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.

Dictum of Lord President Inglis (then Lord Justice-Clerk) in *Hamilton* v. *Allan*, February 16, 1861, 23 D. 589, *explained* and *commented on.*

Lieutenant-Colonel Home Drummond, of Blairdrummond, and others, raised an action in the Sheriff Court at Alloa against Henry M'Lachlan, fisherman, Alloa.

The pursuers prayed the Court to find that the defender "has committed a breach of the interdict granted by the Court on 18th August 1902, and made perpetual on 21st October 1903, in the action at the instance of the pursuers to have the said defender and certain other persons restrained from fishing by themselves, or by others acting under their direction, for salmon or fish of the salmon kind in any part of the river or estuary of the Forth with the nets known as drift nets or hang nets, and from placing or setting nets of that description in any part of the said river or estuary, and that he has thereby been guilty of a contempt of Court; to fine and amerce the defender in the sum of twenty pounds, or such other sum as the Court shall think fit in the circumstances or otherwise, or failing payment by the said defender of such fine, to adjudge him to be imprisoned for such period as the Court shall appoint, and to find him liable in expenses."

The defender pleaded—"(1) The defender not having fished in the manner condescended on by the pursuers should be assoilzied with expenses. (2) The beforementioned interdict not having been intimated and being unknown to the defender he was not acting in breach or disregard thereof, and the action should be dismissed with expenses."

The Sheriff-Substitute (DEAN LESLIE) on 28th November 1906, after a proof, pronounced the following interlocutor, which, with the note appended, contains the material facts of the case:—"Finds (1) that on 18th August 1902 a petition was presented in this Court praying for interdict against the respondent and others from fishing by themselves or by others, having the authority and consent of all or any one or more of them, for salmon or fish of the salmon kind in any part of the river or estuary of the Forth, with the nets known as drift nets or hang nets, or from placing or setting nets of that description in any part of the said river or estuary; (2) that on said 18th August 1902 interim interdict, as craved, was granted; (3) that appearance was entered and defences lodged by the respondent; (4) that said interim interdict has not been recalled; (5) that on 17th July 1906 the respondent fished for salmon or fish of the salmon kind in the river Forth, between Kelliebank, North Alloa, and Alloa Inch, in the parish of Alloa and county of Clackmannan, with a drift or hang net in the manner interdicted: Therefore finds that the respondent has broken the interim interdict granted on 18th August 1902, fines the respondent Henry M'Lachlan the sum of five pounds sterling, and failing payment within seven days decerns and adjudges the said respondent to be imprisoned for the space of one month from the 7th day of December 1906, and thereafter to be set at liberty . . . and decerns."

Note.—[*After dealing with the evidence showing that the defender had on 17th July 1906 fished with a drift or hang net the Sheriff proceeded*]—"But even if engaged in drift net fishing on 17th July 1906 the respondent contends that there is no valid interdict standing against him, and that whatever interdict there may be he had not at the date in question received proper intimation thereof. On the first point respondent's contention is good to the extent that the interdict as made perpetual on 21st October 1903 is invalid.

"In the process—*Home Drummond* v. *Mackenzie and Others*, including the respondent—no step was taken between the dates of the interlocutors on 3rd October 1902 closing the record and the interlocutor of 7th October 1903, when on the pursuer's motion the case was appointed to be enrolled. The process had therefore fallen asleep. The interlocutor of 7th October 1903 cannot be accepted as having properly wakened it; therefore the interlocutor following thereon, which declares the interdict perpetual, is inept. An interim interdict, however, does not lose its effect by the falling asleep of the process —*Hamilton* v. *Allan*, 1861, 23 D. 589—and, in my opinion, the later proceedings though inept do not prejudice it. As to the second point, the intimation of 27th July 1906, in virtue of extract decree reciting the interdict of 21st October 1903, is of no avail both because of its date being later than that of the breach complained of and of the invalidity of the decree intimated. The respondent took objection to the production and use, as evidence, of the process in *Home Drummond* v. *Mackenzie and Others*, in respect that it had not been produced before the proof, and that the petitioners by producing in process the extract decree of interdict of 21st October 1903 founded upon it and ought therefore to be restricted as to proof of the interdict to that extract. To this I think the answer of the petitioners is sufficient, namely, that the process is founded upon in the petition and was not in their hands, but in the hands of the Sheriff Clerk, where it was equally available to both parties; and that though they may fail in proving their case in one way it does not follow that they are to be debarred from proving it in another. The process—*Home Drummond* v. *Mackenzie and Others* —proves that interim interdict was granted against the respondent on 18th August 1902, and there is no evidence that it has been recalled. This interim interdict was duly intimated, and that it was well known to the respondent must be presumed from his entering appearance, lodging defences, and taking part in the closing of the record in the case—*Henderson* v. *Maclellan*, May 23, 1874, 1 R. 920. The respondent must have been well aware of the interdict, and by fishing as he did he deliberately committed a breach of the order of this Court, and that cannot be tolerated."

The defender appealed to the Sheriff

(LEES), who on 9th February 1907 recalled his Substitute's interlocutor and found that the defender had broken the interdict made perpetual on 21st October 1903.

Note.—"It is not doubtful that the defender disobeyed the interdict that was granted. But it was urged that the final decree of interdict was incompetent—that the cause had fallen asleep. I am afraid I cannot enter on any question of this kind. This is not the process in which to impugn the regularity of the former decree. I must assume it to be good. Nothing was said in regard to the punishment awarded by the Sheriff-Substitute. I have therefore repeated it. It was also urged that the defender was not cognisant of the interdict. But he knew of the interim interdict, and he does not suggest it was recalled, and he continued a party in the process. *Henderson* v. *Maclellan* is therefore fatal to this plea."

The defender appealed, and argued—(1) It was not proved that the net used was a drift net. (2) No step having been taken in the process between 3rd October 1902 and 7th October 1903 the cause had fallen asleep—Sheriff Courts Acts 1876 (39 and 40 Vict. cap. 70), section 49—and consequently the interlocutor of 21st October making the interdict perpetual was inept, and the infringement of it could not be complained of—*Clark* v. *Stirling*, June 14, 1839, 1 D. 955, Lord Cockburn, at p. 984. (3) There was no evidence that interim interdict was ever granted. But assuming it had been granted, it had been brought to an end by lodging defences—*Hamilton* v. *Allan*, February 16, 1861, 23 D. 589, Lord Justice-Clerk Inglis, at p. 591.

Argued for the pursuers—(1) The defender had fished with a drift net in breach of the interdict. (2) There was standing against the defender an *ex facie* regular decree of a competent Court, the interlocutor of 21st October making the interdict perpetual, and that could not be set aside by way of exception—*Neil* v. *M'Nair*, June 7, 1901, 3 F. (J.) 85, 38 S.L.R. 804. (3) The former process which defender relied on as establishing that the cause had fallen asleep established that the interim interdict was granted, and it, at any rate, was still in force. An interim interdict subsisted until it was recalled or competently set aside—*Clippens Oil Company, Limited* v. *Edinburgh and District Water Trust*, March 20, 1906, 8 F. 731, 43 S.L.R. 540, June 11, 1907, 44 S.L.R. 669—and was not brought to an end by the process falling asleep—*Hamilton* v. *Allan* (*cit. sup.*). If the dictum of Lord Justice-Clerk Inglis had the meaning contended for by defender it was inconsistent with the earlier part of his opinion and with existing practice, whereby the Lord Ordinary in the Bill Chamber on passing the note continued the interim interdict, thereby treating it as subsisting. In any case the dictum even if sound referred only to answers in the Bill Chamber and not to defences in the Sheriff Court. It must be presumed that a party to the cause who had entered appearance and lodged defences was aware of the interdict —*Henderson* v. *Maclellan and Others*, May 23, 1874, 1 R. 920, 11 S.L.R. 531.

At advising—

LORD JUSTICE-CLERK—This case stands in somewhat a peculiar position, but as regards the merits I have no doubt. In using a drift net or a net as a drift net the defender was plainly acting contrary to the interdict whether interim or perpetual.

There remains, however, the question whether the judgment can stand notwithstanding the fact that the interlocutor which declared the interdict perpetual was pronounced in a process which had fallen asleep. At the time at which the Sheriff disposed of the case I think he was probably right and could not have considered the regularity of the former decree, but we are in a different position, for we have the former process before us and can see that it had gone to sleep. That being so, it is, I think, safer to revert to the judgment of the Sheriff-Substitute. But it was strongly pleaded and with considerable force that there was no interim interdict any longer standing, because that had been brought to an end by the fact that the respondent had lodged answers, and in support of this the opinion of Lord President Inglis—then Lord Justice-Clerk—in *Hamilton* v. *Allan*, 23 D. 589, was referred to. Now, if that case had been a clear decision to that effect it would have had to be given effect to. But to read the opinion of Lord President Inglis in that way is to make it inconsistent with itself, and it must, moreover, be considered as having some relation to practice. There is no practice which suggests that the lodging of answers can take away the effect of a judgment of a competent court. On the contrary, the practice is that where interim interdict has been granted *de plano* that the Lord Ordinary after answers have been lodged and parties heard either passes the note to try the question and continues the interim interdict or refuses the note and recals the interdict. Now, either to continue or to recal an interdict that has previously come to an end is impossible.

I see that the late Mr Antonio, who had, of course, great experience in such matters, gives in his book the procedure as—"Intimation ordered and interim interdict granted. Answers lodged and parties heard. Note passed and interdict continued." The practice without doubt being so, and commending itself to common sense, it is inconceivable that an interdict can be set aside merely because answers are lodged. Accordingly, I am of opinion that the interim interdict was standing at the time of the fishing in question.

I think we should recal the interlocutor of the Sheriff and revert to that of the Sheriff-Substitute both as to his findings in fact and in law.

LORD LOW—I am of the same opinion. As regards the merits, the evidence appears to me to be perfectly clear and to justify the interlocutor of the learned Sheriffs.

The only matter of any difficulty in the case arises in consequence of certain dicta of the late Lord Justice-Clerk Inglis in the case of *Hamilton* v. *Allan*. I cannot help thinking that the report incorrectly sets forth what the learned Lord Justice-Clerk really said. The main question in that case was as to whether an interim interdict granted in the Bill Chamber upon presentation of the note and before answers were lodged, continued in force notwithstanding that the action had been allowed to go to sleep, and it seems to have been argued on behalf of the respondent that it would be a great hardship to him to have an interim interdict hanging over his head for an altogether indefinite period; and what the Lord Justice-Clerk pointed out was that there was really no hardship, because the position of matters was due to the fact that the respondent had not lodged answers. His Lordship is reported as having said that the interim interdict would have been brought to an end by the lodging of answers. I think that what was meant was that if the case was one in which it was not just that interdict should be granted, the respondent might have asked for and obtained immediate recall if he had lodged answers. I think that that must have been what was meant, because I know of no rule of law or practice whereby the lodging of answers in itself operates the recall of an interim interdict previously granted, and I am confirmed in this view by the careful explanation of the effect of interim interdicts granted in the Bill Chamber, given by the present Lord President in the case of the *Clippens Oil Company*. I therefore think that the interim interdict here did not fall, and I agree that the safer course will be to revert to the judgment of the Sheriff-Substitute.

LORD ARDWALL—I agree with both your Lordships. The question as to the subsistence of the interim interdict would be important if there were any doubt about the practice. But so far as my experience, both as counsel and as judge, not only in this Court but in the Sheriff Court, extends, I never heard it doubted that where an interim interdict had once been granted, it subsisted until it was recalled, and that it was not recalled by implication in consequence of answers being lodged in the Bill Chamber, or by defences, or notice of appearance being lodged in process in the Sheriff Court. I have always understood that the true doctrine was that laid down by Lord Justice-Clerk Inglis in the first portion of his opinion in the case of *Hamilton* v. *Allan*, 23 D. p. 591. His Lordship quotes an interlocutor, which was in the ordinary form of the first deliverance in the Bill Chamber, and proceeds—"The meaning of that interlocutor is perfectly well known to every professional man. From the time when that interlocutor was pronounced, and until the application is disposed of, the party is under an interdict to the extent and effect craved in the bill of suspension, and it lies with him to remove that interdict by lodging answers as ordered by the interlocutor." So far there is little difficulty as to the meaning of his Lordship's words, but further on in the opinion he is reported to have spoken as follows—"It is in vain to say that this is any hardship on the respondent in an application for interdict; he has it in his power to bring the interim interdict to an end whenever he chooses, by lodging answers. The interdict is then at an end, and requires to be renewed, and unless it is then renewed by another deliverance the respondent is no longer under interdict." Now it is plain that if the latter part of this dictum has the meaning contended for by the appellant, there is a contradiction between the two portions of the opinion. I think we must reconcile them in some reasonable way, and that the true explanation is that the Lord Justice-Clerk lays down the general rule in the first part of his opinion, and that in the latter part he points out that if the party wishes to get rid of the interim interdict, lodging answers is the proceeding which gives him a *locus standi* to discuss the question and to get rid of the interim interdict.

I am unable to doubt that that is what the Lord Justice-Clerk meant, and I am confirmed in this opinion by what fell from the present Lord President in the *Clippens Oil Company's* case. He points out that the practice in the Bill Chamber as to the subsistence of interim interdicts was always the same as we now understand it, although procedure by note has been substituted for procedure by bill. Further, in an excellent work by the late Mr Antonio, Clerk of the Bills, on the practice of the Bill Chamber, it is set forth as the usual procedure that on the note being passed the interim interdict is continued. That implies that at the time when the note is passed there is a subsisting interdict, because it would be absurd and futile to issue an interlocutor continuing an interdict if the interdict had fallen the moment answers were lodged, for in that case there would be no existing interdict capable of being continued. Accordingly I have no doubt that when interim interdict has once been granted, it subsists until it is recalled by a competent court or judge.

LORD STORMONTH DARLING was absent.

The Court sustained the appeal and recalled the interlocutor appealed against; found in fact in terms of the five findings in fact in the interlocutor of 28th November 1906; found that the defender had broken the interim interdict granted on 18th August 1902, and remitted to the Sheriff to fine the defender and to proceed thereafter as accords.

Counsel for the Pursuers (Respondents)—Blackburn, K.C.—Lord Kinross. Agents—Dundas & Wilson, C.S.

Counsel for the Defender (Appellant)—W. Thomson—J. Macdonald. Agents—Lindsay, Cook, & Dickson, Solicitors.