LORD M'LAREN—This case raises, with reference to a new state of facts, a question we have had several times to consider, viz., what are the limits under which the law allows certain moveable rights to be constituted by parole agreement, and what are the cases in which writing is necessary for the constitution of the agreement or at least as evidence of the terms of the agreement. The Lord Ordinary, after stating that in his opinion the alleged agreement is only susceptible of proof by writ or oath, gives as his reason that the contract averred is innominate and important and certainly unusual, and that it involves besides the substitution of a parole agreement for a written destination. I think there is sufficient authority for the proposition, that innominate contracts relating to moveables, especially if they are important and unusual, must be constituted or proved by writing. But then that leaves open the question whether a particular agreement is to be regarded as innominate and unusual; and therefore I cannot see that this is a very useful criterion for solving such questions. For example, a contract of barter is treated by philosophical jurists as an example of an innominate contract, but by our law we treat barter as just a branch of the law of sale, and I do not doubt that an agreement for the sale of a cargo for example, to be paid for by goods to be exported in return, would be capable of proof in the same way as an ordinary agreement of sale. But then the case may be reduced to one falling within a very limited category when you consider that, whatever be the terms of the agreement alleged or to be proved, the substance of it is to give to persons not named or indicated in the private Act of Parliament regulating the succession a right in place of one of the persons, or through one of the persons named in the Act. The substance of it is an assignment of a *spes successionis* or right secured by will and confirmed by Act of Parliament to the survivor of these two near relatives. Now I think it is not laying down too wide a proposition, or one that is not in entire harmony with the spirit of our law, to say that as an Act of Parliament is an instrument in writing any rights secured in it can only be transferred by writing—that whatever is necessary to the constitution of a right will in general regulate the transmission of that right or an interest in it, and I see no reason for making this an exception to the ordinary rule that rights of inheritance conferred by writing can only be transferred by writing. On the contrary, all the circumstances, unusual as they are called by the Lord Ordinary, and as is very apparent on the statement of them, go to show the necessity of evidencing by writing an intention however honestly entertained in dealing with rights of this character.

I should be disposed to think that in general anything in the nature of an incorporeal right to moveables could only be transferred by writing, but I hesitate to assert that proposition in an unqualified sense, because it is not unlikely that we may find exceptions to it. But we know that there are large classes of incorporeal rights of a moveable character, such as stocks and shares in companies, rights constituted by or secured under contracts of indemnity, partnership interests, rights in ships (and a long list might be written out) which have this in common, that the nature of the interest in the subject is an incorporeal right, and it is the policy of the law, and I can hardly doubt with good reason, that all assignments of rights of this description are to be in writing. Very likely the rule had its origin in the Act of Parliament of 1579 to which our attention was called by Mr Mitchell, and the language of the Act would certainly apply to assignments of that character.

But it is enough for the purpose of this case to say that this particular kind of incorporeal right, the right of succession, whether constituted by a private deed, or as in this case by the authority of Parliament, can only be transferred in the same way in which it is constituted. Therefore I consider that the interlocutor of the Lord Ordinary snould be affirmed.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Shaw, K.C.—C. D. Murray. Agents—M. J. Brown, Son, & Co., S.S.C.

Counsel for the Defenders and Respondents — Campbell, K.C. — Hunter — W. Mitchell. Agents — Fraser, Stodart, & Ballingall, W.S.

Friday, November 20.

FIRST DIVISION.

DYKES' TRUSTEES *v.* DYKES.

Succession—Appointment—Profits of Law Business—Income or Capital.

By contract of copartnery between two law-agents it was provided that on the death of either of the partners survived by his wife or children, the surviving partner should pay to the trustees or executors of the deceased partner for ten years a share of the net profits of the business, which share should be applied for behoof of the wife and children of the deceased partner in such way and in such proportion as the partner deceasing might direct. By his trust-disposition and settlement, which was later in date than the contract of copartnery, but did not refer to it or specially direct how the sums payable under it in the event of his predecease should be applied, the predeceasing partner directed that the whole "income and profits" of his whole means and estate should be paid to his widow during her lifetime. For ten years after the death of the predeceasing partner his trustees received

from the surviving partner yearly payments in terms of the contract of copartnery.

Held (1) that the trust-settlement operated as a conveyance or valid appointment under the contract of copartnery of these yearly payments, and (2) that the yearly payments fell to be treated as capital of the trust-estate.

Edward Pellew Dykes, writer, Hamilton, died on April 25, 1891. He was survived by his widow, Mrs Barbara Anderson Taylor or Dykes and by two children, a daughter Isabella, wife of Thomas Dykes, and a son, Douglas Dykes.

For many years prior to his death Edward Pellew Dykes had been a partner of the firm of Messrs T. J. & W. A. Dykes, writers, Hamilton, of which firm William Alston Dykes and he were the sole partners. The firm were also agents in Hamilton for the Royal Bank of Scotland. The partners were equally interested in the business of the firm and in the bank agency.

The contract of copartnery between William Alston Dykes and Edward Pellew Dykes was dated 9th April 1880, and was declared to be for the period of ten years from and after the first day of January 1880. The contract contained no provision for the continuation of the partnership after the expiry of the term of ten years from 1st January 1880, but during the period between 1st January 1890, the date specified for its expiry, and the death of Mr E. P. Dykes, the business of the firm was carried on and the profits were divided in accordance with its provisions. The said contract provided (Art. 5)—"In the event of the death of either of the parties hereto during the continuance of this contract survived by his wife or a child or children, his trustees or executors shall be entitled to receive for behoof of such survivors, and the partner surviving hereby binds himself to pay, not only the amount standing at the credit of such partner deceasing at the time of his death, and his share of all sums due to the copartnery (including sums earned to that date, and which may ultimately be received), but also and yearly a sum equal to one-half of what such partner deceasing would have been entitled to receive out of the net profits of the business had he survived, and also one-fourth of the net amount of the salary paid by the said bank, and that for a period of ten years after such death, and which sums last mentioned shall be applied for behoof of such wife and child or children in such way and in such proportions as the partner deceasing may direct, and in the event of the death of either party hereto within the last five years of this contract the stipulations herein in favour of the family of the deceaser shall hold and have effect for the period of ten years after such death, notwithstanding the sooner expiry of the period above provided for this contract, which to that effect shall be held to continue and subsist for such further period; and at the expiry of the period during which such sums shall be payable for behoof of such wife and children the representatives of the partner deceasing shall be entitled to receive from the partner surviving one half of the value of the said heritable property and furniture and books of the said concern, as the same may be agreed upon or fixed by a neutral party to be named for the purpose."

Mr E. P. Dykes left a trust-disposition and settlement, dated March 17, 1881, by which he conveyed to trustees his whole means and estate "presently belonging, or that shall happen to pertain and belong or be addebted or owing to me at the time of my decease," and directed his trustees, *inter alia*, to hold his whole means and estate for the use and benefit of his wife and children, and "to pay to my wife during her lifetime the whole income and profits of the same for her own use and for the maintenance and upbringing of our children and for their education." The trust-disposition did not make any mention of the contract of copartnery or direct specially as to the application of the sums payable thereunder for behoof of the predeceasing partner's wife and children.

On the death of the truster the surviving partner of the firm made payment to the truster's testamentary trustees of one-half of the share of the net profits of the firm to which the truster would have had right if he had survived (equivalent to one-fourth of the total net profits), and one-fourth of the bank salary during the ten succeeding years in terms of the fifth article of the contract of copartnery. The yearly sum so received by the trustees amounted on an average of ten years to £600 per annum.

The testamentary trustees from the date of the truster's death paid over to his widow Mrs Barbara Anderson Taylor or Dykes yearly the whole of the yearly sums received from the surviving partner of the firm, and also the net income of his general estate.

In these circumstances a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the testamentary trustees, (2) the widow, Mrs Barbara Anderson Taylor or Dykes, (3) the truster's daughter Mrs Thomas Dykes and her husband Thomas Dykes, and (4) the truster's son Douglas Dykes.

The first and second parties maintained that the said yearly sums paid to the first parties belonged to the trust estate of the truster and fell under the general conveyance in his trust-disposition and settlement, or otherwise that his said trust-disposition and settlement was an exercise of the power of division reserved to him in the said contract of copartnery. They further maintained that the said yearly sums were of the nature of income falling to the widow under the trust-disposition and settlement, and that the third parties had no separate right thereto, and were not entitled to call the first parties to account therefor.

The third parties maintained that the

said yearly sums were not validly appointed by the truster in his settlement, but formed a separate provision to be applied in accordance with article fifth of the said contract of copartnery for behoof of the widow and children of the deceased partner, and fell to be divided equally *per capita* among them; and alternatively, on the assumption that the said sums were validly appointed, that the said yearly sums truly represented the amount paid out to the representatives of the predeceasing partner for his interest in the business, and should not therefore have been paid away by the first parties as income and profits of the trust estate, but should have been treated as capital thereof.

The fourth party, at the request of the other parties interested, became a party to the case in order that all parties interested might be represented.

The following questions of law were, *inter alia*, stated:—"1. Did the said trust-disposition and settlement of the said Edward Pellew Dykes operate as a conveyance or as a valid appointment under article five of the said contract of copartnery of the said yearly sums paid to the first parties? or 2. Did the said yearly sums form a separate fund to be applied by the first parties solely in accordance with article five of the said contract of copartnery for behoof of the widow and children of the said Edward Pellew Dykes? 3. If the first question is answered in the affirmative, were the said yearly sums properly paid to the second party as income and profits of the trust estate? or 4. Should they have been treated as capital of the trust estate?"

Argued for the first and second parties—(1) The yearly sums paid to the trustees by the surviving partner fell under the general conveyance in the truster's settlement. The truster had power to direct the mode in which the payments to be made by his surviving partner should be applied, and the words of his testamentary settlement directing payment to his widow of the "whole income and profits" of his whole estate were wide enough to cover the yearly payments in question. The truster was dealing with his own property, and his power of bequest was unlimited—*M'Tavish's Trustees* v. *Ogston's Trustees*, March 10, 1603, 5 F. 641, 40 S.L.R. 458. (2) The profits of the business fell to be treated as income and were properly paid to the widow. These yearly sums were not of the nature of capital, but were simply the profits or fruits of a going business—*Strain's Trustees* v. *Strain*, July 19, 1893, 20 R. 1025, 30 S.L.R. 906; *Mein's Trustees* v. *Mein*, June 21, 1901, 3 F. 994, 38 S.L.R. 715; *Wilson's Trustees* v. *Wilson*, March 17, 1871, 8 S.L.R. 437; *Howe* v. *Earl of Dartmouth*, 1 White & Tudor (7th ed.), pp. 77-79.

Argued for the third parties—By the contract of copartnery the yearly payments formed a separate provision for behoof of the widow and children of the deceased partner, and under article 5 of the contract fell to be divided equally *per capita* among them—*Jarvie's Trustees* v. *Jarvie's Trustees*, January 28, 1887, 14 R. 411, 24 S.L.R. 299. There was nothing in the truster's will, the terms of which were entirely general, which would lead to the inference that he meant to deal with this fund, or alter the direction as to its disposal contained in the contract of copartnery. As a matter of fact these payments were never *in bonis* of the truster. (2) Assuming that the yearly payments fell within the will, they were to be treated as part of the capital of the trust estate. The payments represented simply the value of the deceased's interest in the business. They formed a debt payable in ten instalments which the trustees had a right under the copartnery contract to ingather as the instalments accrued—*Freer's Trustees* v. *Freer*, January 28, 1897, 24 R. 437, 34 S.L.R. 323; *Ferguson* v. *Ferguson's Trustees*, February 23, 1877, 4 R. 532, 14 S.L.R. 377; *Adamson's Trustees* v. *Adamson's Trustees*, July 14, 1891, 18 R. 1133, 28 S.L.R. 869.

At advising—

LORD PRESIDENT—The first parties to the case are the testamentary trustees and executors of Edward Pellew Dykes, writer in Hamilton (hereinafter called the truster), who died on 25th April 1891, leaving a trust-disposition and settlement dated 17th March 1881.

He was survived by his widow Mrs Barbara Anderson Taylor or Dykes, the second party to the case, and by two children, a daughter Miss Dykes, now Mrs Thomas Dykes, who is one of the third parties, and a son, who is the fourth party to the case.

The truster was for many years prior to his death a partner of the firm of Messrs T. J. & W. A. Dykes, writers in Hamilton, of which William Alston Dykes and he were the sole partners. The firm were also agents in Hamilton for the Royal Bank of Scotland. The partners were equally interested in the profits of the firm and in the bank agency.

The contract of copartnery between William Alston Dykes and the truster was dated 9th April 1880, and it was declared by it that the copartnership should be for ten years from and after 1st January 1880.

Both partners survived the expiration of the contract, and no arrangement was made for its renewal, but between 1st January 1890, the date specified for its expiry, and the death of the truster on 25th April 1891, the business of the firm was carried on, and the profits were divided, in accordance with its provisions.

It was declared by the fifth article of the contract that in the event of the death of either of the parties to it during its continuance, survived by his wife or a child or children, his trustees and executors should be entitled to receive, for behoof of such survivors or survivor, and the partner surviving thereby bound himself to pay, not only the amount standing at the credit of the deceasing partner at the time of his death, and his share of all sums due to the copartnery (including sums earned to that date and which might ultimately be received), but also and yearly a sum equal to

one half of what the deceasing partner would have been entitled to receive out of the net profits of the business if he had survived, equivalent to one-fourth of the total net profits, and one-fourth of the net amount of the salary paid by the bank, and that for a period of ten years after his death, and which sums should be applied for behoof of his wife and children in such way and in such proportions as the deceasing partner might direct; and in the event of the death of either party to the contract within the last five years of its currency, the stipulations contained in it in favour of the family of the deceaser, should hold and have effect for the period of ten years after the death, and at the expiry of the period during which such sums should be payable for behoof of the wife and children the representatives of the partner deceasing should be entitled to receive from the partner surviving one-half of the value of the heritable property, furniture, and books of the concern, as might be agreed upon or fixed by a neutral party to be named for the purpose.

On the death of the truster the surviving partner of the firm made payment of one-half of the share of the net profits of the firm to which the truster would have had right if he had survived (equivalent to one-fourth of the total net profits), and one-fourth of the bank salary, during the ten succeeding years, in terms of the fifth article of the contract, to the first parties. The yearly sum so received by the first parties amounted, on an average of ten years, to £600 per annum.

The truster did not leave any directions expressly relating to the fifth article of the contract of copartnery. The only deed which he left relating to or governing the disposal of his estate, or of estate the destination of which he had power to regulate after his death, was his testamentary trust-disposition and settlement already mentioned.

The first parties have, since the death of the truster, paid over to the second party, as his widow, yearly, the whole of the yearly sums received from the surviving partner of the firm, believing that she was entitled to these sums as well as to the net income of his general estate.

The first and second questions put in the case are, whether the testamentary trust-disposition and settlement of the truster operates as a conveyance, or as a valid appointment, under the fifth article of the contract of copartnery, of the yearly sums paid to the first parties by the surviving partner of the firm, or whether these yearly sums form a separate fund to be applied by the trustees solely in accordance with the fifth article of the contract for behoof of the widow and children of the truster.

Upon these questions I am of opinion that the trust-disposition and settlement did operate as a valid appointment of the yearly sums paid to the first parties. It appears to me that the direction in the trust-disposition and settlement that the trustees should pay to the second party during her lifetime the whole income and profits of his estate for her own use and for the maintenance and upbringing of their children and for their education, was intended to operate upon all estate the destination or disposal of which the truster had power to regulate, whether it was strictly his property or not. It is true that the sums paid under the fifth article of the contract were never *in bonis* of the truster, because they only began to be payable after his death, but he had in my judgment a power to direct the mode of application for behoof of his widow and any child or children whom he might leave, and I think that he did so effectually by his testamentary settlement, which should, in my judgment, be so construed as to have effect rather than to fail.

The third question is, whether, if the first question is answered in the affirmative, the yearly sums were properly paid to the second party as income and profits of the estate, and I am of opinion that this question should be answered in the negative. The sums in question were not the fruits of, or income accruing from, any estate which belonged to the truster, and they never were *in bonis* of him during his life. They were, in my judgment, substantially an annuity, not the interest of or income arising from any capital source. It happens that the payments were continued for the full period of ten years, but if only one payment had been made after the trust came into operation, and the widow and children had then died, it would, in my view, scarcely have admitted of doubt that such a payment was capital and not income.

The fourth question is, whether the sums referred to should have been treated as capital of the trust estate. The second party had, in my opinion, right to the income which might accrue from the payments (regarded as capital), just as she had to the income arising from the capital of any other part of the estate, subject to the obligation to maintain the child or children of the marriage.

In the course of the argument reference was made to a number of authorities, and in particular to the case of *Ferguson* v. *Ferguson's Trustees*, 4 R. 532, in which it was held that the proceeds of collieries fell to be treated as capital, not as income for the purposes of a question relative to the rights of a widow; to the case of *Strain's Trustees* v. *Strain*, 20 R. 1025 (followed in *Mein's Trustees* v. *Mein*, 3 F. 994), in which it was held by a majority of Seven Judges that the net proceeds of collieries formed part of the free annual income and produce of the residue of the estates, and therefore fell to be paid by the trustees to the widow during her lifetime; and to *Freer's Trustees* v. *Freer*, 24 R. 437, in which it was decided that where a law-agent in his trust settlement directed that his widow should "enjoy the free liferent use and enjoyment of the residue," a share of the profits of the business which it was stipulated in his contract of copartnery that his trustees

should be entitled to receive from his surviving partner for several years did not belong to the widow as income but fell as capital into residue. The first three of these decisions do not appear to me to have any material bearing upon the present case, but the third (*Freer's Trustees* v. *Freer*) affords material support to the view that such a payment as the surviving partner of the truster agreed to make, and did make, is not in the nature of income but of capital.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the first question in the affirmative, the second question in the negative, the third question in the negative, and the fourth question in the affirmative.

Counsel for the First and Second Parties — H. Johnston, K.C.—Chree. Agents — E. A. & F. Hunter & Company, W.S.

Counsel for the Third Parties—Wilson, K.C.—Constable. Agents—Bruce, Kerr, & Burns, W.S.

Counsel for the Fourth Party—Dewar. Agent—W. C. L. Stark, S.S.C.

HOUSE OF LORDS.

Tuesday, November 24.

(Before the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson, and Lord Lindley.)

M'CULLOCH'S TRUSTEES *v.* MACCULLOCH.

(*Ante*, March 14, 1900, 37 S.L.R. 535, and 2 F. 749.)

Succession—Trust—Payment—Vested pro indiviso Share of Residue — Payment Postponed till Period Fixed by Testator —Ulterior Purposes—Liferent and Fee—Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 84), *sec.* 17.

A testator directed his trustees on the death of his wife to hold the residue for behoof of his children in liferent, and equally among them and their lawful issue in fee, and on the death of all his children to divide his estate among the children of his sons and daughters *per stirpes*. He directed that if any of his children died leaving issue, such child's share of the income should belong to such issue. The son of one of the testator's sons, who was dead, attained majority after the death of the testator's widow, and thereupon claimed payment of one-third of the residue. Two of the testator's children were still alive and had issue. It was admitted that a share of the residue had vested in the beneficiary who now claimed payment. He based his claim (1) upon the terms of the settlement, and also (2), when the case was argued in the House of Lords, upon the 17th section of the Entail Amendment (Scotland) Act 1868, he having been born after the death of the testator, and the testator having died after the passing of that Act.

Held (*aff.* judgment of the Second Division) that he was not now entitled to payment or conveyance of any part of the residue, in respect (1) that the testator intended the residue to remain unsevered until the death of the last survivor of his children, and that the interests of the other present and ultimate beneficiaries might be prejudiced by severing the estate now; and (2) that the case was not within the provisions of section 17 of the Entail Amendment (Scotland) Act 1868, because the beneficiary claiming payment was not a liferenter but a fiar.

Miller's Trustees v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236; and *Yuill's Trustees* v. *Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668, *approved*, but *explained* and *distinguished per* Lord Davey.

Haldane's Trustees v. *Haldane*, December 12, 1895, 23 R. 276, 33 S.L.R. 206, *approved per* Lord Davey.

Expenses—Special Case—Interpretation of Trust-Disposition and Settlement.

One of the parties to a special case as to the effect of a trust-disposition and settlement having unsuccessfully appealed to the House of Lords against a unanimous judgment of the Second Division, the House of Lords *found him liable* in the expenses of the appeal.

This case is reported *ante ut supra*.

The second party (Bertram Douglas Macculloch) appealed to the House of Lords.

In addition to the contentions maintained by him in the Court of Session the second party contended that he was entitled to payment of one-third of the residue under the provisions of section 17 of the Entail Amendment (Scotland) Act 1868 (quoted *infra*).

Counsel for the first parties (respondents) was only called upon to reply to the argument upon the statute.

In answer to the second party's contention upon the statute, it was argued for the first parties that section 17 did not apply, in respect (1) that the second party was not a liferenter but a fiar, and (2) that the section could not apply to the effect of prejudicing the rights of third parties.

The Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. c. 84), sec. 17, enacts as follows:—"From and after the passing of this Act it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent; and where any moveable or personal