obstructions, or projections on, upon, or over it" are forbidden by the 151st.

The first part of the definition covers only public passages or places, and this branch of the argument must be taken on the assumption that the pieces of ground in dispute are not public unless they are made so by the Edinburgh Police and Municipal Statutes. But it is said that so far at least as the railway bridge is concerned, it is covered by the words "bridges open to the public." These are words of ordinary language and they do not appear to be very difficult of interpretation. A bridge is not open to the public if the public is prevented from making use of it by any physical or legal obstruction, and the definition must therefore mean that it is physically accessible, and that the public is either entitled or allowed to enter upon it. But the words of definition describe a condition of fact without any implication of legal right or liability. So long as that condition of fact continues the definition applies. If it is lawfully altered the definition applies no longer. There is nothing in words that are merely descriptive to import a transference of rights of property from one person to another or from a private owner to the public. But the pursuers' argument is that once the definition is satisfied the 112th section comes in to vest the roads or bridges in the Magistrates, and that on the same condition the Magistrates may under the 151st section order the removal of all obstructions, encroachments, and projections. But in so far at least as regards streets not at "present maintained by the Magistrates and Council," the 112th section vests no right in the Magistrates beyond "charge, control, and superintendence;" and the criterion of the power to control and regulate is the fact that a street or bridge is open to the public. If the ground is not already subject to a public right, there is no positive enactment that touches the inherent power of the private owner to exclude the public, and if the public has been allowed to pass out of mere good will, and so long only as their passage is not inconsistent with the use and occupation by the proprietor of his own property, there is nothing in the statute to prevent the proprietor from taking his road or bridge outside the definition by appropriating it to purposes inconsistent with public use. It is familiar that landowners within burghs may lay out ground for streets in such a way as to create an indefeasible right in the public or in a community of feuars; or again they may allow the public to make use of their land in such a way and for so long a time as to found a prescriptive right. In either case their private street will continue to be a street in perpetuity. But the pursuers' argument is that if they once allow the public to enter upon a road or bridge, although not for long enough to found a prescriptive right, and without creating an adverse right in any other form, the supereminent right of the Magistrates comes in to compel them to keep their property open to the public for all time. This is confiscation of private property for the benefit of the community, without compensation, and without the previous notice which is generally exacted before power is given by Parliament, even to purchase without the owner's consent. A construction of an Act of Parliament so inconsistent with the ordinary methods of legislation ought not to be adopted if it is not the plain meaning of clear language, and I find nothing in the Act to support it. The true effect of the clauses founded on seems to me to be that so long as private streets are streets in fact, the owners must submit to the superintendence and control of the magistrates, for the safety and advantage of the community. But I find nothing to interfere with the legal right of private owners to convert their property to other uses, if independently of the police statute it has not become the subject of any public right-of-way. Even if this were doubtful, however, I should not be able to read the pursuers' statute of 1879 as repealing to any effect the statutes of the North British Railway Company, or enabling the Magistrates to interfere with the statutory purposes for which the company holds its property.

For these reasons I am for adhering substantially to the Lord Ordinary's interlocutor.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

The Court recalled the Lord Ordinary's findings and adhered so far as he assoilzied the defenders.

Counsel for the Appellants—Clyde, K.C. —Cooper. Agent—Thomas Hunter, W.S.

Counsel for the Respondents—The Dean of Faculty (Asher, K.C.)—Ure, K.C.—Grierson. Agent—James Watson, S.S.C.

Tuesday, February 2.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ALLISON *v.* ALLISON AND OTHERS.

Proof — Contract — Innominate and Unusual Contract — Salary and Share of Profits.

In an action of count, reckoning, and payment against the trustees of his brother, a wood merchant, the pursuer averred that he acted as manager in the timber yard of his brother at a specified salary with an allowance for house rent, "together with one-fourth of the profits of the business," and that with one exception he did not draw out his share of the profits in each year as it accrued, but allowed it to remain in his brother's hands.

The defenders pleaded that as the pursuer's averments set forth an innominate and unusual contract, the

proof must be limited to writ or oath. The Court (*aff.* judgment of Lord Stormonth Darling, Ordinary) *repelled* the plea, and allowed proof *prout de jure.*

Prescription—Triennial Prescription—Act 1579, cap. 83—Service—Commercial Contract—Salary and Share of Profits.

W. A., a wood merchant, employed his brother, D. A. (the pursuer), in his timber yard under an agreement where by the pursuer alleged he was to act as manager at a specified salary, with an allowance for house rent, "together with one-fourth of the profits of the business." It was averred by the pursuer that these profits were not paid when due, but were allowed to remain in his brother's hands.

In answer to the pursuer's demand for the balance due to him in an action of count, reckoning, and payment, the trustees of W. A. pleaded that as the contract was one of service only the pursuer's claim, so far as applicable to the period prior to the three years before the raising of the action, had undergone the triennial prescription.

Held (*rev.* judgment of Lord Stormonth Darling) that the alleged agreement was a commercial contract to which the Act 1579, cap. 83, did not apply.

This was an action of count, reckoning, and payment at the instance of David Allison, timber merchant, Paisley, against the trustees of his late brother William Allison, also timber merchant at Paisley, concluding for production of a statement of the accounts and affairs of the business of a timber merchant carried on by the deceased William Allison, and of his whole intromissions with the funds and assets of said business from 1st July 1883 to 30th June 1902, and for payment of £10,000.

The following narrative of the averments of the parties is taken from the opinion of the Lord President—"The pursuer and the late William Allison were brothers, sons of the deceased Walter Allison who was a timber merchant in Paisley. From the statement in the record it appears that upon the retirement from business of Walter Allison in or about 1846 his business was taken over by the late William Allison, who was his eldest son, and it is admitted that for some years prior to 1876 the pursuer was in his brother's employment. He then commenced business on his own account but was unsuccessful, and his estates were sequestrated in December 1878.

The pursuer alleges that in or about the year 1879 the late William Allison asked him to return to his employment, and that he did so, bringing with him his own customers and connection, which he says were considerable. He alleges that he acted as manager in the timber yard at a specified salary with an allowance for house rent "together with one-fourth of the profits of the business," and that with a specified exception he did not draw out his share of profits in each year as it accrued, but allowed it to accumulate in his brother's hands. I understand this averment to mean that under the agreement with his brother he had right to receive a share of profit as profits and not merely a salary in part measured by profits. The defenders on the other hand allege that the late William Allison took the pursuer back into his service as a salaried servant, and that he, not being under any antecedent obligation to do so, resolved to treat the pursuer as having a sum of £1169, 1s. 10d. invested in the business. The pursuer on the other hand avers that under a settlement of accounts and a new arrangement between them in July 1883 the pursuer was given £1169, 1s. 10d. or thereby, and that it was agreed that the pursuer should continue in the employment of the defender and act as manager at the yearly salary of £104, with £26 per annum in name of house rent, and a share of the profits, which was increased to three-eighths, and that it was arranged that the sum of £1169, 1s. 10d. above mentioned should not be drawn out by the pursuer, but should be left in the business and used by William Allison as part of the working capital of the business, and yielding interest at the rate of 5 per cent. He also alleges that the sum due to him as above mentioned, and his share of profits, are set forth in a holograph statement made out by the said William Allison as at 30th June 1883, and he calls upon the defenders to produce it. The pursuer produces a report which he alleges to have been prepared by the defenders' accountants, in which the pursuer's share of profits is taken to be three-eighths, and the balance of £2028, 12s. 2d. is brought out in his favour. The defenders allege that the sum of £1169, 1s. 10d. invested in the business was a gift on the part of William Allison to the pursuer, and that a few months after his death there was discovered between the leaves of his stock-book for the year 1883 a half-sheet containing a calculation by him bringing out the sum of £1169, 1s. 10d. just mentioned as due to the pursuer, written in ink, and having subjoined by him at some unknown date a pencil jotting

'W. Allison - - - 4/8
D. Allison - - - 3/8
Geo. Richmond - - 1/8
8/8ths,'

and the following words in William Allison's handwriting, "The profits after this date to be allocated as p. each share. W.A.'"

The pursuer pleaded—"(1) The defence is irrelevant."

The defenders pleaded—"(1) The pursuer has no title to sue an action of accounting against the defenders. (2) The pursuer's averments are not relevant, *et separatim* are not sufficiently specific to be remitted to probation. (3) The contract alleged by the pursuer being a contract of employment for a period of more than a year's duration, or otherwise being an innominate contract of an unusual kind, can be proved only by the probative writing of the late William Allison delivered to the pursuer.

(6) Any claim at the pursuer's instance, so far as applicable to the period prior to three years before the raising of the action, has undergone the triennial prescription."

On 14th November 1903 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Repels the first plea-in-law for the pursuer, and the first, second, and third pleas-in-law for the defenders: Sustains the sixth plea-in-law for the defenders: Allows the pursuer a proof by writ in support of his claim to remuneration for services prior to 28th May 1900: Further, allows the pursuer a proof *prout de jure* of his averments in support of his said claim subsequent to that date, and also of his averments with regard to the sum of £1169, 1s. 10d., mentioned on record, and interest thereon, and to the defenders a conjunct probation," &c.

Opinion.—"The pursuer's right to demand an account of his late brother's business affairs from 1st July 1883 to 30th June 1902, depends upon his averment that on the first of these dates his brother and he made the 'new arrangement' described in the condescendence. The arrangement is said to have consisted of two parts, one relating to his remuneration for the future as manager of his brother's business, the other relating to a sum of £1169, which was then fixed as the amount of past profits standing at his credit, and which was to be left in the business, bearing interest at 5 per cent.

"The first plea to be noticed is one stated by the defenders to the effect that the contract alleged by the pursuer, being an innominate contract of an unusual kind, can be proved only by the probative writing of the late Mr Allison delivered to the pursuer. The alleged contract may be somewhat unusual, inasmuch as it consists of two parts, but it is not innominate, for it is a contract of service and nothing else. The pursuer does not allege that, either in 1879 when he first entered his brother's employment, or after 1883 when the 'new arrangement' was made, he was his brother's partner or anything but manager of his brother's business. That a manager should in part be remunerated by a share of profits, or a percentage of profits, is no uncommon occurrence. This plea, therefore, must be repelled.

"It is otherwise, in my opinion, with the defenders' plea 6, which is founded on the triennial prescription. The Act 1579, c. 83, has been found to apply to superior as well as inferior servants and to wages and salaries whether fixed or unfixed. If so, I can see no reason why it should be excluded from a case where part of the wages are payable in the form of a share of profits. All the evils and inconveniences which the Act presumably was passed to prevent would be incurred rather more by a belated inquiry into the profits of a business than by a similar inquiry into the payment of wages. Nor is it at all necessary for the person founding on the Act to aver payment. That was a notion for which at one time there was some foundation in judicial *dicta*, but, as explained by Lord Kincairney in *Miller* v. *Miller*, 25 R. 995, at p. 997, the contrary has been settled for at least half-a century. Therefore it is nothing against the plea to point to the defenders' statement (in Ans. 3) that after 1887 the late Mr Allison 'never paid to the pursuer any further sum as a share of profits.' Neither can it be maintained that the pursuer's claim is founded on a 'written obligation' in the sense of the statute. The passage in Bell's Commentaries, i, 349, quoted with approval by Lord President Inglis in *Chalmers* v. *Walker*, 6 R. at p. 201, makes it clear that the kind of written obligation which excludes the statute must be such a written constitution of the debt as to require a written discharge. Accordingly, I must hold that each annual sum of remuneration for services started a fresh prescription, that within the *triennium* the pursuer is entitled to a proof at large, but that beyond it he is restricted to writ.

"It only remains to notice the part of the pursuer's demand which relates to recovery of £1169, with interest thereon at 5 per cent. Apart from admission, this would truly resolve itself into an averment of loan, and proof would have to be restricted accordingly. But the situation is altered by the defenders' admission that in July 1883 the late William Allison 'resolved to treat the pursuer as having a sum of £1169, 1s. 10d. invested in the business,' and to allow him 5 per cent. thereon. They further say that in 1892 he handed over to the pursuer £1000 of this sum, and thereafter paid him interest only on the balance. No doubt they explain that this was all done *ex gratia*, but they do not allege either that the arrangement was in itself revocable, or that William Allison ever desired to revoke it. Accordingly the matter in dispute is reduced to the question whether part of the capital was repaid, and whether any of the interest remains unpaid. These are matters to be proved in the ordinary way.'

The pursuer reclaimed, and argued—There was only one contract averred on record, and no ground for treating it as two contracts. What was averred was neither a contract of service nor a contract of loan, and therefore the restriction of proof to writ or oath recognised in cases of service or loan was not applicable here. *Esto* it was an innominate contract the particular terms were not so unusual as to restrict the proof to writ or oath—Dickson on Evidence, i, sec. 565; *Forbes* v. *Caird*, 1877, 4 R. 1141, 14 S.L.R. 672; *Edmonston* v. *Edmonston*, 1861, 23 D. 995. It was quite usual now for employees not only to get a share of profits, but also to leave certain parts of these profits in the business. There was nothing here so anomalous as to make applicable the rule that the contract must be proved by writing. The triennial prescription did not apply, as the Act 1579, c. 83, does not include profits. Dealing with this as a contract of service alone, the authorities showed that if the whole question at issue was as to the rate of remuneration, then proof *prout de jure* would be allowed; this was the case

here—*Brunton* v. *Angus*, 1822, 2 S. 61; *Ritchie* v. *Little*, 1836, 14 S. 216; *Fife* v. *Innes*, 1860, 23 D. 30.

Argued for the defenders—(1) There were here averments of two contracts—service and loan—neither could be proved except by writ or oath. If there was only one contract, it was innominate and unusual. (2) The triennial prescription applied—Fraser on Master and Servant, p. 155; *Scott* v. *Gregory's Trustees*, 1832, 10 S. 375; *Smellie* v. *Cochrane*, 1835, 13 S. 544; *Smellie* v. *Miller*, 1835, 14 S. 12; *White* v. *Caledonian Railway Company*, 1868, 6 Macph. 415 (L. P. Inglis, at p. 419), 5 S.L.R. 250.

At advising—

LORD PRESIDENT—The question which we have now to decide is whether the pursuer is entitled to a proof *prout de jure* of his averments, or whether he is by force of the Act 1579, cap. 83, limited to a proof by writ or oath, and the answer to this question in my judgment depends upon whether in his record he avers a contract of service and nothing else, or whether he alleges a contract under which he is entitled not only to specified remuneration for his services but also to a share of the profits of the business, in the conduct of which he was associated with his brother the defender. If the contract alleged is one of service only, the Act of 1579, cap. 83, will, in my view, apply, but if it is either an innominate contract containing only simple provisions, or is partly a contract of service and partly a contract of partnership, I think that the restriction on the mode of proof introduced by the Act just mentioned will not apply.

[*His Lordship narrated the averments of parties, ut supra*].

Such being the nature of the averments in the record, it appears to me that the pursuer alleges not merely such a contract that the restriction on the mode of proof introduced by the Act of 1579, cap. 83, would apply to it, but a complex contract implying partnership as well as service, and that consequently the Act of 1579, cap. 83, should not apply to the case.

With reference to the defenders' contention that this restriction applies because the contract is an innominate one, I may refer to the case of *Forbes* v. *Caird*, 4 R. 1141, in which it was held that the proof of an innominate contract is not restricted to writ or oath unless the stipulations which it contains are of an extraordinary character, and I see nothing extraordinary in the stipulations of the contract alleged by the pursuer.

I am therefore of opinion that the Lord Ordinary's interlocutor of 14th November 1903 should be recalled, except in so far as it repels the first plea-in-law for the pursuer, and the first, second, and third pleas-in-law for the defenders, and that before further answer a proof should be allowed to the parties of their respective averments, and to the pursuer a conjunct probation.

LORD M'LAREN—I also concur, and I shall only add that in my view the character of the proof required will be the same whether the agreement in question amounts to a proper constitution of a partnership or whether it is only an agreement to share profits, without giving the pursuer the powers of a partner. Under the Act of 1579 the triennial prescription was applied to merchants' compts, servants' fees, and the like, which are a class of debts in which long credit is not usually given. But the agreement alleged here is for a share of profits, under an arrangement by which the profits are not paid when due, but are placed to the credit of the manager in the books of the firm, and are held up for a time. Now, under such an arrangement—by no means an uncommon arrangement in commercial relationships—it is easy to see how three years might elapse without a payment being made, and without negligence being imputed to the party in the assertion of his claim. I am unable to hold that a pursuer must be limited to a proof by writ or oath when, under such circumstances as these, the triennial period has elapsed without fault or remissness on his part. I am of opinion that this agreement does not fall within the scope of the Triennial Prescription Act, but is one of those commercial contracts to which the Act of 1579 was not intended to apply.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor: Of new repel the first plea-in-law for the pursuer, and the first, second, and third pleas-in-law for the defenders: And before further answer allow parties a proof of their respective averments, and to the pursuer a conjunct probation; and decern."

Counsel for the Pursuer—Clyde, K.C.—MacRobert. Agents—Pringle & Clay, W.S.

Counsel for the Defenders—Campbell, K.C.—M'Lennan. Agents—R. R. Simpson & Lawson, W.S.

Friday, February 26.

OUTER HOUSE.

[Lord Low, Ordinary.

ARMITAGE'S TRUSTEES *v.* ARMITAGE AND OTHERS.

Domicile—Abandonment of Domicile of Origin—Acquisition of New Domicile.

Circumstances in which *held* that a person abandoned his domicile of origin in England and acquired *animo et facto* a domicile in Scotland.

The facts of this case are fully set forth in the opinion of the Lord Ordinary.

Opinion.—"This is a multiplepoinding brought by the trustees of the deceased Dr Walter Stanley Armitage, who died on 2nd June 1902, for distribution and payment of the residue of his estate.