

Friday, October 18.

SECOND DIVISION.

[Sheriff Court at Peebles.

DON FRANCESCO v. DE MEO.

Revenue—Stamp—Conveyance on Sale—Document Setting forth Verbal Agreement Previously Arranged for Sale of Business—Stamp Act 1891 (54 and 55 Vict. cap. 39), sec. 14 (1) and (4), sec. 54, and sec. 59 (1).

On 13th June 1904 A verbally agreed to sell and B to purchase an ice-cream business for £150, and B was given possession of the shop. About two years later A started another ice-cream shop in the same town. B thereupon sued A for £150, averring that A had undertaken, as part of the agreement, not to compete with him in business in that town under penalty of £150, being the price paid.

A produced a document dated 26th August 1904, signed by the parties, which he alleged set forth the terms of the agreement, which the parties had had reduced to writing. It bore only a sixpenny agreement stamp. The defender pleaded that the document, as being a conveyance on sale of property within the meaning of the Stamp Act 1891, section 54, was insufficiently stamped, and required an *ad valorem* stamp before it could, under section 14, be admitted in evidence.

Held that as the document might be read as being merely an agreement (1) as to the mode of payment of the price, and (2) as to the obligation on the defender not to carry on a similar business in that place, it was not necessary for the Court to require it to be stamped with an *ad valorem* stamp.

The Stamp Act 1891 (54 and 55 Vict. cap. 39) enacts—Section 14—(1) “Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the Court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.” (4) “Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance

with the law in force at the time when it was first executed.”

Section 54—“For the purposes of this Act the expression ‘conveyance on sale’ includes every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.”

Section 59—(1) “Any contractor agreement . . . made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares, or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.”

Francesco Don Francesco, confectioner and ice-cream merchant, Peebles, raised an action in the Sheriff Court of the Lothians and Peebles at Peebles against Onofrio De Meo, confectioner and ice-cream merchant there. The pursuer prayed the Court to interdict the defender from carrying on a business in the sale of confectionery or ice-cream in the town of Peebles, and to grant interim interdict; also to ordain the defender to pay to the pursuer the sum of £150 with interest thereon.

The averments and answers of the parties were as follows:—“(Cond. 2) For sometime prior to June 1904 the defender carried on business in the premises now occupied by the pursuer, and the pursuer about that time entered into negotiations with the defender for the purchase of that business. (Ans. 2) Admitted. (Cond. 3) On 13th June 1904, a verbal agreement was come to between the parties whereby the defender agreed to sell, and the pursuer agreed to purchase, the stock-in-trade, fittings, and goodwill of the said business at the price of £150 (the stock-in-trade and fittings being valued at £50, and the goodwill at £100), said price to be paid within two years by instalments of £2 per week during the summer months, and £1 or so per week during the winter season, the sum to be paid during the winter season being dependent on the income from the business, and in respect of said price the defender undertook not to compete with the pursuer in business in Peebles under a penalty of £150. (Ans. 3) Admitted that defender agreed to sell on the date here mentioned the business as then carried on by him in shop at 25 Northgate, Peebles, including the whole moveable property therein and pertaining thereto, to pursuer at the price of £150, which was subsequently paid in terms of the documents referred to in the following answer. *Quoad ultra* denied. (Cond 4) Said verbal agreement was repeated in the presence of witnesses at a meeting between

the parties in Edinburgh on 26th August 1904, and was reduced to writing and signed by the parties on that date before said witnesses. Both pursuer and defender are Italians, and the document was executed in the Italian language, and is herewith produced. (Ans. 4) Admitted that the pursuer and defender are both Italians, and that on 26th August 1904 they reduced the terms of the sale and purchase of said business to writing in their own language as after explained. *Quoad ultra* denied. Explained that the agreement between the parties was contained in two documents each signed by them, one containing an offer or agreement by defender to sell said business to pursuer for £150 on certain conditions as regards payment of the purchase price, which was delivered to pursuer, and the other containing an acknowledgment by pursuer that he had bought said business (the signing by him of the first-mentioned document being held by the parties as an acceptance by him of said offer), and agreeing to fulfil the defender's conditions under certain penalties therein expressed, if incurred, which was delivered to the defender, said two documents together forming the contract of sale between the parties and showing exactly its terms. . . . Further explained and averred that said first-mentioned document did not contain the last paragraph appearing in the writing No. 3 of process lodged by pursuer, the accurate translation of which into English is:—'I, Onofrio De Meo, bind myself not to serve in any other ice-cream shop in Peebles, and if I do so the party is entitled to all the money paid. This space remains for anything to be put afterwards.' Further also explained and averred that said writing No. 3 of process founded on by pursuer . . . is insufficiently impressed with stamp duty as a conveyance on sale of property according to the Stamp Act of 1891 (54 and 55 Vict. cap. 39), sec. 54. . . (Cond. 5) Notwithstanding the obligation undertaken by defender and contained in said agreements of sale the defender did in or about the month of June 1906 open premises at No. 34 High Street, Peebles, under the name of N. De Meo, where he still continues to carry on business for the sale of confectionery and ice-cream contrary to the terms of said agreement. (Ans. 5) Admitted that defender in the month of June 1906 commenced and still carries on the business of a confectioner and ice-cream merchant at 34 High Street, Peebles. *Quoad ultra* denied."

The pursuer lodged in process the following translations of the two documents referred to on record:—

Translation by pursuer of document
No. 3 of process.

"Edinburgh, 26th August 1904.
"I, the undersigned, Onofrio De Meo, do agree to sell my shop to Francesco Don Francesco for £150, which is situated at 25 Northgate, Peebles; such sum must be paid by instalments as follows:—That in two years' time Francesco Benigno will pay to Onofrio De Meo two pounds each week during the summer season and one pound or so each week during the winter

season, according to the income of business. The said shop was handed over to Francesco Don Francesco on 13th June 1904, the vendor to receive full payment in two years' time from that date.

"I, Onofrio De Meo, bind myself not to serve in any other ice-cream shop in Peebles, and should I do so, Francesco Don Francesco is entitled to all the money he paid to me for said property. We leave the following space for anything to be added to the above contract.

Stamp
6d.

ONOFRIO DE MEO.
FRANCESCO DON FRANCESCO.
BORDONE ACHILLE, *testimone*.
PASQUALO MARANDOLA.
ALPHONSO VETRAINO."

Translation by pursuer of document
No. 6 of process.

"Edinburgh, the day 26 August 1904.

"I, here undersigned, Francesco Donfrancesco, myself declare of being debtor with Mr Onofrio Demeo for the sum of £ sterling 150. Say one hundred and fifty paid £ sterling 42 say pounds for having bought one of his shop situated at No. 25 Northgate, Peebles.

"I, Francesco Donfrancesco, have the full responsibility of paying the said Onofrio Demeo the said sum of £ sterling 2 say two in the summer months from 15 May to 15 November 1905, in the winter at one pound per week or what I am able to. I, Donfrancesco, myself guarantee to pay all the sum for £50 sterling from 13 June 1904 to 13 June 1906 say June nineteen six, and every time I pay the said Onofrio above the sum of two pounds he is obliged to put on a stamp.

"Refusing to pay the said sum the way written the said Onofrio he can retake the present shop and satisfy me with what the law will allow.

"If the Donfrancesco does not pay the witness have no responsibility or interest in the consequence.

FRANCESCO DONFRANCESCO
DI DEMENICO.

Stamp
6d.

Accetto ONOFRIO DEMEO.
BORDONE ACHILLE, *testimone*.
PASQUALO MARANDOLA.
ALPHONSO VETRAINO.
Testimoni."

The defender pleaded, *inter alia*—"(1) Said writing, forming No. 3 of process, being insufficiently stamped in terms of law, pursuer ought to be called upon to implement the provision contained in the Stamp Act of 1891 (54 and 55 Vict. cap. 39), sec. 14 anent the production of insufficiently stamped deeds in judicial proceedings, and failing such implement the action should be dismissed with expenses."

On 27th December 1906 the Sheriff-Substitute (ORPHOOR) granted decree against the defender for £150 with interest.

The defender appealed to the Sheriff (MACONOCHE), who on 18th January 1907 dismissed the appeal and of new granted decree against the defender for the sum sued for with interest.

The defender appealed to the Court of Session, and argued—The defender denied signing any document containing the

restrictive clause founded on, but admitted signing a document similar in other respects. No. 3 was insufficiently stamped; it was not a mere agreement, nor was it an offer of which No. 6 was the acceptance; it was a conveyance on sale, within the meaning of section 59 (1) of the Stamp Act 1891, of the goodwill of the business, and as such required to be stamped—*Benjamin Brooke & Company, Limited v. Commissioners of Inland Revenue*, [1896] 2 Q.B. 356; *West London Syndicate, Limited v. Commissioners of Inland Revenue*, [1898] 2 Q.B. 507; *Potter v. Commissioners of Inland Revenue*, [1854] 10 Ex. (Hur. & G.) 147—and unless and until stamped could not be received in evidence—Stamp Act 1891, section 14 (1) and (4).

Argued for the pursuer (respondent)—(1) The agreement for the sale of the business had taken place on 13th June, and had been partly implemented. No. 3 was only a memorandum of the agreement. (2) Assuming the first argument wrong, No. 3 was an offer of which No. 6 was the acceptance. It was not necessary to look at No. 6, as pursuer admitted the offer was accepted. (3) In any case the English cases cited as to goodwill did not apply, for No. 3 made no mention of goodwill.

At advising—

LORD ARDWALL—This action arises out of the sale of an ice-cream business by the defender to the pursuer, and the pursuer asks that the defender should be ordained to pay a sum of £150 sterling, being the penalty agreed to be paid in case of the defender breaking his agreement not to carry on business in any other ice-cream shop in Peebles.

The defender states as a preliminary objection to the document founded on by the pursuer that it is not properly stamped, inasmuch as it is stamped only with a sixpenny agreement stamp and not with an *ad valorem* stamp as provided for by section 59 (1) of the Stamp Act 1891, and the section of the Stamp Act founded on as excluding the document from the cognisance of the Court is section 14, subsection 1, of the said Stamp Act, which provides that notice shall be taken by judges "of any omission or insufficiency of the stamp" on any instrument produced as evidence. Now, this is not a provision compelling judges to raise test cases or try doubtful questions regarding the stamping of instruments. I think that they are only bound to intervene to protect the Revenue where there is an undoubted case of insufficient stamping or an attempted evasion of the Stamp Act. Now, in my opinion there is no such case here. The document in question was stamped with a sixpenny stamp, which is the proper and appropriate stamp for any ordinary agreement, but it is pleaded for the defender that this document was not only an agreement but was an agreement for the conveyance and sale of the stock and fittings and goodwill of the shop mentioned in the document. In my opinion this is far from being clear, for

the document itself sets forth, and it is matter of common ground on the record, that the agreement for the sale of the business was, as set forth in condescendence 3 and answer thereto, a verbal agreement, and was concluded on 13th June 1904, and on the same date the shop was handed over to the pursuer, the price of the business being then also fixed at £150. This being so, it appears to me that so far as the sale of the business was concerned No. 3 of process was not the instrument under which that sale took place, although it refers to and recites the sale, but was merely an agreement (1) as to the mode of payment of the price, and (2) as to the obligation on the defender not to carry on another similar business in Peebles under penalty of paying back all the money paid for the business; and it falls to be observed that it is only as evidence of the second point that the document is now produced, and for that purpose, undoubtedly, it is sufficiently stamped.

I accordingly think that this is not a case in which there is any duty on the Court to order this document to be stamped with an *ad valorem* stamp either *proprio motu* or on the motion of one of the parties.

The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD STORMONTH DARLING was absent.

The Court dismissed the appeal and of new ordained the defender to make payment of the sum sued for.

Counsel for the Pursuer (Respondent)—Carmont. Agent—W. R. Mackersy, W.S.

Counsel for the Defender (Appellant)—Scott Brown. Agent—S. F. Sutherland, S.S.C.

Friday, October 18.

SECOND DIVISION.

[Sheriff Court at Alloa.

HOME DRUMMOND AND OTHERS v.
M'LACHLAN.

Interdict—Interim Interdict—Subsistence of Interim Interdict.

A petition was presented in a Sheriff Court for interdict against a certain fisherman fishing with drift or hang nets in a certain river, and on the same day interim interdict was granted. Appearance was entered and defences lodged for the respondent, and finally an interlocutor was pronounced making the interdict perpetual. This interlocutor was, however, inept, as prior to its date the cause had fallen asleep. Thereafter the respondent was proved to have fished with drift net in the river.

Held that the interim interdict had not been recalled by the lodging of defences but still subsisted.