to support her cannot in a question with the parochial board exceed their legal liability, that is, their liability had it arisen in a question with the pauper herself. The right of the parochial board as against the pauper is to insist that his or her existing estate shall be applied to the maintenance of the pauper. If the pauper has no estate, and no relative bound and able to support her, the parochial board are bound to support her, and if she subsequently acquires funds by succession, the parochial board is not entitled to reimbursement out of such estate for prior outlays which it has made. If, again, the pauper has no estate of her own, the parochial board may claim payment from those relations who are legally bound to support her; but the measure of their liability is what they can at the time afford after reserving enough for their own support, and if there is no superfluity they are assoilzied—*Hamilton* v. *Hamilton*, 4 R. 688. No doubt a relative who is liable for the aliment of a pauper, and is not at once proceeded against, continues liable in this sense that when discovered he is bound to pay arrears of aliment which has been advanced by the parochial board. But that is on the footing that when the advances were made the relation was not only bound but able to contribute. It may be that it lies upon the relation to prove that he was unable to contribute or pay when the advances were made; but that does not alter the legal measure of his liability. This point is noted by Lord Fraser in his elaborate opinion in the case of *The Inspector of Poor of Kilmartin* v. *Macfarlane*, 12 R. 713, in which he says—'If there be an existing source from which the pauper can obtain maintenance without coming upon the parish, that must be drained dry before the parish can be burdened. But that is a totally different case from what we are here dealing with—of a pauper who had nothing at the time relief was granted, either in the shape of property of her own or of relatives who could support her. The argument would be of force if a claim could be made against a relative of a pauper for repayment of the expense of the maintenance of the pauper for nineteen years, on the ground that the relative had succeeded at the end of that time to a fortune. But no such claim can be made against the relative if it could not be against the pauper himself. This is indeed *idem peridem*. The past aliment has been absolutely given at a time when neither the relative nor the pauper had estate to meet it. Whatever may be the case as to maintenance given after the fortune has been acquired by either, the past maintenance grounds no claim for repetition.'

"I was referred by the pursuers' counsel to a case, *Duncan* v. *Forbes*, 15 S.L.R. 371, in which the late Lord President said—'I must add that the question for us is not to settle whether he was unable to pay at the time that the aliment was paid, but whether he is able to do so now. For the parochial board when it aliments a person, always has a continuing claim for the sum against anyone who is bound to maintain the pauper.' I cannot ascertain from the report what was the point in the evidence or argument with reference to which this observation was made. It may simply mean that a temporary deficiency of income in any one year will not excuse ultimate payment of arrears. But as no notice is taken of the *dictum* in the subsequent case of *Kilmartin*, in the absence of further authority to the same effect I feel justified in following the views expressed by Lord Fraser in the case of *Kilmartin*, with which I agree." . . . .

Counsel for the Pursuer—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for the Defender — Young. Agents—Welsh & Forbes, S.S.C.

Friday, December 13.

OUTER HOUSE.

[Lord Kyllachy.

MEIKLE *v.* MEIKLE.

Contract—Pactum illicitum—Restraint on Trading — Partnership — Dissolution of Partnership.

A contract restricting a former partner of a firm from carrying on the trade of the firm in any area, however wide, is valid and binding, unless it appears from the nature and extent of the business of the firm that the restriction is wider, either as regards the whole business or any separable part of it, than is reasonably necessary for the protection of the party in whose favour the restriction is imposed.

This action was raised at the instance of William Tait Meikle, wholesale glass merchant and glazier, Glasgow, and concluded for declarator that James Harvie Meikle, 19 Royal Terrace, Glasgow, was not entitled to carry on business in Scotland as a wholesale or retail glass merchant or glazier, in opposition to or in competition with the pursuer, or the pursuer's firm of William Meikle & Sons, and for damages in respect that the said James Harvie Meikle had already done so.

The circumstances of the case as they appeared on a proof were as follows:—Prior to 1892 the pursuer and defender had been partners in the firm of William Meikle & Sons, wholesale glass merchants and glaziers, Glasgow. At that date negotiations were entered into, the upshot of which was that the defender agreed to retire from the business on 31st December 1894. This arrangement was expressed in an agreement, dated 19th January 1892, by the sixth article of which it was provided—"In respect that it is reasonably necessary for the protection of the interest of the first party (the pursuer) having regard to the nature of the business carried on by the firm throughout Scotland, the second party (the defender) binds himself not to commence business in that country as a

wholesale or retail glass merchant, or glazier, or glass stainer or decorator, in opposition to or in competition with the first party, or the said firm of William Meikle & Sons, either on his own account or in partnership with others, or directly or indirectly in any way whatever."

The pursuer retired from the business as had been agreed on 31st December 1894, but on or about 1st March 1895 a circular was addressed to the customers of the firm of William Meikle & Sons in the following terms:—

"69 *and* 71 *M'Alpine Street, Glasgow, 1st March* 1895.

We beg to intimate having commenced at above address as glass merchants and glaziers. The business will be under the charge of Mr J. H. Meikle (late of Wm. Meikle & Sons, 21 Wellington Street), and any work entrusted to us will have prompt and careful attention.

CRAIG, MEIKLE & CO."

It was proved that J. H. Meikle had the main interest in the firm of Craig, Meikle & Company. Evidence was also led as to the nature and extent of the business of William Meikle & Sons, the import of which is stated in the opinion of the Lord Ordinary *infra*.

William Tait Meikle accordingly raised the present action, and pleaded—"(1) The defender having committed a breach of the sixth article of the agreement of 19th January 1892, the pursuer is entitled to decree in terms of one or other of the declaratory conclusions of the summons.

The defender pleaded, *inter alia*—"(2) The clause in the contract founded on being in restraint of trade, and unnecessary for the protection of the pursuer's legitimate interests, is null and void.

On 13th December 1895 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the defender has committed a breach of the sixth article of the agreement libelled: Therefore finds, decerns, and declares that the defender is not entitled to commence or carry on business in Scotland as a wholesale or retail glass merchant or glazier, or glass stainer or decorator, in opposition to or in competition with the pursuer, or the pursuer's firm of William Meikle & Sons, either on his own account or in partnership with others, or directly or indirectly in any way whatever, and interdicts, prohibits, and discharges the defender from commencing or carrying on business in Scotland as a wholesale or retail glass merchant or glazier, or glass stainer or decorator, in opposition to or in competition with the pursuer, or the pursuer's firm of William Meikle & Sons, either on his own account or in partnership with others, or directly or indirectly in any way whatever, and further decerns against the defender for payment to the pursuer of the sum of £5 sterling in full of the conclusion for damages: Finds the pursuer entitled to expenses," &c.

Opinion—[*After considering the evidence relating to the defender's connection with Craig, Meikle, & Company*]—"It is said however—and as authorities were referred to I took time to consider this part of the defender's argument—it is said that the contract on which the pursuer founds is void as in restraint of trade, or at all events that it is void so far as regards one part or branch of the business, viz., their trade or business as glaziers, and the ground of this argument is, that the restraint stipulated in the contract extends to the whole of Scotland, and not merely to Glasgow and its immediate neighbourhood.

"I do not know that there is any doubt as to the law on this subject. It may still, I think, be affirmed if it is desired to state the legal doctrine quite generally, that an unlimited restraint is bad, while a limited restraint is good. But it is no longer the law (if it ever was the law in Scotland, which I doubt) that a restraint is necessarily unlimited because with respect to area it extends to the whole of Scotland, or the whole of Britain, or even the whole of Europe. The law is that a restraint is sufficiently limited whatever area it may in terms cover, if taken as a whole it is no larger than is reasonably necessary for the protection of the party with whom the contract is made. If taken as a whole it satisfies that condition, it will be good—otherwise it will be bad. If it admits of being divided, that is to say, divided without defeating its purpose, each part, that is to say, each separated part, will be good or bad according to the same test. That, I think, is the result of the recent authorities in England, particularly the case of *Nordenfeldt* v. *Maxim-Nordenfeldt Gun Company*, 1894, App. Cas. 535, following upon the cases of *Rousellon* v. *Rousellon*, 14 Ch. Div. 351, and *Royers* v. *Maddocks*, 1892. 3 Ch. 346, and other cases there cited. And I am not able to deduce from any of the decided cases that the law of Scotland is or has at any time been really different.

"Now if this be the law, what in the present case is the result of the evidence. Has the defender established—for the *onus* is on him, that is admitted—that the restraint in question, or any separable part of it, is larger—plainly and obviously larger—than can possibly be required for the pursuer's protection as the continuing parties in this business. That, I take it, is the question I have to decide. For, as I have already said, the *onus* is on the defender, who is in the position of impeaching his own contract, and who cannot, I think, do so successfully except by showing conclusively that the restraint which is in question is useless and therefore oppressive. Now, it was not, I think, seriously disputed that the pursuer's business—the business to be protected—extends, as regards the sale of glass and the department of glass-staining and decorating, over the whole of Scotland. At all events, that fact is, I think, well proved. There may be particular counties to which the contracts and transactions of the pursuer's firm do not extend, but that the firm are candidates for business all over Scotland, cannot I think consistently with the evidence be disputed. The question really at issue comes, I think, to relate to what is

called the firm's glazier business—a business or branch of business which appears to consist in taking and executing contracts for the execution of glazier-work contracts, that is to say, in which the workmanship as well as the material is supplied by the contracting firm. This business, the defender contends, is really a separate business, and is practically confined to Glasgow and its immediate neighbourhood, so that a restraint applying to the whole of Scotland is beyond what is in any reasonable view necessary for its protection as regards that part of the pursuer's business.

"Now, the first observation which I have to make is that the defender is on this part of the case a formidable witness against himself. The contract which he has signed declares in express terms that in respect that it is reasonably necessary for the protection of the interest of the first party, the pursuer, having regard to the nature of the business carried on by the firm throughout Scotland. That is set forth as the foundation and basis of the agreement. Now, that being so, I am bound to ask, can the defender, having so declared, now say that in a material particular the restraint thus stipulated goes beyond what is necessary for the declared object? No doubt the declaration in question is not conclusive. The defender's case rests ultimately on grounds of public policy, and if these grounds exist, they cannot of course be displaced by any declaration of parties. But the declaration is nevertheless the defender's testimony, and we are bound to take it as valuable testimony. The defender knew the firm's business. Nobody except the pursuer knew it so well, and when he is found affirming that, having regard to the nature of that business, the stipulated protection is no more than necessary, it does seem to me extremely difficult to hold that as regards one important branch of the firm's business, that the protection is in fact needless and cannot possibly be required.

"In truth, however, the evidence as a whole does not appear to me to support the defender's contention. For one thing, I greatly doubt whether it is legitimate in this matter to break up the pursuer's business into parts. I rather take it as the result of the evidence that the business is one business, and that it is going much too closely to work to pick out this or that branch, or this or that department, and point out that as regards such branch or department a more restricted area than that stipulated would suffice for protection. But apart from that consideration, I am not able to affirm as the result of the proof that even the pursuer's Glasgow business is confined to Glasgow and its immediate neighbourhood. In point of fact it is proved to extend more or less over the west and south-west of Scotland, and I confess I see no reason why it should not extend like the rest of the business over other parts of the country. It may be true that in certain towns local tradesmen compete at some advantage—that is to say, such tradesmen save what is called the country allowance, which it appears is always paid to workmen who are sent to work at a distance from their homes. But that advantage does not apply to country contracts. As to these, so far as I can see, the pursuer may quite well compete with anybody, and that being so, I am unable to discover any sufficient grounds for setting aside the restraint in question as a whole, or for curtailing its operation as regards any branch of the pursuer's business. The result is that the pursuer is entitled to a judgment in terms of the leading conclusion of his summons.

"I should add that I have considered the question of damages, and as mentioned at the close of the proof, it appears to me that assuming the pursuer to be right, as I hold him to be right in his contention, the damages should be assessed at £5."

Counsel for the Pursuer—M'Leod. Agent—J. Knox Crawford, S.S.C.

Counsel for the Defender — Salvesen. Agent—John Rhind, S.S.C.

Wednesday, January 8, 1896.

OUTER HOUSE.

[Lord Kincairney.

M'GREGOR'S TRUSTEES *v.* BOSOMWORTH.

Succession—Trust—Direction to Trustees—Uncertainty.

By his trust-disposition and settlement a testator directed, *inter alia*, "that after payment of the above legacies the residue of my estate, if any, shall be disposed of at the discretion of my said trustees." *Held* that this direction was void from uncertainty.

By his trust-disposition and settlement the deceased George M'Gregor conveyed his whole estate to the Reverend Robert Davidson, minister of the parish of St Cyrus, and others, as trustees. By the fifth purpose of the said trust-disposition the truster directed "that after payment of the above legacies the residue of my estate, if any, shall be disposed of at the discretion of my said trustees."

After the other purposes of the trust were fulfilled, there remained a balance in the hands of the trustees of £511, 5s. 7d. They alleged that they had the verbal instructions of the granter to employ this residue as a charitable fund for behoof of the parishioners of the parish of St Cyrus, but in respect of questions raised by the heirs *in mobilibus* of the truster they brought a multiplepoinding in which the residue was the fund *in medio*.

The fund *in medio* was claimed by (1) the trustees, and (2) the heirs *in mobilibus* of the truster.

The latter pleaded—"The testator's direction as to the residue of his estate being null and void for uncertainty, the claimants