

for the trial of the cause. In this issue malice was not inserted.

The defender reclaimed, and argued that there was no relevant case stated on record.

Argued for pursuer—The letter contained a charge by the Chief-Constable against the defender of breach of special licence. This was the only possible meaning of the letter. The licence was that by means of which an innkeeper made his living, and to an innkeeper nothing was so important as that he should retain his licence. To act upon an unfounded rumour and charge the pursuer with breach of licence was libellous on the part of the Chief-Constable, and the action was therefore relevant—*Keay v. Wilson*, January 11, 1843, 5 D. 407; *Carmichael v. Cowan*, December 19, 1862, 1 Macph. 204; *M'Iver v. M'Neil*, June 28, 1873, 11 Macph. 777; *Macrae v. Wicks*, March 6, 1886, 13 R. 732.

LORD JUSTICE-CLERK—In this case the defender, the Chief-Constable of Inverness, wrote a letter to the pursuer in which he says that it had come to his knowledge that on two occasions recently in connection with special licences in the pursuer's hotel the neighbourhood was disturbed by the firing of shots or fireworks there, and then he goes on to say that "I think it right to give notice if there is any repetition of this or any other breach of the licence I will consider it my duty to strenuously oppose the granting of any special licences to the house in future." Now, this was a letter which the Chief-Constable was under no obligation to write to this innkeeper. It was practically a private communication by way of warning or hint. It appears to me that it was a most proper letter for the Chief-Constable to write. He does not assert as a fact that what he says is true; he merely says that certain things had "come to his knowledge." I cannot see anything libellous in that. I think that any chief-constable dealing with a respectable innkeeper would naturally communicate with the innkeeper and tell him what had come to his knowledge, and then add by way of caution that if such and such things happened again he might have to take action. I think that the defender was quite within his right in what he did, and that the action ought to be dismissed.

LORD YOUNG—I concur. The Lord Ordinary has allowed an issue. I have a sincere respect for the judgment of the Lord Ordinary in this case, and but for that opinion I might have been disposed to use pretty plain language in expressing my view of this action. As it is, I think it sufficient to say that I differ from the Lord Ordinary. I think it only due to the Chief-Constable of Inverness to add that so far as we have any materials to form a judgment, I think that he acted with perfect propriety and in a manner altogether becoming in writing this letter.

LORD TRAYNER—I am of the same opinion. The case which the pursuer makes is that this letter charges him with

a breach of his licence. If the letter could bear that innuendo I think that it would be libellous, for in my opinion it is a libel to charge a public-house keeper with breach of his licence. But will the letter, fairly read, admit of the innuendo suggested by the pursuer? I think not. The letter is written to the pursuer by the Chief-Constable in a friendly spirit, and is to the effect that he had heard of certain bad conduct on the part of guests in the pursuer's hotel on the last two occasions on which a special licence was granted. So far it is obvious, I think, that there is nothing in the letter which can be innuendoed as a libel against the pursuer. The letter goes on—"I think it right to give notice that if there is any repetition of this, or any other breach of the conditions of the licence, I will consider it my duty to strenuously oppose the granting of any special licences to the house in future." Now, that means nothing more than that if in the future there should be any disturbance on the part of guests in the hotel, or any breach of the licence, the writer would oppose the granting of special licences for the hotel. I can find nothing in the letter in question open to censure. On the contrary, it was a very proper letter for the defender to write in the circumstances. I am therefore of opinion that the issue proposed should be refused and the defender assolzied.

LORD MONCREIFF—I am of the same opinion. This is not a libellous letter in any sense of the term. I rather think that the Chief-Constable was under the impression that if what he said had occurred really did occur the pursuer had committed a breach of his certificate; but I regard the letter as a warning most properly given that such things must not occur again. Such a letter certainly is not libellous.

The Court recalled the interlocutor reclaimed against, assolzied the defender from the conclusions of the action, and decerned.

Counsel for the Pursuer—Ure, Q.C.—Cooper. Agent—John A. Tweedie, Solicitor.

Counsel for the Defender—Guthrie, Q.C.—C. D. Murray. Agents—W. & J. L. Officer, W.S.

Friday, June 23.

## SECOND DIVISION.

[Sheriff of Dumbartonshire.

### MACFARLANE v. DUMBARTON STEAMBOAT COMPANY, LIMITED.

*Restraint of Trade—Stipulation by Seller not to Carry on Similar Business—Area of Restriction—Whether Restriction Necessary for Protection of Purchaser.*

In the contract of sale to a limited liability company of the business of a carrier between Dumbarton, Glasgow,

Greenock, the Vale of Leven, and other places in the neighbourhood, together with the goodwill, the seller bound himself "not to carry on or be concerned in any separate business of a like or similar kind in the United Kingdom for a period of ten years." In the company's articles of association, which were endorsed by the seller, power was taken to extend the business throughout the United Kingdom.

In a suspension of interdict the Court (1) *held* that the restriction was excessive and more than was necessary for the protection of the purchasers' rights, and therefore void; and (2) *refused* to remodel the restriction and confine it to a more limited area.

*Goodwill—Sale of Goodwill—Canvassing Former Customers.*

Where a business has been sold together with the goodwill, the seller is not entitled to apply to former customers to deal with him or not to deal with the purchaser — *Trego v. Hunt* [1896], A.C. 7, *followed*.

Prior to 31st December 1894 Donald MacFarlane, carrier, Dumbarton, and Robert Lang, carrier there, under the style or firm of MacFarlane, Lang, & Company, steamship owners, general traders, and common carriers, Dumbarton, carried on business between Dumbarton, Glasgow, Greenock, the Vale of Leven, and other places in the neighbourhood.

By agreement dated 15th and 17th January 1895, MacFarlane and Lang agreed to sell their business to a limited liability company to be formed and called the Dumbarton Steamboat Company, Limited. Article 7 of the said agreement provided—"The said Donald MacFarlane and Robert Lang, two of the vendors, shall give their services to the company, and the company shall employ them in the capacities they have respectively filled or occupied hitherto in carrying on the business of MacFarlane, Lang, & Company, and that during such time and at such remuneration as the directors of the company shall fix, and during the time they are so employed the said Donald MacFarlane and Robert Lang shall faithfully and diligently serve the said company, and shall each devote his whole time and attention to the business of the company, and shall not engage in or take part in the management of any other business soever, whether alone or in partnership with any other person or persons, without the consent, in writing, of the directors of the company; the said Donald MacFarlane and Robert Lang, and each of them, shall procure for the company the benefit of the custom of all customers of the firm, and will do nothing to induce the said customers to cease dealing with the company."

The company was thereafter incorporated, the memorandum of association and articles of association being dated 25th January 1895. In the articles of association power was taken by the company to extend its business throughout the United King-

dom. The memorandum and articles were endorsed by the vendors MacFarlane and Lang.

After the company was incorporated, an adopting agreement was entered into between the parties. This agreement, *inter alia*, provided—"(*Third*) The said Donald MacFarlane and Robert Lang, two of the vendors, who are to give their services to and be employed by the company in the capacities and on the terms set forth in article 7 of the within written agreement, without prejudice to what is therein written, but in corroboration thereof, shall not, by themselves or himself, separately or together or in partnership with any other or others, carry on or be concerned in any separate business of a like or similar kind in the United Kingdom for a period of ten years at the least from the date hereof."

On 6th May 1898 the company dismissed MacFarlane from their employment. MacFarlane immediately started a competing business in Dumbarton.

The company raised against MacFarlane in the Sheriff Court at Dumbarton an action in which they prayed the Court "To interdict the defender, either by himself or in partnership with any other or others, his servants, and all others acting under or by his authority, from carrying on or being concerned in any business of steamship owner, general trader, or common carrier, by land or water, or any business of a like or similar kind to that carried on by the pursuers in the United Kingdom or otherwise in or near Dumbarton, for ten years from 27th May 1895, without the consent in writing of the directors of the pursuers, and to grant interim interdict, and in any event to interdict, prohibit, and discharge the defender, his partners, servants, or agents from applying by letter, circular, or other written communication, or personally, or by a traveller, or agent, or servant, to any person who was, prior to the formation of the pursuers' company, a customer of the firm of MacFarlane, Lang, & Company, or to any customer of the pursuers asking such customer to deal with the defender or not to deal with the pursuers, and to grant interim interdict."

The defender lodged defences, in which he averred (1) that he had in no way violated the agreements founded on; and (2) that the restriction contained in agreements was void in respect that it was in restraint of trade, or in any case unreasonable and exceeded what was necessary for the fair protection of the pursuers.

On 29th July the Sheriff-Substitute (GEBBIE) granted interim interdict. The defender appealed to the Sheriff (LEES), who on 2nd September restricted the interim interdict to the second conclusion of the petition, viz., the solicitation of customers, and refused it *quoad* the first conclusion, namely, the carrying on business as carrier.

After hearing proof the Sheriff-Substitute on 21st December 1898 pronounced the following interlocutor:—"Finds that the defender was a partner of MacFarlane,

Lang, & Company, which carried on business as common carriers between Dumbarton and neighbourhood and Glasgow and elsewhere; that in 1895 the firm sold for valuable consideration their business, including assets and goodwill, to the petitioners, who retained the defender in their employment for some time as their canvasser; that in or about May of this year the defender left the petitioners' employment and started business on his own account as a carrier in opposition to or in competition with that carried on by them; that since beginning business the defender has personally and by printed or written cards or circulars canvassed or solicited orders from customers of the firm of MacFarlane, Lang, & Company, with the view of inducing them to deal with him or not to deal with the pursuers: Finds in law that it is against the good faith of the contract of sale above mentioned for the defender to canvass the customers or solicit the custom of his former firm, the goodwill of which had been transferred to the petitioners: Therefore declares the interim interdict formerly granted perpetual."

The defender appealed to the Sheriff, who on 6th February 1899 pronounced the following interlocutor:—"Refuses the appeal and adheres to the interlocutor of the Sheriff-Substitute of 21st December 1898 complained of, with this variation, that it is recalled from the words "therefore declares" to the end of the interlocutor, and that in lieu thereof there are added the following findings—'Recals the interim interdict formerly granted, assoilzies the defender from the first conclusion of the prayer of the petition, but interdicts the said defender from applying by letter, circular, or other written communication, or personally, or by a traveller, or agent, or servant, to any person who was a customer of the defender's firm of MacFarlane, Lang, & Company prior to the sale of its business to the pursuers, asking such person to deal with the defender in the business in and about Glasgow and Dumbarton and neighbourhood of steamship owner, general trader, or common carrier, or not to deal with the pursuers in such business, and decerns."

*Note.*—... "The only matter on which parties have latterly joined issue is as to whether or not the defender has canvassed his former customers to resume dealing with him. . . . He is quite entitled to resume business. He is free to accept any business offered to him. He may solicit business from the whole world by advertisement, and of course he cannot prevent former customers from seeing the advertisement which intimates he has resumed business. But he is not entitled, by direct application to them, to exert his personal influence to get them to come back to him or to leave the pursuers; and he does this if he either asks them for business or gets others to ask for him, or sends them his circular, or takes any step to invite their special attention to the fact that he has resumed business. But these are the things he has done. To sell the goodwill of his

firm's business to the pursuers implied that they paid him so much to abstain from doing any of these things. But he has taken their money and then taken back the money's worth. Such acting is quite illegal, and must be stopped. Interdict has therefore been granted."

The defender appealed on the facts, and the pursuer took advantage of the appeal to argue against the refusal of the Sheriff to grant interdict under the first conclusion of the petition.

Argued for the defenders—(1) On the proof there was no evidence that the defender had solicited former customers of the old firm for business, and the Sheriff's decision on this part of the case was wrong. (2) The Sheriff had rightly refused interdict under the first conclusion of the petition. The business was limited to the carrying trade between Glasgow, Dumbarton, and the Vale of Leven. A restriction from trading within the United Kingdom was far too wide for the necessary protection of such a business. It was unreasonable and a restraint of trade, and the Court would not enforce it. Where the restriction fixed by the contract was over too wide an area, the Court were not entitled to revise the contract and restrict the area. The agreement was void and could not be amended by the Court—*Baker v. Hedgecock* (1888), L.R., 39 Ch. Div. 520; *Perls v. Saalfield* (1892), 2 Ch. 149, distinguishing *Baines v. Geary* (1887), L.R., 35 Ch. Div. 154. The case of *Price v. Green* (1847), 16 M. & W. 346, was not in point. In that case the contract was divisible, and was held good as regards the lesser restriction although void as regards the greater. But the present contract was not separable.

Argued for respondents—(1) The judgment of the Sheriffs was sound so far as it granted interdict in terms of the second conclusion of the action. There had not been observance in good faith of his bargain by the defender. He had sold the goodwill and then broken his bargain by canvassing from former customers. The case was ruled by *Trego v. Hunt* (1896), A. C. 7. [LORD TRAYNER—I think the Sheriff in his note sums up very correctly the present state of the law on this subject.] (2) The pursuers were entitled to interdict under the first conclusion of their action. The articles of association of the company which had been endorsed by the defender showed that the company contemplated extending their business over a much wider area than that at present covered by them. The restriction was therefore not wider than that reasonably necessary for their protection. A restriction against carrying on the canvassing trade in London or within 150 miles thereof, or in Edinburgh or Dublin, or within 50 miles from either, had been given effect to in *Tullis v. Tullis* (1853), 1 E. & B. 391. A stipulation not to practise as a solicitor in any part of Great Britain had received effect in *Whittaker v. Howe* (1841), 3 Beav. 383, while in *Nordenfelt v. Maxim-Nordenfelt Guns and Ammunition Company* [1894], A. C. 535,

an area of restriction as wide as the world had been held good. If the Court held that the restriction was wider than was reasonable they were entitled to grant a modified interdict—*Price, supra*.

At advising—

LORD JUSTICE-CLERK — I am satisfied upon the evidence adduced that the appellant gave ground for complaint to the respondents, to whom he had sold his business, by so dealing with and canvassing former customers of his as to interfere with the rights of the complainers as purchasers from him of his business. The case is complicated by this, that the appellant was of course entitled to any business that might, voluntarily and without any inducement or solicitation on his part, be placed in his way by those who chose to be his customers, he having been dismissed from the respondents' employment into which he had been taken when he sold his business. And if all he had done had been to do such business as he was spontaneously employed to do by persons choosing without solicitation to consign goods to his care for transit, I do not think there could have been any ground for complaint. But it is, I think, quite plain that he went beyond this, and in certain cases tried to induce business against the legitimate rights of the complainers as purchasers from him. In other words, he, not by general advertisement of his business, but by particular invitation or solicitation, endeavoured to gain over old clients to do business with him again. And it is, I think, proved that on some occasions he conveyed goods which had been specially marked for conveyance by the respondents. I think the Sheriffs were right in holding that he had given ground for interdict being granted to restrain him from so proceeding.

But the respondents have taken advantage of the appeal to make a further demand that the interdict be extended. For this I can see no reasonable ground. The whole business of the appellant was and the whole business of the respondents is carried on within a very limited area, and I think it would be quite unreasonable that by any interdict to be pronounced the power of the appellant to carry on business in other parts of the country should be excluded. I am of opinion that the Sheriff has rightly disposed of the case, and that his judgment should be adhered to.

LORD YOUNG — I arrive at the same conclusion, and I do not think it necessary to say more than this, that in my opinion, upon the agreement referred to on record, and the evidence as to the appellant's conduct, the respondents were entitled to the interdict which they have got. I am therefore for refusing this appeal and affirming the judgment of the Sheriff.

LORD TRAYNER—Two questions have been raised under this appeal for our decision; the first, and perhaps the most important of which is, whether the restraint imposed

on the defender (by his agreement with the pursuers) from carrying on the business of a carrier within the United Kingdom for ten years is valid and enforceable. The Sheriff has decided that it is not, and in that decision I concur. The business which the defender sold to the pursuers was the business of a carrier between Dumbarton and the Vale of Leven, and Glasgow, and it was for the pursuers' protection in carrying on that business that the restriction or restraint now sought to be enforced was put on the defender. I think that restraint was unreasonable having regard to the subject-matter of the contract in which it is introduced. Its unreasonableness appears from this, that it would prevent the defender from carrying on business as a carrier, between say Liverpool and Manchester, or between Galashiels and Selkirk, both localities so distant from the place or places where the pursuers carry on the business bought by them, that rivalry or competition between them and the defender is entirely out of the question. A restraint operating over so wide an area is greatly more than necessary for the pursuers' protection, and cannot therefore, in my opinion, be sustained. The pursuers sought to maintain the restriction over the whole United Kingdom, on the ground that in the articles of association of the company (referred to in the contract between the parties) power is taken to extend the operations of the company over a wider area than that within which the defender carried on business. But I cannot give effect to this contention. In the first place the defender is not a party to the company's articles of association, and is not bound by them, and if the restriction placed on the defender was held to cover all future operations of the company as foreshadowed by the articles, it might be extended so as to apply to an area far greater than even the United Kingdom, and exclude him from carrying on his business as a carrier everywhere for a period of ten years. That is not according to the language or the obvious intention of the contract between the parties. In the second place, the business itself carried on by the pursuers does not in fact extend beyond the area between Dumbarton and Glasgow. They have no through rates beyond these termini, and do not carry or undertake to carry and deliver goods beyond them.

The pursuers said that they would be satisfied if the defender was interdicted from carrying on the business of carrier between Glasgow and Dumbarton. But that was not contracted for. If the restraint, as the parties themselves expressed it, is not valid, then I think it must be disregarded. The Court cannot remake the contract for the parties. On this point I agree with the views expressed by Mr Justice Chitty in the case of *Baker, L.R.*, 39 Ch. Div. 520.

On the other hand, I agree with the Sheriff that interdict should be pronounced against the defender in terms of the second part of the prayer of the petition. I think it is established that the defender has been directly soliciting the business of persons who were his customers, that is, customers

of the business which he sold to the pursuers, and endeavouring to get them to withhold their orders from the pursuer and to give them to him. This is against the good faith of his contract with the pursuers, and in violation of his duty and the pursuers' rights.

LORD MONCREIFF—I also agree that the Sheriff's judgment should be affirmed, because I hold it proved that the defender has canvassed or solicited orders from customers of the old firm of MacFarlane & Company, the goodwill of which he sold to the pursuers. The only point as to which I have any doubt is whether the pursuers are not entitled to a wider interdict than that which the Sheriff has granted, looking to the fact that in the memorandum and articles of association of their company the objects for which the company was established are declared to include the carrying on the business of carriers throughout the United Kingdom. This, taken in connection with the fact that the defender was in the service of the pursuers' company, and presumably was aware of the purposes of their association when he sold to them the business of MacFarlane, Lang, & Company, there is room for argument that when he undertook not to carry on "any separate business of a like or similar kind in the United Kingdom for the period of ten years," the undertaking was given with reference to the purposes for which the pursuers' company was formed.

But on the whole I am satisfied that the safer view is to hold that as the business which was sold by the defender to the pursuers was of a very limited character, the restriction which would prevent him from carrying on the business of carrier in any part of the United Kingdom, however remote from Dumbarton and unconnected with the Dumbarton trade, is excessive and should not receive effect.

I also agree that the Court has no power to remodel the restriction and confine it to a more limited area.

The Court pronounced this interlocutor:—

"Dismiss the appeal and affirm the interlocutor of the Sheriff of Stirlingshire dated 6th February 1899: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Of new assoilzie the defender from the first conclusion of the prayer of the petition, but interdict the said defender from applying by letter, circular, or other written communication, or personally, or by a traveller or agent or servant to any person who was a customer of the defender's firm of MacFarlane & Company prior to the sale of the business to the pursuers, asking such persons to deal with the defender in the business in and about Glasgow and Dumbarton and neighbourhood of steamship owner, general trader, or common carrier, or not to deal with the pursuers in such business, and discern."

Counsel for the Pursuers—Salvesen—M'Clure. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—Clyde—Moncrieff. Agents—Webster, Will, & Co., S.S.C.

Tuesday, June 27.

FIRST DIVISION.

Lord Kyllachy Ordinary.

RENDALL v. STEWART & COMPANY,  
*et e contra.*

*Contract—Duration of Contract—Licence to Use Patent.*

The owner of a patent entered into an agreement embodied in the following terms:—"I, W. F. R., do appoint Messrs S. sole makers of my patent freezer machine, and do hereby accept the royalty of 10 per cent of the money received on each of the machines they sell under this patent."

*Held* that the right conferred on Messrs S. was a licence which was terminable at pleasure by the owner of the patent.

Mr William Frederick Rendall was the joint owner along with Mr Richard Cracknell of the patent rights for the manufacture of refrigerating machines. On 20th April 1893 he entered into an agreement with Messrs D. Stewart & Company, Glasgow, in the following terms:—"I, W. F. Rendall, do appoint Messrs Stewart & Company, Limited, sole makers of my patent freezer machine, patent No. 4035, A.D. 1892 (patented in the name of Richard John Cracknell, 50 Finsbury Park Road, Middlesex), and do hereby accept the royalty of 10 per cent. of the money received on each of the machines they sell under this patent.—W. F. RENDALL. *Witness*, James Gourlay."

A number of machines were made and sold by Messrs Stewart & Company under the patent, and payments were made by them to Mr Rendall and the other joint-owner of the patent by way of royalties.

In 1896 negotiations were entered into between the parties with a view to the sale of the goodwill of the business, &c., by Messrs Stewart & Company to the owners of the patent, who were proposing to form a company for working it. The negotiations fell through, and on 9th December 1896 Mr Rendall intimated on behalf of himself and Mr Cracknell the termination of the agreement of 20th April 1893.

An action was raised by Mr Rendall against Messrs Stewart & Company, in which he claimed, *inter alia*, an account of the royalties due to him under the agreement.

A further action was raised by Messrs Stewart & Company, concluding for damages for breach of contract in respect of the termination of the agreement.

The pursuers pleaded—"The pursuers having incurred loss, injury, and dam-