connecting the place of the accident with the factory, so as to get over what seems to me to be *prima facie* the insuperable difficulty which his finding has created. I observe in the illustrations which have been given by Judges in the English cases that their Lordships have dealt with or figured cases where the cart was loaded, not within the works, but outside them, at a place separate from but near them. I quite understand that if it were the practice to load at a place no considerable distance from the factory, no one would say that it was not a place "about" the factory. But in the present case there is nothing of that kind, for the place is not specially connected with the factory by use or in any way, the carter having been on the road as a wayfarer for two miles. The case has been somewhat peculiarly stated by the Sheriff, but I think his finding amounts to this, that he decided that the accident occurred "on, in, or about" the factory, otherwise he could not have arrived at the result which he has reached.

I think therefore that we should negative the first two questions. I confess that I do not understand the third, but it seems unnecessary to answer it.

Lord M'Laren—I agree, and I think that our decision is perfectly consistent with the recent English case referred to in argument, where the existence of the element of proximity was admitted, and it was held to be a question for the decision of the arbiter whether as a matter of fact the place was "about" the factory. In the present case, as has been clearly stated by the Sheriff, there is no element of proximity, and the only question is, whether we should give a remote and analogical meaning to the word "about," or its ordinary and plain meaning.

Lord Adam and Lord Kinnear concurred.

The Court answered the first and second questions in the negative, found it unnecessary to answer the third question, and found the appellant entitled to expenses.

Counsel for the Appellants—J. Wilson. Agents—Anderson & Chisholm, Solicitors,

Counsel for the Respondent—A. Duncan Smith. Agent—William Alston, Solicitor.

Saturday, June 17.

FIRST DIVISION.

[Bill Chamber—Lord Pearson.

WILLIAMS & SON *v.* FAIRBAIRN.

Interdict—Interim Interdict—Agreement not to Practise or Start Business—Practising as Servant of Another for Weekly Wage.

F. sold to W. the goodwill of his business as a veterinary surgeon, binding himself "not to practise or start business in E." for a certain period from the date of the sale. Within that period F. entered the service of a firm of veterinary surgeons in E. at a weekly wage. While in their service he granted certificates and otherwise acted as a qualified veterinary surgeon. In a note of suspension and interdict at the instance of W., *interim* interdict *granted.*

William Douglas Fairbairn, veterinary surgeon, sold to W. Williams & Son, New Veterinary College, Edinburgh, the goodwill of the business of veterinary surgeon and farrier carried on by him in Edinburgh, by disposition and assignation of 27th June 1895, and at the same time bound himself "not to practise or start business in Edinburgh as a veterinary surgeon or farrier for at least the space of five years from and after the 29th June 1895."

In May 1899 W. Williams & Son presented in the Bill Chamber a note of suspension and interdict against Fairbairn, in which, founding on the obligation quoted above, they averred—"(Stat. 3). In breach of the said obligation the respondent has recently commenced to practise as a veterinary surgeon in Edinburgh in the employment of Messrs Colin C. Baird & Son, veterinary surgeons there. The complainers believe and aver that his remuneration in Messrs Baird & Son's employment consists in whole or in part of a share of the profits of their business of veterinary surgeons in which he is employed by them. The respondent has recently canvassed a number of his old customers who were in the habit of employing him before he sold his business to the complainers, and who thereafter employed the complainers, with a view to inducing, and has thereby induced, them to transfer their employment from the complainers to Messrs Baird & Son."

The complainers pleaded—"(1) The proceedings complained of being in breach of the respondent's obligation not to practise or start business in Edinburgh as a veterinary surgeon or farrier, the complainers are entitled to suspension and interdict as craved. (2) The complainers are entitled to interim interdict."

The respondent's answer to Statement 3 was in these terms—"Denied respondent has commenced to practise, and that he gets remuneration by a share of profits. Explained that he is simply a servant in receipt of a weekly wage and board.

Denied that he has canvassed any of his old customers, or that even one of them has come to Messrs Baird since he entered their employment."

The respondent pleaded—"(2) On a sound construction of the obligation contained in the disposition and assignation founded on, it prevents the respondent only from practising as a principal on his own account, and does not strike against his acting merely in the position of a servant. (4) In any event, the note should only be passed on caution."

On 18th May the Lord Ordinary (PEARSON) passed the note and refused to grant interim interdict.

The complainers reclaimed, and argued—The Veterinary Surgeons Act 1881 (44 and 45 Vict. cap. 62), sec. 17, imposed a fine on anyone not duly qualified as a veterinary surgeon, who acted in that capacity, and incapacitated such person from suing for fees. The profession of veterinary surgeon was therefore one requiring special qualification, and the respondent, acting in that profession, though in the service of another, could not be heard to say that he was not carrying on business.—*Palmer* v. *Mallet*, July 13, 1887, L.R., 36 Ch. Div. 411.

Counsel for the complainers produced at the hearing two certificates signed by the respondent as a veterinary surgeon with reference to the condition of certain horses professionally examined by him.

Argued for the respondent—Obligations in restraint of trade were to be very strictly construed. The negative obligations of the agreement "not to practise" and not to "start business" were exegetical of one another, and did not strike at earning a living as a servant. *Palmer* v. *Mallet* was in the respondent's favour; the question decided in that case was one of the intention of parties in using the words "set up or carry on"—Justice Chitty, p. 415. The agreement in question in this case, when considered with reference to the intention of parties was to be interpreted in favour of freedom.

LORD PRESIDENT—In this application the complainers plainly have a grave and substantial interest in obtaining interim interdict, because the currency of the agreement sued on is so nearly run out that if it were not granted their interest might be prejudiced.

The words of the agreement are of the simplest description—"I bind myself not to practise or start business in Edinburgh as a veterinary surgeon or farrier." It is said that in spite of that agreement the respondent is practising as a veterinary surgeon. The answer to that averment is expressed with a reservation, because it reads—"Denied respondent has commenced to practise, and that he gets remuneration by a share of profits. Explained that he is simply a servant in receipt of a weekly wage and board."

I should say the fair reading of that was that his point is that he is not drawing the ordinary remuneration of his practice, but receives for it only a weekly wage as the servant of another. Therefore I regard this answer as an admission by the respondent that he is practising. Certificates are produced which bear to have been granted by him, and we have no denial that he had granted them, or had professionally examined the horses referred to in them. The question is, Is he practising? I read the record as containing an admission that he is, but that he is paid a weekly wage for doing so. I think that, as we are in the Bill Chamber, the complainers are in a position which entitles them to the interim interdict for which they ask, but it is only right that the respondent should have the security of caution for the loss of business which he is obliged to abandon.

I therefore propose that we should recal the interlocutor of the Lord Ordinary, and remit to his Lordship to grant interim interdict upon caution being found by the complainers.

LORD ADAM—I agree with your Lordship upon the same grounds. I do not read in this record any denial of the averment that the respondent is practising as a veterinary surgeon. The answer to the averment that he has a share in the profits of the business of his employers is a denial, not that he is practising, but that he is paid for his practice by receiving a share of the profits. It is said that practising as the servant of another he is not practising as a veterinary surgeon, and that raises the issue between the parties.

I therefore agree that interim interdict should be granted as your Lordship proposes.

LORD KINNEAR—If this case had been in the same position before us as before the Lord Ordinary, I should have been disposed to follow the course adopted by his Lordship, because although I am inclined to read the papers as your Lordships do, the statements appear to me to be somewhat vague, and I do not think it safe in the Bill Chamber to rest a judgment on pleadings as if we had a closed record in the Court of Session. If we had nothing but the complaint and answers before us, it might not have been clear that the respondent did not intend to raise a question of fact, which ought to be investigated before interdict could be granted. But the position is entirely altered by the production of the certificates to which your Lordship has referred. These certificates, bearing to be signed by the respondent as a veterinary surgeon, afford the strongest *prima facie* evidence that he is practising his profession, and his counsel have been unable to meet the natural inference arising from their terms. I therefore agree in the course proposed, of granting interim interdict on the complainers finding caution.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to grant interim interdict upon caution being found by the complainers.

Counsel for the Complainers—Balfour, Q.C.—Chree. Agents—Gordon-Petrie & Shand, S.S.C.

Counsel for the Respondent—Campbell, Q.C.—Wilson. Agent—Hugh Martin, S.S.C.

Tuesday, June 20.

FIRST DIVISION.

[Lord Kinnear, Ordinary on the Bills.

M'LETCHIE *v.* ANGUS BROTHERS.

Bankruptcy—Sequestration of Estates of a Deceased Debtor—Recal of Sequestration—Relevancy.

A petition for recal of an award of sequestration of the estates of a deceased debtor was presented by his executrix, who averred that if she were successful in an action of accounting raised by her against the creditor upon whose application sequestration had been awarded, a considerable surplus of assets over liabilities would be disclosed. The Court *dismissed* the petition.

On 14th March 1899, in the Sheriff Court of Lanarkshire, Messrs Angus Brothers Glasgow, obtained sequestration of the estates of the deceased Matthew M'Letchie, grain merchant, who died on 30th May 1898. The amount of the debt due to them by Mr M'Letchie was stated in their oath to be £975, 17s. 6d. There were a few other creditors of the deceased for comparatively small amounts, and at a meeting of creditors Mr John Wishart, accountant, Glasgow, was elected trustee on the sequestrated estates.

Mrs Annie Brown or M'Letchie, executrix-dative, *quâ* relict of the said Matthew M'Letchie, presented a petition under section 31 of the Bankruptcy Act 1856, for recal of the award of sequestration, in which she made averments to the following effect:—When Mr M'Letchie retired from business in February 1898 Messrs Angus took over the whole assets of the business with his consent in order to secure their debt, and also took out a policy on his life for £1000. In February 1899 Mrs M'Letchie raised an action of accounting against Messrs Angus for their intromissions with the proceeds of the policy of insurance and the assets of the business. The petitioner averred that Messrs Angus were, on a true accounting, due to her a large sum of money, and that the application for and award of sequestration were wrongous and oppressive.

Messrs Angus Brothers lodged answers in which they denied that there was a surplus in their hands, and averred that the policy in question never formed any part of the estate of the deceased. They accordingly submitted that the petition should be refused.

On 7th April 1899 the Lord Ordinary on the Bills (KINNEAR) dismissed the petition.

The petitioner reclaimed, and argued—Granted that sequestration could not have been refused, the petitioner now made averments which entitled her to recal thereof. The Court had an equitable jurisdiction in such matters, and inasmuch as the petitioner's averments instructed that there was a surplus sufficient to meet the claims of all the creditors of the deceased, there was no good reason why the administration of the estate should be continued in the hands of a trustee instead of being entrusted to the proper person, viz., the executrix—*Gardner* v. *Woodside*, June 24, 1862, 24 D. 1133; *Ballantyne* v. *Barr*, Jan. 29, 1867, 5 Macph. 330; *Blair* v. *North British and Mercantile Insurance Company*, Jan. 8, 1889, 16 R. 325; and *Aitken* v. *Kyd*, Nov. 19, 1890, 28 S.L.R. 115, referred to.

The respondents' argument sufficiently appears from the opinion of Lord M'Laren.

In the course of the discussion it appeared that the action of accounting against the respondents had been sisted at the instance of the petitioner herself.

LORD M'LAREN—This is a case of sequestration at the instance of a debtor in which an application for recal has been presented by the executrix. I think such cases are to be carefully distinguished from sequestrations of a living debtor, because the grounds on which sequestration may be applied for are quite different in the two cases, and it follows by clear induction that the grounds of recal must also be different. The sequestration of the estate of a deceased debtor is granted on the application of a creditor, who is not necessarily in the position of having given a charge, or having used diligence for the recovery of his debt. Of course the condition of notour bankruptcy is altogether inapplicable to the estate of a deceased debtor, for no person can be rendered bankrupt after his death. But more than that, the statute does not even require as a condition of the right to the distribution of an estate in this form that it should be shown that the estate of the deceased is insolvent, and that arises in this way. Insolvency is only a requisite in the case of a living debtor, because notour bankruptcy is necessary, and notour bankruptcy is defined as insolvency coupled with a charge or certain equivalent diligence.

Such being the condition upon which sequestration may be applied for, it appears to me that this is purely a process of distribution of the estate of a deceased debtor. The award of sequestration does not represent that the defunct was bankrupt, or even insolvent. It carries with it no interference with the conduct of a business or the conduct of any party's affairs by himself. It is merely a mode in which creditors of a deceased debtor, who had been unable to get payment of their debts in the ordinary way, may by judicial authority take the management of his estates into their own hands. Now, while I wish to guard myself against the view which has been deduced from some of the cases, that equitable considerations enter into the question of a recal of the sequestration of a living debtor, because I think that there the matter must be determined by the