interest was to be something substantial above £210, the salary he was in receipt of at the commencement of the partnership. There the partner was to have one-fourth of the profits. It is not alleged that the business is not a profitable one; and I think the Court has the means of striking a proportion, and so giving effect to the contract.

I am of opinion that the Lord Ordinary has rightly repelled the pleas against relevancy, and that the case ought to be sent to proof.

The Court assoilzied the defender.

Counsel for Pursuer—Guthrie Smith. Agents—Macrae & Flett, W.S.

Counsel for Defender—Fraser—Rhind. Agent—R. P. Stevenson, S.S.C.

Thursday, July 19.

FIRST DIVISION.

[Bill Chamber.

MUIRHEAD *v.* MILLER.

Husband and Wife—Marriage-Contract—Alimentary Provision—Bankrupt.

Under an antenuptial marriage-contract a husband bound himself to pay his wife during her life and after the marriage, exclusive of his *jus mariti*, "a free yearly annuity of £100." Five years after marriage the husband became bankrupt. The wife claimed upon his estate for the arrears of annuity since the marriage, and alleged that, even if the annuity was alimentary, the aliment she had received had fallen short of it in amount. *Held* that on the face of the deed the provision was alimentary, and that the presumption was that the claim had been satisfied by aliment afforded otherwise.

The estates of Lewis P. Muirhead & Company and Lewis Potter Muirhead were sequestrated on 18th April 1876, and John Miller was elected trustee. Muirhead's wife lodged a claim with an affidavit for £495, said to be due by the bankrupt to her in terms of an antenuptial contract of marriage between them. In the marriage-contract, dated 27th September 1871, Lewis Potter Muirhead bound and obliged himself "to make payment to the said Florence Lefevre D'Arcy Hale, his promised spouse, during all the days and years of her life, and after said marriage, exclusive of the *jus mariti* and right of administration of the first said party, and of any other husband she may marry, of a free yearly annuity of £100 sterling." The first payment was to be at the first term of Whitsunday or Martinmas occurring after the marriage.

The claimant stated that she had not received aliment to the extent of the annuity, and that her weekly allowance was about £3 for the maintenance of the house, consisting of herself, her husband, two servants, and children. There was an obligation to pay the annuity, which was not merely alimentary.

The trustee rejected the claim *in toto*, "in respect the instalments of annuity and interests claimed are satisfied and extinguished by the maintenance and alimentary payments which the claimant has received since her marriage from her husband."

The claimant appealed to the Sheriff of Lanarkshire, and pleaded:—"(1) The obligation to pay £100 a-year being part of the antenuptial contract of marriage, is a good obligation. (2) It is not extinguished by the bankrupt supplying her with aliment, because the annuity is not for this purpose; he is bound at common law to maintain her, and this provision as an obligation is over and above the common law obligation, and because she is entitled to the disposal of the annuity as she pleases for all the ordinary purposes of a woman. (Additional) There is no legal presumption that the arrears claimed have been paid, because the annuity is founded upon a written obligation, and it is not within house rents, servants' fees, men's ordinaries, and merchant's accounts.

The respondent pleaded—"(1) The arrears of annuity and interest claimed are satisfied by the aliment received by the appellant since her marriage. (2) In any event, the appellant can claim only for the three half-years prior to the sequestration—the others being presumed to be discharged."

The Sheriff-Substitute (SPENS) refused the appeal. In a note he said:— . . . "I observe it is pleaded that this annuity is in no way alimentary. This I cannot hold under the clause in the marriage-contract declaring that the provisions thereunder are purely alimentary. I am of opinion that the trustee, in holding that this provision has been extinguished by the aliment and maintenance afforded by the bankrupt to his wife up to the date of sequestration, has arrived at a sound conclusion."

The claimant then presented an appeal to the Court of Session under section 170 of the Bankruptcy (Scotland) Act 1856.

The Lord Ordinary (CURRIEHILL) dismissed the appeal, when the appellant reclaimed, and argued—A provision given by a husband to a wife in a marriage-contract was not satisfied by the wife's living in family with him. The husband was bound to support her even though she had separate estate. The word "alimentary" in the deed was only a word of style, meaning that the fund was not to be attachable nor assignable. The provision was one of pin-money.

Authorities—*Buie* v. *Gordon*, Feb. 2, 1827, 5 S. 464, and 9 S. 923; *Rennie* v. *Ritchie*, April 25, 1845, H. of L. 4 Bell's Apps. 221 (Lord Campbell's opinion, 242); *Kemp* v. *Napier*, Feb. 1, 1842, 4 D. 558; *Howard* v. *Digby*, 2 Clark and Finn, H. of L. Reps. 634 (Lord Lyndhurst's opinion, 665); Macqueen on Husband and Wife, 356-8.

The respondent argued—This was not so favourable a provision as pin-money. Pin-money was something over and above what was necessary for the wife. Mrs Muirhead had been alimented by her husband, and it was to be presumed that she had spent the aliment. In the cases cited on the other side the provisions were not alimentary.

Authorities—*Dunlop's Trustees* v. *Dunlop*, March 24, 1865, 3 Macph. 758; *Hutchison* v. *Hutchison's*

Trustees, June 10, 1842, 4 D. 1399; *Allan* v. *Hutchison's Trustees*, Feb. 1, 1843, 5 D. 469; *Donald* v. *Donald*, May 26, 1860, 22 D. 118.

At advising—

Lord President—I think the grounds of judgment upon which the Sheriff-Substitute decided this case are quite sound. The provision in the marriage-contract is certainly not an ordinary one, but there cannot be the smallest doubt that on the face of the deed it is alimentary. In a question between the husband or the husband's creditor and the wife it must be held to be given by the husband for the purpose of aliment only. When the provision is in arrear, I think the natural presumption is that the aliment has been afforded otherwise, and that the wife's claim has been satisfied. When arrears of an alimentary annuity are claimed, they are so claimed as applicable when paid to alimentary purposes in the past; and they must be so used, because the aliment for the future goes on at the same rate. But the aliment claimed here can only be applied for the satisfaction of debts; if it were paid in full, I do not see how the claimant could apply it consistently with its being an alimentary fund.

Lord Deas—I do not differ from the Sheriff-Substitute's judgment. But I desire not to be held as laying down that if this aliment were asked by the wife termly it would not be granted.

Lord Mure and Lord Shand concurred, the former stating that the principle of the case of *Donald* v. *Donald*, 22 D. 118, applied.

The Court adhered.

Counsel for Claimant (Appellant)—Fraser—Rhind. Agent—William Officer, S.S.C.

Counsel for Trustee (Respondent)—Gloag. Agents—Ronald & Ritchie, S.S.C.

Friday, July 20.

FIRST DIVISION.

[Sheriff of Banff.

FORBES *v.* CAIRD.

Proof—Parole—Writ or Oath.

In an action by one innkeeper against another for payment of the cost of stabling the horses of an omnibus the defender stated that it had been arranged between them that there was to be no charge, the fact of the omnibus starting from and arriving at the pursuer's hotel being sufficient consideration. *Held* that the defender ought not to be restricted to the writ or oath of the pursuer for proof of his averments, and that he was entitled to a proof at large.

Observations regarding the restriction of proof in contracts of an unusual nature.

This was an action by James Forbes, innkeeper and stabler, Portsoy, against James Caird, innkeeper, Cullen. From 1st May 1867 till 28th October 1876 the defender had run a two-horsed omnibus each day between Cullen and Portsoy, and twice a-day the horses were stabled in the pursuer's stable attached to his hotel in Portsoy. The pursuer now sued the defender for the stabling of the horses, at the rate of fourpence for the two on each occasion, amounting for the whole period to £98.

The defender answered that there had been an arrangement between the pursuer and himself, at the pursuer's request, that the omnibus should arrive at and depart from the pursuer's hotel, as there was a rival omnibus in connection with a rival hotel. That was in order to benefit the pursuer's hotel, and the pursuer on his part agreed to give the stabling free of charge.

The Sheriff-Substitute (Gordon) allowed both parties a proof of their averments, and on appeal the Sheriff (Bell) adhered to that interlocutor, with the addition that he restricted the proof of the agreement alleged by the defender to writ or oath. He added the following note:—

"*Note.*—. . . With reference to the description of evidence which is competent in addition to the authorities cited, observe Ersk. iv. 11, 20, and *Johnstons* v. *Goodlet*, July 16, 1868.

"The contract in *Johnstons'* case and that in *Edmonston* v. *Bruce*, June 7, 1861, 23 D. 995, are very different from the present. But the opinions delivered are in point.

"And the Sheriff does not see that any sound distinction can be drawn between the present case and *Taylor* v. *Forbes*, 24 D. 19. The contract there was in its main branch as nearly a nominate contract, whether of *locatio operis* or agency, as the leading undertaking in the present case can be held to be. But Lord Rutherfurd and the Court were all of opinion that the counter engagement of remuneration must also be taken into view. And having here the same element of an averment that it was part of the agreement that no money was to be paid, it seems impossible to distinguish between the two cases. It can make no essential difference that the law agent was said to look for remuneration of expenses to be recovered from the opposite party, and the innkeeper is said to trust for his remuneration to the influx of guests into his hotel."

The defender reclaimed against the restriction on the proof.

The following cases, in addition to those quoted by the Sheriff in his note, were cited:—*Thomson* v. *Fraser*, October 30, 1868, 7 Macph. 39; *Scotland* v. *Henry*, July 19, 1865, 3 Macph. 1125.

At advising—

Lord President—I do not see any legal difficulty in this case, and I am very unwilling to go back upon the somewhat abstruse distinctions which have been laid down between nominate and innominate contracts. It is sometimes difficult to reconcile the dicta of judges upon that subject. I think it is better to go back to the law upon the matter as laid down by Erskine.

In the present case the contract which is alleged is a simple and ordinary one of every-day occurrence. There is nothing unusual or complicated about it. The case contemplated by Erskine, of which proof is to be restricted to writ or oath, is a case with mutual stipulations which are not of the usual kind, and which do not flow from the general nature of the contract between