer's notes of the trial.

(5) Exhibits.

(6) Formal Judgment, Trial Court.

(7) The Reasons for Judgment of Trial Judge, Baxter, C.J., N. B.

(8) The Notice of Appeal to the Supreme Court of New Brunswick, Appeal Division.

(9) The Formal Judgment of the Supreme Court of New Brunswick, Appeal Division.

(10) Reasons for Judgment of the Supreme Court of New Brunswick, Appeal Division, namely, those of Grimmer J., Fairweather J., concurring, and those of LeBlanc J.

(11) Order of the Supreme Court of New Brunswick, Appeal Division, granting special leave to appeal to the Supreme Court of Canada.

(12) Notice of Appeal to the Supreme Court of Canada.

(13) Bond on appeal.

(14) And this Order.

Dated the 7th day of March, A.D. 1938.

(Sgd.) JOHN B. M. BAXTER, C.J.

I hereby consent to the making of this Order.

Dated the 7th day of March, A.D. 1938.

(Sgd.) C. F. INCHES,
Respondents' Solicitor.

No. 18.

No. 18.

Certificate of Appellant's Solicitor pursuant to Rule 13.

(Not printed.)

No. 19.

No. 19.

Registrar's Certificate certifying Case on Appeal and Bond.

(Not printed.)

No. 20. Factum of Bernard Connors.

No. 20.

Factum of Bernard Connors.

PART I.

10 STATEMENT OF FACTS.

Early in the year 1924, Lewis Connors and his sons, Bernard and Edwin Connors, entered into the business of packing and selling sardines at the Booth factory, so called, at West Saint John and this business was later incorporated under the name of Lewis Connors & Sons, Limited. (Record p. 18, ll. 28–36). The stock in the company was issued to Lewis Connors, who was the active head of the concern, Bernard Connors, Mrs. Lewis Connors, and another son and daughter of Lewis Connors. The two brothers and sister held an equal number of shares in the company and the shares owned by Mr. and Mrs. Lewis Connors together with the shares 20 of either son or the daughter comprised control. (Record p. 21, ll. 26–43.)

In the first twelve months the company was in business it sold 40,000 cases of sardines, the market being Canada and a number of foreign countries. (Record p. 22, ll. 18–29.)

In April, 1925, negotiations were entered into between Lewis Connors and Neil McLean, president of Connors Bros., Limited, sardine packers of Black's Harbor, N. B., regarding the sale of the business of Lewis Connors & Sons, Limited to Connors Bros., Limited. (Record p. 44, ll. 19–43). As a result of these negotiations, an option agreement was executed under date of April 30, 1925, whereby Lewis and Bernard Connors agreed to sell a con-30 trolling interest in Lewis Connors & Sons, Limited, to Neil McLean and Allan McLean upon certain terms among which was the ratification of same by Connors Bros., Limited. (Ex. No. 4, Record p. 175). This agreement was ratified by the latter company in writing on June 9, 1925. (Ex. No. 3, Record p. 181.)

In the Supreme Court of Canada.

No. 20. Factum of Bernard Connors—*continued.*

At a meeting of the Board of Directors of Connors Bros., Limited, held May 14, 1925, the president, Neil McLean, pointed out that for upwards of a year competition from the factory of Lewis Connors & Sons, Limited, had resulted in a price cutting by the two companies which was costing Connors Bros, Limited, a large loss of profit. In his opinion Connors Bros., Limited, could pursue one of two courses, go on price cutting for another year or so with a view to forcing the other company out of business, or obtain a controlling interest in Lewis Connors & Sons, Limited. Mr. McLean explained that the latter course was possible and submitted the proposal of purchase. The directors authorized him to arrange for the purchase of Lewis 10 Connors & Sons, Limited, after he had examined the latter concern's financial affairs and if he considered the purchase in the best interests of Connors Bros., Limited. (Record p. 52, ll. 15–45 ; p. 53, ll. 1–5).

By virtue of the agreement of June 9, 1925, control of Lewis Connors & Sons, Limited, passed to Connors Bros., Limited, and by the agreement also dated June 9, 1925, Lewis Connors & Sons, Limited, and Connors Bros., Limited, hired Bernard Connors as manager of the former company's factory at Saint John for five years at a salary of $5,000 a year. (Ex. No. 1, Record p. 183).

In the agreement of June 9, 1925, (Ex. No. 3, Record p. 181), there is 20 contained the following covenant, "(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, A. D., 1925, use the name of Connors in connection with the sardine business in any country whatsoever."

In the employment agreement of Bernard Connors dated June 9, 1925, there is no covenant in restraint of trade contained. 30

In the fall of 1925, the factory of Lewis Connors & Sons, Limited, at Saint John was closed down and the company's operations were carried on thereafter from Connors Bros., Limited, plant at Black's Harbor. (Record p. 39, ll. 13–26 and 30–31). By agreement in writing dated October 2, 1926, Bernard Connors' employment with Lewis Connors & Sons, Limited, was terminated by mutual arrangement and the agreement he was then asked to sign contained the following covenant:—"(3) 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 40 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."

Bernard Connors, having been approached by certain parties, other than the parties involved in this action, who wished to have him identified with them in the sardine business (Record p. 41, ll. 5–15), wrote to Connors

Bros., Limited, and Lewis Connors & Sons, Limited, on April 15, 1937. In his letter he pointed out, among other things, that he did not consider the restrictive covenants in the agreements of June 9, 1925, and October 2, 1926, as binding in law but that, if they were binding, he did not wish or intend to violate them. He served notice of his intention to engage in the sardine business in Canada and to use the name of Connors if he saw fit. He pointed out that, if the companies intended to hold him to the covenants, he would apply to the Chancery Court for a construction of the agreements containing the covenants and directions as to the rights of the parties thereunder. (Ex. No. 6, Record p. 192). The defendant companies replied through their solicitors that they considered the contracts binding in every respect and had no intention of releasing Mr. Connors or abandoning their rights under these agreements. (Ex. No. 7, Record p. 194).

Accordingly, the plaintiff applied under Order 54a of the New Brunswick Judicature Act for an originating summons and the same was issued by Baxter, C.J., under date of April 27, 1937. Three questions (*a*), (*b*), and (*c*), were submitted to the Court for construction and a declaration as to the rights of the parties applied for. (Record pp. 1–3).

The matter came on for hearing before Chief Justice Baxter in the Chancery Court of New Brunswick on the 15th, 16th, 17th, and 25th of June, 1937, at Saint John and judgment was delivered on August 24, 1937. (Record pp. 72–79).

In his judgment, the learned Chief Justice of New Brunswick answered question (*a*) in the affirmative; declined to answer question (*b*) for the reasons given in his judgment; and answered question (*c*) in the negative, and ordered the plaintiff to pay the costs of the application.

The plaintiff appealed to the Supreme Court of New Brunswick, Appeal Division, at the November sittings in 1937, and, after taking time to consider, the Appeal Court dismissed the appeal with costs on February 8, 1938, written judgments being delivered by Grimmer J. and LeBlanc, J. (Record p. 81).

The plaintiff, on February 18, 1938, obtained special leave from the Appeal Division of the Supreme Court of New Brunswick to appeal to the Supreme Court of Canada. (Record p. 82).

Part II.

ERROR.

The learned judges of the Appeal Court were in error in affirming *in toto* the judgment of the court below and the learned Chief Justice in the court below was in error :—

(1) In not dealing with the necessary element of time in relation to the restraint imposed by the covenant, and in not holding that the restraint, being for all time, was too wide ;

In the Supreme Court of Canada.

No. 20. Factum of Bernard Connors—*continued.*

(2) In treating the question of the area of restriction as applying only to sales of sardines in Canada, and in not holding that the plaintiff was denied access to the source of supply of Canadian sardines for sale anywhere in the world, the covenant thereby being world wide in extent and therefore too broad;

(3) In holding that the covenant was a reasonable one in the face of the evidence as to reasonableness adduced by the defendants;

(4) In not holding that the covenant of June 9, 1925, (Ex. No. 3, Record p. 181), was cancelled by the general release to Bernard Connors in the agreement of October 2, 1926, (Ex. No. 5, Record p. 186), and that the covenant contained in the said agreement of October 2, 1926, was a mere covenant against competition *per se* and illegal;

(5) In his application to this case of the law on the question of public policy in relation to restraint of trade agreements;

(6) In apparently considering as material to the question of the reasonableness of the covenant irrelevant evidence touching upon matters anterior to the formation of the business of Lewis Connors & Sons, Limited;

(7) In declining to answer question (*b*) for the reason given, namely, that he was exercising the discretion conferred upon him by Order 54a Rule 4, and in not holding that the plaintiff can be employed in the sardine business in Canada.

PART III.

ARGUMENT.

For purposes of convenience, the Appellant's argument will be developed under the headings of the grounds of error in their numerical order.

ERROR NO. (1).

TIME.—It is submitted that the restraint imposed by the covenant is unreasonably wide both as to extent of time and extent of space and that, if too wide as to both elements or either one, the covenant is invalid. The restraint placed upon the Appellant in the present case is completely general and, in its extent, is unusual if not unparalleled among reported cases.

Since no time is mentioned in the first part of the covenant, it must be taken that Bernard Connors is restrained from engaging in the sardine business in Canada for all time, and so the learned Chief Justice decided in the first instance and his judgment was affirmed in whole by the Court of Appeal. But in his judgment, he did not deal specifically or at all with the time element in the covenant as applied to the question of reasonableness, confining himself entirely to a consideration of the extent of space. It is submitted by the Appellant that the most salient feature of the question of reasonableness in this case is the matter of the time element.

It is a well established principle of law, following a long line of authorities, that restraint on competition *per se* is illegal and void: *Vancouver*

Malt and *Sake Brewing Co., Ltd.* vs. *Vancouver Breweries, Ltd.*, 1934, A. C. 181; *McEllistrim* vs. *Ballymacelligott Co-Operative Agricultural and Dairy Society*, 1919, A. C. 548.

In the Supreme Court of Canada.

No. 20. Factum of Bernard Connors—*continued*

An agreement whereby a person undertakes not to compete with another for a money consideration, is void. However, if the covenantor sells his business for a consideration and at the same time undertakes not to compete with that business, the covenant, if drafted within the bounds of reasonableness in law, may be good. In the latter case, the law presumes that the purchaser wishes to make the business his own free from competition by the former owner because a component part of the business is the goodwill built up by the former owner.

Had Connors Bros., Limited, immediately discontinued the operations and activities of Lewis Connors & Sons, Limited, there would have been no question but that the covenant was void. The law, in supporting these covenants in restraint of trade, definitely contemplates that the purchaser intends to continue the business and the restraint is imposed in order to give him a reasonable opportunity to retain the customers for, without those, the property purchased would not be so valuable. The protection of the goodwill then is the crux of the matter.

Accordingly, the extent of time is a necessary element to be considered in construing the question of reasonableness as applied to the present contracts. It is submitted that the purchasers of Lewis Connors & Sons, Limited, were entitled to get from Bernard Connors (if they were entitled at all) his interest in the business he sold free from competition by him for a *period of time sufficient in extent to enable the purchasers to secure to themselves the goodwill which they had bought.*

That freedom from competition would enable the new owners to make contact with the existing customers of Lewis Connors & Sons, Limited, and insure the retention, at least for a reasonable period, of the trade of those customers. Once the new owners had made those contacts (Bernard Connors being out of the picture) it would then be incumbent upon them to provide those customers with the service and quality of product which the customers demanded. If they failed to do this, the new owners would lose the customers whether Bernard Connors was in business or not.

There is clear evidence on the record (Record p. 59, ll. 35—p. 60, l. 7) that the customers trading with Lewis Connors & Sons, Limited, at the time these agreements of 1925 were executed have been retained. The following from the cross-examination of Mr. Doone (Record p. 59, l. 41—p. 60, l. 7) is significant:—

> "*Q.*—I mean you have had plenty of time to retain those "customers? *A.*—Oh, yes, those customers were retained. I did "not know if you mean by Lewis Connors or Connor Bros."
>
> "*Q.*—I mean by Lewis Connors. *A.*—Those customers are all "retained. Lewis Connors & Sons supplied the same customers as "they always did to a great degree."
>
> "*Q.* You didn't get my point. Lewis Connors & Sons, Limited, "had certain customers in 1925. Has that company succeeded

In the Supreme Court of Canada.

No. 20. Factum of Bernard Connors—*continued.*

" in retaining that connection during the last twelve years ?—*A*. Yes, " pretty well."

" *Q*. Added some new ones to it no doubt ?—*A*. Yes, that " is true."

According to the prepared figures on the sales of sardines by that company (Ex. M, Record, p. 198) the output in 1925 was 53,168 cases while in 1936 it was 57,598. It can be seen that Lewis Connors & Sons, Limited, has had no loss of business and it is submitted that its increase could have been substantially larger had Connors Bros., Limited, not, as Mr. McLean practically admits in his evidence (Record, p. 53, ll. 6–11), purchased the company primarily to eliminate competition and not as an investment with a view to increased profits.

It will be seen that Connors Bros, Limited, sales increased from 127,111 in 1925 to 257,752 in 1936 and Mr. McLean appears to think the increase was even higher and he should know. (Record, p. 48, l. 43, p. 49—l. 1.) Since the two companies are directed by the same interests, it is reasonable to infer that the sales of Lewis Connors & Sons, Limited, could have progressed in the same proportion as the other company if the latter gave the matter proper attention. In any case Mr. McLean has been well satisfied with the growth of the businesses. (Record, p. 53, ll. 29–33; Record, p. 54, ll. 13–15.) No doubt the reason the figures for both companies are not even higher is because both packs are put up at the Connors Bros. plant at Black's Harbor and its equipment is limited. Mr. McLean says that if they had the equipment they could pack 600,000 cases. (Record, p. 54, l. 17.)

Mr. Hill states in his evidence, (Record, p. 64, l. 4) that the net profit, on a conservative basis, is twenty-five cents on a case of sardines. The purchasers of Lewis Connors & Sons, Limited, paid for a controlling interest $55,000 in stock of Connors Bros., Limited, and $35,000 for the balance. (Ex. No. 4, Record, p. 175.) This business had been conducted by them for twelve years up to the time this action was commenced with an average sales' showing of 50,000 cases a year, showing a return to them in profits alone of £150,000, without any extra investment in plant, etc., since the business is all handled from the plant of Connors Bros., Ltd.

At the time the Respondents submitted this covenant to Bernard Connors in 1925, they should have been in a position to estimate the time required to enable them to make the goodwill of the business their own and to insure them a return of their investment and a fair profit.

The evidence in this case shows conclusively that, over a period of twelve years, they have more than succeeded in doing those very things. They have retained all their customers and in net profits alone they have practically doubled their investment. And, the purchasers of Lewis Connors & Sons, Limited, being in the sardine business themselves at the time, would be in a much better position than a stranger to the business to estimate the extent of time required to make this covenant a reasonable one.

There does not appear at any place in the record one syllable of evidence to show why the purchasers of this business required an all time covenant against Bernard Connors (who was in his thirties at the time) in which to make the business their own. Subsequent events, as disclosed by the evidence, show that, if they needed any restraint at all, its extent in time should have been no more than ten years.

The only reason which the Respondents can advance for such a wide restraint is that they wanted Bernard Connors out of the sardine business for all time, and that is hardly an adequate reason to be consistent with
10 the common law principle of public policy.

It was the Respondents' duty in this case to disclose to the court why an all time restraint was reasonably necessary for the protection of the business of Lewis Connors & Sons, Limited, as a going concern, and it is submitted that they have not done so.

It is true that Lindley, M. R. in *Haynes* vs. *Doman*, 1899, 1 Ch. at p. 23, suggests that no case can be found in which an agreement in restraint of trade, free from objection in other respects, has been held void simply because its duration was not restricted. But all that this statement can surely mean is that a covenant is not faulty *prima facie* because a definite period
20 of time is not stated. There may be instances where an indefinite period is reasonable as, for example, within a small restricted area in connection with the business, such as that of a solicitor, where personal contact means everything. How can the same be said about a business as extensive as the one in the present case?

The extent of a time restriction is a *material element* in deciding whether the agreement as a whole is reasonable according to *Eastes* vs. *Russ*, 1914, 1 Ch. 468.

It is submitted that the restriction placed upon the Appellant *goes further than was reasonably necessary for the protection* of the business of
30 Lewis Connors & Sons, Limited, and that the restraint tends to do nothing more than stifle competition as such.

The Appellant would refer to the case of *McEllistrim* vs. *Ballymacelligott*, *supra*, and to the case of *Attwood* vs. *Lamont*, 1920, 3 K.B., 571, particularly to the judgment of Younger, L.J., pages 580 to 598.

In the latter case, the principle laid down in the case of *Nordenfelt* vs. *Maxim-Nordenfelt Guns and Ammunition Co.*, 1894, A.C. 535, and followed by the House of Lords in all subsequent cases of restraint of trade with reference to the burden of proof being on the covenantee to establish that the scope of the covenant *went no further* than was *reasonably necessary*
40 for his protection, was again affirmed.

Younger, L.J., at pages 596 and 597 in the *Attwood* case says: "The covenant . . . being a covenant for life and excluding the appellant for that period from a considerable area with reference to the great bulk of whose residents . . . the plaintiff has no relation at all, it is, I think, on any view, unreasonably wide." And further at page 597, he says: "The covenant . . . as it stands has not been justified by any evidence

from him (Attwood) that his connection required so wide a restraint or, at any rate, a *restraint so extended in duration*."

It is contended by the Appellant that the Respondents, in drafting this covenant, were wholly concerned with keeping the Appellant out of competition under the name "Connors," which all through the evidence they have sought to show was synonymous with the sardine business in Canada. Had they so drafted the covenant as to restrain Bernard Connors from engaging either directly or indirectly *in any sardine business in Canada in which the name "Connors" was used*, there might be something said in their favor because then they would have shown that, in trying to make a reasonable covenant, they worded it so as to protect the thing they really sought to protect.

But they went further and tried to shut out the Appellant *as an individual* (apart from the fact that he bore the name Connors) from competition for all time.

Having a practical monopoly of the sardine business in Canada at the time, (Record p. 54, ll. 40–45) and their companies being operated under the name "Connors," it is perhaps reasonable to draw a conclusion that they would wish to be the only concerns packing sardines under that name. But, in restraining Bernard Connors from engaging in the sardine business in Canada under *any name*, they have gone further than the achievement of their main purpose required.

The Respondents have made some effort to show why they needed protection for the name "Connors" and, had they been content to protect the name and not try to push the individual, Bernard Connors, out of business for all time, it might be that their covenant was reasonable. Since they did not do this, the Court cannot help them by modifying the covenant. If the restraint is too wide, a Court must find it invalid and that ends the matter.

Haldane, L.C., in the case of *Mason* vs. *Provident Clothing Co.*, 1913, A. C. 724 at page 732 says: "The question is not whether they could have made a valid agreement, but whether the agreement actually made was valid."

"Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself and the State of his labour, skill or talent by any contract that he enters into. This is equally applicable to the right to sell his goods." *McEllistrim* vs. *Ballymacelligott Society*, *supra*, at page 572.

The evidence discloses no special circumstances in regard to the nature and extent of the business of Lewis Connors & Sons, Limited, which would require a restriction on the liberty of Bernard Connors to make his living in his own country at the business in which he was brought up and at which he worked from boyhood, a restriction which might extend for 35 or 40 years having regard to the Appellant's age and the possibilities of human life, as pointed out by Lord Birkenhead in the case of *McEllistrim* vs. *Ballymacelligott Society*, *supra*, at page 564.

It is clear from the evidence that Lewis Connors was the principal owner and organizer of Lewis Connors & Sons, Limited, and it was he with whom Mr. McLean held the opening negotiations for the purchase of that company by Connors Bros., Limited. Since no specific evidence was given to the contrary, it is reasonable to infer that Lewis Connors would be the principal person whose future competitive activities the purchasers would desire to curtail, he being one of the original Connors " brothers." Bernard Connors was small fry, so to speak, as compared with his father, being only a minority shareholder in the company. Yet in the June 9th agreement (Ex. No. 3, Record p. 181) a *joint covenant* was taken from these two men, placing the *same time restriction* on both. Lewis Connors was well into his sixties while the Appellant was in his thirties. (Record p. 13, ll. 14–16; Record p. 14, l. 21.) The former had a very much shorter expectancy of life—in fact he died in 1934. It is submitted that, had the Respondents placed a ten year restriction on these men, they would have achieved their purpose in regard to Lewis Connors, they would have allowed themselves ample time (as has already been shown) to maintain the stability of the list of customers they acquired, and they might not have been considered to have imposed too harsh a restraint on Bernard Connors, who was a young man at the time. But it was inconsistent to ask the same restriction under the circumstances from two men of such disparity in ages, and having gone too far the Respondents violated the rules as to reasonableness, and any restraint at this time is nothing more than a mere restraint on competition and void.

If the Respondents considered Bernard Connors to be so valuable and to have such valuable connections in the sardine business, they should have retained him in their organization. They had the opportunity. In fact he made it clear that he wished to continue being identified with the sardine business when he stipulated in the option of April 30, 1925, for a contract of employment. (Ex. No. 4, Record p. 175). However, apparently the Respondents did not want him and succeeded in getting him out of the organization on October 2, 1926. (Record p. 39, ll. 35–44). It is obvious that they did not fear competition from the man, Bernard Connors, but from the name he bore and it was the use of the latter which they really wished to restrict.

In making their covenant they went too far and the Appellant would submit that the use of the Connors name and its synonymity with the sardine business should not be allowed to obscure the fact that the man, Connors, as well as the name, Connors, is restricted, and this restriction on the individual is too wide. There is no evidence to show that an all time covenant was required and the action of the Respondents in letting Connors out of their organization proves this fact.

The fact of the whole matter is that Connors Bros., Limited, did not wish to have Lewis Connors & Sons, Limited, another sardine company using the name Connors, in opposition to them. As Mr. McLean says at (Record p. 48, l. 21) " it was very confusing," and see also the evidence of Mr. Hill at (Record p. 66 l. 37—p. 67, l. 10). They did not buy what all through the

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evidence they tried to show was a bankrupt concern for the sake of building up the business of that concern, as public policy dictates they should do. They bought the company to close it down and eliminate this " confusion " Mr. McLean talks about because for them to carry it on would only continue the confusion.

But after getting the business of Lewis Connors & Sons, Limited, the thought must have occurred to them that to wind up the company would cause them to lose the force of the restrictive covenant, since the latter would then be interpreted merely as a restraint on competition *per se*, and the purchasers were astute enough to continue Lewis Connors & Sons, Limited, as a subsidiary and later a wholly owned subsidiary. 10

The minutes of the meeting of directors of Connors Bros., Limited, May 14, 1925, (Record p. 52, l. 15—p. 53, l. 5), discloses that this concern was not interested at that time in considering the matter of public policy. They were not interested in buying a business with a view to continuing it. A restrictive covenant pre-supposes the continuation of the business for whose protection the covenant has been taken, and the public interest is only served by the continuation of that business.

The policy of Connors Bros., Limited, was aimed " with a view to driving the company's competitor out of business." Mr. McLean admits that their prime object was to eliminate competition. (Record p. 53, ll. 6–11). 20

In drawing the restrictive covenant, Connors Bros., Limited, was concerned simply and entirely with the protection of the business of that company only and not with the protection of the business of Lewis Connors & Sons, Limited. The former concern was merely getting rid of a competitor that was making it " confusing."

It is submitted by the Appellant that the entire surrounding circumstances of this transaction show conclusively that this matter is one which should be classed under the head of competition *per se*. If the cloak the Respondents have drawn around it obscures the issue to such an extent as to make such a construction impossible, then at least, it is obvious that Connors Bros., Limited, was intent purely on restricting the Appellant from repeating the confusion by engaging in the sardine business under the name " Connors." But an all time restraint on his individual liberty, apart from the use of the name, exceeds the bounds of reasonableness and should be held to be void. 30

ERROR No. (2).

AREA — The phrase " sardine business " used in the covenant is an intriguing one. The learned Chief Justice on trial was immediately impressed by its ambiguity. He asks Mr. Inches " What do you mean by the word 'business'" ? (Record p. 30, l. 23). He also says : " I shall want to know your contentions. Whether this man, the plaintiff, could not manufacture sardines within the Dominion of Canada, selling them outside the Dominion ? Do you contend that ? Or do you simply contend that so long as he did not sell or attempt to sell in the Dominion of Canada, he could sell elsewhere ? " (Record p. 30, l. 40—p. 31, l. 2). To which Mr. Inches replied, " He cannot do 40

any business in Canada at all." (Record p. 31, l. 3). The Chief Justice continued, "I want to know whether you mean manufacturing or merchandising or both." And Mr. Inches asserted, "I said putting up in tins and merchandising." (Record p. 31, ll. 4–6.)

The Chief Justice made a further observation, (Record p. 47, l. 39—p. 48, l. 3). "There may be a condition that only means merchandising in the sense of selling and distributing and it may also be contended even to manufacturing. The distinction is rather important because I should like to find out whether the evidence is that they might not manufacture in Canada
10 and send the goods elsewhere than in Canada because they were allowed to go in other parts of the world under the terms of the covenant or does it mean that it was considered necessary to the protection of Connors Bros. business that there should be no invasion of the source of supply in Canada."

The Respondents' counsel did not specifically reply to that last observation of the learned Chief Justice. (Record p. 48, ll. 5–14). But the Appellant contends that the scope of the covenant in this case is that far-reaching, that is to say that Bernard Connors cannot manufacture in Canada for sale anywhere in the world. In other words he is shut off completely from the Canadian source of supply.

20 The learned Chief Justice in his judgment (Record p. 78, ll. 10–18) in reference to the area of restriction appears to have construed the covenant to apply only to *sales* of sardines in Canada. But, if the Appellant is excluded from *packing* in Canada, he is also excluded from selling Canadian sardines anywhere in the world packed by him in Canada.

The Appellant submits that in his judgment the learned Chief Justice did not apparently consider the *world wide* aspect of this covenant.

Since the Appellant, by this covenant, is shut off from the entire source of supply of Canadian sardines, the area of restriction comprehended by the covenant, so far as the goodwill of Lewis Connors & Sons, Limited, is con-
30 cerned, cannot be confined to the Dominion of Canada, as both courts below apparently held to be the case.

The judgment of the trial judge at (Record p. 78, ll. 10–13) contains the following statement: "Where was it that the Connors people could do injury to the goodwill with which they had parted? Surely wherever the business has been carried on. And they had carried it on in each of the provinces of Canada."

But the evidence also discloses that they had carried it on in certain foreign countries as well, though there is no evidence that the business was carried on in *all the countries of the world.*

40 A scrutiny of Exhibit M (Record p. 198) will show that in 1924, its first year in business, Lewis Connors & Sons, Limited, sold 6,930 cases in the foreign market as against 20,437 in the Canadian market. In the year 1925, (the year the covenant was entered into) this company sold 26,372 cases in the foreign market and 26,796 in the domestic market. In considering the foreign sales for the year 1925, it must be borne in mind that Connors Bros., Limited, acquired ownership around the first of June in that year, which might conceivably account for the increase in foreign sales, because there

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would be nothing to stop the latter concern from directing part of its foreign sales to its subsidiary as admitted by Mr. Doone. (Record p. 59, ll. 32–34).

Accordingly it will be seen that Connors Bros., Limited, in imposing the restraint upon the Connors men, considered that it required an all time restriction for the whole world not only for the protection of the Canadian market of Lewis Connors & Sons, Limited, but also for the protection of the goodwill of that company as measured by foreign sales of approximately 7,000 cases.

In his judgment (Record p. 78, ll. 18–23) the learned trial judge stated : " In dealing with the area of restriction, the rule seems to be that laid down by the Lord Macnaghten in the *Nordenfelt* case at p. 566 where he says that ' the Court ought not to hold the contract void unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion or that the public interest would be sacrificed if the proposed restriction were upheld '."

The Appellant submits that the interest of Lewis Connors & Sons, Limited, did not require the entire source of supply nor, for the protection of its small foreign trade, that the Connors men should be restrained from packing in Canada and selling anywhere in the world, especially in view of the fact that the company was not selling in every country in the world. The covenant in those respects definitely goes further than was required for the protection of the covenantees, and that is what Lord Macnaghten implied in the rule cited by the learned trial judge in the present case.

The *Nordenfelt* case, which is the outstanding if not the only reported instance of a world wide covenant, at least had a limit of time involved. And the reasons why a world wide covenant was upheld in that case bear not the slightest resemblance to the present case. Nordenfelt's customers were the governments of countries throughout the world. He could not have confined his business (sale of quick-firing guns) to the United Kingdom. The same cannot be said of sardines because every single individual is a potential customer for food and sardines are a food.

Furthermore, in the *Nordenfelt* case, the Vendor was parting with a patented invention and there is no suggestion in the present case that any special trade secrets or formulæ were sold by Lewis Connors & Sons, Limited, to the purchasers of that business.

Connors Bros., Limited, took the widest type of restriction possible, with no special circumstances to justify their doing so unless for the reason that this company wanted the entire sardine business in Canada, with its consequent export trade, to itself. In this connection a scrutiny of the Record p. 54, l. 43—p. 55, l. 41 is indicated.

In *Herbert Morris, Limited* vs. *Saxelby*, 1916. 1 A. C. 688, Lord Shaw at page 717 makes the following statement, the last part of which might be made applicable to the present situation : " My Lords, in my opinion *Mitchel* vs. *Reynolds* still remains among all the decisions the most outstanding and helpful authority. Lord Macclesfield states the principle in a form which seems to fit and rule many very modern conditions and many developments of commerce and of contract : ' The true reasons of

the distinction upon which the judgment in these cases of voluntary restraints are founded are, first, the mischief which arise from them, first to the party by the loss of his livelihood and the subsistence of his family; secondly to the public by depriving it of a useful member. Another reason is the great abuses these voluntary restraints are liable to, as for instance from corporations, who are perpetually labouring for exclusive advantages in trade and to reduce it into as few hands as possible . . .' "

ERROR No. (3).

The test applied by all the courts in modern times to the subject of
10 restraint of trade is that laid down by Lord Macnaghten in the House of Lords in the celebrated case of *Nordenfelt* vs. *Maxim-Nordenfelt Guns and Ammunition Co.*, 1894 A. C. 535, wherein at page 565, he says :

" 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 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
20 sufficient justification, and indeed it is the only justification, if the restraint 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 a fair result of all the authorities."

In the case of *Mason* vs. *Provident Clothing and Supply Co.*, 1913, A. C. 724, Lord Haldane at page 733 says : " My Lords, the respondents have to show that the restriction they have sought to impose goes no further than was reasonable for the protection of their business."

30 As to the onus being upon the covenantee to prove the reasonableness of the restraint imposed, see also *Morris* vs. *Saxelby*, *supra*, at page 706; *Attwood* vs. *Lamont*, *supra*, at page 589; *Maguire* vs. *Northland Drug Co.*, 1935, S. C. R., 412.

Lord Haldane in the case of *Mason* vs. *Provident Clothing Co.*, *supra*, at pages 732 and 733 says :—

" Such a restraint on the liberty of a man to earn his living or exercise his calling is a serious one, and the Courts have always regarded such restrictions with jealousy. They have steadily refused to allow the question of their validity to be decided by a jury. Questions of this kind have always
40 been reserved by the Courts as being for the Court itself and to be decided in accordance with a definite legal test. Evidence cannot be given on the question of validity or of reasonableness, although evidence can be given as to the nature of the business and of the employment and, I think, also as to any practice which is usual among business men as regards the terms of the employment, not because this can determine the legal question of what is

reasonable, but because what is usual is to some extent a guide in the consideration of the requirements of the particular business."

The Appellant submits in the present case that the evidence of reasonableness to meet the application of this "definite legal test" is only such as touches upon the character and requirements of the business of Lewis Connors & Sons, Limited at the time the contract was made.

Applying this test, the record does not disclose anywhere sufficient evidence touching upon the character and requirements of this business to show why an all time and world wide restriction was reasonably necessary. The burden of so showing was upon the Respondents and they have not 10 discharged it. The covenant remains invalid until this onus has been discharged.

The Respondents will no doubt lay great stress upon the evidence given by Bernard Connors at Record pp. 32-34, and seek to establish that Mr. Connors' views, as expressed in that testimony, constitute evidence of reasonableness.

The most which that evidence can establish, however, is that Mr. Connors considered that the price he was receiving for his shares was a fair one.

It may further be pointed out that, during the examination of the 20 Appellant by the Court on Record pp. 32-34, he was palpably confused between the covenant signed in 1925 and that executed in 1926.

Attention may be drawn to the following: (Record p. 33, ll. 3-10). "*Q.* (By the Court). Have you any other idea than that Connors Brothers were taking over your concern for the purpose of eliminating competition by your concern? They wanted to get you out of business to get a clear field?—*A.* Yes."

"*Q.* (By the Court). And paying you more money than your stock would be worth?—*A.* It might have been."

"*Q.* (By the Court). You thought so?—*A.* We thought the price 30 was fair."

This evidence clearly refers to the transaction in June, 1925.

However, later on in the evidence (Record p. 33, ll. 13-32) we have the following:—

"*Q.* (By the Court). What gives you the idea you would like to go into the business now?—*A.* They insisted upon having this agreement signed and I at the time had legal opinion on it—that it was not binding —and I did not want to sign it at first but they insisted and after I had a consultation with my solicitors I was under the impression it was not binding and I was not giving them——" 40

"*Q.* (By the Court). In other words, they were not getting what they thought they were getting and not getting what they were paying for?—*A.* I thought they were trying to bind me as best they could."

"*Q.* (By the Court). Didn't they think they were providing for keeping you out of business?—*A.* Yes, they were trying to provide for keeping me out altogether."

"*Q*. (By the Court). You felt they were just a bit wrong about that and were not getting what they thought they were?—*A*. They might."

"*Q*. (By the Court). Was it or not?—*A*. I do not know what they thought they were getting."

"*Q*. (By the Court). We will repeat ourselves. Have you any doubt what they thought they were getting? Have you any doubt?—*A*. Well, one of their directors told me he was not sure it would be binding."

"*Q*. (By the Court). That director was who?—*A*. B. M. Hill."

"*Q*. When did Mr. Hill tell you that?—*A*. I cannot recall the date. It was during that time—of these negotiations. I do not know the exact date."

"*Q*. Where did the conversation take place?—*A*. I cannot just recall exactly where it was. I think down in Mr. Hill's office—in one of his offices."

That the time when Connors had legal advice that the agreement was not binding was when the last agreement in October, 1926, was signed is evidenced at Record p. 46, ll. 11-13, and also at Record p. 69, ll. 12-16. See also (Record p. 64, ll. 17-41; and Record p. 68, ll. 33-39).

It is surely impossible for a court to take this phase of the evidence (where the witness and the examiners were obviously at cross purposes) and say that there is evidence justifying this covenant as a reasonable one.

Furthermore, the Appellant would submit that any views he may have entertained at any stage of the transactions upon the validity of these covenants can have no bearing upon the application by a court of the test of reasonableness. There was no duty upon Bernard Connors, when this covenant was submitted to him, to point out that he did not consider it a valid one. It was the covenantees who insisted upon placing the covenant in the agreements and it was drafted by them and for their own protection. Connors was selling his shares in the business and the Respondents were acquiring the assets of Lewis Connors & Sons, Limited, and among those the goodwill. The Appellant was not selling an undertaking against competition which he held out to be valid. The respondents assumed the responsibility for the validity of the covenant and, if they exceeded the bounds of reasonableness in drafting this covenant, that is their loss. It was their duty to make sure that the restriction was reasonable and, in doing so, to ask no wider restraint than they could prove to be necessary. When they insisted upon a completely general restriction, they assumed the risk that it might be declared illegal, and Connors' opinion whether or not he considered it invalid can have no effect on the legal question now involved. To repeat the observation of Lord Haldane in the *Mason* case at page 732: "Evidence cannot be given on the question . . . of reasonableness, although evidence can be given as to the nature of the business . . ."

The evidence given in this case as to the nature and extent of the business of Lewis Connors & Sons, Limited, does not make it clear that this company required such a wide restraint upon the Appellant for the protection of the goodwill of that business, and the Courts below were in error in not so holding.

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The Respondents will doubtless seek to advance the argument that the parties were the best judges of what was reasonable as between themselves. That principle was enunciated in such cases as *Palmolive Co.* vs. *Freedman*, 1928, 1 Ch. 264 ; *English Hop Growers* vs. *Dering*, 1928, 2 K. B. at p. 186 ; *North Western Salt Co.* vs. *Electrolytic Alkali Co.*, 1914, A. C. 461.

But when these cases are studied they will be seen to be actions involving contracts purely for *price maintenance* and the principles so enunciated were based upon those circumstances.

The argument advanced for the Appellant under this heading of Error No. (3) also answers the written judgment of Mr. Justice LeBlanc in the Court of Appeal. (Record p. 81). And in this connection the following observation of Sargant, L. J., in the case of *Palmolive Co.* vs. *Freedman*, *supra*, at page 279, may be pertinent :—

" I have naturally no sympathy with the defendant in the course which he pursued of deliberately breaking his contract with the plaintiffs quite irrespective of whether he still had stock acquired from them or not. But this is not the crucial question. What is crucial is that the terms of the contract devised by the plaintiffs go beyond what is required for their reasonable protection and impose unreasonable obligations on the defendant, particularly as regards duration."

Error No. (4).

The Appellant contends that by the agreement of October 2, 1926, (Ex. No. 5, Record p. 186) he was released by the Connors companies and the McLeans from the covenants in restraint of trade contained in the agreements of April 30, 1925, and June 9, 1925. (Ex. No. 4, Record p. 175; Ex. No. 3, Record p. 181). Paragraph (5) of Exhibit No. 5 releases the Appellant " from all claims and demands of every nature and description which they or either of them may have or which hereafter they or either of them may have . . . . by reason of anything to the date of these presents."

The word " anything " is a very comprehensive one, and even though the covenants are not specifically mentioned in clause (5), they may be included within the scope of the word " anything " especially if the parties contemplated their being so included.

Bouvier's Law Dictionary defines release as : "The giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced."

As Pollock says in his work on Contract, Ninth Edition, page 274 : " The one universal principle (of construction) is that effect is to be given to the intention of the parties collected from their expression of it as a whole. It must be collected from the whole : that is, particular terms are to be construed in that sense which is most consistent with the general intention."

Lord Westbury in the case of *L. & S. W. Railway Co.* vs. *Blackmore*, 1870, L. R. 4 H. L. at page 623, says :

" The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given."

Attention may be directed to the use in clause (5) of the word " including" instead of the word " particularly," which is customarily used. (Record p. 187, l. 7).

When one considers the whole of this agreement of October 2, 1926, with special reference to paragraph (7); the agreements of April 30th and June 9th, 1925; and more particularly the agreement of October 2, 1926, (Ex. No. 2, Record p. 188) made with Lewis Connors, there is clear evidence that the general intention of the parties was to cancel the restrictive covenants as contained in the 1925 agreements so far as Bernard Connors was con-10 cerned, and that this cancellation was included among those things which were specially in the contemplation of the parties.

The reason is obvious. A part (and no doubt a substantial part) of the consideration for Bernard Connors' agreeing to sell his first block of stock and sign the 1925 restrictive covenant was the fact that he was promised a five year employment contract at $5,000 a year. By the October 2nd agreement, this employment contract was being terminated and about four-fifths of that consideration wiped out. Rather than risk the possibility that Connors would later on go into the sardine business and claim that the covenants were no longer binding because Connors Bros., Limited, had not fulfilled the con-20 sideration stipulated for, the companies decided to wipe out the earlier agreements and take a new covenant from Bernard Connors. They could not wipe out the contracts in their entirety because some parts had been performed, notably the acquisition of control and consequently the goodwill. But they must have felt that they had cancelled all the rest of the provisions of the 1925 agreements because they carried forward as paragraph (7) of the October 2nd agreement with Bernard Connors a repeated promise by Connors Bros., Limited, that it would purchase the remaining outstanding shares of Lewis Connors & Sons, Limited, as previously promised on June 9, 1925. It is significant to note that the McLeans were made parties to this October 30 2nd agreement and they could have no concern with the mere termination of the employment agreement as such.

Then comes evidence which clinches the fact that the 1925 restrictive covenants, given by Bernard Connors, were cancelled. Also on October 2, 1926, the companies and the McLeans entered into an agreement with Lewis Connors (Ex. No. 2, Record p. 188) by which they release him, not from " all claims and demands of every nature and description," as was given to Bernard Connors, but merely from " any claims and demands " they may have against Lewis Connors respecting alleged shortage, misrepresentation or other improper conduct. They then go on to state that the *general release given the* 40 *same day to Bernard Connors shall not operate as a release to Lewis Connors from the restrictive covenants* given jointly by Lewis and Bernard Connors on April 30th and June 9th, 1925. This agreement with Lewis Connors concludes (Record p. 189, ll. 2-5), " but the said agreements of April 30th, 1925, and June 9th, 1925, so far as all the parties hereto are concerned, shall be of the same force and effect as if the said agreement hereto annexed marked "A" had not been made." (The agreement marked "A" is Exhibit No. 5, Record p. 186).

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The 1925 covenants do not read, " The said Lewis Connors and Bernard Connors *jointly* and *severally* agree, etc." They were purely *joint* covenants and by the agreement with Bernard Connors on October 2, 1926, (Exhibit No. 5) Lewis Connors was considered to be automatically released. And the Connors companies and the McLeans did not want him released, hence they had him execute his October 2nd agreement. (Ex. No. 2).

At first glance it seems strange that they did not incorporate in the agreement with Lewis Connors a restrictive covenant as they did in the agreement with Bernard Connors and bring the whole matter up to date. But the reason is obvious. Lewis Connors was still a director of the companies and getting $3,000 a year, part of his consideration for signing the 1925 agreement, so he affirmed the 1925 covenant as applying to him in order to retain it as part of the original transaction. But Bernard Connors had parted with his position and most of the salary which went with it and was released from the 1925 obligations. The companies then made an entirely new agreement with him and took a new restrictive covenant.

There is no other logical reason why the covenant was placed in the October 2nd agreement with Bernard Connors. If the 1925 covenant was intended to be in effect as applying to Bernard Connors after October 2, 1926, there could be no reason for placing a similar one in the last agreement.

It is accordingly submitted that, if the Appellant's contention is correct, the only covenant now in existence purporting to restrain Bernard Connors is the one contained in the October 2nd agreement. (Ex. No. 5).

These covenants in restraint of trade fall within two classes (*a*) vendor and purchaser agreements; (*b*) employer and employee covenants. It is clear that the covenant in question (that is the last one taken) does not come within the second class because those covenants are taken before the employment is entered into and not when it is being terminated. There is no such covenant in Exhibit No. 1 (Record p. 183).

Vendor and purchaser covenants have to do entirely with the sale of the goodwill of a business. On October 2, 1926, Bernard Connors was not selling goodwill. He was selling 172 shares (the balance of his stock in Lewis Connors & Sons, Limited), a very minor interest out of a total of 1,500 issued shares of that company, and furthermore Connors Bros., Limited, by the agreements of 1925, was obligated to buy those 172 shares whether Bernard Connors gave them a restrictive covenant on October 2nd or not. He was not obligated to sell. (Ex. No. 3, Record p. 181).

There was absolutely nothing which was being protected by this last covenant of 1926, certainly not goodwill, because Connors Bros., Limited, had acquired the goodwill of Lewis Connors & Sons, Limited, in June, 1925, when the former company acquired control. If Bernard Connors had continued to hold those 172 shares up to the present time, he could not as such a minority shareholder have affected the policy or goodwill or operation of Lewis Connors & Sons, Limited, in the slightest.

He did not want to sign the last agreement with this covenant in it because he had wit enough to know it was valueless. He made sure by asking his solicitors their opinion and they apparently agreed with him.

Now, after he has signed it, he finds himself being placed in an unenviable light, as will be seen from the judgment of LeBlanc, J. in the Court of Appeal below, (Record p. 81) whose construction of the circumstances, it is submitted with respect, is in error.

Accordingly, it will be seen that the covenant of October 2, 1926, signed by Bernard Connors, was nothing more or less than a covenant in gross, a mere restraint on competition *per se* and therefore void.

ERROR NO. (5).

In his judgment (Record p. 78, ll. 31-36) the learned trial judge appears
10 to suggest that the question of public policy, which arises under these restraint of trade contracts, must be determined by evidence showing injury or no injury to the public.

The Appellant submits, with respect, that this view is erroneous. It would be extremely difficult if not impossible, to prove actual injury or lack of injury to the whole body of citizens of the world or even of a large country like Canada.

The judgment at p. 78, lines 35 and 36 states : " There is not a syllable of testimony to show any injury to the public and I find that there has not been any."

20 The Appellant would submit that the principle on which these cases is founded is that all restraints of themselves are bad, not because they have or have not been shown to have injured the public but because *public policy* dictates that this type of contract should not be made unless it is a reasonable one. That principle is stated by Lord Parker in the case of *Morris* vs. *Saxelby*, *supra*, at page 706 in these words :—

" As I read Lord Macnaghten's judgment (referring to the *Nordenfelt* case) he was of the opinion that all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. It is not that such restraints necessarily operate to the public injury but that
30 it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of providing such special circumstances must of course rest on the part alleging them."

In *Mason* vs. *Provident Clothing Co.*, *supra*, at page 739, Lord Shaw says : " It may be that bargains have been entered into with the eyes open, which restrict the field of liberty and of labour, and the law answers the public interest by refusing to enforce such bargains in every case where the right to contract has been used so as to afford more than a reasonable protection to the covenantee."

40 In the case of *Morris* vs. *Saxelby*, *supra*, at page 718, Lord Shaw also makes this statement :—" And under modern conditions, both of society and of trade, it would appear to be in accord with the public interest to open and not to shut the markets of these islands to the skilled labour and the commercial and industrial abilities of its inhabitants, to further and not to obstruct for these *les carrieres ouvertes*."

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These authorities definitely point the way. There is no special question of evidence involved. " It is against the policy of the common law to enforce them." That is the true definition of public policy as applied to these contracts.

There is no policy of the common law, however, which operates towards the shutting off of competition. In fact it is an old saying that competition is the life of trade and it must be generally conceded that competition is in the interest of the public.

In the present case, it has been shown by the evidence that this assertion is a correct one. In his judgment (Record p. 78, ll. 32-35) the learned trial judge says : " The only evidence before the Court is to the effect that the price of sardines to the public has not been increased but somewhat lessened since the making of this contract." With the greatest respect, the Appellant submits that the evidence is *not* to the effect that the price of sardines was lessened *after* the making of the contract. On the contrary, the price of sardines to the public was lessened *before* the making of the contract and *because* Lewis Connors & Sons, Limited, went into business in competition with Connors Bros., Limited. These contentions are borne out by the evidence of Mr. Connors and Mr. McLean at Record pp. 39 and 40, 48.

The Respondents claimed that price cutting was one of the reasons for their purchase of Lewis Connors & Sons, Limited, and this " price cutting " really meant that Lewis Connors & Sons, Limited, was selling sardines at five cents a tin while Connors Bros., Limited, had been selling for seven cents a tin. From the time Connors Bros. met this competition (before any of the contracts in restraint of trade were entered into) the price of sardines has remained at five cents. This shows that the competition and not the elimination from competition of the Connors men was in the interests of the public. This is amply borne out by the evidence of Mr. Hill at Record pp. 67 and 68.

It might be well at this point, although the argument does not specifically come under the head of public policy, to deal with a suggestion which will no doubt be urged by the Respondents. The latter may indicate that Bernard Connors by the covenant has not been cut off from other branches of the fish business and that therefore it was not unreasonable to take a covenant in connection with the sardine business.

Exhibit M, Record p. 198 shows that in 1924, Lewis Connors & Sons, Limited, packed nothing but sardines and it was the competition from the sales of sardines which the Respondents objected to. In 1925, the statement shows that the sales from other lines of fish totalled 12,209 cases but it will also be remembered from that June until the end of that year, the company was controlled by Connors Bros., Limited, who may have adopted a different policy or directed sales from their own sources of business. In fact there is no evidence to show that all this business in sundry lines did not take place after June, 1925. It will also be observed that the sales from sundry lines in 1936 were only 9,080 cases. Not a very profitable or extensive business compared with the sardine business and not the *principal*

business to which the Appellant's previous activities were devoted and which he must have known best.

It can also be inferred that the ability to pack and sell sardines would have a powerful influence upon sales of other lines by a person or company engaged in these sundry lines.

The respondents might just as well say to Bernard Connors, " We are cutting you off from the business you made your life's work but it will be in order for you to engage in the grocery business."

The business the Appellant was engaged in at the time of making this 10 covenant in 1925 was the sardine business and it is no answer to say to him, " You can go into some other business."

Lord Birkenhead in the case of *McEllistrim* vs. *Ballymacelligott Society, supra,* at page 565, says: " It is no answer to such a man to say, ' You can go elsewhere.' " It is submitted in the present case that it is no answer to Bernard Connors to tell him that he can get into another form of business activity or that, if he wants to remain in the sardine business, he can go outside his native country, and become an exile. Surely, both these answers are opposed to public policy.

ERROR NO. (6)

20 It is submitted by the Appellant that the covenants in question could only be taken for the protection of the business of Lewis Connors & Sons, Limited, and not for the protection of the business of Connors Bros., Limited, since it was the former business which was being sold under the agreements of 1925. *Leitham & Sons,* vs. *Johnstone-White,* 1907, 1 Ch. 322; *B. R. C. Engineering Co., Ltd.,* vs. *Schelff,* 1921, 2 Ch. 563.

The learned Chief Justice on trial apparently accepted this contention. (Record p. 78, ll. 4, 5, 36, 37).

Accordingly, it is submitted that any evidence touching upon matters anterior to the commencement of the business of Lewis Connors & Sons, 30 Limited, is irrelevant to the issues in this cause, and should not be considered in dealing with the question of reasonableness which arises under the covenants in restraint of trade. On the trial a blanket objection was taken on behalf of the Appellant to all evidence of this nature, especially that touching the transactions of Connors Bros., Limited, prior to the negotiations for the purchase of Lewis Connors & Sons, Limited.

At Record, p. 14, where Respondents' counsel is dealing with the early history of Connors Bros., appears the following; at lines 3 to 8: " Mr. Drummie: I do not wish to make a nuisance of myself but what this has to do with it I cannot see. It is entirely irrelevant." The Court: " We 40 are going down the road." Mr. Drummie: " I want to point out, my lord, that any evidence in regard to Connors Brothers has nothing to do with this case." The Court: " It cannot do you any harm."

And again at Record, p. 57, l. 15, appears this statement: " The Court: You have general objection to the whole thing."

In his judgment (Record p. 72, l. 6) the learned Chief Justice says: " The history of the relations between the parties is material." And on

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Record p. 72 throughout and on page 72 to line 45, there will be seen to be incorporated in the judgment matters anterior to the formation of Lewis Connors & Sons, Limited. Particular attention is called to the paragraph on page 72, ll. 39-45, which deals with the employment of Patrick W. Connors, a matter which the court on trial did not consider of importance. (Record p. 17, l. 39—p. 18, l. 1). Attention is also called to those statements on Record p. 72, ll. 15-37, dealing with the acquisition of the old Connors Bros. concern and the sums paid for that business by the new company or the McLean group.

The subject matter of this sale of Connors Bros., Limited, is evidenced by Exhibit A, Record p. 164, an agreement dated August 25, 1923, placed in evidence by the Respondents subject to objection by the Appellant. (Record p. 15, ll. 26-34).

If this evidence or other evidence referring to matters antecedent to the formation of Lewis Connors & Sons, Limited, in 1924, was considered material by the learned Chief Justice in dealing with the question of reasonableness to such an extent as to influence his finding as stated on page 78 of the Record, ll. 27-29, " I do not think . . . . that the restraint of the covenant is, under all the circumstances, other than reasonable between the parties," then it is submitted by the Appellant, with respect, that the learned Chief Justice was in error.

Since all the evidence in this case must of necessity be concerned only with the question of the reasonableness of a restrictive covenant, any evidence touching upon a previous separate transaction (even though some of the parties were the same), which did not involve a restrictive covenant, cannot be said to be relevant to the issue in this case.

Exhibit A is an interesting document and presumably the Respondents introduced in it evidence to show how much the McLean group, so called, paid the old shareholders of Connors Bros., Limited, for that company. But they could not have intended to show that they took over the company without putting up any money at the time, and that would appear to be exactly what they did according to the option of August 25, 1923. They paid off the vendors by raising $250,000 secured by a mortgage on the vendor's own property, and then issued stock in a new company for whatever it might be worth and handed the vendors a portion of the preferred class of that stock. The vendees kept $50,000 of the mortgage money and the proceeds of $50,000 of preferred stock and put these sums back in the business, no doubt as working capital. Then, to quote Exhibit A, " The common stock of the said company of the par value of $250,000·00 will be owned by the vendees." It will be observed that the document does not say " will be subscribed for by the vendees."

The so-called sale in 1923 was nothing more than a re-organization of the company with some new personnel introduced, who presumably got into a good going concern without putting up any capital. Lewis Connors, one of its founders, apparently expected that in the re-organization he would be placed on the board of directors and could still carry on his life work. (Record p. 19, ll. 41-44) Neil McLean and his associates however kept P. W.

Connors with them and ignored Lewis Connors. The latter accordingly started in business for himself and took his sons, Bernard and Edwin, with him, and that business became Lewis Connors & Sons, Limited. Had Lewis Connors been retained by Connors Bros, Limited, there would have been no Lewis Connors & Sons, Limited. The McLean group belatedly tried to remedy their treatment of Lewis Connors by engaging him in an advisory capacity to both companies in 1925, (Ex. No. 4, Record p. 175) when Neil McLean arranged with him for the sale and purchase of Lewis Connors & Sons, Limited.

10 When asked by Respondents' counsel on trial what the general object of Connors Bros., Limited, was in purchasing the stock of Lewis Connors & Sons, Limited, Mr. Hill said: "The general object, from my point of view, was to eliminate the competition of the Connors men and to get the Connors people back into the Company." (Record p. 66, ll. 24–28). Mr. Hill when asked, " You feel that elimination of the Connors name from competition was the most important factor ? " replied, " It should have been accomplished in the original purchase of Connors Brothers." (Record p. 66, ll. 37–39).

There is clear evidence on the record (Record p. 14, ll. 24–28) that Bernard Connors worked from the time he was fourteen until he was thirty-20 five in Connors Bros. sardine industry. The business was owned by his father and uncle and it is a safe inference that he intended to continue making that business his life work and that his expectations were very great. When the business was reorganized in 1923, it is also a safe inference to assume that, even if he were opposed to the new scheme, he would have little to say and could not stop it, being the owner of only 100 shares out of 2,400 issued shares of stock in the company.

Mr. McLean in his evidence (Record p. 43, ll. 39–42) suggests that Bernard Connors was offered a position with the new company and turned it down. But Mr. McLean does not indicate the sort of position or its remunera-30 tion or prospects and, considering all the evidence put in by the Respondents as to what they had done for the Connors family, it is reasonable to infer that, had the position been a good one, Mr. McLean would have been glad to say so.

Despite the fact that Bernard Connors' career in the sardine industry had been cut off in 1923, that his father (a large shareholder) was not put on the board of directors of the new organization, and that Bernard Connors received only the amount represented by his paltry 100 shares, the Respondents sought to suggest that he should have stayed out of the sardine business after 1923. Surely there is nothing reprehensible in a man's trying 40 to make his living out of the one form of business in which he has spent his whole life.

The Respondents sought to confuse the issue in the present case by holding up the figure of $400,000 paid the various branches of the Connors family in 1923, and suggesting that this was the consideration for Bernard Connors' staying out of the Canadian sardine business for all time. Mr. Hill suggests a restrictive covenant should have been taken then. A scrutiny of Exhibit A will show that such a suggestion is ridiculous as there was

apparently no thought in the minds of the Connors family, especially Lewis Connors, but that they were simply continuing in the sardine business with Connors Bros., Limited, of which they were shareholders.

But Mr. Hill's evidence is indicative of this feature of the purchase of Lewis Connors & Sons, Limited, that the general intention was to restrict in future competition the use of the name "Connors." If that was the general intention (and it is submitted by the Appellant that it was) then it was most unreasonable to place the same restriction on the liberty of the individual Bernard Connors to engage in the sardine business under another name, such as Atlantic Sardine Company. 10

If Connors Bros., Limited, wished to purchase Lewis Connors & Sons Limited, in 1925, the former company was entitled to ask for a restrictive covenant no matter who the owners of the latter company were. But that covenant should have been made to apply to the goodwill of Lewis Connors & Sons, Limited, as a going concern and the sale and purchase of Connors Bros., Limited, in 1923, should have no bearing on the scope of that covenant.

Therefore, the history of the relations between the parties prior to the formation of Lewis Connors & Sons, Limited, is not, as suggested by the learned trial judge, material to the construction of the restrictive covenant in the present case. It is submitted that, if the judgment is premised 20 upon such evidence, then there was error.

Error No. (7).

In his judgment (Record p. 79, ll. 6–10) the learned Chief Justice purports to exercise the discretion conferred by Rule 4 of Order 54*a* and declines to answer question (*b*) of the summons. It is submitted by the Appellant that this course was erroneous.

The relevant rules of Order 54*a* are as follows :

1. "Any person claiming to be interested under a deed, will or other written instrument, may apply to the Court or a Judge by originating summons for the determination of any question of construction arising 30 under the instrument, and for a declaration of the rights of the persons interested."

4. "The Court or Judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

It is submitted by the Appellant that the discretion conferred upon the learned trial judge by Rule 4 of Order 54*a* is one as to *procedure* only. *In re Staples, Owen* vs. *Owen*, 1916, 1 Ch. 322.

Rule 1 makes it possible to apply to the Court for the determination of any question of construction arising under the instrument and the procedure 40 is by way of originating summons. Rule 4 does not say that the Court shall have a discretion whether or not to determine some particular question of construction. It provides that the Court "shall not be bound to determine any such question of construction" but only if it is one which should not be determined "*on originating summons*."

When the matters came on for hearing on the summons, the learned trial judge could then have immediately discovered that "The word 'employee' is a very wide term," as stated in his judgment, and that question (*b*) was "too hypothetical to admit of any answer which would not be subject to many qualifications." He should then have exercised his discretion and refused to deal with the summons until the question was worded differently or struck out of the summons.

Furthermore, when Respondents' counsel took objection to the procedure at the beginning of the hearing, the objection was overruled and the hearing proceeded with. No objection was raised as to the wording or subject matter of question (*b*).

Accordingly, it is submitted, by decreeing that the hearing of the summons should be proceeded with and no order having been then made as to the nature of question (*b*), the learned Chief Justice exercised the discretion conferred on him by Order 54*a*, r. 4.

The matter then became a trial of the issues between the parties upon the construction and validity of the covenants, and the Appellant became entitled to an answer to all the questions he submitted. It is respectfully submitted that the learned Chief Justice had no power under Order 54*a* or otherwise to select two questions to be answered and decline to answer the third, with consequent costs to the Appellant.

The crux of the matter is, so far as the Court's discretion is concerned, that the Court is not bound to determine the matter *on originating summons*. But, the procedure for determining the matter having been approved, the Court then becomes bound to determine it.

If the New Brunswick Court of Appeal was influenced by Order 58, r. 3, of the Judicature Act it is submitted that the Court was in error. This rule says in part: "Every judgment, order or decision made by a Judge in Court or in Chambers, except orders made in the exercise of such discretion as by law belongs to him, may be set aside or discharged upon notice, by the Court." The discretion conferred upon the learned trial judge in the present matter was a special discretion dealt with under Order 54*a* and is not the type of discretion comprehended by Order 58, r. 3. In any event, he exercised that discretion in favor of the Appellant at the opening of the hearing as has been shown.

Order 58, r. 4, of the Judicature Act is sufficient to have permitted the Court of Appeal to answer question (*b*).

The Supreme Court of Canada can, of course, give the judgment which the court below should have given.

Re Question (*b*)—Assuming, therefore, that this question should be answered by the Court, the Appellant contends that a covenant by him that he "will not directly or indirectly engage in" the sardine business in Canada cannot, in the circumstances of the present case, be taken to mean that he cannot be employed by any person, persons, firm or corporation engaged in the sardine business in Canada.

Reference may be made to two Canadian cases which are, so far as the language used is concerned, about on all fours with the present case. They

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are *Lee Hing* vs. *Green*, 1927, 2 W. W. R., 729; *Knight* vs. *Fairall*, 1934, 1 W. W. R., 131.

In the *Lee Hing* case, the vendors of a business covenanted that they would not for a period of five years " engage in the Town of Estevan either directly or indirectly in the business of restaurant keepers or confectioners."

Martin, J. A., in the Saskatchewan Court of Appeal (see his judgment at p. 734) referred to a statement in Halsbury Vol. 27, page 576, on this situation and reviewed and discussed all the authorities noted in Halsbury, among which the judgment of Kekewich, J., in *Watts* vs. *Smith*, 62 L. T. 453 appears to be the most pertinent. The case of *Pearks, Ltd.*, vs. *Cullen*, 28 T. L. R. 371, referred to by the learned Chief Justice in the present case, follows this case of *Watts* vs. *Smith*. In the latter case, Kekewich, J., says in part : " When I come to the terms of the bargain and the consideration that it was for a limited time and a limited distance that he should not engage in a similar business, I think it means that he should not go and do within these limits that which he until then was doing."

Martin, J. A., in the *Lee Hing* case at page 734 says : " A reasonable construction to place on the language used is that the defendants should not do within the Town of Estevan that which at the time of the covenant they were doing, namely, carrying on the business of restaurant keepers, and I must say I can see no difference in the ordinary acceptation of the term between ' carrying on business ' and ' engaging in business.' This seems to me to be a more reasonable and more natural construction of the language than to hold that the word ' engage ' means and includes being employed or hired, and I think that if the plaintiffs desired to prevent the defendants from acting as servants in other restaurants, they should have so stated in unmistakable terms."

In the light of these decisions, how is the term " engage in " to be applied to the present case ? A study of the agreements (Ex. No. 3, Record p. 181; Ex. No. 4, Record p. 175) will disclose the subject matter of the whole transaction to be a sale by Lewis and Bernard Connors of a controlling interest in the company's stock. Consequently, the covenant entered into then purported to restrain the Appellant from doing that which, at the time of the covenant, he was doing, namely, carrying on or being engaged in the sardine business as an owner or shareholder in a company carrying on the sardine business.

It will be noted that, in the earlier agreements, he was restrained from engaging " in any other sardine business." The reason for the use of the word " other " is apparent. It was used to avoid a seeming contradiction of ideas because, despite the fact that the Appellant was parting with some of his stock, nevertheless he still held 172 shares in the company and was therefore continuing to " engage in " the sardine business in that capacity until such time as he might exercise his option and sell the balance of his stock to Connors Bros., Limited.

Coming then to the agreement of October 2, 1926 (Ex. No. 5, Record p. 186) it will be found that this was the time when the Appellant exercised his option of selling the balance of his stock. It is true that, between June 9,

1925 and October 2, 1926, the Appellant had been in the employ of Lewis Connors & Sons, Limited, but there was no restrictive covenant in his employment agreement. (Ex. No. 1, Record p. 183). If the Respondents contemplated restraint from employment after the contract was terminated, they would have logically placed a covenant to this effect in Exhibit No. 1.

On October 2, 1926, the Appellant was parting with the balance of his stock, leaving him no longer " engaging in " the sardine business as an owner of stock. The Respondents then simply incorporated in the last agreement the same restrictive covenant contained in the earlier agreements, with this exception. They deleted the word " other " obviously because there was no longer a contradiction of ideas.

Therefore, when the Respondents sought to restrain the Appellant from engaging in the sardine business, either by the earlier agreements or the October 2nd one, they were restricting him from doing that which he had been doing which, for the purposes of these agreements, comprehended only an ownership. The covenant did not comprehend employment. If the Respondents had intended to restrain the Appellant from employment, they could easily have so stated in unmistakable terms.

Furthermore, the covenant was placed in the agreements by the Respondents for their protection. It was their duty to see that it was not vague or ambiguous. If a Court finds that this covenant is ambiguous, the Appellant contends that a construction should be given favourable to the covenantor.

If anything further is needed to clinch the argument that restraint from employment was not intended, it is to be found in a consideration of Exhibit K. (Record p. 171). The relevant portion is discussed in the evidence of Mr. McLean. (Record p. 49, l. 11—p. 50, l. 6).

The first part of clause 14 of this Exhibit reads " All parties entering into this agreement shall endeavour . . . not to enter into any outside business whatsoever, either directly or indirectly, in the Dominion of Canada, unless they all do so together." Surely that clause could not contemplate Lewis and Bernard Connors and Neil and Allan McLean having any thought that they might, all four, some day become servants or employees in another sardine business together. But it could and must be taken to mean that they might, all four, become shareholders together in another sardine business.

The matter is further explained by the next words in clause 14 : " *i.e.*, they must not have interest in other companies in Canada, or partnerships, or go into business for themselves, packing sardines, individually or independently, without the consent of all parties."

These words can comprehend nothing more or less than financial interest or an interest consistent with ownership. The intention is clear. The McLeans, who were agents of Connors Bros., Limited, in the transaction, wanted to make it clear that the Connors men were not to take the stock of Connors Bros., Limited, they were getting, sell it and invest the money in another outside business or use the money to start a competitive business.

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That proposal " assumed the shape as is shown in that agreement of April 30th." (Record p. 50, l. 6).

Nothing was mentioned in the proposals, which were reduced to writing, about restraining the Appellant from becoming a servant in another sardine business. Nothing to this effect was mentioned in the covenants contained in the agreements. Not a word was said to this effect by Mr. McLean or any of the other witnesses on the stand. Mr. McLean knew the Appellant was asking the Court to tell him he could seek employment in the sardine business. Mr. McLean must have known that his counsel were opposing this move. Therefore, any conversations between the parties, explaining the meaning of this covenant, if there were any, should have been given by him. 10

During the examination of Mr. McLean (Record p. 49, ll. 9, 10, 11) the learned Chief Justice asked : " From beginning to end I have heard a lot of things but didn't anybody do any talking beforehand of the making of this particular covenant ? "

And all that the Respondents could do in answer to this query was to send out for the paper which became Exhibit K. The Appellant submits that it was impossible for Mr. McLean to say that this covenant intended to prevent the Appellant from being employed as a servant of another sardine concern. The covenant means just what it imports, especially when read with Exhibit K and considered in relation to the Appellant's connection with the sale of Lewis Connors & Sons, Limited. He was simply a shareholder selling his stock and they were asking him " not to go and do that which he had been doing," namely, engage in the sardine business in competition with them as a stockholder or in any other form of ownership. If they contemplated employment, as Martin, J.A. says in the *Lee Hing* case, *supra*, " they should have so stated in unmistakable terms." 20

Accordingly, the Appellant submits, it cannot matter into what " categories " the word " employee " may be divided if, as has been shown, the covenant did not contemplate restraint from employment at all. 30

Questions (*a*) and (*b*) were asked in as specific a manner as the subject matter in this particular case required. The first asked in effect, " Can Bernard Connors have any form of ownership in a sardine business in Canada ? " and the second asked, " Can Bernard Connors become the servant of the owners of a sardine business in Canada ? "

If the opposite construction is placed on the covenant and the Appellant is restrained from seeking employment, then it is submitted that the scope of the covenant is too wide on this feature of the restraint. The Courts have always placed a very narrow construction upon restraint of trade agreements between employer and employee, and, in the present case, the restraint is for all time in the Dominion of Canada. 40

COMMENTS ON THE NORDENFELT CASE

As suggested by the learned Chief Justice in that part of his judgment found in Record p. 77, ll. 6-20, the Appellant contended on trial that a minority shareholder could not by himself sell the goodwill of a business. This argument was directed mainly towards the support of the contentions

dealt with in this factum under the head of Error No. (4). Whether, in the earlier agreements, the fact that Bernard Connors by participating in the sale of the goodwill brought himself, so far as that particular transaction was concerned, within the vendor and purchaser category was a matter for the court to decide.

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The learned Chief Justice seems to think the Connors and Nordenfelt transactions are on all fours. That assumption does not appear from the judgments of Lord Herschell, 1894 A. C. at pp. 539, 540 and 541, and Lord Macnaghten at pp. 559 and 560.

10 In 1886 Nordenfelt sold his business to a company and gave a restrictive covenant not to compete so long as that company was in business. In 1888 it was proposed that a new company be formed to merge the Nordenfelt and Maxim businesses. Had that taken place without some arrangement to the contrary, Nordenfelt's convenant would have gone out of existence. It was essential for the new company that this restraint on Nordenfelt be continued and he, one of the subscribers to the memorandum of association of the new organization, agreed to its continuation. Had the merger not gone through, he would still have been bound by the first covenant he signed. By allowing the amalgamation to take place and signing the covenant of 1888, he was 20 simply *continuing* the restriction he placed upon himself *in 1886 when he sold the goodwill of his company.*

This agreement also provided that Nordenfelt would be engaged by the new company as managing director for seven years at a salary of £2,000 a year and a commission on the net profits of the company. The whole circumstances of the Nordenfelt and Connors cases are so different that it is difficult to understand how " the parallel is so complete."

Bowen, L.J., in the Court of Appeal in the *Nordenfelt* case, 1893, 1 Ch. at page 664, says, in speaking of the extent of the covenant : " The real question in respect of which the action is brought was, as we are informed, a 30 threat by Mr. Nordenfelt to engage abroad in the sale or manufacture of guns and ammunition. The case thus raised is a new and unprecedented one. Mr. Nordenfelt's old business did not, broadly speaking, consist in the supply of commodities to any English city or district, nor of any article intended for English consumption or use at all. He may have at times, for anything we know, supplied the English government with some materials for war ; but his trade consisted in manufacturing and selling guns and ammunition for the use and benefit of the foreign world, or of the middlemen and agents who negotiate orders for foreign exportation. The area over which he might distribute his guns or ammunition was a foreign one, unlimited in geographical 40 space, no doubt, but it must be remembered that the governments or bodies who require to use guns and materials of war are capable of approximate enumeration."

Lord Watson, in the House of Lords, in the report of this case in 1894 A. C. at page 552, says in this connection : " The area which it supplied was and is practically unlimited. The customers who buy the products, which the appellant agreed he should not manufacture, are necessarily a limited class, but they are to be found all over the world. They include, or, strictly

speaking, consist of, governments and potentates, great and small, civilized and savage, who for purposes offensive or defensive desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition."

Applying the remarks of Bowen, L. J., it may be pointed out that Connors' commodity was supplied for Canadian consumption; that the Connors' commodity was a food and not materials for war and, as a food, could be and was sold to individuals whose numbers might comprise the entire population of the world, and the customers for which were not "capable of approximate enumeration."

The effect of competition on English business by foreign traders was apparently considered material by the Court of Appeal and the House of Lords in dealing with the question of public policy in the *Nordenfelt* case. 10

Lindley, L. J., says in the report in 1893, 1 Ch. at page 651 : "Further, our predecessors, from whom we inherit this branch of the law, would never have thought it contrary to public policy to prevent a man from assisting foreigners to compete with an English trader who had bought his business; and I am not aware that it has ever been judicially held to be contrary to public policy to give effect to a covenant entered into for such a purpose."

Herschell, L. C., in the report in 1894, A. C. at page 550 says in part : "They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant." 20

Lord Watson in the report 1894, A. C. at page 554 says : "I venture to doubt whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered competition in the sale of arms of precision to tribes who may become her antagonists in warfare. I also doubt whether at any period of time an English court would have allowed a foreigner to break his contract with an English subject in order to foster such competition." 30

It may be pointed out that Nordenfelt had allied himself with the interests of the foreign concern of Societe Cockerill of Belgium and that he had sold to the English company his own private inventions in regard to materials for the purpose of war and defense. No such circumstances exist in the present case.

The Respondents in the present case will no doubt urge, in their argument under question (*b*) of the summons, that the covenant in the *Nordenfelt* case was on all fours with the Connors covenant, that Mr. Nordenfelt was *working* for Societe Cockerill and the covenant was enforced. 40

However, a perusal of the Nordenfelt covenant will dispel this analogy. There the covenantor agreed, that he would not "during the term of twenty-five years from the date of the incorporation of the company if the company shall so long continue to carry on business, engage *except on behalf of the company*, either directly or indirectly, etc."

The Appellant admits that this phraseology could comprehend employment. The word " engage," when read with the words " except on behalf of the company " admits of this meaning. But no such phraseology occurs in the Connors covenant.

It is respectfully submitted by the Appellant that his appeal should be allowed, and that question (*a*) should be answered in the negative, question (*b*) answered in the negative and question (*c*) answered in the affirmative.

J. H. DRUMMIE,
Counsel for Appellant.

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No. 21.

Factum of Connors Bros., Limited, and Lewis Connors & Sons, Limited.

PART I.

STATEMENT OF FACTS.

This is an appeal from the judgment of the Appeal Division upholding the interpretation placed by Baxter, C.J., under an originating summons upon certain restrictive covenants contained in two contracts dated June 9th, 1925, and October 2nd, 1926, respectively for the sale by the Appellant to the Respondent, Connors Bros., Limited, of an interest in the business of the Respondent, Lewis Connors & Sons, Limited. The learned Chief
20 Justice held the restrictive covenants to be valid and enforceable.

Patrick W. Connors, who died in 1928 (Appellant : Record p. 13, l. 18) and Lewis Connors, who died in 1934 (l. 14) were brothers who were fishermen at Black's Harbour, N.B., in early life. (l. 21). As time went on they salted and dried their fish, (l. 24) and formed a partnership under the name Connors Bros. (p. 13, l. 39). Later they went in for canning, putting up blueberries, clams and scallops in the plant which they had established at Black's Harbour (l. 37) and finally they specialized in canning sardines. Connors brands soon became well known. Later, about 1901, the partnership became incorporated under the name Connors Bros.,
30 Limited, (p. 14, l. 39) and the new company by degrees acquired a world wide trade, selling its product in every province of Canada and many foreign countries. (p. 17, l. 14; p. 17, l. 33). Through long-continued use the word " Connors " acquired a secondary distinctive meaning, as a description or designation of the sardines of Connors Bros., Limited. (p. 23, ll. 23–26).

The Appellant, Bernard Connors, is a son of Lewis Connors (p. 13, l. 9) and is about 50 years old. (p. 14, l. 21). At the age of 14 he went to work in the Connors plant, (l. 24) and was continuously employed therein down to 1923, (p. 14, l. 26) becoming superintendent of one of the two factories. (p. 14, l. 34). In that year, Lewis Connors, the President of the Company, importuned
40 A. Neil McLean (McLean p. 43, ll. 18, 33 and 37) to purchase the business, and the result was that the shareholders of Connors Bros., Limited, sold

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their shares to Arthur E. Cox, Howard P. Robinson, A. Neil McLean and Charles H. Easson for $400,000, the vendors receiving $200,000 in cash, and $200,000 in preferred stock of the new company, named Connors Bros., Limited, formed by the purchasers to take over all the assets of the old company (Ex. A., pp. 164–166). The shareholders of the old company were:

Patrick W. Connors	owning	1,200	shares
Lewis Connors	,,	1,090	,,
Robert Thompson	,,	10	,,
Bernard Connors	,,	100	,,

The Appellant thus received $16,667. (ibid p. 164, ll. 23-26) for his interest in the old company. (Appellant p. 16, ll. 2, 10–20). 10

On November 1, 1923, the new company was vested with all the assets, including good will, of the old company, (p. 16, l. 39—p. 17, l. 8) and soon thereafter it registered the name "Connors" as a specific trademark to be used in connection with the sale of fish and fish products (Ex. G, p. 169), and shortly thereafter similarly registered by way of a trademark the words "Connors Famous Sea Food" (Ex. H, p. 170).

After the new company took over, Patrick W. Connors entered into a contract with it to act as its general manager for a period of five years at a salary of $10,000, per annum. (Ex. B, p. 166). 20

The Appellant was offered a position with the new company, but turned it down (McLean, p. 43, l. 42). This fact and similar willingness exhibited by the Respondents on subsequent occasions to provide for the Appellant, is emphasized here, in view of the direful picture painted by the Appellant, of the alleged callous indifference which the Respondents had for his future welfare.

It appears that the Booth Fisheries had established a sardine factory at West Saint John, (Appellant, p. 18, l. 31) but it had not been a success and had been closed down. (McLean, p. 56, l. 39). On February 5, 1924, three months after Lewis and the Appellant had sold their shares in the old company, they purchased the Booth factory, (Appellant, p. 19, l. 21) and started a sardine business. (p. 20, l. 14). 30

The Appellant put no money into the business. It was all supplied by his father out of the $200,000, he had received from the sale of his shares (p. 19, ll. 25–32). Edward Connors, another son of Lewis, (p. 22, l. 8) was associated with his father and brother in the business, which was run under the name of "Lewis Connors & Sons" until it was incorporated in the fall of 1924 under the name of "Lewis Connors & Sons, Limited" (p. 20, l. 7) and of its capital stock $150,000 was issued, divided into $50,000 preferred, and $100,000, common, and which stock was used in payment for the assets of the partnership. (p. 21, ll. 23–27). 40

Of this stock, the Appellant received, as a gift from his father, at least 172 shares of a par value of $100.00 a share, and a good many more, but just how many more he refused to say (p. 21, l. 30).

Lewis Connors & Sons, with the Appellant as manager, from the very state, by most reprehensible methods which were deprecated by the learned

trial judge in his judgment (p. 73, l. 15) entered into competition with Connors Bros., Limited, whose best selling brand was called " Brunswick " (p. 20, l. 10). They put up a brand called " Banquet " identical in every respect with " Brunswick ". (p. 20, l. 18; McLean, p. 44, l. 7).

They went into Mexico where Connors Bros. were selling " Brunswick " Brand, and there actually registered the trade mark " Brunswick " (Appellant, p. 21, l. 5) and wrote to Connors Bros. forbidding Connors Bros. selling " Brunswick " brand in Mexico. (McLean, p. 44, l. 28).

They adopted a letter head identical in design with that of Connors
10 Bros. (Exs. No. C, p. 167 and No. J, p. 168, and McLean, p. 44, l. 12); even their cable address was that of Connors Bros., spelled backwards. (p. 167).

They circularized the customers of Connors Bros. throughout the world, soliciting their patronage, telling them that they were the original Connors people. (Appellant, p. 22, l. 3 and ll. 12–17).

By means of such methods they were able to sell, in the first twelve months they were in business, 40,000 cases (l. 19) compared with 120,000 cases sold by Connors Bros., (p. 37, l. 19).

They were selling in all the countries Connors Bros. were selling. (p. 22, ll. 33–41).

20 On October 8, 1924, they wrote a letter to Connors Bros., complaining that Connors Bros. were advertising that three out of four tins of sardines sold in Canada were packed by Connors Bros. and threatening to bring suit if such statements were not withdrawn. (Ex. C. p. 167). They cut prices, and sold their output for less than cost, (McLean, p. 52, ll. 27–32) and the result was that Lewis Connors & Sons, Limited, were losing money and facing bankruptcy (p. 50, l. 40), and Connors Bros., Limited, though it could manufacture much cheaper than Lewis Connors & Sons, Limited, were not making any profit (Hill, p. 63, ll. 36–37). Such being the state of affairs, Lewis Connors approached A. Neil McLean and put it up to him that there
30 was no money in fighting, and suggested that the two companies get together (McLean, p. 44, l. 35). The reference to " fighting " was an action which Connors Bros. contemplated bringing against Lewis Connors & Sons for theft of brands (p. 44, l. 38).

The result of this meeting was the agreement dated April 30, 1925, between Lewis Connors and the Appellant of the first part, and A. Neil McLean and his brother Allan McLean, of the second part (p. 44, l. 45) (Ex. 4, p. 175). Bearing in mind that the issued stock of Lewis Connors & Sons, Limited, consisted of $50,000 preferred and $100,000 common (Ex. 4, p. 177, l. 30).

40 The McLeans bought from Lewis Connors and the Appellant $25,000, preferred and $52,500, common stock of Lewis Connors & Sons, Limited, for which Lewis and the Appellant received in payment $25,000, preferred and $30,000, common stock of Connors Bros., Limited, (p. 175, ll. 15–17); this, it will appear, gave Connors Bros., Limited, a controlling interest in Lewis Connors & Sons, Limited.

With reference to the remaining outstanding capital stock of Lewis Connors & Sons, Limited, $47,500 common, and $25,000 preferred, the

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McLeans undertook to procure a contract to be executed by Connors Bros., Limited, with the stockholders of Lewis Connors & Sons, Limited, providing that Connors Bros., Limited, would at any time within five years from January 1, 1926, and on demand from any of the stockholders of Lewis Connors & Sons, Limited, who at the time of such demand held any part of the remaining outstanding issued capital stock of the said Lewis Connors, Limited, purchase the holdings of such stockholders so making such demand on the basis of $35,000 cash for $72,500 capital stock (p. 175, ll. 18–29) :

It was further provided :

(a) That the McLeans would have Connors Bros. pay Lewis Connors a salary of $1,500, a year for five years for his services to Lewis Connors & Sons, Limited, and a similar sum by way of salary from Connors Bros., all for merely nominal services (p. 175, l. 43—p. 176, l. 4). 10

(b) That the McLeans would have Connors Bros., relieve Lewis and the Appellant of a personal liability at the Bank of Nova Scotia. (p. 176, ll. 19–21).

(c) That Lewis Connors and the Appellant should be continued as directors of Lewis Connors & Sons, Limited, until they exercised their option to sell their stock in that company to Connors Bros., Limited, and their stock was fully paid for. (p. 176, ll. 22–28). 20

(d) And that the McLeans would have Lewis Connors & Sons, Limited, employ the Appellant as manager for five years at a salary of $5,000, with the possibility of its being $7,500, the contract to be guaranteed by Connors Bros. (p. 177, ll. 15–25).

The agreement contemplated that Lewis Connors & Sons, Limited, would carry on (p. 176, ll. 29–35) and express provision was made in the event the manufacture of the product was transferred to Black's Harbour; and the receipt of dividends, if declared on the capital stock of Lewis Connors & Sons, Limited, by the Connors family shareholders for a long period of years.

The agreement of April 30, 1925, (Ex. 4, p. 175) further provided for several things that the Appellant was to do in association with and by way of co-operation with the officials of the two companies. 30

It was provided :

" All parties hereto agree to work together for the benefit of the stock-
" holders of Connors Bros., Limited, and Lewis Connors & Sons, Limited,
" and 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 date hereof use the name of Connors in connection with 40
" sardine business in any country whatsoever." (p. 176, ll. 40–47).

An analysis of this covenant is meet here. The agreement was preceded by a proposal (Ex. K, p. 171) as follows :

" All parties entering into this agreement shall endeavour to work
" together in harmony, for the benefit of the stockholders, and not to enter

" into any outside sardine business whatsoever, either directly or indirectly,
" in the Dominion of Canada, unless they all do so together, i.e. they must
" not have interest in other companies in Canada or partnerships, or go into
" business for themselves, packing sardines, individually or independently,
" without the consent of all parties." (p. 172, ll. 6–12).

The documents in evidence show conclusively that the term " sardinr business " meant the kind of business that the two companies were carrying on.

It was common ground between the parties at the trial that the Passamaquoddy area of the Bay of Fundy is the only practical and economic spot " in the Dominion of Canada " where sardines can be processed. (Appellant p. 38, l. 9; McLean, p. 45, l. 11).

The reason for prohibiting the user of the brands is obvious, in view of the activities of the Appellant in that regard, hereinbefore set forth.

So, also, the use of the word " Connors." As the Appellant himself testified, it had acquired a distinctive meaning. (p. 23, l. 22). If he wished to go across the line to Maine or elsewhere and start a sardine business, he could not use the Connors name for ten years in the foreign country. (Ex. 3, p. 182, l. 24; Ex. 5, p. 186, l. 42).

That the Appellant himself had no illusions whatever as to the meaning of the words used, is witnessed by the letters (Ex. No. 6, p. 192) which he put in evidence.

An outstanding feature of the agreement made between the parties demands comment, and that is the comprehensive provision made, not only for the present, but also for the future welfare of Lewis Connors and the Appellant.

The father was an elderly man, tired of the exactions of a business life (McLean, p. 43, l. 19), his son, the Appellant, an experienced executive in the sardine business in the prime of life. Their company was facing bankruptcy, and by this agreement their investment was protected without loss. Connors Bros., Limited, assumed their personal bank liability of from $20,000 to $30,000. (App. p. 29, ll. 24–26; Hill, p. 66, l. 21). Lewis Connors received $15,000, by way of salaries for doing practically nothing. (Ex. 4, p. 176, ll. 1–6.) The Appellant was to receive at least $25,000, possibly $37,500, in salary for five years, with the probability that if he made good, he would be retained in the position for many years. (Ex. 1, p. 186, ll. 14–39).

Together they received $25,000 preferred stock, which was the same as cash, and $30,000 par value common stock in Connors, Bros., for $25,000 preferred, and $52,500 common stock in a bankrupt company.

The agreement was in option form; the McLeans had up to May 30, 1925, in which to accept it. (Ex. 4, p. 177, ll. 3–8).

The McLeans were willing to pay the Connors men cash instead of shares of stock in Connors Bros., Limited, but the Appellant wanted shares of stock (McLean p. 45, ll. 40–43). The reason soon became apparent. On analysis of the distribution of the shares, it meant that if Lewis and the Appellant received 550 shares more of Connors Bros., Limited, stock and they

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pooled their total holdings with Patrick W. Connors, the result would be that the Connors families might soon have control of the company.

This situation brought into being the Voting Trust Agreement of May 23, 1925, (Ex. D, pp. 178–180), between the Appellant of the first part, the two McLeans of the second part, and The Eastern Trust Company of the third part, whereby the Appellant transferred 180 shares and the McLeans 180 shares to The Trust Company (p. 178, l. 24 and p. 180, ll. 11–16), which gave A. Neil McLean an irrevocable proxy to vote the shares for the term of three years specified in the agreement, (p. 178, ll. 25 and 31), and which also contained a stipulation that Mr. McLean must vote the stock for the material advantage of the Appellant in certain respects. (p. 179, ll. 5–17). 10

The agreement gave the parties liberty to sell the trusteed shares at any time, but provided that they must first give the other party to the agreement the right for 30 days to purchase at the market price. (p. 178, l. 36; p. 179, l. 4).

This agreement was evidently entered into by the McLeans pursuant to the general authority given A. Neil McLean, the President of Connors Bros., Limited, at the directors meeting held on May 14, 1925, which discussed the option agreement of April 30, 1925, (Ex. A), and gave him authority to accept the offer, which had been presented to the Company through the medium of the Saint John Trust Company, provided he considered after 20 examination of the financial affairs of Lewis Connors & Sons, Limited, that it was in the best interests of Connors Bros., Limited, to do so. (McLean p. 52, ll. 25-39).

So, having obtained the voting trust agreement, the offer was accepted, and the arrangements of June 9, 1925, (Ex. 3, p. 181, and Ex. 1, p. 183), were executed to implement the undertakings of the two McLeans.

The real purpose of the covenant was to restrain the future activities, not as the Appellant has suggested, of his father Lewis Connors, but of the Appellant himself. The father, it has been shown, had expressly stated that he was tired of business life. For that reason, presumably, Bernard Connors 30 was the manager of Lewis Connors & Sons, Limited; it was the Appellant who conducted the business in a manner which the learned Trial Judge stamps as discreditable. (McLean p. 44, l. 32; Jdgt. p. 73, l. 14).

The fact that it was he who became the party to the voting trust agreement identifies him as the active mind of the transactions.

Exhibit 3, (pp. 181–182) is an agreement between Connors Bros., Limited, of the first part, and Lewis Connors and the Appellant of the second part, and recites, and is substantially in the form of, the option agreement of April 30, (Ex. A, pp. 164–166), between the two Connors and the two McLeans. Paragraph (4) reads as follows: (p. 182, ll. 18–25). 40

> " The said Lewis Connors and Bernard Connors agree with the
> " said Connors Bros." Limited, that they will not, directly or in-
> " directly 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."

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Exhibit 1, (p. 183) is an agreement between the Appellant of the first part, Lewis Connors & Sons, Limited, of the second part, and Connors Bros., Limited, of the third part, whereby the Appellant is employed as manager of Lewis Connors & Sons, Limited, for five years at $5,000 per annum, which salary is guaranteed by Connors Bros., Limited. If the Appellant is employed as manager of two factories, the salary is to be $2,500 a year more.

10 The Appellant entered on his duties at the factory in West Saint John. (Appellant p. 29, l. 19).

It was not long, however, before Bernard Connors started again to achieve his objective to gain control of Connors Bros., Limited. On December 15, 1925, his solicitors, Messrs. Barnhill, Sanford & Harrison wrote the McLeans (Ex. E, p. 184) offering on his behalf to sell them 100 shares of common stock and 83 shares of preferred stock of Connors Bros., Limited, trusteed as aforesaid to The Eastern Trust Company for $150 and $160 per share respectively, which the letter stated was the market price as evidenced by copies of two letters attached to the offer purporting to come from
20 a man in West Saint John named J. H. Driscoll and a man in the city named James T. McCormick, offering Bernard Connors that price for the shares, (p. 185). McCormick was Bernard Connors' father-in-law, (Appellant p. 30, l. 1).

The preferred stock had a par value of $100, and was callable at par; there had been sales of the common stock from $30 to $35 per share (McLean p. 46, l. 29); however, the McLeans accepted the offer and bought the stock from Bernard Connors at the price asked, namely $28,280, (Appellant p. 31, l. 17), which was $16,980 more than the real market value.

The Appellant continued as manager of Lewis Connors & Sons, Limited,
30 at West Saint John until June 1926, when the business was transferred to Black's Harbour, and he was transferred there also. He says he was not happy in his employment there, and not very well satisfied (p. 39, l. 39), and the result was the agreement of October 2, 1926 (Ex. 5, p. 186), whereby he severed his relations with the two companies.

A bone of contention between him and Connors Bros., Limited, was the fact that Connors Bros., Limited, had purchased the controlling interest in Lewis Connors & Sons, Limited, on the basis of a balance sheet of the latter company submitted by the Appellant, (Ex. A, pp. 164-166), which showed a certain inventory value of goods on hand and after the taking over, it was
40 discovered that there was a shortage in inventory for which claim was being made on the Appellant. (App. p. 35, l. 26; McLean p. 47, l. 5).

Bearing in mind this fact, and also the terms of the agreement of June 9, 1925, (Ex. 3, p. 181), which provided that at any time within five years from its date Connors Bros., Limited, would on demand from any one of the shareholders of Lewis Connors & Sons, Limited, purchase the balance of that shareholder's stock in Lewis Connors & Sons, Limited, on the basis of

$35,000 cash for $72,500, in which event Connors Bros., Limited, had five more years in which to pay for it by annual instalment payments, and also bearing in mind that the Appellant had 172 shares left, it is now meet to discuss the terms of the said agreement of October 2, 1926, (Ex. 5. p. 186).

By that agreement, which was made between the Appellant of the first part, Lewis Connors & Sons, Limited, of the second part, Connors Bros., Limited, of the third part, and the two McLeans of the fourth part.

(*a*) The Appellant sold his said 172 shares to Connors Bros., Limited.

(*b*) The appellant released the two companies from the employment obligation. 10

(*c*) By paragraph (5) (p. 187, ll. 3-11) Connors Bros., Limited, and the McLeans " hereby release the said party of the first part 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 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 misrepresentations 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." 20

And then, presumably against the possibility that the Appellant by some stretch of the imagination might suggest that the document released him from the burden of the restrictive covenants, and also to guard against the possible suggestion that Connors Bros., Limited, were relieved from its obligation to purchase, if requested, the shares of stock of the other shareholders of Lewis Connors & Sons, Limited, the following clauses appear in the agreement :

> " (3) 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 30 " 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." (p. 186, ll. 37-43.)
>
> " (7) The said party of the third part also agrees that it will on " demand of any stockholder in Lewis Connors & Sons, Limited, " purchase the shares of the capital stock of Lewis Connors & Sons, " Limited, held by such shareholder on the terms set out in paragraph 40 " one of an agreement bearing date the ninth day of June, A. D., " 1925, and made between the party of the third part, one Lewis " Connors and the party of the first part." (p. 187, ll. 17-22.)

These paragraphs are set forth in full because of the suggestion made in the Courts below that all the old agreements were washed out between the parties, and the restrictive covenant contained in the new agreement is

the only covenant the Court had to consider. The fact that the covenant dates back to April 30, is a conclusive answer to this suggestion, and shows the intention of the parties to keep the covenant alive.

In consideration of the aforegoing premises, Connors Bros., Limited, agreed to, and did pay the Appellant $11,416. (p. 187, l. 15). It is not possible to give the total benefits that the Appellant received from Connors Bros., Limited. He could not remember. We do have knowledge of some cash items as follows :

For his interest in the old Connors Bros., Limited - - -	$16,667.00
10 For 183 shares of stock in the present Connors Bros., Limited	28,280.00
For 172 shares in Lewis Connors & Sons, Limited, and for other considerations - - - - - - - - -	11,416.00
Total - - - - - - - - -	$56,363.00

In addition to the above, he received more than 172 shares in Lewis Connors & Sons, Limited (App. p. 21, l. 31). The additional shares formed part of the stock of Lewis Connors & Sons, Limited, which he and his father exchanged for $25,000, preferred and $30,000 common stock of Connors Bros., Limited.

He was relieved by Connors Bros., Limited, of a $20,000 to $30,000 (p. 20 29, ll. 24-26; Hill, p. 66, ll. 21-23) liability at the Bank of Nova Scotia.

He was released from any liability to make good the shortage in inventory of Lewis Connors & Sons, Limited, and any claims Connors Bros., Limited, might have against him as manager of Lewis Connors & Sons, for unfair competitive trade methods.

To offset the suggestion that may be advanced that Connors Bros., Limited, wanted to put him out of business, which, after all, may enter into the determination as to whether or not the covenant was reasonable, it is meet to point out the following facts :

(*a*) The large sums of cash he received, and the release from liabilities 30 as above set forth.

(*b*) At the very start he was offered a position in the present company, but turned it down (McLean, p. 43, l. 41).

(*c*) His later employment as manager for five years at a large salary, with the probability of its renewal if he made good.

(*d*) He was made a director of Connors Bros., Limited.

(*e*) The covenant did not debar him from going into the fish business in other lines.

In regard to (e), it should be pointed out that besides sardines, both companies were dealing in six other lines of fish products, namely : canned 40 herrings, kippered herrings, finnan haddies, clams, flaked fish and chicken haddies. (App. p. 23, ll. 28–35; 43–44; p. 36, ll. 19–26; Doone, p. 61, ll. 16–18.) Soon after severing relations with the two companies, Bernard Connors started a fish business of his own under the name of Harbour Packing Co. This was in 1927. He incorporated in April, 1932, under the name Harbour Packing Company, Limited. (App. p. 23, l. 45.)

Besides the lines above mentioned, he sold, in violation of his covenant, a brand of sardines. (p. 24, l. 15, l. 40; p. 40, l. 39—p. 41, l. 4.)

Whether this business was a real success is open to conjecture. In any event, history repeated itself, and in August 1933, he approached Connors Bros., Limited, and tried to get them to purchase a 40% interest in his company. (p. 26, l. 25.)

Later he started business under the name The B. Connors Fish Company, and still later, on June 2, 1937, obtained Letters Patent incorporating The B. Connors Fish Company, Limited, one of its purposes being to take over the business of The B. Connors Fish Company (Ex. I, pp. 195–196) and now he says he wants to add sardines to his products because he has been approached by interests who want to engage in a sardine business with them. (p. 41, ll. 5–15.)

Therefore, he brought this action.

If an element entering into the determination of the question whether a restrictive covenant is reasonable or not, is protection from a man who is entirely indifferent to the rights of his business competitor, and also to the rights of a person with whom he has entered into a contract, the following breaches of business etiquette, inter alia, are attributable to the plaintiff:

(*a*) His unfair competitive business methods as before enumerated.

(*b*) The submission of an incorrect balance sheet which formed the basis of the sale of the controlling interest in Lewis Connors & Sons, Limited.

(*c*) The fictitious value he placed on Connors Bros., Limited, stock in his endeavour to get control of Connors Bros., Limited.

(*d*) His acceptance of a large sum of money for his covenant not to engage in the sardine business when his belief was that it was not binding upon him.

The evidence the Appellant gave with reference to (*d*) is as follows: (p. 33, ll. 13–38.)

" *Q*. (By the Court). What gives you the idea you would like to go " into the business now?—*A*. They insisted upon having this agreement " signed and I at the time had legal opinion on it—that it was not binding— " and I did not want to sign it at first but they insisted and after I had a " consultation with my solicitors I was under the impression it was not " binding and I was not giving them——

" *Q*. (By the Court). In other words, they were not getting what they " thought they were getting and not getting what they were paying for?— " *A*. I thought they were trying to bind me as best they could.

" *Q*. (By the Court). Didn't they think they were providing for " keeping you out of business?—*A*. Yes, they were trying to provide for " keeping me out altogether.

" *Q*. (By the Court). You felt they were just a bit wrong about that " and not getting what they thought they were?—*A*. They might.

" *Q*. (By the Court). Was it or not?—*A*. I do not know what they " thought they were getting.

" *Q*. (By the Court). We will repeat ourselves. Have you any doubt " what they thought they were getting? Have you any doubt?—*A*. Well, " one of their directors told me he was not sure it would be binding.

" *Q*. (By the Court). That director was who?—*A*. B. M. Hill.

" *Q*. When did Mr. Hill tell you that?—*A*. I cannot recall the date. " It was during that time—of those negotiations. I do not know the " exact date.

" *Q*. Where did the conversation take place?—*A*. I cannot just recall " exactly where it was. I think down in Mr. Hill's office—in one of his " offices."

10

Neil McLean's evidence on this point is as follows: (p. 46, ll. 11–18.)

" *Q*. Now Mr. McLean, you have heard Bernard Connors say that " when this agreement was signed, the last agreement in October, that he had " been told or advised by his client that it was not binding upon him. " When, if ever, did the question of an illegal—of this clause—restrictive " covenant come to your attention?—*A*. It was after they were all signed. " I absolutely considered they were considered in good faith. It was a day " or so after they were signed I heard Mr. Bernard Connors stating he didn't " think they were binding."

20

B. M. Hill testified that he had no discussion with anybody before the agreement of April 30, 1925, (Ex. 4, p. 175), the first agreement which contains the restrictive covenant, was signed, and saw it for the first time in the following May (p. 64, ll. 7–10).

Nor did he ever discuss the agreement of June 9, 1925, (Ex. 3, p. 181), with Bernard Connors. He was living in Fredericton, as he was Chief Engineer of the Province at the time and didn't see it until after it was signed (p. 64, ll. 17–31).

Nor did he discuss the restrictive covenant in the agreement of October 2, 1926, (Ex. 5, p. 186), with Bernard Connors, (p. 65, l. 44), and says he never had any doubt as to its binding force (p. 66, l. 2). He was cross-examined at length and says he could not possibly have told the plaintiff it was not binding (p. 69, l. 18).

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By an originating summons dated April 27, 1937, (pp. 1–3), issued under R. S. C. N. B., O. 54*a*, (see Appendix to this Factum) the Appellant sought an interpretation and construction of and a declaration as to the rights of the Appellant and Respondents under the covenants contained in the agreements dated June 9, 1925, and October 2, 1926. (Ex. 3, p. 182, ll. 18–25, and Ex. 5, p. 186, ll. 37–43 respectively) and for the determination of the questions (a), (b) and (c) set out in the Record at p. 2, l. 27—p. 3, l. 4.

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The learned Chief Justice answered question (a) in the affirmative (p. 78, l. 45), (c) in the negative (p. 79, l. 28) and declined to answer (b) (l. 22), and see Judgment (p. 71, ll. 27-31).

The Appeal Division (Grimmer, LeBlanc and Fairweather, J.J.) affirmed the Judgment of the learned Chief Justice and dismissed the appeal therefrom with costs (p. 81, ll. 34-37; ll. 17-18). Grimmer, J., delivered the Judgment of the Court and LeBlanc, J. added supplemental reasons for Judgment. (p. 81, ll. 38-45).

PART II

ERROR

It is submitted that the Judgment appealed from is correct and should be affirmed.

Three questions arise on this appeal :

1. Whether the question (a) set out in the Record (p. 2, ll. 27-36) should be answered in the affirmative or negative ;

2. Whether the question (c) (p. 2, l. 42—p. 3, l. 4) should be answered in the affirmative or negative ;

3. Whether the learned Chief Justice rightly exercised his discretion in refusing to answer the question (b) p. 2, ll. 37-41. 10

The Respondents submit that question (a) should be answered in the affirmative, question (c) in the negative, and that the learned Chief Justice properly exercised his discretion in refusing to answer (b).

PART III

ARGUMENT

The general principle governing contracts alleged to be in restraint of trade is stated by the Judicial Committee of the Privy Council: (Viscount Haldane L.C., Lord Shaw, Lord Moulton and Lord Parker) in *Attorney-General of Australia* v. *Adelaide S.S. Co.*, 1913, A.C. 781, at p. 795, as follows : 20

> " Though, speaking generally, it is the interest of every individual " member of the community that he should be free to earn his liveli- " hood in any lawful manner, and the interest of the community that " every individual should have this freedom, yet under certain " circumstances it may be to the interest of the individual to contract " in restraint of this freedom, and the community if interested to " maintain freedom of trade is equally interested in maintaining " freedom of contract within reasonable limits. The existing law " on the point is laid down in the case of *Nordenfelt* v. *Maxim* " *Nordenfelt Co.* (1894) A.C. 535. For a contract in restraint of 30 " trade to be enforceable in a court of law or equity, the restraint, " whether it be partial or general restraint, must (to use the language " of Lord Macnaghten, evidently adapted from that of Tindal, C.J., " in *Horner* v. *Graves* (1831) 7 Bing. 735) be reasonable both in " reference to the interests of the contracting parties and 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. Their Lordships are not aware of any case in which a restraint " though reasonable in the interests of the parties has been held un- 40 " enforceable because it involved some injury to the public."

This may be more succinctly stated thus :

" 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," : per Lord Birkenhead L.C., in *McEllistrim* v *Ballymacelligott Society,* 1919 A.C., 548, at p. 562.

As to (a) : In determining whether a covenant, alleged to be in restraint of trade, is reasonable as between the parties, the law regards very differently such covenants in contracts for the sale of a business from similar covenants 10 in contracts of services : In contracts for the sale of a business the law regards the parties as the best judges of what is reasonable as between themselves.

In *Attwood* v. *Lamont* (1920) 3 K.B., 571, Younger, L.J., in whose judgment Atkin, L.J., concurred, said at p. 582 :

" In consequence it must now, I think, be recognized in all " Courts that there is every difference in the matter of its validity " between such a covenant as we find here embodied in a contract " of service and the same covenant when found in an agreement " for the sale of goodwill; and the dispute between the parties to 20 " this action must be decided with due regard to that difference. " This declared difference is, as I have said, a matter of recent " development."

(And see *ibid* at pp. 589 and 590).

The modern distinction between contracts for sale of a business and contracts of service was first drawn up by Lord Macnaghten in the following passages in his Judgment in the *Nordenfelt* case (1894) A.C. 535, at p. 566 :

" To a certain extent, different considerations must apply in " cases of apprenticeship and cases of that sort, on the one hand, " and cases of the sale of a business or dissolution of partnership on 30 " the other. A man is bound an apprentice because he wishes to " learn a trade and to practice it. A man may sell because he is " getting too old for the strain and worry of business, or because he " wishes for some other reason to retire from business altogether. " Then there is obviously more freedom of contract between buyer " and seller than between master and servant or between an employer " and a person seeking employment . . . It is a principle of " law and of public policy that trading should be encouraged and " that trade should be free ; but a fetter is placed on trade and trading " is discouraged if a man who has built up a valuable business is 40 " not to be permitted to dispose of the fruits of his labours to the " best advantage."

And Lord Herschell in the same case said at p. 548 :

" I think that a covenant entered into in connection with the sale of the " goodwill of a business must be valid where the full benefit of the purchase

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"cannot be otherwise secured to the purchaser. It has been recognized in "more than one case that it is to the advantage of the public that there should "be free scope for the sale of the goodwill of a business or calling. These "were cases of partial restraint. But it seems to me that if there be occupa- "tions where a sale of the goodwill would be greatly impeded, if not prevented "unless a general covenant could be obtained by the purchaser there are no "grounds of public policy which countervail the disadvantage which would "arise if the goodwill were in such cases rendered unsaleable."

And see Lord Watson at p. 552.

The same distinction is drawn by Lord Haldane in *Mason* v. *Provident Clothing and Supply Co.*, (1913) A. C. 724, at p. 731, and on pp. 737 and 738 by Lord Shaw. 10

Similarly in *Morris* v. *Saxelby* (1916) 1 A. C. 688, at p. 701, Lord Atkinson said :

"These considerations in themselves differentiate, in my opinion, "the case of the sale of goodwill from the case of master and servant "or employer and employee. The vendor in the former case would "in the absence of some restrictive covenant be entitled to set up in "the same line of business as he sold in competition with the pur- "chaser, though he could not solicit his own old customers. The 20 "possibility of such competition would necessarily depreciate the "value of the goodwill. The covenant excluding it necessarily "enhances that value, and presumably the price demanded and paid, "and, therefore, all those restrictions on trading are permissible "which are necessary at once to secure that the vendor shall get the "highest price for what he has to sell and that the purchaser shall "get all he has paid for. Restrictions on freedom of trading are in "both classes of case imposed, no doubt, with the common object "of protecting property. But the resemblance between them, I "think, ends there." 30

And see p. 708-709, per Lord Parker concurred in by Lord Sumner :

"The distinction between the two cases is, I think quite clear, "and is recognized both by Lord Macnaghten and Lord Herschell in "the *Nordenfelt* case (1894) A. C. 535. The goodwill of a business "is immune from the danger of the owner exercising his personal "knowledge and skill to its detriment, and if the purchaser is to take "over such goodwill with all its advantages it must, in his hands, "remain similarly immune. Without, therefore, a covenant on the "part of the vendor against competition, a purchaser would not get "what he is contracting to buy, nor could the vendor give what he 40 "is intending to sell. The covenant against competition is, there- "fore, reasonable if confined to the area within which it would in "all probability enure to the injury of the purchaser."

And Lord Shaw, at p. 713 :

"When a business is sold, the vendor, who, it may be, has "inherited it or built it up, seeks to realize this piece of property,

"and obtains a purchaser upon a condition without which the whole "transaction would be valueless. He sells, he himself agreeing not "to compete; and the law upholds such a bargain, and declines to "permit a vendor to derogate from his own grant. Public interest "cannot be invoked to render such a bargain nugatory; to do so "would be to use public interest for the destruction of property. "Nothing could be a more sure deterrent to commercial energy and "activity than a principle that its accumulated results could not be "transferred save under conditions which would make its buyer 10 "insecure.

"In the case of restraints upon the opportunity to a workman "to earn his livelihood a different set of considerations comes into "play."

In *Vancouver Malt and Sake Brewing Company, Limited* v. *Vancouver Breweries, Limited* (1934) A. C. 181, Lord Macmillan in delivering the judgment of the Board said at p. 189:

"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 com-20 "mercial 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."

The *Vancouver* case was exceptional in that nothing had been sold, and the covenant complained of was a bare covenant against competition, that is, a covenant in gross, and therefore illegal.

In the case at bar, the Appellant entered into the respective covenants which he now seeks to repudiate as a term of the sale of shares in Lewis Connors Sons, Limited, to Connors Bros. See the option of April 30th, 1925 (Ex. 4, pp. 175-177), and the contracts of June 9, 1925 (Ex. 3, pp. 181-182), 30 and October 2, 1926 (Ex. 5, pp. 186-187).

The agreement of April 30, 1925, gave the McLeans an option to buy from the Appellant and Lewis Connors $25,000 par value preferred stock and $52,500 par value common stock of Lewis Connors & Sons, Limited, but was subject to its acceptance and ratification by Connors Bros., Limited (p. 177, ll. 1-7). It contained a restrictive covenant (p. 176, ll. 40-47). By the agreement of June 9, 1925, made with the Appellant and Lewis Connors the Respondent, Connors Bros,. Limited, in effect accepted and ratified the agreement of April 30, 1925 (p. 181, ll. 21-22) and see the authority to accept the offer presented to Connors Bros., Limited, through the medium of the Saint 40 John Trust Company (McLean p. 52, ll. 25-39; p. 52, l. 43—p. 53, l. 2; p. 44; ll. 18-21, and Appellant p. 34. ll. 34-40). As consideration for the restrictive covenant entered into by the Appellant and Lewis Connors (p. 182, ll. 18-25) the Respondent Connors Bros., Limited, agreed (1) to buy within five years from January 1, 1926, from the stockholders of Lewis Connors & Sons,

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Limited, the remaining issued capital stock of that Company on the basis of $35,000 for $72,500 capital stock (p. 181, ll. 26-36); the Appellant owned more than 172 of such shares (Appellant p. 21, l. 30); (2) undertook to relieve the Appellant and Lewis Connors from all personal responsibility in respect of the account of Lewis Connors & Sons, Limited, with the Bank of Nova Scotia by June 1, 1926 (p. 182, ll. 5-8); this proved to be worth from $20,000 to $30,000 (Hill p. 66, l. 21; Appellant p. 29, l. 24) and by an agreement of the same date to which the Appellant and both the Respondents were parties the Respondent, Connors Bros., Limited, guaranteed the payment to the Appellant by Lewis Connors & Sons, Limited, of a salary of $5,000 per annum for five years (Ex. 1, p. 183, ll. 22-25). 10

The contract dated October 2, 1926 (Ex. 5, pp. 186-187) provided for the sale of 172 shares in Lewis Connors & Sons, Limited, by the Appellant to Connors Bros., Limited (p. 186, ll. 23-26) and in addition to relieving the Appellant from any obligation he was under to the Respondents under the employment agreement dated June 9, 1925 (p. 186, l. 43—p. 187, l. 2) released him from all claims and demands up to date, including any shortage in inventory (p. 187, ll. 3-11) and entitled him to receive the sum of $11,416 (ll. 12-16). The Appellant on his part gave the restrictive covenant already embodied in the agreements of April 30th and June 9th, 1925, but inasmuch as he was no longer to be connected with either of the Respondents, the word " other " was omitted before the words " sardine business " and the covenant read :—" 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—— " (p. 186, ll. 37-39). 20

Such a contract for the sale of shares in a company under the authorities is treated in law in the same way as the sale of the business carried on by the Company. *Nordenfelt* v. *Maxim Nordenfelt* (1894) A. C. 535, was such a case. See judgment of Lord Herschell at pp. 539-541; Lord Watson, pp. 550-551; Lord Ashborne, p. 555, and Lord Macnaghten, pp. 559-560. On page 8 of his judgment, the learned Chief Justice, in dealing with this point, said : 30

" The plaintiff contends that as a minority stockholder he could " not himself sell the goodwill of a business. I think this is entirely " disposed of by consideration of the facts in the *Nordenfelt* case " (1894) A. C. 535. There the covenant bound Nordenfelt per- " sonally yet when he executed it he was the managing director " of the Nordenfelt Company in which he held stock. He did not " own the business of the company nor any of its assets, yet it was " not held to be a covenant in gross. In 1886 Nordenfelt put his " business into a limited liability company. That company pur- " chased his goodwill and got from him a covenant against com- " petition. Then in 1888 this Company and the Maxim Company " made an arrangement for amalgamation, one of the terms being " that the Nordenfelt Company would procure Nordenfelt to enter 40

" into an agreement which was afterwards embodied in an instru-
" ment of September, 1888, which contained the covenant against
" competition by him and was, of course, executed by him. The
" parallel is so complete that nothing more need be said."

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The principle clearly established by this case 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 goodwill of the business, and that the covenant is reasonably necessary to protect the goodwill.

10 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* (1934) A. C. 181 (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 the *Nordenfelt* case, 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 goodwill 20 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. There is a strong disposition on the part of the Courts to uphold these; for as was said by Lord Hanworth, M. R., in *Palmolive Co.* v. *Freedman* (1928) 1 Ch. 264, C. A. at p. 274:

" It has been said many times that commercial men are the
30 best judges of what is reasonable between them."

and at p. 280-281 Lawrence, J., said:

" Different considerations apply in cases of agreements made
" between independent traders for the purpose of regulating their
" business relations where the law regards the parties as the best
" judges of what is reasonable as between themselves and in cases
" of agreements for service where there is less freedom of contract."

In *North Western Salt Co., Ltd.* v. *Electrolytic Alkali Co.* (1914) A. C. 461, at p. 471, Lord Haldane said:

" When the question is one of the validity of a commercial
40 " agreement for regulating their trade relations, entered into between
" two firms or companies, the law adopts a somewhat different
" attitude—it still looks carefully to the interest of the public, but
" it regards the parties as the best judges of what is reasonble
" themselves."

There is no reason why this observation should not extend to an experienced man of business like the Appellant. In *English Hop Growers* v. *Dering* (1928) 2 K. B. 174, see the judgment of Scrutton, L. J., at pp. 180 and 181; Sankey, L. J., said at p. 186:

> "With regard to contracts of the present character, and also "contracts restraining a vendor of the goodwill of a business from "canvassing former customers, where the parties enter into an agree-"ment with their eyes open, the Court should not, in my view, be "astute to assist those who endeavour to break it, as Jessel, M. R., "said in *Printing and Numerical Registering Co. v. Sampson* (1875) "L. R. 19 Eq. 462, 465: 'You have this paramount public policy "to consider,—that you are not lightly to interfere with this freedom "of contract.' There is still something to be said for the sanctity of "contracts, and for the man who keeps his agreement, though it is to "his own hindrance."

And at p. 187:

> "The Court will always be jealous to protect the public where any "question arises as to a monopoly being created by a combination of "buyers or sellers, but it regards the parties as the best judges of what "is reasonable among themselves. The common law of England is "no crystallized code; its adaptability is one of its chief advantages, "and it seeks within due bounds to facilitate, not to fetter, trade and "industry."

At p. 192, Romer J., said:

> "It may be safely assumed that this large body of hop growers "knew their own business best and what it was reasonable to do in "the circumstances with which they were confronted."

Moreover, the Appellant himself admitted on the stand that at the time the contracts under consideration were made, he and Lewis Connors thought them reasonable. In answer to the Court he said: "We thought the price was fair."

"Q. Considering that you were to get out of business and stay out of "business?"

"A. Yes." (p. 33, ll. 9-12).

This admission is of particular importance because in determining the reasonableness of restrictive covenants, they should be considered in the light of all the circumstances which existed at the time the contracts containing them were made, and not of subsequent events. Lord Macnaghten's statement on this aspect of the law made in the *Nordenfelt* case (1894) A. C. at pp. 573-4, is authoritative. He said:

> "Now in the present case it was hardly disputed that the restraint "was reasonable, having regard to the interests of the parties at the "time when the transaction was entered into. It enabled Mr. Norden-"felt to obtain the full value of what he had to sell; without it the

" purchasers could not have been protected in the possession of what
" they wished to buy . . . Mr. Nordenfelt received over £200,000 for
" what he sold. He may have got rid of the money, I do not know how
" that is. But even so, I would answer the argument in the words of
" Tindal, C. J. : 'If the contract is a reasonable one at the time it is
" entered into, we are not bound to look out for improbable and
" extravagant contingencies in order to make it void.' *Rainnie v.*
" *Irvine* 7 M. & G. at p. 976."

See, too, *Dowden v. Pook*, 1904, 1 K. B. 45 per Cozens-Hardy, L. J., at
10 p. 55, and *Lamson Pneumatic Tube Co. v. Phillips* (1904) 91 L. T. 363 C. A.

In determining whether or not the covenant is reasonable between the parties, the whole agreement in which it is contained and the surrounding facts must be weighed. (*Fitch v. Dewes*, 1921, 2 A. C. 158, 163). Three elements which are treated as of great importance are : consideration, time and space.

We find on examining each element that it is reasonable in the circumstances.

(i) As to consideration :

" The quantum of consideration may enter into the question of the
20 reasonableness of the contract," per Lord Macnaghten in the *Nordenfelt* case, 1894, A. C. at p. 565. In view of the Appellant's express admission already quoted, that at the time the contract was made he thought the price fair, it is perhaps idle to argue this point. Undoubtedly, however, the consideration received by the Appellant for his covenants was generous in the extreme. Under the agreement of June 9th, 1925, he was relieved of personal liability of from $20,000 to $30,000 to the Bank of Nova Scotia in respect of the account of Lewis Connors & Sons, Limited (App. p. 29, l. 24; Hill p. 66, l. 21) and obtained an assured market for his shares in Lewis Connors Bros., Limited (Ex. 3, p. 181, ll. 26-34); under the contract of October 2nd,
30 1925, he sold 172 shares of Lewis Connors & Sons, Limited, and obtained $11,416. (Ex. 5, p. 187, ll. 12-16). He also received a further $28,280 for certain other shares he had in the Connors business. (App. p. 31, l. 16). Lord Macnaghten in the *Nordenfelt* case said at p. 574 :

" It (i.e. the restraint) enabled Mr. Nordenfelt to obtain the full
" value of what he had to sell ; without it the purchasers could not have
" been protected in the possession of what they wished to buy."

And his comments at pp. 572-573 on *Whittaker v. Howe*, 3 Beav. 383, are particularly illuminating in this case :

" There is a homely proverb in my part of the country which says
40 " you may not 'sell the cow and sup the milk.' This is just what Mr.
" Howe tried to do . . . he tried to steal the business he had sold.
" His defence was that a covenant so wide was against public policy.
" But it did not occur to him to return the price ; that he kept in his
" pocket . . . It is a public scandal when the law is forced to uphold a
" dishonest act."

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The same disapproval of the low standard of business ethics which impels vendors of businesses, who have received their full price for the business and its goodwill, to seek the aid of the Court in breaking their covenants is voiced in case after case referred to at the beginning of this brief. Lord Watson, at p. 552, of the *Nordenfelt* case said :

"But it must not be forgotten that the community has a material "interest in maintaining the rules of fair dealings between man and man. "It suffers far greater injury from the infraction of these rules than from "contracts in restraint of trade."

In *Underwood & Son, Ltd.* v. *Barker* (1899) 1 Ch. Lindley, M. R., at p. 305, said :

"If there is one thing more than another which is essential to the "trade and commerce of this country, it is the inviolability of con- "tracts deliberately entered into; and to allow a person of mature "age, and not imposed upon, to enter into a contract, to obtain the "benefit of it, and then to repudiate it and the obligations which he "has undertaken is, prima facie at all events, contrary to the inter- "ests of any and every country."

In *English Hop Growers* v *Dering* (1928) 2 K. B., Scrutton, L. J., said at p. 181 :

"I have always myself regarded it as in the public interest that "parties who, being in an equal position of bargaining made contracts, "should be compelled to perform them, and not escape from their "liabilities by saying that they had agreed to something which was "unreasonable."

See also the extract from Sankey, L. J., in the same case already quoted.

(ii) As to time :

That the Appellant is restrained indefinitely from engaging in the sardine business is no objection to the covenant in the circumstances of this case. It was essential to the protection of the Respondents. The argument advanced by the Appellant under this heading in the Courts below was unsound because it ignored throughout the following fundamental considerations :

(*a*) The distinction drawn by the authorities between restrictive covenants contained in contracts for the sale of a business and those for personal service.

(*b*) The rule that in contracts for the sale of a business the Courts regard the parties as the best judges of what is reasonable among themselves.

(*c*) The fact that the Appellant admitted that he regarded the price as fair when he made the contract.

(*d*) The extremely generous consideration paid the Appellant for the restriction to which he submitted.

(*e*) The experience of Connors Bros., Limited, after they bought the original business in having serious inroads made on it by the Company formed by the Appellant, and his father and brother.

(*f*) The fact that the Appellant was engaged at one time or another in six different branches of the fish canning business, and is restrained from engaging in only one of these—the Sardine branch.

(*g*) The effect of *Haynes* v. *Doman* (1899) 1 Ch. 13.

We have set out at length the authorities which establish points (*a*) and (*b*), have referred to the Appellant's evidence (p. 33, ll. 9–12) in support of (*c*), 10 and have dealt fully with (*d*).

As to (*e*) : The facts regarding the attempt made by the Appellant and his father, Lewis Connors, to repossess themselves of the business they had sold Connors Bros., Limited, are set out in Part 1 of this factum. They may be briefly recapitulated as follows :

Within six months after receiving $200,000 for their interest in Connors Bros., Limited, Lewis Connors & Sons (Bernard and Edwin) not only set up a competing business, but solicited orders from the customers of the business which they had sold. (App. p. 22, l. 3 and ll. 12–17). This was illegal, as appears from *Trego* v. *Hunt* (1896) A. C. 7. See Lord Macnaghten's judg- 20 ment at pp. 24 and 25, where he says, inter alia :

> " It is not an honest thing to pocket the price and then to recap-
> " ture the subject of sale, to decoy it away or call it back before
> " the purchaser has had time to attach it to himself and make it his
> " very own."

See also *Boorne* v. *Walker* (1927) 1 Ch. 667.

In a year and one-half the new business set up by Lewis Connors and his sons had seriously encroached upon the business of Connors Bros., Limited. It had become a Dominion wide—in fact a world wide—business in that time (p. 22, ll. 30–41). There is no reason why the Appellant could not do 30 likewise again with his experience and knowledge, if unrestrained. Moreover, they had attempted to deprive Connors Bros., Limited, of the benefit of their trade marks in Mexico (p. 21, l. 5; McLean p. 44, l. 28). The Appellant by means of offers for stock, which were some five times the actual value of the stock, forced the McLean's to purchase his shares in Connors Bros., Limited, for $28,200 (supra Part I).

These were all matters which made it reasonable as between the parties that Connors Bros., Limited, should restrain the Appellant by such covenants as those under consideration.

As to (*f*): The Appellant is free to engage in any branch of the fish 40 business, except the sardine branch. Not only had Lewis Connors & Sons, Limited, extended its business throughout Canada and the world, when the Appellant made the agreements of June, 1925, and October, 1926, but it had engaged in several other lines of fish business—of these the sardine business was but one. (App. p. 23, ll. 43–44; p. 36, ll. 19–26; Doone p. 61, ll. 15–18). Connors Bros., Limited, did not attempt to restrain the Appellant from engaging in any of the other lines; it merely took a partial covenant

confined to the sardine business. The Appellant had ample opportunities of earning his living by engaging in other branches of the fish business, and in fact had done so since 1926 (App. p. 23, l. 43—p. 24, l. 9); this establishes firmly the reasonable character of the covenant. There is no ground for the suggestion that he is precluded from engaging in useful and gainful occupations other than one branch of the canning business, and that he was paid lavishly on the sale of a business to relinquish.

As to (*g*) : The attitude of the Courts towards restrictive covenants of unlimited duration is conclusively summarized by Lindley, M.R., in *Haynes* v. *Doman*, (1899) 1 Ch. 13 at p. 23 :

> " But it is very remarkable that no case can be found in which " an agreement in restraint of trade, free from objection in other " respects, has been held void simply because its duration was not " restricted."

That statement has never been challenged. In *Fitch* v. *Dewes* (1921) 2 A.C. 158, such a covenant was upheld.

These seven compelling reasons provide a conclusive answer to the contention that it is unreasonable to restrain the Appellant from competition for more than a limited period. The law regards the parties as the best judges of what is reasonable between themselves, especially when, as here, the Appellant has admitted that he regarded the price paid as fair, when the consideration has been generous in the extreme, and the restraint is applicable to only one branch of the business sold. The Courts will not in such circumstances impugn the contract.

(iii) As to space :

The business of Connors Bros., Limited, both while the Appellant was interested in it as a shareholder, director and plant manager, and ever since, has been carried on, not only in every province of Canada, but in practically every continent in the world (App. p. 17, ll. 13–35 ; Doone, p. 57, ll. 31–39). Between the latter part of 1923, when the Appellant and his father, Lewis Connors, disposed of a substantial part of their holdings in Connors Bros., Limited, and June 1925, when they made their agreement with Connors Bros., Limited, for the sale of their stock in Lewis Connors & Sons, Limited, their new company, Lewis Connors & Sons, Limited, had established a business as extensive in area as Connors Bros., Limited; it extended throughout every part of Canada, and into almost every continent (App. p. 22, ll. 18-41). The same was true in October, 1926, when the Appellant agreed to sell the balance of his stock in Lewis Connors & Sons, Limited, to Connors Bros., Limited (Ex. L. p. 197, ll. 8-10; Doone p. 58, ll. 8-14; App. p. 36, ll. 14-26). In these circumstances, it was clearly reasonable that Connors Bros., Limited, in buying the Appellant's shares in Lewis Connors, Limited, should safeguard itself against a repetition of such competition throughout the Dominion of Canada. Even if the covenant in the circumstances had been without limit as to space, it would have been reasonable, as such a covenant was held to be in the *Nordenfelt* case.

In the Supreme Court of Canada.

No. 21.
Factum of Connors Bros., Limited, and Lewis Connors & Sons, Limited—*continued.*

The Appellant suggested in the Court below that the word sardine "business" is ambiguous, and that the covenant under consideration is void for uncertainty. Surely there is no ambiguity about the word "business;" it is used generally to designate the manufacturing and selling of goods. The expressions "business of manufacturing" and "business of selling" are common expressions in everyday use. In the contracts under consideration, made as they were between business men, the term should be construed in its ordinary everyday business sense. The expression used in the covenants, moreover, was any (other) sardine business whatsoever, and must 10 therefore be construed in the widest sense. This was the construction placed on it by the Respondents' counsel at the trial (p. 31, l. 6), and is adopted here.

Used both to designate manufacturing, *i.e.*, packing of sardines, and their sale, the covenant was reasonable in extending the restraint throughout the Dominion of Canada. It was common ground at the trial and on the appeal below, that sardines can be packed in Canada only in the Bay of Fundy area (App. p. 38, ll. 7–30; McLean, p. 45, ll. 10–27). This is the area where the sardine packing business of Lewis Connors & Sons, Limited, and of Connors Bros., Limited, was carried on when the contracts 20 for the sale of the business were made, containing the covenants under consideration. The restriction was, therefore, reasonable as to area as regards the packing of sardines, because the Dominion of Canada in this connection is synonymous with the Bay of Fundy area.

The evidence regarding the sales of sardines by Lewis Connors & Sons, Limited, in every province of Canada, when the contracts containing the restricted covenants were made in 1925 and 1926, referred to at the beginning of this topic is, it is submitted, conclusive that in this respect the covenants were not too extensive.

The covenant is clear in its terms—the Appellant may not "engage in 30 any sardine business whatsoever in the Dominion of Canada." This is the plain statement of the restraint and in the circumstances is clearly reasonable.

As to (*b*)—the interests of the public: Emphasis is laid on the concluding words of the extract from the judgment of the Judicial Committee in *Attorney General of Australia* v. *Adelaide S. S. Co.* (1913) A. C. 781, at p. 795, quoted at the outset of this argument:

> "Their Lordships are not aware of any case in which a restraint "though reasonable in the interests of the parties has been held "unreasonable because it involved some injury to the public."

The same point was stressed in the judgment of the English Court of 40 Appeal in *Palmolive Co.* v. *Freedman* (1928) 1 Ch. 264, per Sargent, L. J., at p. 277, who said:

> "So far as the interests of the public are concerned the observa-"tions of Lord Parker in the *Adelaide Steamship Company's* case "are very relevant here and practically conclusive."

In the Supreme Court of Canada.

No. 21. Factum of Connors Bros., Limited, and Lewis Connors & Sons, Limited—*continued.*

And Lawrence, L. J., said at p. 282:

"It is perhaps worth noticing that their Lordships in that case "stated that they were not aware of any case in which a restraint, "though reasonable in the interests of the parties, had been held "unenforceable because it involved some injury to the public, and "no such case has been called to our attention on this appeal."

And see Viscount Haldane, L. C., in *Northwestern Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* (1914) A. C. at p. 473: Lindley, M. R., in *Underwood & Son, Ltd.* v. *Barker* (1899) 1 Ch. 300 at p. 305; and Jessel, M. R., in *Printing and Numerical Registering Co.* v. *Sampson*, L. R., 19 Eq. 462 at 465. 10

No Court has ever refused to enforce a covenant reasonable as between the parties because it involved some injury to the public. As the learned Trial Judge pointed out, moreover:

"Lord Parker in *Morris* case (1916) A. C. 688 at p. 707, thinks "that the onus of so showing should lie on the party alleging it. "The only evidence before the Court is to the effect that the price "of sardines to the public has not been increased but somewhat "lessened since the making of the contract. There is not a syllable "of testimony to show any injury to the public and I find that 20 "there has not been any." (Jdgt. p. 78, ll. 31–36).

This statement is borne out by Mr. McLean's evidence (p. 48, ll. 27–32). Mr. Doone testified also that the prices paid to the fishermen have been maintained. "In fact, I think they are getting a little better prices on the average." (p. 63, ll. 9–13).

Turning to the particular questions which the Court is asked to determine.

As to question (*a*) (p. 2, ll, 27–36):

The learned Trial Judge has held (p. 78, ll. 40–44) that the words "will not (either) directly or indirectly engage in any (other) sardine business 30 whatsoever in the Dominion of Canada" used in the covenants under consideration, debar the Appellant from engaging in the sardine business in Canada as (1) owner by himself, or (2) in partnership with others of such a business; or (3) as a shareholder of an incorporated company engaged in such business in Canada.

As to (1) and (2) there can be no question whatsoever. They are prohibited in the clearest terms by the covenant, and as the covenant is reasonable, the Appellant is debarred.

As to (3), the Appellant is debarred from becoming a shareholder of an incorporated company engaged in the sardine business in Canada. This 40 is the effect of the word "indirectly." A case in point is *Castelli* v. *Middleton*, 17 T. L. R. 373: "What cannot be done directly cannot be done indirectly." This is a universal principle. See *Great West Saddlery Company* v. *The King* (1921) 2 A. C. 91 at p. 100. A good recent case is *Gilford Motor*

Company v. *Horne* (1933) Ch. 933, C. A. See the judgment of Hanworth, M. R., at pp. 955 and 961; Lawrence, L. J., at p. 965; and Romer, J., at p. 969. The Company in such a case would be a mere cloak or sham, and a device for enabling the Appellant to commit a breach of his agreements. He should not be permitted to become a shareholder in such a company. See, too, *Dimes* v. *Proprietors of the Grand Junction Canal* (1852) 3 H. L. C. 739 (10 E. B. 301).

As to question (*b*) (p. 2, ll. 37–41):

10 The Appellant has seen fit to ask the Court to determine the validity of the covenants under consideration by a special procedure provided under O. 54A (See Appendix to this factum). Against the protest of the Respondents, the learned Trial Judge permitted the Appellant to proceed. Having heard the case he doubted the propriety of the procedure in this type of case for reasons which he stated (p. 79, ll. 29–37).

Having selected this procedure, however, the Appellant is bound by its express limitations. By Rule 4 of O. 54A.:

> "The Court or Judge shall not be bound to determine any "such question of construction if in their or his opinion it ought not "to be determined on originating summons."

20 The learned Trial Judge was given a discretion as to whether he should determine any question submitted to him. He exercised that discretion by refusing to answer question (b) for the conclusive reason that the question "is too hypothetical to admit of any answer which would not be subject to "many qualifications." (p. 79, ll. 8–10).

Where a trial Judge is given a discretion, as here, a Court of Appeal will not interfere with his exercise of it, except on very strong grounds. The remarks of Wright, M. R., in delivering the judgment of himself and four other Lords Justices of Appeal in *Hope* v. *G. W. Ry. Co.* (1937) 2 K. B. 130 at pp. 138-140, show the reluctance with which an Appellate Court interferes 30 with the exercise of judicial discretion. The refusal of the learned Chief Justice to answer question (b) was surely well founded. He said (p. 79, ll. 4–22):

> "The word 'employee' is a very wide term. It may embrace "anything from a general manager of a business to one who is engaged "in some mere routine occupation . . . I think the only satisfactory "way of determining the question is when the plaintiff undertakes "to act in some form of employment for some person or corporation "engaged in the sardine business in Canada. Without professing to "decide anything, I can see a wide difference between the plaintiff 40 "working at a machine which seals the tins of sardines, or superin- "intending the operation of a new company. I cannot, with the "material before me, grade the possible occupations which the "plaintiff may undertake, into exhaustive categories, and provide an "answer in respect to each of them, and as pointed out by Jessel, "M. R., in *Custis* v. *Sheffield*, 21 Ch. D. 1, the Court does not as a rule

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No. 21. Factum of Connors Bros., Limited, and Lewis Connors & Sons, Limited—*continued.*

"decide as to future rights. See also the remarks of Kekewich, J., in "*In re Harman ; Lloyd* v. *Tardy*, 1894, 3 Ch. 614, at the end of his "judgment as to the necessity of questions being specific. I, "therefore, decline to answer question (b)."

In the case at Bar, as in the *Nordenfelt* case, the Appellant covenanted not to engage directly or indirectly in a business of the character as he was selling. In the *Nordenfelt* case, the Appellant was restrained from working for another Company. (See facts set out in report in Court of Appeal, 1893, 1 Ch. at p. 535). To accept the Appellant's contention, the Court must ignore the *Nordenfelt* case, which, as the learned Chief Justice held, is a complete parallel to this. The wide meaning which must be placed on the covenant is shown by the following cases:

Rolfe v. *Rolfe*, 60 E. R. 550, where the defendant, who on the sale of his share in a business to the plaintiff, covenanted that he would not engage in such a business, commenced such a business in co-partnership with another. The defendant's objection that he had not broken the agreement because he was acting merely as a foreman and not as a principal in the business, was rejected, and it was held that as he had engaged with another in carrying on the prohibited business, he had plainly violated the agreement.

In *Cade* v. *Calfe*, 22 T. L. R. 243, the defendant, on entering the plaintiff's service, covenanted that he would not, either directly or indirectly, be engaged in the same business within a certain area. On leaving the plaintiff's service, he immediately entered the service of a competitor in the same line of business, and it was held that there had been a breach. This case follows that of *Watts* v. *Smith*, 62 L. T. 453, where the defendant had covenanted not to engage in a similar business, and was held to have broken the covenant by entering the service of a competitor. Mr. Justice Kekewich said:

> "Servants are engaged when a bargain is made between them "and their employers and they are engaged for a particular purpose."

In *Pearks, Limited* v. *Cullen*, 28 T. L. R. 371, the decisions in *Cade* v. *Calfe*, and *Watts* v. *Smith*, were followed by the eminent Judge, Mr. Justice Hamilton (later Lord Sumner) on similar phraseology.

If it were necessary for the Court to answer question (b) (which in view of the exercise of the learned Chief Justice's discretion, it is submitted it is not), the answer, in view of the foregoing authorities and particularly the *Nordenfelt* case, must be that the Appellant is debarred from working in the sardine business in Canada as an employee of any person, firm or corporation engaged in the sardine business; as already pointed out, he has ample opportunity to engage in branches of the fish business in Canada, other than the sardine branch.

As to question (c) (p. 2, l. 42—p. 3, l. 4):

The clear construction of the latter part of the covenants, read with the earlier, is to allow Bernard Connors, after the ten year period, to use the

name of "Connors" in connection with the sardine business outside of Canada, but not within Canada. Such a covenant by the vendor of a business (viz., not to trade under a particular name) was upheld in *Vernon* v. *Hallam,* 34 C. D. 748. It is part of Bernard Connor's agreement, and he should be held to it. The evidence has clearly shown that for many years the name of Connors Bros. has been synonymous throughout Canada, and in fact the world, with the sardine business (App. p. 23, ll. 23–40). We are not concerned at this stage with the covenant not to use the name "Connors" for a period of ten years in parts of the world other than Canada. In view of the close identification of the name "Connors" with the sardine business in all parts of Canada, however, it is reasonable that Bernard Connors should be required to keep his agreement which he entered into as a free agent on the sale of a business, and for which he was paid such a large consideration. He is free to carry on all other parts of the fish business in Canada and elsewhere, and to use the name "Connors" in all parts of the world except Canada in connection with the sardine business. In answering this question in the negative, the learned Trial Judge said (p. 79, ll. 24–28):

> "Having decided that under question (a) the plaintiff cannot "engage directly or indirectly in any sardine business whatsoever in "the Dominion of Canada, I do not see how it is possible for him "to lawfully use any name in connection with that business."

The Appellant contended in the Courts below that the release from all claims and demands in paragraph 5 of the agreement between the Appellant and Respondents dated October 2, 1926 (Ex. 5, p. 187, ll. 3–11), released the covenants in the agreements of April 30th and June 9th, 1926. The learned Chief Justice disposed of this contention conclusively in the following passage of his Judgment (p. 77, ll. 23–35):

> "It is enough to read the paragraph to see that it is a release of "'claims and demands' but does not extend to the subject of "covenants, the implementing or breach of which had not then "caused any contention. The claims and demands released are "those which the parties of the second, third and fourth parts 'have "or 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.' How can I extend this to things which may be "breaches of the covenant but have not yet come into existence "when the precise language of the covenant limits the release to "things antecedent to the 2nd October, 1926, it is impossible for me "to see nor do I think there is anything in the plaintiff's contention "that the reference to 'this general release of the said Bernard "Connors from all demands' carries it any further. It is not "claims but covenants with which we are dealing here."

It is absurd to suggest that by the words "claims and demands" the parties intended to include the covenant in question, when by paragraph (3)

of the same agreement (p. 186, ll. 37–43), they were including it and thereby emphasizing and ensuring beyond question its continued existence.

Lord Westbury, in *Directors of L. & S. W. Ry. Co.* v. *Blackmore*, L. R., 4 H. L. at p. 623, said :

> " The general words in a release are limited always to that thing
> " or those things which were specially in the contemplation of the
> " parties at the time when the release was given. But a dispute
> " that had not emerged, or a question which had not at all arisen,
> " cannot be considered as bound and concluded by the anticipatory
> " words of a general release. There is no difficulty, therefore, in
> " holding that the present contention on the part of this plaintiff,
> " Mr. Blackmore, in respect of matters that subsequently arose,
> " cannot be at all affected by words in a release given anterior to
> " the arising of the subject of the present dispute."

The last two sentences of this passage have a special bearing here.

Finally, even if the contention of the Appellant as to the effect of the release were upheld, it would not help him, for by the same agreement of October 2, 1926, the Appellant sold an interest in Lewis Connors & Sons, Limited, to Connors Bros., Limited, and repeated the restrictive covenant. That covenant so given is effectual to establish the Respondents' rights.

For the above reasons, it is respectfully submitted that this appeal be dismissed with costs.

C. F. INCHES,
A. N. CARTER,
Counsel for Respondents.

APPENDIX.

RULES OF THE SUPREME COURT OF NEW BRUNSWICK.

Order 54a.

DECLARATION ON ORIGINATING SUMMONS

1. Any person claiming to be interested under a deed, will or other written instrument, may apply to the Court or a Judge by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.

2. The Court or a Judge may direct such persons to be served with the summons as they or he may think fit.

3. The application shall be supported by such evidence as the Court or a Judge may require.

4. The Court or Judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons.

No. 22.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

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

MONDAY THE 19TH DAY OF DECEMBER, A.D. 1938.

Present :

THE RIGHT HONOURABLE SIR LYMAN P. DUFF, P.C., G.C.M.G., C.J.C.
THE HONOURABLE MR. JUSTICE CROCKET,
10 THE HONOURABLE MR. JUSTICE DAVIS,
THE HONOURABLE MR. JUSTICE KERWIN,
THE HONOURABLE MR. JUSTICE HUDSON.

Between

BERNARD CONNORS - - - - - - - (*Plaintiff*) *Appellant*

and

CONNORS BROS., LIMITED, and LEWIS CONNORS & SONS, LIMITED, - - - - - (*Defendants*) *Respondents.*

The Appeal of the above named Appellant from the judgment of the Supreme Court of New Brunswick, Appeal Division, pronounced in the 20 above cause on the Eighth day of February in the year of Our Lord one thousand nine hundred and thirty-eight dismissing the Appellant's appeal from the judgment of the Honourable the Chief Justice of New Brunswick in the Chancery Division of the Supreme Court of New Brunswick, rendered in the said cause on the Twenty-fourth day of August in the year of Our Lord one thousand nine hundred and thirty-seven having come on to be heard before this Court on the Sixteenth and Seventeenth days of May in the year of Our Lord one thousand nine hundred and thirty-eight in the presence of Counsel as well for the Appellant as for the Respondents, whereupon and upon hearing what was alleged by Counsel aforesaid this Court was 30 pleased to direct that the said appeal should stand over for judgment and the same coming on this day for judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed and the said judgments of the Supreme Court of New Brunswick and of the Appellate Division should be and the same were set aside and judgment be entered declaring that the covenant in question, insofar as it prohibits the Appellant from engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada, is unenforceable,

AND THIS COURT DID FURTHER ORDER AND ADJUDGE 40 that the said Respondents should and do pay to the said Appellant the costs incurred by the said Appellant as well in the Supreme Court of New Brunswick, Chancery Division and Appeal Division as in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

In the Supreme Court of Canada.

No. 23. Reasons for Judgment—(a) The Chief Justice.

No. 23.

Reasons for Judgment.

(*a*) 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 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*, 1916, 1 A.C., at p. 707). 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*, 1919, A.C. 548, 562; *Vancouver Malt Co.* v. *Vancouver Breweries, Ltd.*, 1934, A.C. 181, at pp. 190–1) 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, 1894, A.C. 535) 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 goodwill of the business, and that the covenant is reasonably necessary to protect the goodwill.
>
> 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* (1934,

A.C. 181) (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 the *Nordenfelt* case, 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 goodwill 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 the Supreme Court of Canada.

No. 23.
Reasons for Judgment.
(*a*) The Chief Justice—*continued.*

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 Brewing Co., supra* at p. 191).

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 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 the Supreme Court of Canada.

No. 23. Reasons for Judgment—(*a*) The Chief Justice—*continued.*

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 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*, *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 *B.R.C. Engineering Co. Ltd.* v. *Schelff* (1921, 2 Ch. 563, at p. 574) :

> 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 employés' restrictive covenants has been so clearly laid down. Take, for instance, the justification

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No. 23. Reasons for Judgment—(a) The Chief Justice—*continued.*

for a wider vendor's covenant in Lord Shaw's speech in *Mason's* case (1913 A.C. 724, 737) : " 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 show 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 a declinature by the law to enforce it would amount to a denial of justice." Again in *Saxelby's* case (1916 1 A.C. 688, 708) Lord Parker says : " In the *Nordenfelt* case (1894 A.C. 535, 552) that which it was required to protect was the goodwill 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 (*supra*) : " 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 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 Hershell in the same case says (1894 A.C. 548) : " I think that a covenant entered into in connection with the sale of the goodwill 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 Brewing Co.* (at p. 191) "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 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 during the period of 10 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*, 46 S.C.R. 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

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Investigation Act, it is by no means clear that reasonableness as between the parties concludes the question whether or not a combine is "likely 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 (1913 A.C. 781) of the phrase "pernicious monopoly" employed by Bowen L. J. in *Nordenfelt's* case (1893 1 Ch. at p. 668) as a monopoly having the effect of increasing prices. 10

(*b*) Davis, J. (concurred in by Hudson, J.).

(*b*) DAVIS, J. (Concurred in by HUDSON, 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 20 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 30 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. 40

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 :

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> 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.
>
> 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 possible 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 corporations 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, 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 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

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Reasons for Judgment—(b) Davis, J. (concurred in by Hudson, J.)—*continued.*

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 10 corporation engaged in the sardine business in Canada.

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. 20 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 respondent's 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 30 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 40 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

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No. 23. Reasons for Judgment—(*b*) Davis, J. (concurred in by Hudson, J.) —*continued.*

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*, 1934 A.C., 181, at 189–190 :

> The law does not condemn every covenant which is in restraint of trade, for it recognises 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.* (1919) A.C., 548, 562.

Lord Hanworth, M.R., in *Gilford Motor Co.* v. *Horne* (1933) 1 Ch., 935, at 958, referring to page 475 of 1 Smith's Leading Cases, 13th ed., dealing with the *Nordenfelt Co.'s* case (1893) 1 Ch., 630, 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 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.

(*c*) KERWIN J. (Concurred in by CROCKET 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 provisions 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".

The Chief Justice of New Brunswick, 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 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.

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No. 23. Reasons for Judgment—(c) Kerwin, J. (concurred in by Crocket, J.) —*continued.*

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 twenty-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 realise 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 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 St. 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.

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 merchandising 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, 1894, A.C. 535, 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 susbtantial extent, in each company and took an active 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 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 interest of the parties concerned and reasonable in reference to the interest 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."

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His judgment was not authoritatively approved until *Mason's* case, 1913, A.C. 724, and its full effect was not explained until *Morris* v. *Saxelby* (1916) 1 A.C. 688. In the latter case Lord Atkinson quoted with approval that part of Lord Macnaghten's judgment in the *Nordenfelt* case 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 :—

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" 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."

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 ".

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

In the Supreme Court of Canada.

No. 23. Reasons for Judgment—(c) Kerwin, J. (concurred in by Crocket, J.) —*continued.*

In *Atwood* v. *Lamont* (1920) 3 K.B. 571, 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* (1921) 2 A.C. 158, 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 directly or indirectly engage 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 uniformally 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 instant, 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.

In the Supreme Court of Canada.

No. 23. Reasons for Judgment—(c) Kerwin, J. (concurred in by Crocket, J.) —*continued.*

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 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.

In the Supreme Court of Canada.

No. 23. Reasons for Judgment—(c) Kerwin, J. (concurred in by Crocket, J.)—*continued.*

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.

In the Privy Council.

No. 24. Order in Council granting special leave to appeal to His Majesty in Council, 30th March, 1939.

No. 24.

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Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE

The 30th day of March, 1939

present :

THE KING'S MOST EXCELLENT MAJESTY

MARQUESS OF ZETLAND — MR. SECRETARY HORE-BELISHA
LORD BAYFORD — SIR DOUGLAS HACKING

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 24th day of March 1939 in the words following, viz. :— 20

"Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Connors Bros. Limited and Lewis Connors and Sons Limited in the matter of an Appeal from the Supreme Court of Canada between the Petitioners Appellants and Bernard Connors Respondent setting forth (amongst other things) that the Petitioners desire leave to appeal from a Judgment of the Supreme Court of Canada dated the 19th December 1938 which by a majority of three Judges to two reversed the unanimous Judgment of the Supreme Court of 30 New Brunswick (Appeal Division) dated the 8th February 1938 which had dismissed an Appeal by the Respondent from a Judgment of the Supreme Court of New Brunswick dated the 24th August 1937 : that the only question in the Appeal for which leave is sought would be whether the Respondent is bound by certain covenants in restraint of trade entered into by him on the sale of his interest in a business for adequate consideration and when he was not only a man of considerable business experience but was independently advised by experienced lawyers or whether the Respondent is entitled to have the covenants declared unenforceable 40

In the Privy Council.

No. 24. Order in Council granting special leave to appeal to His Majesty in Council, 30th March, 1939—*continued.*

as being in illegal restraint of trade: and reciting the cause of action and the course of the litigation between the Parties: that on the 19th January 1939 the Supreme Court of Canada granted a stay of proceedings conditioned on the Petitioners giving within 30 days security in the sum of $2,500 which condition has been fulfilled to afford the Petitioners an opportunity of applying to Your Majesty in Council for special leave to appeal: that the Petitioners submit that the reasoning of the majority of the Judges in the Courts below is to be preferred to that of the majority of the Supreme Court of Canada that the Judgment of the Chief Justice of Canada is based on a demonstrable mistake of fact concerning the evidence given and that the case raises important questions of law fit to be determined by Your Majesty in Council: And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court of Canada dated the 19th December 1938 or for such further or other Order as to Your Majesty in Council may appear fit:

"The LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 19th day of December 1938 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs.

"And Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioners upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondent) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

RUPERT B. HOWORTH.

Exhibits.

EXHIBITS.

"A." Option Agreement, Lewis Connors et al and Arthur E. Cox et al, 25th August, 1923.

"A." (Defendants' document.)

Option Agreement, Lewis Connors et al and Arthur E. Cox et al.

"A"—16 June, '37—J.B.M.B.

This Agreement made this twenty-fifth day of August in the year of our Lord one thousand nine hundred and twenty-three, Between Lewis Connors of Black's Harbour in the County of Charlotte in the Province of New Brunswick, canner; Patrick W. Connors of the same place, canner; Robert Thompson of the same place, canner, and Bernard Connors of the same place, canner, hereinafter called the vendors of the first part; and 10 Arthur E. Cox of the City of Saint John in the County of the City and County of Saint John in said Province, chartered accountant; Howard P. Robinson of the said City of Saint John, manager of the New Brunswick Telephone Company, Limited; A. Neil McLean of the said City of Saint John, secretary-treasurer of Scovil Bros., Limited, and Charles H. Easson of the City of Toronto in the Province of Ontario, banker, hereinafter called the vendees of the other part.

Whereas, the vendors are the shareholders of Connors Bros., Limited, which is an incorporated company duly incorporated under the laws of the Province of New Brunswick, and having its head office at Black's Harbour 20 aforesaid, and hold all the issue of the capital stock of the said Connors Bros., Limited, in the following proportions, namely,

Lewis Connors - - - - -	1090	shares
Patrick W. Connors - - - -	1200	,,
Robert Thompson - - - - -	10	,,
Bernard Connors - - - - -	100	,,

and have agreed to sell and transfer their shares of stock to the vendees upon the terms and conditions hereinafter set forth;

And Whereas, the vendees intend to form a company under the New Brunswick Companies Act, with a view, amongst other things, to the 30 acquisition as a going concern of the undertaking and business of the said Connors Bros., Limited.

Now this Agreement Witnesseth, that the vendors hereby offer and agree, in consideration of the sum of one dollar and other good and valuable considerations, to sell to the vendees all their shares of the capital stock of Connors Bros., Limited, the said shares of stock to be at the time of the said sale free and clear of all liens, charges, encumbrances, taxes and assessments, the consideration for the said sale to be as follows: The vendees will incorporate a company as aforesaid under the New Brunswick Companies Act with a capital stock of $500,000.00 divided into 5,000 shares of $100.00 each, 40 of which 2,500 shall be 7% preference shares of $100.00 each, and the balance,

Exhibits.

"A." Option Agreement, Lewis Connors et al and Arthur E. Cox et al, 25th August, 1923—*continued.*

2,500 shall be common or ordinary shares of $100.00 each, the said preference shares shall confer upon the holder the right to cumulative preferential dividend at the rate of seven per centum per annum, and shall upon the winding up of the Company have priority as to the return of capital and payment of all arrears of dividend, whether declared or not, and shall further have priority as to return of capital over all other shares of capital stock for the time being of the Company upon such winding up, dissolution, bankruptcy or otherwise. The said preference shares shall be subject to the right of the Company to redeem the same or any part thereof upon payment to 10 the owner or owners thereof of the sum of $100.00 per share for each and every share, and the Company will undertake to redeem the said preference shares at the holders' option at par, provided however, that the vendors cannot compel the Company to redeem a larger amount than $12,500.00 par value of shares of the said Company in one year.

It is Further Agreed that the Company so to be formed shall issue bonds secured by a trust mortgage in terms approved by the vendees or their solicitors, upon the undertaking of the Company to the amount of $250,000.00 which said bonds shall be sold by the vendees, and the proceeds from the sale thereof will be used by the vendees as follows: $200,000.00 20 will be paid to the said vendors in proportion to the number of shares they hold as above set forth in Connor Bros., Limited, and the balance, namely $50,000.00 less brokers commissions, legal expenses in incorporating the Company, and all other necessary expenses, will be put back into the business of the Company;

It is Further Agreed that the vendors shall receive and accept $200,000.00 par value of preferred stock to be divided among the said vendors in proportion to the number of shares they hold as above set forth in Connors Bros., Limited, and the balance of the preferred shares, namely $50,000.00 will be sold by the vendees, and the proceeds of the sale, less 30 the expenses of selling the said shares, will be put back into the business of the Company.

The Common Stock of the said Company of the par value of $250,000.00 will be owned by the vendees.

It is Further Agreed that commencing not later than five years from the formation of the Company, the Company shall pay to the trustee under the trust mortgage for the purpose of a sinking fund, a yearly sum equal to not more than five per cent of the par value of the bonds to be issued as aforesaid, the exact percentage to be determined by the vendees.

This Option shall expire on the 10th day of October, A. D. 1923, 40 unless the vendees or their assigns shall before that time, give notice in writing of its acceptance, in which case the transaction is to be completed within a reasonable time thereafter, that is, such time as is reasonably necessary for the incorporation of the Company and flotation of bonds, etc. This option may be accepted by written notice mailed, postage prepaid and registered, addressed to the vendors at Black's Harbour, Charlotte County, New Brunswick.

Exhibits.

"A."
Option Agreement, Lewis Connors et al and Arthur E. Cox et al, 25th August, 1923—*continued.*

It is understood and agreed that by accepting this option the said vendees assume no responsibility or liability to purchase the said shares of stock unless the said vendees or their assigns shall elect so to do by written notice given as aforesaid, and that in case of an assignment, this instrument and all its provisions shall inure to the benefit of and be obligatory upon such transferee and the said vendees shall be free from liability thereunder as though such transferee had originally been made the purchaser herein.

In Witness whereof the vendees have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of } 10

"B."
Agreement, P. W. Connors and Connors Bros., Limited, 8th November, 1923.

"B." (Defendants' document.)

Agreement, P. W. Connors and Connors Bros., Ltd.

16/June/37—J.B.M.B.

Agreement made this eighth day of November, 1923, between Connors Bros., Limited, a company duly incorporated under The New Brunswick Joint Stock Companies Act, 1916, having its Head Office at Black's Harbour, in said Province of New Brunswick, of the One Part; and Patrick W. Connors of Black's Harbour aforesaid, Manufacturer of the Other Part.

The said Patrick W. Connors agrees that he will work for the said 20 Company under the direction of the Board of Directors in the capacity of Manager of the Company's Sardine Factories at Black's Harbour aforesaid for a period of five years from the date hereof.

And the said Company covenants and agrees to and with the said Patrick W. Connors to employ the said Patrick W. Connors as Manager as aforesaid for a period of five years from the date hereof and to pay the said Patrick W. Connors for his services as such Manager the sum of Ten Thousand Dollars ($10,000) per year payable monthly.

The said Patrick W. Connors covenants and agrees to and with the Company to serve the Company in the capacity aforesaid for the compensa- 30 tion herein specified and under the direction above specified and to devote his entire time and energy exclusively to the Company's business it being understood that said Patrick W. Connors shall be entitled to reasonable holidays.

It is further agreed by and between the parties hereto that the said Patrick W. Connors as such Manager shall have authority to hire and discharge all factory employees of the said Company employed at Black's Harbour aforesaid in connection with the company's Sardine Factories, including office help employed in the factories and in said Manager's private office. 40

In witness whereof, the said Company has executed these presents under its corporate seal and the hands of its duly authorized officers and the

said Patrick W. Connors has hereunto set his hand and seal the day and year first above written.

Exhibits.

"B." Agreement, P. W. Connors and Connors Bros., Limited, 8th November, 1923—*continued.*

CONNORS BROS., LIMITED [L.S.]
By A. N. McLEAN
President.
C. F. INCHES
Secretary.
P. W. CONNORS [L.S.]

Signed, sealed and delivered in the presence of

W. H. HARRISON.

"C." (Defendants' document.)

Letter, Lewis Connors & Sons, Limited, to Connors Bros., Limited.

"C." Letter, Lewis Connors & Sons, Limited, to Connors Bros., Limited, 8th October, 1924.

16 June/37 J.B.M.B.

All orders are accepted and contracts made subject to delays brought about by accidents strikes, fires or other causes beyond our control. In case of the destruction of our factory from any cause, all orders and contracts are to be considered off.

LEWIS CONNORS & SONS, LIMITED
Canners and Packers

Cable Address
Sronnoc
Western Union
Five-Letter Edition

Manufacturer's
License
No. 126

West St. John, N.B., Canada

October 8th, 1924

West Saint John, N.B., October 8th, 1924.

Messrs. Connors Bros., Limited.
Black's Harbour, N.B.

Gentlemen :

We notice your Company are making some very strong statements in their advertisements, for instance, in October 3rd issue of the Canadian Grocer the add is headed—

"Three out of Four Tins of Sardines sold in Canada are packed by Connors Bros."

According to statistics to date which we have at our office, this is not a correct statement, and without a doubt is detrimental to the sales of our Banquet Brand Sardines in Canada.

Exhibits.

"C." Letter, Lewis Connors & Sons, Limited, to Connors Bros., Limited, 8th October, 1924—*continued.*

This is to notify you that unless this statement is withdrawn at once from all your advertisements, we will be obliged to seek damages in the matter.

Yours truly,

LEWIS CONNORS & SONS, LTD.

B. Connors.

BC/M.

BANQUET BRAND SARDINES

"J." Letter Head of Connors Bros., Limited, 9th October, 1924.

"J." (Defendants' document.)

Letter Head of Connors Bros., Limited.

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J—17/6/37 J.B.M.B.

All orders are accepted and contracts made subject to delays brought about by accidents, strikes, fires or other causes beyond our control. In case of the destruction of our factory from any cause, all orders and contracts are to be considered off.

A. N. McLean, President. P. W. Connors, Vice-President

CONNORS BROS. LIMITED.

Telegraphic Address St. George, N.B.

Canners and Packers
Brunswick Brand Sea Foods

Cable Address
"Connors" St. George
A B C Code, 5th Edition
Bentley's
Western Union,
5 Letter Edition

20

Black's Harbour N.B., Canada

October 9, 1924

"G." (Defendants' document.)

Trade Mark, Connors Bros., Limited.

Exhibits.

"G."
Trade Mark, Connors Bros., Limited, 28th March, 1925.

G—17/6/37—J.B.M.B.

CONNORS [Seal]

To the Commissioner of Patents.
Ottawa.

We, Connors Bros., Limited, of Black's Harbor, in the Province of Nova Scotia, in the Dominion of Canada, hereby request you to register in the name of ourselves a Specific Trade Mark to be used in connection with the sale of
10 Fish and Fish Products, which we verily believe is ours on account of having been the first to make use of the same.

We hereby declare that the said Specific Trade Mark was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof.

The said Specific Trade Mark consists of the name CONNORS.

A drawing of the said Specific Trade Mark is hereunto annexed.

Signed at Montreal, Canada, this 10th day of March, 1924, in the presence of the two undersigned witnesses.

CONNORS BROS., LIMITED.
20 By E. J. FETHERSTONHAUGH,
Atty.

Witnesses,
I. MILLER,
D. CORCORAN.

CANADA [Seal]

This is to certify that this Trade Mark (Specific) to be applied to the sale of Fish and Fish Products, and which consists of the name : "CONNORS" as per the annexed pattern and application, has been registered in The Trade Mark Register No. 168, Folio 37482, in accordance with "The Trade Mark and Design Act" by CONNORS BROS., LIMITED, of Black's Harbor, Province
30 of Nova Scotia, on the 28th day of March, A. D. 1925.
Patent and Copyright Office
(Copyright and Trade Mark Branch)
Ottawa, Canada, this 28th day of March, A. D. 1925.

GEO. F. O'HALLORAN,
Commissioner of Patents.
V. Q.

Exhibits.

"H."
Trade Mark,
Connors
Bros.,
Limited, 6th
April, 1925.

"H." (Defendants' document.)

Trade Mark, Connors Bros., Limited.

H—17/6/37—J.B.M.B.

"CONNORS FAMOUS SEA FOOD" [Seal]

To the Commissioner of Patents, Ottawa:

We, Connors Bros., Limited, of Black's Harbor, in the Province of Nova Scotia, in the Dominion of Canada, hereby request you to register in the name of ourselves a Specific Trade Mark to be used in connection with the sale of Fish and Game and products therefrom which we verily believe is ours on account of having been the first to make use of the same. 10

We hereby declare that the said Specific Trade Mark was not in use to our knowledge by any other person than ourselves at the time of our adoption thereof.

The said Specific Trade Mark consists of the Slogan Connors Famous Sea Food.

A drawing of the said Specific Trade Mark is hereunto annexed.

Signed at Montreal, Canada, in the presence of the two undersigned witnesses, March 10, 1924.

CONNORS BROS., LIMITED,
By E. J. Fetherstonhaugh, 20
Atty.

Witnesses:

I. MILLER,

J. O. MITCHELL.

CANADA [Seal]

This is to Certify that this Trade Mark (Specific) to be applied to the sale of Fish and Game and Products therefrom, and which consists of the words: "CONNORS FAMOUS SEA FOOD," as per the annexed pattern and application, has been registered in The Trade Mark Register No. 168, Folio 37532, in accordance with "The Trade Mark and Design Act" by CONNORS 30 BROS., LIMITED, of Black's Harbor, Province of Nova Scotia, on the 6th day of April, A. D. 1925.

Patent and Copyright Office
(Copyright and Trade Mark Branch)
Ottawa, Canada, this 6th day of April, A. D. 1925.

GEO. F. O'HALLORAN,
Commissioner of Patents.
V. Q.

"K." Proposal from Allan and Neil McLean to Lewis Connors and Bernard Connors.

"K." (Defendants' document.)

Proposal from Allan and Neil McLean to Lewis Connors and Bernard Connors.

K—17/6/37—J.B.M.B.

1. We would be favourable to taking over a majority interest in your issued Capital Stock, on the following basis:

EXCHANGE

2. $25,000 Connors Bros., Limited, Preferred for $25,000 Lewis Connors & Sons, Preferred,

3. 30,000 Connors Bros., Limited, Common for $52,500 Lewis Connors & Sons, Common.

4. (This exchange on basis of issued Capital Stock Lewis Connors & Sons $150,000; Treasury Stock to be apportioned pro rata when issued).

5. Pack at the St. John factory this year to be governed by sale of product and financial conditions, but to aim at Fifty Thousand (50,000) or more, Connors Bros., Limited, to co-operate; and in succeeding years pack in all factories to be governed by cost, sale of products and market conditions.

6. With regard to the minority interest in the stock of Lewis Connors & Sons which will remain in the hands of Lewis Connors, Bernard Connors, and their associates, it is agreed that Mr. L. Connors will after the first day of January, 1926, have the option of turning in to the treasury of Connors Bros., Limited, the total of these minority shares held by himself and others, and receive from Connors Bros., Limited, the sum of Thirty-Five Thousand Dollars ($35,000.00), he to be paid as follows:

7. At the rate of Seven Thousand Dollars ($7,000.00) a year, Connors Bros., Limited, to have thirty days' notice in each and every year before payment is required to be made.

8. Lewis Connors to receive Six Per Cent (6%) interest on these deferred payments, from date of notice, and if this option is not exercised, after five years' time, it will simply lapse.

9. Bernard Connors and Allan McLean to be appointed a committee immediately to fix all prices, pending the consummation of this agreement.

10. Allan McLean for the time being to represent Connors Bros., Limited on the board of Lewis Connors & Sons.

11. The board of Connors Bros., Limited, to be enlarged and Bernard Connors to be elected on same.

12. Lewis Connors to be also elected on our board.

13. A contract to be made with Bernard Connors for five years at Five Thousand Dollars ($5,000.00) a year. This contract to be guaranteed by Connors Bros., Limited, and it is understood that Bernard Connors will

Exhibits.

"K." Proposal from Allan and Neil McLean to Lewis Connors and Bernard Connors—*continued.*

have the management of a factory or factories which would be controlled by either company; and in case of an increased responsibility being put on Bernard Connors by death or otherwise, during the period of this contract, he would be entitled to an increase in salary to compensate him for such extra responsibility, as the board of directors may place upon him.

14. All parties entering into this agreement shall endeavour to work together in harmony for the benefit of the stockholders, and not to enter into any outside Sardine Business whatsoever either directly or indirectly, in the Dominion of Canada, unless they all do so together, i.e., they must not have interest in other companies in Canada, or partnerships, or go into business for themselves, packing sardines, individually or independently, without the consent of all parties. 10

15. Lewis Connors to have a contract for five years at Three Thousand Dollars ($3,000.00) a year, to be paid as follows:

$1,500 from Connors Bros., Limited.
1,500 from Lewis Connors & Sons.

16. Lewis Connors' time to be his own as far as Connors Bros., Limited, are concerned, excepting his attendance at directors' meetings and such other meetings where his consultation and advice would be required, provided he is able to attend. 20

17. In case of death or otherwise, conditions may result in which the services of Lewis Connors are needed in a more active capacity, and if it is agreeable to him he is to receive a further salary over and above the amount named, to compensate him for the extra responsibility.

"F." Lewis Connors & Sons, Limited, Balance Sheet, 30th April, 1925.

"F." (Defendants' document.)

Lewis Connors & Sons, Limited, Balance Sheet, April 30th, 1925.

F—16 June, '37—J.B.M.B.

ASSETS

Leased Lands and Water Lots		$3,500·00	
Dock		35,088·00	
Building	$33,994·68		
Machinery and Equipment	75,612·28		
		109,606·96	
Boats		27,472·70	
Canadian Appraisal Co. Valuation and Addition to Date			$175,667·66

30

Exhibits.

"F."
Lewis Connors & Sons, Limited, Balance Sheet, 30th April, 1925.
—*continued.*

Line	Item			
	CURRENT :			
	Cash on hand and in Bank - - - - - -		$5,469·35	
	Accounts Receivable—Trade - - - - -		6,771·43	
	Fire Insurance Cheques Receivable - - -		3,027·45	
	Manufactured Stock, Saint John - - - -		3,238·20	
	Manufactured Stock, Outside Points - - -		8,506·89	
	Inventory, Oil, Tin and Supplies - - - -		5,017·45	
				32,030·77
	PREPAID CHARGES :			
10	Insurance - - - - - - - - -		$1,541·00	
	Incorporation Expenses and Trade Marks - -		742·25	
	Advertising Materials - - - - - - -		1,500·00	
	Factory Expense, 1925 Preparation - - -		1,000·00	
				4,783·25
				$212,481·68
	LIABILITIES :			
	Bills Payable - - - - - - - -		$709·65	
	Accounts Payable - - - - - - -		5,540·31	
	Accrued Wages - - - - - - - -		280·00	
20	Accrued Interest - - - - - - - -		400·00	
	B. Connors Loan Account - - - - - -		1,076·46	
	Lewis Connors Credit Balance - - - - -		469·44	
	Sales Tax - - - - - - - - -		499·10	
	Repairs Fire Account Payable - - - - -		2,323·73	
	Bank of Nova Scotia, Loan Account - - -		23,000·00	
	Mortgage Payable - - - - - - -		25,000·00	
				59,298·69
	Fixed :			
	Capital Stock, Preferred - - - - - -		$50,000·00	
30	Capital Stock, Common - - - - - -		100,000·00	
				150,000·00
	Surplus Account			
	Dec. 31st, Credit Balance - - - - - -		$6,715·82	
	Less :			
	Salary, Lewis Connors to date -	$3,000·00		
	Sundry Charges Capital Account	1,022·97		
			4,022·97	
			$2,692·85	
	Net Profit 4 Months to April 30th - - - -		490·14	
40				3,182·99
				$212,481·68

Certified Correct,

P. F. BLANCHET, C.A.,
Auditor.

Exhibits.

"F."
Lewis Connors & Sons, Limited, Balance Sheet, 30th April, 1925 —*continued.*

LEWIS CONNORS & SONS, LIMITED

Trading Account

Dec. 31st, '24 to April 30th, '25.

CREDIT :		
Sales	$54,576·27	
DEBIT :		
Inventory Dec. 31st, '24	$53,990·00	
Cost of Factory Expense	1,950·84	
	$55,940·84	
Inventory Apr. 30th, '25	11,745·09	
		44,195·75
		$10,380·52
Sundry		60·00
Net Profit Canned Goods Trading Account		105·20
Net Profit Fire Loss Account		4,000·00
		$14,545·72
DEBIT :		
Shipping Freight Out	$4,262·52	
Sales Commission	2,424·31	
Advertising	500·54	
Telephone and Telegrams	237·78	
Postage	89·85	
Storage	414·93	
Excise and Stationery	204·29	
Interest and Discount	1,737·51	
Insurance	1,330·65	
General Expense	587·39	
Office Salaries	1,599·00	
Taxes	505·26	
Bad Debts	161·55	
		14,055·58
Net Profits 4 Months		$490·14

Certified Correct,

P. F. Blanchet, C.A.,
Auditor.

10
20
30

4. (Plaintiff's document.)

Exhibits.

Agreement, Lewis Connors and Bernard Connors, A. Neil McLean, and Allan McLean, 30th April, 1925.

Agreement, Lewis Connors and Bernard Connors, A. Neil McLean, and Allan McLean.

15/6/37—J.B.M.B.

THIS AGREEMENT made this 30th day of April, A. D. 1925, BETWEEN Lewis Connors of Black's Harbour, in the County of Charlotte, in the Province of New Brunswick, Merchant, and Bernard Connors of the City of Saint John, in the Province aforesaid, Manufacturer, of the first part; and Neil McLean of the City of Saint John aforesaid, Merchant, and Allan
10 McLean of Black's Harbour aforesaid, Merchant, of the second part.

The parties of the first part agree to sell, and the parties of the second part agree to buy $25,000.00 par value preferred stock, and $52,500.00 par value common stock of Lewis Connors & Sons, Limited, for the consideration and on the conditions following :

(1) The parties of the second part will deliver to the parties of the first part $25,000.00 par value preferred stock and $30,000.00 par value common stock of Connors Bros., Limited.

(2) With reference to the remaining outstanding issued capital stock of Lewis Connors & Sons, Limited, $47,500.000 par value common stock, and
20 $25,000.00 par value preferred stock, the parties of the second part will procure a contract to be executed by Connors Bros., Limited, with the stockholders of Lewis Connors & Sons, Limited, providing that Connors Bros., Limited, W.H.H. will at any time within five years from the 1st day of January, 1926, and on demand from any of the stockholders of Lewis Connors & Sons, Limited, who shall at the time of such demand hold any part of the said remaining outstanding issued capital stock of the said Lewis Connors & Sons, Limited, purchase the holdings of such stockholder so making such demand on the basis of $35,000.00 cash for $72,500.00 capital stock, either preferred or common, of Lewis Connors & Sons, Limited.
30 Such cash to be payable one-fifth thirty days from the date of the demand, and the remaining four-fifths in four equal annual payments with interest at 6% per annum on the balance unpaid, such interest on the balance unpaid to be payable annually with each instalment. The first of such instalments to be payable one year from the date when the first instalment of purchase price becomes due. In the event of any purchase as above in this paragraph set forth, the stockholder or stockholders of Lewis Connors & Sons, Limited, whose shares are so purchased shall deposit the certificate for same with a trustee to be approved of by said Connors Brothers, Limited, to be held in trust for said Connors Bros., Limited,
40 until the purchase is completed, and in the interim, and until completion as aforesaid, dividends, if any, on the said shares shall be payable to the said Connors Bros., Limited.

(3) The parties of the second part will procure a contract to be executed W.H.H. by Connors Bros. Limited, with Lewis Connors providing

Exhibits.

4.
Agreement, Lewis Connors and Bernard Connors, A. Neil McLean, and Allan McLean. 30th April, 1925—*continued.*

and guaranteeing that Lewis Connors shall for a period of five years from the making of such contract be paid a salary of fifteen hundred dollars per annum for his services to Connors Bros., Limited, and fifteen hundred dollars per annum for his services to Lewis Connors & Sons, Limited, such amounts to be payable whether Lewis Connors & Sons, Limited, operate a factory or not, and the services to be rendered by Lewis Connors to each company to be his attendance at directors meetings and such other meetings as he may be requested to attend to give consultation and advice, provided he is able to attend; and further provided that the said Lewis Connors shall render the same service to Lewis Connors & Sons, Limited, as heretofore without extra compensation, and any further services required to be rendered by him shall only be rendered by him when authorized by the Board of Directors of Lewis Connors & Sons, Limited, and for such further services, he shall be paid a further salary over and above the amount named to compensate him for the extra work and responsibility.

(4) Allan McLean and Bernard Connors shall be a committee to arrange with the Bank of Nova Scotia, the further financing of the said Lewis Connors & Sons, Limited, and Connors Bros., Limited, will contract with Lewis Connors and Bernard Connors to relieve and discharge them from all personal liability in respect to the account of Lewis Connors & Sons, Limited, with the Bank of Nova Scotia by the first day of June, 1926.

(5) The Board of Directors of Lewis Connors & Sons, Limited, shall consist of five persons, of whom the parties hereto of the second part shall have the right to elect three, one of whom shall be Allan McLean. Lewis Connors and Bernard Connors shall be continued as directors of Lewis Connors & Sons, Limited, until they exercise their option to sell their stock in Lewis Connors & Sons, Limited, to Connors Bros., Limited, and until such stock is fully paid for as above provided.

(7) The pack at the factory of Lewis Connors & Sons, Limited, this year shall be governed by sale of product and financial conditions, but to aim at Fifty Thousand cases or more—Connors Bros., Limited, to co-operate, and in succeeding years, the pack in all factories to be governed by costs, sale of products and market conditions, but all sales profits on different brands of W.H.H. sardines shall be credited to the company now owning such brands.

(8) Bernard Connors, representing Lewis Connors & Sons, Limited, and Allan McLean representing Connors Bros., Limited, shall be a committee immediately to arrange for prices pending the carrying out of this agreement.

(9) All parties hereto agree to work together for the benefit of the stockholders of Connors Bros., Limited, and Lewis Connors & Sons, Limited, and will not, either directly or indirectly, engage in any other sardine business W.H.H. whatsoever in the Dominion of Canada nor directly or indirectly use the brands of either Connors Bros., Limited, or Lewis Connors & Sons, Limited, W.H.H. in the Dominion of Canada or elsewhere nor, for a period of ten years from the date hereof, use the name of Connors in connection with sardine business in any country whatsoever.

Exhibits.

4.
Agreement, Lewis Connors and Bernard Connors, A. Neil McLean, and Allan McLean, 30th April, 1925—*continued.*

(10) This agreement and everything herein contained is conditional on the acceptance and ratification of the same by Connors Bros., Limited, and it is the intention and meaning of these Presents, that these Presents shall constitute an option given by the parties hereto of the first part to the parties hereto of the second part upon the said $25,000.00 par value preferred stock, and $52,500.00 par value common stock of Lewis Connors & Sons, Limited, for the considerations and the conditions contained in this agreement which option shall expire on the thirtieth day of May, A. D. 1925, unless the parties hereto of the second part or their assigns shall before that time give notice
10 in writing of its acceptance, in which case the transaction is to be completed within one month thereafter, and the consideration for the said option is the receipt by the parties hereto of the first part from the parties hereto of the second part of the sum of One Dollar and other good and valuable considerations, which is hereby acknowledged.

(11) Lewis Connors & Sons, Limited, shall enter into a contract with Bernard Connors to employ him in the management of its factory for a period of five years from date of such contract at a salary of Five Thousand Dollars per annum, and this contract shall be guaranteed by Connors Bros., Limited, PROVIDED, however, that while receiving such salary the said Bernard
20 Connors shall work as manager of any factory or factories of Connors Bros., Limited, or Lewis Connors & Sons, Limited, which the parties hereto of the second part may require, and in case he is manager of two factories actually in operation at the same time, he shall receive for the time he is employed in such dual capacity an increased compensation at the rate of two thousand five hundred dollars per annum.

W.H.H. (12) No delivery of shares shall be made until all contracts provided for are completely executed.

(13) All contracts provided for hereunder shall have effect as of the date of delivery of the shares set forth in Paragraph 12 hereof.

30 (14) This agreement is made on the basis of $150,000.00 par value issued capital stock of Lewis Connors & Sons, Limited, and it is agreed that treasury stock of said company shall be apportioned to the shareholders of said company *pro rata* when issued according to their holdings.

In witness whereof, the parties hereto of the first part have hereunto set their respective hands and seals the day and year first above written.

LEWIS CONNORS [L.S.]
BERNARD CONNORS [L.S.]
A. N. MCLEAN [L.S.]
A. M. A. MCLEAN [L.S.]

40 Signed, sealed and delivered in the presence of

W. H. HARRISON.

Exhibits.

"D."
Voting
Trust
Agreement,
Bernard
Connors et
al and The
Eastern
Trust
Company,
23rd May,
1925.

"D." (Defendants' document.)

Voting Trust Agreement, Bernard Connors et al and The Eastern Trust Company.

16 June 37—J.B.M.B.

This Agreement made this 23rd day of May, A. D. 1925, between Bernard Connors of the City of Saint John, in the City and County of Saint John, in the Province of New Brunswick, Manufacturer, of the first part; A. Neil McLean of the City of Saint John aforesaid, Merchant, and Allan McLean of Black's Harbour, in the County of Charlotte and Province aforesaid, Manufacturer, of the second part; and The Eastern Trust Company, an incorporated company having a Branch Office at the City of 10 Saint John aforesaid, hereinafter called the Trustee of the third part;

Whereas, the parties of the first and second parts are shareholders in Connors Bros., Limited, a company duly incorporated under the Laws of the C.F.I. Province of New Brunswick, and have agreed to transfer 360 shares of the capital stock of Connors Bros., Limited, to the trustee, to the intent that such stock shall be voted in one block by the said A. Neil McLean after consultation with the other parties to this agreement, the said A. Neil McLean undertaking to vote as he conscientiously considers in the best mutual interests of all parties hereto.

Now this agreement witnesseth that for valuable consideration, the 20 receipt whereof is hereby acknowledged by the parties of the first and second parts, and the mutual covenants and agreements hereinafter contained, the parties of the first and second parts hereby assign and transfer unto the Trustee the number of shares of stock of Connors Bros., Limited, aforesaid set opposite their respective names to be held by the Trustee until the first day of June, A. D. 1928 (and thereafter until anyone of the parties hereto gives three months notice in writing to the other parties hereto of his desire to cancel this agreement), in trust, however, for the parties of the first and second parts respectively according to the number of shares so transferred by each of them; subject to the following terms and conditions: 30

(1) The Trustee shall give an irrevocable proxy to the said A. Neil McLean to vote all of the said shares so held by it at any and all meetings of the shareholders of Connors Bros., Limited, and at all elections of directors during such period as though the Trustee were the absolute owner of the said shares.

(2) Each of the parties hereto shall be at liberty to sell any one or more of his shares so transferred to the Trustee, but the party of the first part shall not sell any of his shares without first offering them to the parties of the second part at the market price for a period of thirty days, and neither of the parties of the second part shall sell any of his shares without first offering them to 40 the party of the first part at the market price for a period of thirty days. If during such period of thirty days the said shares so offered are not purchased by the party or parties to whom they are offered, the party desiring to sell shall be at liberty to sell his shares on the open market, and this

Exhibits.

"D."
Voting Trust Agreement, Bernard Connors et al and The Eastern Trust Company, 23rd May, 1925—*continued.*

agreement shall be C.F.I. cancelled as to the shares so sold, and if part only of the shares of one of the parties hereto is sold as above set forth, this trust shall continue as to the balance of the shares held by the parties hereto.

(3) This Agreement is made on the condition that the said A. Neil McLean will vote the stock so under proxy to him in support of the carrying out of the agreement between Lewis Connors and the said Bernard Connors of the first part, and the said A. Neil McLean and Allan McLean of the second part, bearing date the 30th day of April, A.D. 1925, and also that 10 if Patrick W. Connors shall cease to manage the sardine factory of Connors Bros., Limited, that the said A. Neil McLean and Allan McLean will give their support to the obtaining of the position for the said Bernard Connors at a C.F.I. salary of at least $7,500·00 per annum and also that the said A. Neil McLean will vote the said stock in favour of continuing the operation of the factory of Lewis Connors & Sons, Ltd., so long as same is being operated at a profit and will also vote in favour of Lewis Connors and Bernard Connors as directors of Connors Bros., Limited.

(4) In the event of cancellation or expiration of this agreement, the Trustee shall re-transfer to the parties hereto, or to their representatives or 20 assigns, the shares of stock respectively transferred by the said parties to the Trustee.

(5) The remuneration to the Trustee for services under this agreement shall be paid by the parties hereto of the second part.

(6) The Trustee shall receive the dividends that may be declared from time to time upon the shares so transferred to it by the parties of the first and second parts, and shall without charge or compensation immediately pay out the same to the parties transferring such shares, or their representatives or assigns, as their respective interests may from time to time appear.

30 (7) The Trustee accepts the trusts hereby created and covenants and agrees that it will give the said proxy to the said A. Neil McLean as aforesaid.

(8) The Trustee may resign from this Trust at any time and in the event of such resignation a new Trustee shall be appointed by mutual agreement between the parties of the first and second parts.

9. It is agreed that the said stock shall be voted in one block by the said A. Neil McLean, who undertakes to vote as he conscientiously considers in the best interests of all parties hereto.

10. In case the said Bernard Connors is unable to obtain a release from 40 the Bank of Nova Scotia where 83 of his preference shares in Connors Bros., Limited, are deposited as collateral security, the said Bernard Connors undertakes to give the said A. Neil McLean an irrevocable proxy to vote the said stock on the terms of this agreement, and when the said stock is released C.F.I. by said Bank it will be transferred to the Trustee and will then be subject to the terms of this agreement; if the said Bank disposes of the

Exhibits.

"D."
Voting Trust Agreement, Bernard Connors et al and The Eastern Trust Company, 23rd May, 1925—*continued*

said stock, the said A. Neil McLean undertakes to transfer to the said Bernard Connors sufficient stock to enable him to qualify as a director of Connors Bros., Limited.

11. This agreement is conditional upon the acceptance by the said A. Neil McLean and Allan McLean of the option contained in the said agreement of April 30th, 1925, recited in paragraph 4 hereof.

In witness whereof, the parties hereto of the first and second parts have hereunto set their hands and seals, and the Trustee has caused its common corporate seal to be hereunto affixed and these presents to be signed by its duly authorized officers the day and year first above written 10

BERNARD CONNORS [L.S.]
180 Shares.

A. NEIL MCLEAN [L.S.]
130 Shares.

A. M. A. MCLEAN [L.S.]
50 Shares.

Signed, sealed and delivered in the presence of

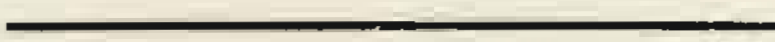
C. F. INCHES.

The Eastern Trust Company [L.S.] 20

F. P. STARR, Chairman.

C. H. FERGUSON, Manager.

As to The Eastern Trust Company,
W. H. HARRISON.



3. (Plaintiff's document.)

Exhibits.

3.
Agreement, Connors Bros., Limited, with Lewis Connors and Bernard Connors, 9th June, 1925.

Agreement, Connors Bros., Limited, with Lewis Connors and Bernard Connors.

15/6/37—J.B.M.B.

This Agreement made the ninth day of June, in the year of our Lord one thousand nine hundred and twenty-five, Between Connors Bros., Limited, an incorporated company duly incorporated by Letters Patent under the provisions of the New Brunswick Companies' Act, 1916, of the first part, and Lewis Connors of Black's Harbour in the County of Charlotte in the Province of New Brunswick, canner, and Bernard Connors of the
10 City of Saint John in the Province aforesaid, canner, of the second part.

Whereas, there is at present issued and outstanding $100,000.00 par value common stock of Lewis Connors & Sons, Limited, and $50,000.00 par value preferred stock of Lewis Connors & Sons, Limited.

And whereas, by contract dated the 30th day of April, A.D. 1925, and made between the said Lewis Connors and Bernard Connors of the first part and A. Neil McLean and Allan M. A. McLean of the second part, the said Lewis Connors and Bernard Connors agreed to sell to the said A. Neil McLean and Allan M. A. McLean, $25,000.00 par value preferred stock, and $52,500.00 par value common stock of the said Lewis Connors & Sons,
20 Limited, upon certain considerations and conditions in the said contract contained, among the said conditions being the acceptance and ratification of the said contract by the said Connors Bros., Limited.

Now this agreement witnesseth that the said Connors Bros., Limited, for certain good and valuable considerations it thereunto moving, doth hereby agree with the said Lewis Connors and Bernard Connors as follows :

(1) That with reference to the remaining outstanding issued capital stock of Lewis Connors & Sons, Limited, namely $47,500.00 par value common stock, and $25,000.00 par value preferred stock, the said Connors Bros., W.H.H. Limited, will at any time within five years from the first
30 day of January A.D. 1926, and on demand from any of the stockholders of Lewis Connors & Sons, Limited, who shall at the time of such demand hold any part of the said remaining outstanding issued capital stock of said Lewis Connors & Sons, Limited, purchase the holdings of such stockholder so making such demand on the basis of $35,000.00 cash for $72,500.00 capital stock either preferred or common, of Lewis Connors & Sons, Limited, such cash to be payable, one-fifth thirty days from the date of the demand, and the remaining four-fifths in four equal annual payments with interest at six per centum per annum, on the balance unpaid, such interest on the balance unpaid to be payable annually with each instalment. The first of such
40 four instalments to be payable one year from the date when the first instalment of purchase price becomes due. In the event of any purchase as above in this paragraph set forth the stockholder or stockholders of Lewis Connors & Sons, Limited, whose shares are so purchased shall deposit the certificate for same with a trustee to be approved of by said

Exhibits.

3.
Agreement, Connors Bros., Limited, with Lewis Connors and Bernard Connors, 9th June, 1925—*continued.*

Connors Bros., Limited, to be held in trust for said Connors Bros., Limited, until the purchase is completed, and in the interim, and until completion as aforesaid, dividends, if any, on the said shares shall be payable to said Connors Bros., Limited.

(2) The said Connors Bros., Limited, hereby undertakes to relieve and discharge the said Lewis Connors and Bernard Connors from all personal liability in respect to the account of said Lewis Connors & Sons, Limited, with the Bank of Nova Scotia, by the first day of June, A.D. 1926.

(3) The said Connors Bros., Limited, agrees with the said Lewis Connors and Bernard Connors that it will co-operate in the endeavour to have the pack at the factory of Lewis Connors & Sons, Limited, this year, which shall be governed by the sale of product and financial condition, aimed at 50,000 cases or more and in succeeding years it is agreed between the parties hereto that the pack in all factories is to be governed by costs, sale of the products and market conditions. All sales profits on different brands of sardines shall be credited to the Company now owning such brand.

(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, W.H.H. 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.

This Agreement is made on the basis of $150,000.00 par value issued capital stock of Lewis Connors & Sons, Limited, and it is agreed by the W.H.H. parties hereto that treasury stock of said Lewis Connors & Sons, Limited, shall be apportioned to the shareholders of the said company *pro rata* when issued according to their holdings.

In witness whereof the said Connors Bros., Limited, has caused its corporate seal to be hereunto affixed, attested by its proper officers in that behalf duly authorized, and the said Lewis Connors and Bernard Connors have set their hands and seals respectively the day and year first herein above written.

CONNORS BROS., LIMITED, [L.S.]
BY A. NEIL MCLEAN, President.
LEWIS CONNORS, [L.S.]
BERNARD CONNORS. [L.S.]

Signed, sealed, and delivered in the presence of
W. H. HARRISON.

Exhibits.

1. Agreement, Lewis Connors & Sons, Limited, with Bernard Connors, 9th June, 1925.

1. (Plaintiff's document.)

Agreement, Lewis Connors & Sons, Limited, with Bernard Connors.

9 June, 1925.

15/6/37, J.B.M.B.

This Agreement made the ninth day of June in the year of our Lord one Thousand nine hundred and twenty-five, BETWEEN Bernard Connors of Black's Harbour in the County of Charlotte in the Province of New Brunswick, canner, of the first part; Lewis Connors and Sons, Limited, a company duly incorporated under the New Brunswick Joint Stock Companies Act, 10 1916, with head office at the City of Saint John in the Province aforesaid, of the second part; and Connors Bros., Limited, a company duly incorporated by letters patent under the provisions of the New Brunswick Companies' Act, 1916, with head office at Black's Harbour aforesaid, of the third part.

Witnesseth that the said Bernard Connors agrees that he will work for said Lewis Connors & Sons, Limited, under direction of a Board of Directors in the capacity of manager of the company's sardine factory at the City of Saint John aforesaid for a period of five years from the date hereof, and the said Lewis Connors & Sons, Limited, covenants and agrees to and with the said Bernard Connors to employ the said Bernard Connors as manager afore- 20 said for a period of five years from the date hereof and to pay the said Bernard Connors for his services as such manager the sum of $5,000.00 per annum payable monthly. The said Connors Bros., Limited, hereby guarantee to the said Bernard Connors payment by the said Lewis Connors & Sons, Limited, to the said Bernard Connors the said salary of $5,000.00 as above set forth.

The said Bernard Connors covenants and agrees to and with the said Lewis Connors & Sons, Limited, and the said Connors Bros., Limited, that he will serve the said Lewis Connors & Sons, Limited, in the capacity aforesaid for the compensation herein specified, under the direction above specified, 30 (W.H.H.) it being understood however, that while receiving such salary as above set forth, the said Bernard Connors shall work as manager of any factory or factories of Connors Bros., Limited, or Lewis Connors & Sons, Limited, which the Board of Directors of said Lewis Connors & Sons, Limited, may require him to do and in case he is manager of two factories actually in operation at the same time he shall receive for the time he is employed in such dual capacity, an increased compensation at the rate of $2,500.00 per annum.

(W.H.H.) It being further understood that the said Bernard Connors is to be allowed reasonable holidays.

40 In witness whereof the said Connors Bros., Limited, and Lewis Connors & Sons, Limited, have caused their corporate seal to be hereunto

Exhibits.

1, Agreement, Lewis Connors & Sons, Limited, with Bernard Connors, 9th June, 1925—*continued.*

affixed and these presents to be executed by their proper officers in that behalf and the said Bernard Connors has hereunto set his hand and seal the day and year just above written.

BERNARD CONNORS,
LEWIS CONNORS & SONS, LTD.
Per LEWIS CONNORS (Pres.)

Signed, and sealed in the presence of W. H. HARRISON.

J. EDWIN CONNORS (Secy.)
CONNORS BROS., LIMITED,
Per A. N. MCLEAN, President.

"E." Letter, Barnhill, Sanford & Harrison to A. Neil McLean and Allen McLean (with copy letters from J.H. Driscoll and James T. McCormick to Bernard Connors.) 15th December, 1925.

"E." (Defendants' document.) 10

Letter, Barnhill, Sanford & Harrison to A. Neil McLean and Allen McLean, with copy letters from J. H. Driscoll and James T. McCormick to Bernard Connors.

E—16 June, '37—J.B.M.B.

TELEPHONE MAIN 2600 CABLE ADDRESS "BARNHILL"

BARNHILL, SANDFORD & HARRISON

C. F. SANFORD, K.C. BARRISTERS, SOLICITORS, ETC.
Master Supreme Court

W. H. HARRISON, K.C. 39 Princes Street
G. G. ANGLIN SAINT JOHN, N. B.
ARTHUR ANGLIN 20

Counsel :
A. P. BARNHILL, K.C., D.C.L.

December 15th, 1925.

To A. NEIL MCLEAN, ESQ.,
53 King Street,
St. John, N. B.

And to—
ALLEN MCLEAN, ESQ.,
c/o Connors Bros., Ltd.
Black's Harbour, 30
Charlotte Co., N. B.

Gentlemen :

In accordance with the Voting Trust Agreement made by you and Mr. Bernard Connors with The Eastern Trust Company dated May 23rd, 1925, we beg on behalf of Mr. Connors to offer to you his shares covered by this Agreement, namely, One Hundred (100) shares common stock of Connors Bros., Limited, and Eighty (80) or Eighty-three (83) shares preferred stock of Connors Bros., Limited.

Exhibits.

"E."
Letter. Barnhill, Sanford & Harrison to A. Neil McLean and Allen McLean (with copy letters from J. H. Driscoll and James T. McCormick to Bernard Connors.) 15th December, 1925—*continued.*

We offer you this stock at the price of One Hundred and Fifty Dollars ($150.00) per share for the common stock and One Hundred and Sixty Dollars ($160.00) per share for the preferred stock, and failing your acceptance of this offer within thirty days, Mr. Connors proposes to sell these shares on the open market.

The price at which these shares are offered is considered the market price, because Mr. Connors holds two offers for the purchase of this stock at the prices named. Copies of these offers are attached hereto.

Yours truly,
10 BARNHILL, SANFORD & HARRISON.

Encl.

(Copy.)

West Saint John, N. B., Dec. 2nd, 1925.

BERNARD CONNORS, Esq.,
West Saint John, N. B.

Dear Sir,

I understand you have One Hundred and Eighty-three shares of Connors Bros., Limited, stock for sale. One Hundred shares of this being Common and Eighty-three shares preferred.

20 At the present time I can offer you One Hundred and Fifty Dollars for the Common and One Hundred and Sixty Dollars for the preferred, providing you accept the offer within six weeks from this date.

Yours very truly,
(Sgd.) J. H. DRISCOLL.

(Copy.)

283 City Road,
St. John, N. B.,
Dec. 8, '25.

BERNARD CONNORS, Esq.

30 Dear Sir,

Regarding our conversation re stock you had for sale, I can offer you ($150) one hundred and fifty dollars per share for Connors Bros., Ltd., Common and ($160) one hundred and sixty dollars per share for Connors Bros., Ltd., preferred.

I would like to know at an early date whether or not you accept.

Yours truly,
(Sgd.) JAMES T. MCCORMICK.

Exhibits.

5. Agreement, Bernard Connors, Lewis Connors & Sons, Limited, Connors, Bros., Limited, Neil McLean and Allan McLean. 2nd October, 1926.

5. (Plaintiff's document.)

Agreement, Bernard Connors, Lewis Connors & Sons, Limited, Connors, Bros., Limited, Neil McLean and Allan McLean.

15/6/37—J.B.M.B.

This Agreement made this second day of October in the year of our Lord one thousand nine hundred and twenty-six, Between Bernard Connors of Black's Harbour, Charlotte County, New Brunswick, Canner, of the first part, Lewis Connors & Sons, Limited, of the second part, Connors Bros., Limited, of the third part, and Neil McLean of the City of Saint John in the province of New Brunswick, Merchant, and Allan McLean of Black's Harbour, Merchant, of the fourth part.

Whereas, by agreement bearing date the ninth day of June, A.D. 1925, made between the party of the first part, the party of the second part, and the party of the third part, the said party of the second part covenanted to employ the party of the first part for the term and at the salary therein mentioned.

And whereas, disputes have arisen between the parties hereto under said agreement and outside thereof and they are desirous to terminate the said employment agreement and arrange said disputes upon the terms and as hereinafter provided.

Now therefore it is mutually covenanted and agreed between the parties hereto as follows :—

(1) The said party of the first part agrees forthwith to assign and transfer to the party of the third part, all the shares of stock namely one hundred and seventy-two shares, held by him in Lewis Connors & Sons, Limited.

(2) The said party of the first part releases the parties of the second and third parts from all claims and demands he has against them or either of them under or arising out of the said employment agreement and agrees that the said employment agreement shall be terminated. He also releases the parties of the second, third and fourth parts from all claims and demands of every nature and description which he has against them or either of them or which hereafter he may have against them or either of them by reason of anything to the date of these presents but not including any rights the party of the first part may have as a shareholder of Connors Bros., Limited, to share in dividends.

(3) 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.

(4) The parties of the second and third parts hereby release the said party of the first part from any obligation he is under to them or either of

them under the said employment agreement dated the ninth day of June, A.D. 1925.

Exhibits.

5. Agreement, Bernard Connors, Lewis Connors & Sons, Limited, Connors, Bros., Limited, Neil McLean and Allan McLean. 2nd October, 1926—*continued.*

(5) The parties of the second, third and fourth parts hereby release the said party of the first part 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 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
10 first part in connection with the business of the said Lewis Connors & Sons, Limited, or the purchase of an interest therein or stock thereof.

(6) The said party of the third part also further agrees for the considerations aforegoing that it will forthwith on the transfer of said stock as aforesaid and the execution of these presents pay to the said party of the first part the sum of Eleven Thousand Four Hundred and Sixteen Dollars of lawful money of Canada.

(7) The said party of the third part also agrees that it will on demand of any stockholder in Lewis Connors & Sons, Limited, purchase the shares of the capital stock of Lewis Connors & Sons, Limited, held by such share-
20 holder on the terms set out in paragraph one of an agreement bearing date the ninth day of June, A.D. 1925, and made between the party of the third part, one Lewis Connors, and the party of the first part.

This agreement shall enure to the benefit of and be binding upon the parties hereto, their respective executors, administrators, successors and assigns.

In witness whereof the parties hereto have executed these presents the day and year first hereinabove written.

BERNARD CONNORS [L.S.]

B. M. Hill, [L.S.]
30 President of Lewis Connors & Sons, Ltd.

A. M. A. McLean,
Vice-President.

A. Neil McLean, [L.S.]
President, Connors Bros., Ltd.

A. M. A. McLean,
Treasurer.

A. NEIL MCLEAN. [L.S.]

A. M. A. MCLEAN. [L.S.]

Signed, sealed and delivered in
40 the presence of

C. F. INCHES,
to all signatures.

Exhibits.

2. Agreement, Lewis Connors & Sons, Limited, Connors Bros., Limited, Lewis Connors, A. Neil McLean and Allan McLean, 2nd October, 1926.

2. (Plaintiff's document.)

Agreement, Lewis Connors & Sons, Limited, Connors Bros., Limited, Lewis Connors, A. Neil McLean and Allan McLean.

15/6/37—J.B.M.B.

This Agreement made this second day of October, in the year of our Lord one thousand nine hundred and twenty-six, between Lewis Connors & Sons, Limited, an incorporated company, of the City of Saint John, in the Province of New Brunswick, of the first part; Connors Bros., Limited, an incorporated company, of Black's Harbour in said Province, of the second part; Lewis Connors, of the City of Saint John aforesaid, merchant, of the third part; and A. Neil McLean of the City of Saint John aforesaid, merchant, and Allan McLean of Black's Harbour aforesaid, merchant, of the fourth part;

Whereas, by agreement bearing even date herewith made between one Bernard Connors of the first part, the party of the first part hereto, of the second part, the party of the second part hereto, of the third part, and the parties of the fourth part hereto, of the fourth part, a copy of which agreement is hereunto annexed marked with the letter "A" the parties of the second, third and fourth parts in the said agreement hereto annexed, released the said Bernard Connors from any claim or demands which they or either of them have or may have against the said Bernard Connors by reason of any shortage in inventory, misrepresentation, or other improper conduct of the said Bernard Connors in connection with the business of the said Lewis Connors & Sons, Limited, or the purchase of an interest therein or stock thereof, or by reason of anything to the day of the date of the said agreement hereto annexed;

Now this Agreement Witnesseth, that in consideration of the agreement herein contained, the parties hereto agree with each other as follows:

The parties hereto of the first, second and fourth parts hereby release the party of the third part from any claim or demands that they or either of them have or may have against the party of the third part hereto by reason of any alleged shortage in inventory, misrepresentation or other improper conduct of the party of the third part hereto in connection with the business of said Lewis Connors & Sons, Limited, or the purchase of an interest therein, or stock thereof.

It is mutually agreed between the parties hereto that nothing in the said agreement hereto annexed marked "A" and in particular but in nowise varying the generality of the aforegoing the general release to the said Bernard Connors from all claims, shall release or discharge or operate to release or discharge the party hereto of the third part from liability under the contracts, agreements and covenants on his part to be performed, contained in an agreement bearing date the 30th day of April, A. D. 1925, and made between the said Bernard Connors, the party hereto of the third part, and the parties hereto of the fourth part, and an agreement bearing date the 9th day of

June, A. D. 1925, and made between the party hereto of the second part and the said Bernard Connors and the party hereto of the third part, but the said agreements of April 30th, 1925, and June 9th, 1925, so far, as all the parties hereto are concerned, shall be of the same force and effect as if the said agreement hereto annexed marked "A" had not been made.

This agreement shall enure to the benefit of and be binding upon the parties hereto, their respective executors, administrators, successors and assigns.

In Witness whereof, the parties hereto have executed these Presents 10 the day and year first hereinabove written.

B. M. Hill, [L. S.]
President of Lewis Connors & Sons, Ltd.

A. M. A. McLean [L. S.]
Vice-President.

A. Neil McLean [L. S.]
President Connors Brothers.

A. M. A. McLean [L. S.]
Treasurer.

Lewis Connors [L. S.]

20 A. Neil McLean [L. S.]

A. M. A. McLean [L. S.]

Signed, sealed and delivered in the presence of

C. F. Inches,
to all signatures.

"A" C.F.I.

This Agreement made this second day of October, in the year of our Lord one thousand nine hundred and twenty-six, Between Bernard Connors of Black's Harbour, Charlotte County, New Brunswick, Canner, 30 of the First Part, Lewis Connors & Sons, Limited, of the Second Part, Connors Bros., Limited, of the Third Part and Neil McLean of the City of Saint John, in the Province of New Brunswick, Merchant, and Allan McLean of Black's Harbour, Merchant, of the Fourth Part.

Whereas, by agreement bearing date the ninth day of June, A.D. 1925, made between the Party of the first part, the party of the second part and the party of the third part, the said party of the second part covenanted to employ the party of the first part for the term and at the salary therein mentioned.

And whereas, disputes have arisen between the parties hereto under 40 said agreement and outside thereof and they are desirous to terminate the said employment agreement and arrange said disputes upon the terms and as hereinafter provided.

Exhibits.

2.
Agreement, Lewis Connors & Sons, Limited, Connors Bros., Limited, Lewis Connors, A. Neil McLean and Allan McLean, 2nd October, 1926—*continued.*

Now therefore it is mutually covenanted and agreed, between the parties hereto as follows:

(1) The said party of the first part agrees forthwith to assign and transfer to the party of the third part, all the shares of stock, namely, one hundred and seventy-two shares, held by him in Lewis Connors & Sons, Limited.

(2) The said party of the first part releases the parties of the second and third parts from all claims and demands he has against them or either of them under or arising out of the said employment agreement and agrees that the said employment agreement shall be terminated. He also releases 10 the parties of the second, third and fourth parts from all claims and demands of every nature and description which he has against them or either of them or which hereafter he may have against them or either of them by reason of anything to the date of these presents but not including any rights the party of the first part may have as a shareholder of Connors Bros., Limited, to share in dividends.

(3) 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 20 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.

(4) The parties of the second and third parts hereby release the said party of the first part from any obligation he is under to them or either of them under the said employment agreement dated the ninth day of June, A.D. 1925.

(5) The parties of the second, third and fourth parts hereby release the said party of the first part from all claims and demands of every nature and description which they or either of them have or which hereafter they or 30 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.

(6) The said party of the third part also further agrees for the considerations aforegoing that it will forthwith on the transfer of said stock as aforesaid and the execution of these presents pay to the said 40 party of the first part the sum of Eleven Thousand Four Hundred and Sixteen Dollars of lawful money of Canada.

(7) The said party of the third part also agrees that it will on demand of any stockholder in Lewis Connors & Sons, Limited, purchase the shares of the capital stock of Lewis Connors & Sons, Limited, held by such shareholder on the terms set out in paragraph one of an agreement bearing date

the ninth day of June, A.D. 1925, and made between the party of the third part, one Lewis Connors and the party of the first part.

This agreement shall enure to the benefit of and be binding upon the parties hereto, their respective executors, administrators, successors and assigns.

In Witness Whereof, the parties hereto have executed these presents the day and year first hereinabove written.

(Sgd.) Bernard Connors [L. S.]

(Sgd.) B. M. Hill [L. S.]
President of Lewis Connors & Sons, Ltd.

(Sgd.) A. Neil McLean [L. S.]
Vice-President.

(Sgd.) A. Neil McLean [L. S.]
President Connors Bros., Ltd.

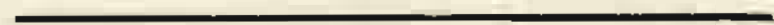
(Sgd.) Allan A. M. McLean [L. S.]
Treasurer.

(Sgd.) A. Neil McLean [L. S.]

(Sgd.) Allan A. M. McLean [L. S.]

Signed, sealed and delivered in the presence of

(Sgd.) C. F. Inches,
to all signatures.



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Exhibits.

6.
Letter.
Bernard
Connors to
Connors
Bros.,
Limited
(Copy to
Lewis
Connors &
Sons,
Limited).
15th April,
1937.

6. (Plaintiff's document.)

Letter, Bernard Connors to Connors Bros., Limited.
(Copy to Lewis Connors & Sons, Limited.)

15/June/37—J.B.M.B.

SAINT JOHN, N. B., April, 15, 1937.

CONNORS BROS., LTD.,
BLACK'S HARBOR, N. B.

Dear Sirs :

In an agreement dated June 9, 1925, and made between Connors Bros., Limited, of the first part and Lewis Connors and Bernard Connors of the second part, there is contained a term reading as follows : 10

"(4) The said Lewis Connors and Bernard Connors agree with the 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."

In an agreement dated October 2, 1926, and made between Bernard Connors of the first part ; Lewis Connors & Sons, Limited, of the second part ; Connors Bros., Ltd., of the third part ; and Neil McLean and Allan McLean of the fourth part, there is contained a term reading as follows : 20

"(3) 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 the sardine business in any country whatsoever." 30

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.

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 40

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.

Exhibits.

6.
Letter, Bernard Connors to Connors Bros., Limited (Copy to Lewis Connors & Sons, Limited). 15th April, 1937—*continued.*

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 possible after this date. I would therefore ask you to advise me on or before April 26, 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.

I should appreciate your prompt attention to this notice.

Yours very truly,

(Sgd.) BERNARD CONNORS.

Exhibits.

7.
Letter,
Inches &
Hazen to B.
Connors,
24th April,
1937.

7. (Plaintiff's document).

Letter, Inches & Hazen to B. Connors.

INCHES & HAZEN
BARRISTERS SOLICITORS
Saint John, New Brunswick, Canada.

CYRUS F. INCHES, K.C. — No. 23 ROYAL SECURITIES BLDG
D. KING HAZEN, K.C. — MARKET SQUARE

15/June/37—J.B.M.B.

24th April, 1937.

B. CONNORS, ESQ., 10
CARE MESSRS. B. CONNORS FISH CO.,
93 PRINCE WILLIAM STREET,
SAINT JOHN, N. B.

Dear Sir :

Our clients, Messrs. Connors Bros., Limited, and Lewis Connors & Sons. Limited, have handed us your letters to them of the 15th instant, and have instructed us to inform you that they consider the provisions of the contracts quoted in your letter to be legally binding upon you in every respect, and that they have no intenton whatever of releasing to you, or abandoning in any way their rights under these agreements. 20

Yours very truly,
INCHES & HAZEN.

CFI/HLC.

" I." (Defendants' document).

Royal Gazette containing copy of Letters Patent granted to The B. Connors Fish Company, Limited.

Exhibits.

" I."
Royal Gazette containing copy of Letters Patent granted to The B. Connors Fish Company, Limited, 10th June, 1937.

I—17/6/37—J.B.M.B.

THE ROYAL GAZETTE

NEW BRUNSWICK

Official Notifications appearing in this Paper, duly authenticated are to be received as such by all whom they may concern.

VOL. 95] THURSDAY, JUNE 10, 1937 [PAGE 108

10

LETTERS PATENT

" THE B. CONNORS FISH COMPANY, LIMITED "

Public Notice is hereby given that under " The New Brunswick Companies' Act " (being Chapter 88 of the Revised Statutes 1927) and amending Acts, Letters Patent have been issued under the seal of the Provincial Secretary-Treasurer of the Province of New Brunswick, bearing date the Second day of June, A. D. 1937, incorporating Bernard Connors, Manufacturer; Bradford Matthews, Salesman; and J. Harold Drummie, Barrister-at-Law; all of the City of Saint John in the County of the City and County of Saint John and Province of New Brunswick, for the
20 following purposes, namely:

To purchase, take over or otherwise acquire as a going concern the business now carried on at Chamcook in the County of Charlotte in the Province of New Brunswick, or elsewhere, under the firm, name and style of " THE B. CONNORS FISH COMPANY," and all or any of the assets and liabilities of the proprietors of that business in connection therewith, the undertaking and good-will thereof, and all the rights and contracts now held by the proprietors subject to the obligations, if any, affecting the same, and to pay for the same in paid-up shares of this Company or otherwise.

30 To purchase or otherwise acquire, to pickle, can, salt, freeze, smoke, cure and otherwise treat, to pack, can and store, to sell and otherwise dispose of and deal in and with fish of all kinds of sea foods and all other products of the seas, rivers and lakes.

Exhibits.

"I."
Royal Gazette containing copy of Letters Patent granted to The B. Connors Fish Company, Limited, 10th June, 1937—*continued.*

To carry on the business of fishing in all its branches, including catching purchasing, curing, treating and dealing in fish and the oils, fertilizing and other by-products thereof, and generally to carry on the fish business and the business of fishing in all their branches.

To purchase, build, hire, acquire and operate and manage ships, boats and vessels of all kinds, and wharves, piers, flake yards, storehouses, smoke-houses, cold and dry storage plants, packing factories, warehouses, elevators, mills and all other kinds of buildings and structures.

To purchase, lease or otherwise acquire all rights and privileges of every nature which may be identified with the fish business or the business of fishing in any of or all their branches. 10

To manufacture and deal in cans, boxes, jars, containers either of wood, metal or other composition, and labels and canners' supplies of all descriptions.

To purchase, charter, hire, build or otherwise acquire, hold, maintain, repair, improve, alter, sell, exchange, let out on hire or charter or otherwise deal with and dispose of steam and other ships or vessels or any shares or interests in the same, with all equipment and furniture and for the purposes aforesaid to carry on all or any of the business of ship owners, ship-brokers, managers of shipping property, freight contractors, carriers by land and water, warehousemen, wharfingers, bargeowners, tug owners, lightermen, towage contractors and forwarding agents. 20

To buy, sell and otherwise dispose of, either wholesale or retail, hold, own, manufacture, produce, export and import and deal in goods, wares and merchandise of every nature and kind.

To transact generally the business of a commission merchant, broker or agent by the name of "THE B. CONNORS FISH COMPANY, LIMITED," with a Capital Stock of Fifty Thousand Dollars divided into Five Hundred Shares of One Hundred Dollars each, with the head office at Chamcook, in the County of Charlotte and Province of New Brunswick. 30

Dated at the office of the Provincial Secretary-Treasurer the Second day of June, A. D., 1937.

W. B. TRITES,
Deputy Provincial Secretary-Treasurer.

"L." (Defendants' document).

Sales Statement, Lewis Connors & Sons, Limited, Connor Bros., Limited and Quoddy.

Exhibits — "L." Sales Statement, Lewis Connors & Sons, Limited, Connors Bros., Limited and Quoddy.

L—17/6/37—J.B.M.B.

LEWIS CONNORS & SONS, LTD., SALES

Year	Foreign Sales		Domestic Sales		Total Sales	
	Cases	Value	Cases	Value	Cases	Value
1924	6,930	$27,038·14	20,437	$96,276·53	27,367	$123,314·67
1925	26,372	102,366·70	26,796	123,685·03	53,168	226,051·73
1926	24,506	93,538·78	14,395	69,472·10	38,901	163,010·88
1927	40,745	150,338·54	14,167	66,539·42	54,912	216,877·96
1928	43,439	167,419·70	17,618	84,456·29	61,057	251,875·99
1929	45,359	179,878·00	14,505	71,437·76	59,864	251,315·76
1930	33,170	122,389·26	16,435	78,701·83	49,605	201,091·09
1931	26,065	89,739·04	7,067	31,771·19	33,132	121,510·23
1932	12,963	37,661·75	9,161	34,912·54	22,124	72,574·29
1933	23,284	72,388·35	12,548	43,710·86	35,832	116,099·21
1934	37,083	120,616·34	25,575½	88,474·68	62,658½	209,091·02
1935	31,105	118,270·10	34,853	107,869·03	65,958	226,139·13
1936	34,911	123,925·67	31,767	115,973·32	66,678	239,898·99

TOTAL SALES CONNORS BROS., LTD., AND LEWIS CONNORS & SONS, LTD. AND QUODDY AFTER 1934.

Year	Foreign Cases	Foreign Value	Domestic Cases	Domestic Value	Total Cases	Total Value
1919	34,617	204,279·87	102,489	653,416·03	137,106	$857,695·90
1920	31,331	183,536·08	93,061	631,991·76	124,392	815,527·84
1921	16,416	68,686·23	96,124	514,292·08	112,540	582,978·31
1922	37,933	130,881·28	92,420	424,698·12	130,353	555,579·40
1923	35,348	143,032·02	116,587	564,611·83	151,935	707,643·85
1924	53,456	216,177·58	106,031	554,752·26	159,487	770,929·84
1925	80,726	307,462·22	113,069	559,378·97	193,795	866,841·19
1926	103,733	402,947·63	117,482	588,014·41	221,215	990,962·04
1927	146,256	529,090·69	145,428	737,146·75	291,684	1,276,237·44
1928	134,529	526,844·24	172,688	883,934·43	307,217	1,410,778·67
1929	148,703	599,313·60	150,786	795,949·26	299,489	1,395,262·86
1930	99,874	384,551·55	156,316	787,980·24	256,190	1,172,531·79
1931	82,661	285,710·27	120,578	550,909·50	203,239	836,619·77
1932	56,017	165,300·26	108,793	407,784·38	164,810	573,084·64
1933	81,699	258,156·34	143,158	493,828·82	224,857	751,985·16
1934	132,497	440,288·53	211,477	740,668·97	343,974	1,180,957·50
QUODDY	15,384	48,565·33	733	2,560·83	16,117	51,126·16
1935	150,141	539,710·61	254,380½	888,078·16	404,521½	1,427,788·77
1936	161,233	584,430·62	259,429	944,296·62	420,662	1,528,727·24

Exhibits.

"M."
Sales Statement, Lewis Connors & Sons, Limited, and Connors Bros., Limited (Reference to Sardine Sales only).

"M." (Defendants' document).

Sales Statement, Lewis Connors & Sons, Limited, and Connors Bros., Limited (Reference to Sardine Sales only).

M—26/6/37—J.B.M.B.

SALES LEWIS CONNORS & SONS, LIMITED—BY CASES—1924, 1925, 1926 AND 1936

	Sardines Only			Sundry Lines		
	Foreign	Domestic	Total	Foreign	Domestic	Total
1924	6,930	20,437	27,367	....	....	....
1925	26,372	26,796	53,168	....	....	12,209
1926	24,506	14,395	38,901	....	....	5,817
1936	31,617	25,981	57,598	3,294	5,786	9,080

10

SALES CONNORS BROS., LIMITED—BY CASES—1924, 1925, 1926 AND 1936.

	Sardines Only			Sundry Lines		
	Foreign	Domestic	Total	Foreign	Domestic	Total
1924	45,537	81,574	127,111	270	9,825	10,095
1925	53,755	81,478	135,233	1,421	8,021	9,442
1926	66,422	92,829	159,251	12,805	10,258	23,063
1936	86,605	171,147	257,752	16,099	54,860	70,959
1936 Quoddy	22,638	1,655	24,293	980	Nil	980

20

TOTAL SALES CANADIAN SARDINES ALL COMPANIES BOTH FOREIGN AND DOMESTIC, 1924, 1925, 1926 AND 1936

	Foreign	Domestic	Total
1924	52,467	102,003	154,478
1925	80,127	108,274	188,401
1926	90,928	107,224	198,152
1936	140,860	198,783	339,643

Proportionate Amount Foreign and Domestic Sales, (Sardines Only) Basis Own Sales, Lewis Connors & Sons, Limited, above years.

Proportionate Amount as between Lewis Connors & Sons, Limited, and Total Sardine Sales of Foreign and Domestic trade (sardines only) for above noted years.

30

			L. C. & Sons, Ltd.		C. B., Ltd.	
1924	Foreign	Domestic	Foreign	Domestic	Foreign	Domestic
1924	25%	75%	13%	20%	87%	80%
1925	50%	50%	33%	24·8%	67%	75·2%
1926	63%	37%	27%	13·4%	73%	86·6%
1936	55%	45%	22½%	13%	77½%	87%

In the Privy Council.

No. 54 of

ON APPEAL FROM THE SUPREME CO
OF CANADA.

BETWEEN

CONNORS BROS., LIMITED AND
LEWIS CONNORS & SONS LIMITED
(Defendants) *Appel*

AND

BERNARD CONNORS
(Plaintiff) *Respon*

RECORD OF PROCEEDINGS.

NORTON ROSE GREENWELL & CO.,
116, Old Broad Street, E.C.2.
Solicitors for the Appel

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STRE