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

the parties. It would not be expedient that these should be capable of being proved by parole.

Lord Deas—I am of opinion that there is no rule which prevents an innominate contract from being proved otherwise than by the writ or oath of the adverse party. It would be better stated if it were said that there is no contract of an anomalous or unusual nature that can be dealt with otherwise. There are many contracts which have no name that are capable of being proved by parole just as much as those that have a name.

The pursuer cannot prove his case here without proving the facts and circumstances connected with it. It will naturally follow that the other party may do the same. The fact that the arrangement has gone on so long since the year 1867 without any change being made is very material of itself.

There are some contracts which have not been allowed to be proved by parole. In reference to the case of *Taylor* v. *Forbes*, 24 D. 19, it was a very unusual thing for a law agent not to ask for remuneration as averred by the defender there, and the proof was accordingly restricted. There is nothing here equivalent to the arrangements in that case between the law agent and his client.

Lord Mure concurred.

Lord Shand—This is a question in which there have been fluctuations in the expression of opinion by different judges. I do not know where the question is more distinctly stated than by Lord Neaves in the case of *Thomson* v. *Fraser*, October 30, 1868, 7 Macph. 39. In the present case a parole proof would be of great benefit, and I think the leaning of the Court should be in favour of allowing proof at large rather than of restricting it in such cases.

The Court ordered a proof at large.

Counsel for Pursuer (Respondent) — Brand. Agent—Thomas Carmichael, S.S.C.

Counsel for Defender (Appellant)—Asher—Mackintosh. Agent—Alex. Morison, S.S.C.

Friday, July 20.

FIRST DIVISION.

GRAHAM AND OTHERS *v.* THE OFFICIAL LIQUIDATOR OF THE EDINBURGH THEATRE COMPANY (LIMITED).

Company—Companies Acts 1862 *and* 1867—*Winding-up of Company—Expenses.*

As an ordinary rule, creditors of a company incorporated under the Companies Acts 1862 and 1867 will not be entitled to the expenses of bringing a second petition having the same purpose with one previously brought by other creditors.

Circumstances where creditors were held to be justified in presenting a second application of the kind, and where they were allowed their expenses by the Court.

Two petitions were presented to the Court praying for the winding-up of the Edinburgh Theatre, Winter Garden, and Aquarium Company (Limited) on the ground of its insolvency. The first was at the instance of Moxon & Son, and Brown Brothers & Company, and was dated April 5th 1877; the second was at the instance of Robert Graham and others, constituting a majority in number and value of the creditors of the company, and was dated April 11th. The first petition asked that the secretary of the company should be appointed official liquidator; the second suggested that the wishes of the creditors should be ascertained on that matter.

After parties had been heard a liquidator, who was not the company's secretary, was appointed by the Court under Moxon & Son's petition. Graham and others then applied for the expenses of their petition and of their compearance to oppose the appointment of the company's secretary as liquidator. The latter part of the motion was not opposed, and in support of the former it was stated that the second petition had been brought as it was doubtful whether Moxon's would be withdrawn or not. There was nothing in the Act of 1862 permitting a sisting of other parties, to which the creditors in the second petition, who were the great body of creditors, had, after meeting, asked Moxon & Son to agree. They had further wished the name of the secretary of the company withdrawn from being suggested as official liquidator.

The liquidator did not dispute the competency of the petition, but said that the second petition was unnecessary.

At advising—

Lord President—I should very much regret if it were to be held that in the ordinary case creditors of a company like the present, when they bring a second petition having the same purpose with one previously brought, were entitled to expenses. But undoubtedly there may be circumstances which will justify a second body of creditors in presenting an application of this kind.

The only question is, whether the circumstances of the present case are of such a nature? It is no doubt true that Moxon & Son and others, who brought the first petition, represent a very small amount of debt, viz., about £300. But I do not know that that would be a sufficient reason for suspecting them of not being sincere in their desire to have the company wound up, and I can hardly say that that would justify a second petition at the expense of the estate. But I attach great importance to a meeting of creditors which afterwards took place, where a much larger amount of debt was represented. From that meeting a proposal came that other creditors should be sisted in the original petition, and that the name of the secretary as liquidator should be withdrawn. Moxon and others differed from the second petitioners in the person to be appointed as liquidator, though that of itself would not have justified another petition. It might only have justified an appearance. But the first petitioners ignored altogether the proposal to get some other liquidator than the secretary of the company, a proceeding for which I cannot conceive any good reason.