taxed. I sympathise with the observation which was made by Mr Balfour upon the terms of the 514th section of the Merchant Shipping Act 1854. It was obviously intended that where a variety of claimants appear against the owner of a delinquent ship, they are to claim together as far as possible, as is done in an action of multiplepoinding in this Court. For that purpose the owner brings a petition to have the fund for which he is liable ascertained and consigned for division. Certainly, one matter which ought to be an object in such a case, is to save expense. If we were to sanction the contention of some of the parties here, to the effect that they were warranted in appearing separately, and were entitled to their expenses accordingly, it would lead to a defeat of the statute. It is necessary to lay down rules for the guidance of the Auditor so as to diminish the expense so far as expedient.

There is one suggestion of the Auditor in which I entirely concur. Where there are a variety of claimants of one class, *e.g.*, owners of cargo, their claims ought to be stated in one paper, and appearance should be made by only one counsel and agent. So, too, in regard to other classes, where they are owners or underwriters, or occupy any other capacity. Where they all have the same interest they are required to claim together, and no expenses will be allowed to individual members.

Then, there is another ground on which the Auditor has not reported, and has not made any suggestion. What expenses are to be allowed to claimants whose claims are unopposed? That question will perhaps fall to be regulated hereafter more precisely than I propose to deal with it at present. But I think, so far as I see now, they should not be entitled to more than the cost of lodging their claim, and of one appearance by agent and counsel. All the expenses should be limited to these two items.

There is still another matter in regard to one particular class of claimants. There seems no reason why the master of the ship should not have joined with the mariners and have lodged one claim with them. It can hardly be said to be inconsistent with his dignity, and I see no other reason why he should decline to do so.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court pronounced the following interlocutor:—

"Of new remit the accounts of expenses to the Auditor, with the following instructions:—(1) That where several claimants have the same interest and ground of claim, they ought all to concur in lodging one claim and appear by the same counsel and agents, and cannot be allowed any expenses for separate claims or appearances; (2) that claimants whose claims are unopposed are to be allowed only the expense of preparing and lodging their claims and of one appearance by counsel to take decree."

Counsel for Petitioner—Balfour—R. V. Campbell. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Owners of Cargo, &c.—Lang—Guthrie—Alison, &c. Agents—Frasers, Stodart, & Mackenzie, W.S., and others.

Thursday, July 19.

FIRST DIVISION.

[Lord Craighill, Ordinary.

M'ARTHUR *v.* LAWSON.

Reparation—Obligation — Copartnery — Contract—Competency.

Held that an action of damages for breach of contract is relevant only where the contract of which breach is averred is capable of specific implement.

Terms of a document which were held (*revg.* Lord Craighill, Ordinary—*diss.* Lord Shand) not to contain *termini habiles*, out of which a contract of copartnery could be formed.

Observations (*per curiam*) on the appropriate remedy in different classes of actions for breach of contract.

This was an action of damages for breach of contract, in which the following averments were made:—"In April 1875 certain negotiations which were initiated by the defender took place between him and the pursuer, and resulted in an agreement being entered into between them, whereby the defender engaged the pursuer to take the sole management under him of his business as a metal merchant—the engagement to be for two years from 12th April 1875. The terms proposed by the defender were that the salary should be not less than £160 for the first year, and not less than £180 for the second, with a partnership at the end of the term. The pursuer entered the defender's employment, and in about a month after, the defender said that instead of drawing his salary at £160 it should be a £180 for the first year, and afterwards he stated that instead of £180 for the second he would give him £210. A written engagement was prepared, but not executed till the 13th January 1876, when the pursuer had been nine months in the defender's employment. In fulfilment of the understanding between the pursuer and the defender, the following agreement was then made between them:—'60 *Robertson Street, Glasgow*, 12*th Apr.* 1875.—Mr John M'Arthur.—Dear Sir,—I hereby engage you to take the sole management under me of my business as a metal merchant. The engagement to be for two years from this date. The salary for the first year to be £180, and for the second year £210. At the expiry of the second year I engage to give you a substantial interest by way of partnership in my business, so that your annual income may be considerably increased.—I am, yours truly,' (Signed) 'John Lawson.' '*Glasgow*, 13*th January* 1876.—The above arrangement is now and hereby confirmed.' —(Signed) 'John Lawson.' '*Glasgow*, 12*th April* 1875.—John Lawson, Esq.—I accept of the above engagement on the terms stated.' —(Signed) 'John M'Arthur, John Lawson.' But for the said engagement or obligation by the defender in favour of the pursuer, which entitled the pursuer to a substantial interest in the defender's business at the end of the term, the pursuer would not have concluded any engagement having such an endurance at the salary mentioned. The pursuer duly entered upon and completed his said two years' engagement, and

during the currency thereof the defender's business greatly increased, and the pursuer was not justly chargeable with any want of care or diligence in the management thereof. Since the termination of the pursuer's said engagement, which happened on 12th April 1877, he has required the defender to implement his said obligation to give him a substantial interest by way of partnership in his business as aforesaid, but this the defender unwarrantably refused to do."

This action was therefore brought for implement of the contract.

It was further stated that the defender's business was very profitable, and yielded a gross profit of about £5000 a year.

The defender answered that he was justified in declining to take the pursuer into partnership, from his temper, behaviour, and manner when in his employment.

The pursuer pleaded, *inter alia*,—"The defender having contracted with the pursuer to give him a substantial interest in his business by way of partnership, and having unwarrantably and unjustly refused to do so, he is liable in damages to the pursuer."

The defender pleaded, *inter alia*,—(1) That the averments were not relevant; and "(2) The writings founded on by the pursuer do not contain any *termini habiles* out of which a contract of copartnery could have been formed, and there having been no binding agreement upon either pursuer or defender to enter into such a contract, the present action of damages for alleged breach of contract is untenable."

The Lord Ordinary repelled the defender's two pleas and allowed a proof.

The defender reclaimed.

Authorities—*Goldston* v. *Young*, Dec. 8, 1868, 7 Macph. 192; *Sinclair* v. *Weddell*, June 13, 1868, 41 Jur. 121; *Sproul* v. *Wilson*, Jan. 24, 1809, Hume 920; *Figes* v. *Cutler*, 3 Stark, N.P.C. 139; *M'Neill* v. *Reid*, June 8, 1832, 9 Bingh. 68; Lindley on Partnership, i. 81, and ii. 991.

At advising—

Lord President—I think the Lord Ordinary has gone wrong in the judgment he has pronounced in this case, and I am of opinion that the plea against relevancy stated by the defender should be sustained.

The writing condescended on constitutes a contract of employment by which the defender engages the pursuer to take the whole management of his business as a metal merchant for a period of two years at a salary which is named. The contract is quite complete in all its parts. The nature of the engagement, the duties to be performed, the term of endurance, and the remuneration are all set forth. But there is this addition—"At the expiry of the second year I engage to give you a substantial interest by way of partnership in my business, so that your annual income may be considerably increased." It is impossible to read that without seeing that it is a promise or an expectation which is liable to be frustrated by many causes, and which is subject to many considerations. Suppose that the business did not prosper—is it to be held that the manager is to be bound to go into a sinking concern? If he does join, on what footing is he to do so, and what is to be the amount of his interest? To what extent is he to be a partner, and what is to be his share? There is nothing from which the terms of a contract of copartnery can be made out. There is no term of endurance, no declaration of the amount of the shares of the partners; in short, none of the essentials are settled in this short sentence. If one were to be set down to prepare a contract of copartnery out of these data, the task would be declined as impossible. They resolve themselves into a vague and indefinite promise, which is not an uncommon occurrence between master and foreman in cases of this kind, but which cannot be enforced.

It is not contended by the pursuer that he could enforce specific implement, but he does not think that that is destructive of his case. He says that there are contracts which cannot be carried out specifically in form and substance, the breach of which gives a claim for damages. These are cases founding an action of damages in respect of considerations outside the contract itself, where the Court will not give decree for specific implement. Implement is not given, because imprisonment would probably be the result of such a decree. Damages are accordingly the alternative. Engagements to marry and engagements to enter into partnership are of that class, but that is not because specific implement cannot be spelt out of the contract, but because of its inequality, or because it would be against policy to compel specific implement.

It appears to me that when the pursuer conceded that he could not seek specific implement of the terms of this writing, he at the same time conceded that he could found no action for damages.

Lord Deas—In order to found an action on a breach of contract there must be a contract. There may be contracts of which the law will not enforce specific implement. But in such a case the contract must be valid and complete.

The objection to an action of damages upon this document is that there is not only no contract, but also no specification of particulars which could possibly make such a contract. If the proportion of interest which the pursuer was to have in this concern had been named, and the term of endurance, the amount of capital, and other particulars, I could then have understood an action of damages for failure to enter into that partnership. But there is no such specification. The present case reminds me of the case of *Heiton* v. *Waverley Hydropathic Company* (*ante*, 532), where there was an agreement to sell upon conditions to be afterwards fixed. We held that there was no valid sale in that case.

Suppose an action of damages goes on in this case, on what footing are damages to be assessed? Is it to be on the footing that the contract is to continue for a certain number of months, and that one of the parties is to put in capital, and the other not? There is nothing tangible here. The vagueness of the second part of the document alone founds an objection.

There is a certain class of cases where damages are given although specific implement is not decreed. In such a case, where one party has misled another and caused another to sustain specific loss, damages may be given. The case

of *Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587, brings out the nature of that class of cases. But damages are not given in respect of breach of contract, but in respect of fraud or falsehood in consequence of some specific loss or of the one party having been so misled by the other. There is no allegation of specific loss here. There is nothing to bring the case under that category. There is nothing that we can enforce, and without a contract there cannot be damages.

LORD MURE—I concur in the results at which your Lordships have arrived. There is no specification of the shares in the proposed partnership, and none of the time of endurance. That is conceded. If there had been possession, it would have been enough to entitle him to have the contract enforced. We were referred to an English authority—the case of *M'Neill* v. *Reid*, 9 Bingham 68—for the doctrine that there may be a breach of contract for which a claim of damages will lie. I agree with your Lordships that where the contract cannot be enforced there cannot be an action of damages for breach of it. In the case of *M'Neill* there were averments of specific loss. One of the partners had undertaken to give up a remunerative employment in order to enter upon his new work, and it was therefore of the same type of cases as *Walker* v. *Milne* and *Bell* v. *Bell*, which have been referred to.

LORD SHAND—I am unable to concur with your Lordships. I think the Lord Ordinary has rightly repelled the 1st and 2d pleas of the defender, and allowed an inquiry. That, of course, leaves it open to the defender to prove that there is a justification for the course he takes in declining to enter into a contract of copartnery with the pursuer.

The nature of the agreement was plainly this—The pursuer agreed to enter into the management of the defender's business at a certain salary for one year, with an advance the next. But the salary was only a part of the consideration which induced the pursuer to enter into the contract. Probably the most material consideration was the absolute undertaking by the defender, which follows—[*reads ut supra*]. I cannot regard that sentence in the light that it holds out a mere hope or expectation. It is the well-known language of obligation which is used. It may be that the pursuer cannot tie down the defender to any obligation, because the terms used are too general; but I am of opinion that it was an obligation given, and not a hope merely that was held out, and that this obligation must be regarded as a main or leading consideration in the contract which led the pursuer to enter the defender's service. I therefore think it is very unfortunate if the Court cannot interfere to give a remedy where the pursuer has given his services for two years only on the footing that he was afterwards to have a higher interest in the business.

It is true that the Court cannot enforce specific implement, but I cannot agree with your Lordships in thinking that the reason of that is that the contract is imperfect in itself. It was conceded that it could not be enforced, but that, as I understood, was merely because the Court will not compel parties to enter upon, or in some cases to continue, an intimate relationship which is disagreeable to them or to either of them. In such cases the remedy given is damages, and the most common instances of contracts where this remedy only is allowed are those of breach of promise of marriage and of service. So too in partnership. If a man has engaged to go into copartnery with another, and afterwards declines to implement the engagement, the Court will not compel specific performance, but damages are given in place of specific implement. In that sense only it was that the pursuer here conceded there was no contract of which implement could be enforced, and it was upon that footing that the Lord Ordinary repelled the 2d plea for the defender.

The only question which remains is, whether we are unable to find in the document founded on enough to lay the foundation of an action for breach of contract? I think the leaning of the Court should be, in a case of this kind, to give the pursuer the justice which the defender by force of this technical pleading refuses. Upon the question, whether there are in this writing *termini habiles* or not, I differ from your Lordships. It is said that the contract is vague, because neither the commencement nor the endurance of the copartnership is stated, and because it is not said what the capital is to be. But it is clear that the copartnery was to begin at the close of the second year's service. It must be held that the copartnery should be at least for a year, and in the absence of a stipulation for payment of capital by the pursuer, it must, I think, be held that he was not to be required to put money into the business. As regards the interest the pursuer was to have, it is true there is a vagueness, but there is sufficient to enable the Court to fix a sum. The salary for the first two years is stated at £180 and £210, and the pursuer is afterwards to have a "substantial interest, so that his income may be considerably increased." There are terms there expressed which would, I think, enable the Court to settle from the salary that the pursuer's share in the business should be not less than from £300 to £400, assuming that the business was yielding such profits as the pursuer alleges.

But it is argued that there is further looseness in the contract inasmuch as it does not appear whether the pursuer was bound to enter into the partnership. The pursuer, I think, was to have it in his power to go into this business as a privilege. He was not to go into it unless he pleased. It was not an absolute undertaking upon both sides. It was an engagement by the defender to give such a proportion or interest in the business as would be an increase on the salary the pursuer had previously had, and give him a "substantial interest" in the business.

In regard to the English cases which have been cited, all that Chief-Justice Abbott is reported to have said in the case of *Figes* v. *Cutler*, 3 Stark, N.P.C. 139, was that "he was of opinion that the action was not maintainable in the absence of evidence to show the terms upon which the parties had agreed to become partners, and said that he had never known any instance in which such an action had been supported without proof of the terms." This is plainly the statement of a case in which the Court had no materials from which to spell out a contract. The case of *M'Neill* v. *Reid*, 9 Bing. 68, appears to me to be of the same class as the present. The only difference is that in the present case the partner's

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*