the employer rested entirely on the legal implication derived from the fact of payment by the person in fault, then it might be a perfectly good answer to his defence for the workman to say, "You are not discharged by my taking payment from Messrs Baird, because I specially reserved my right as against you, and the legal implication of discharge is excluded by the express reservation." But then the discharge of the employer does not rest upon any such legal implication; the statute gives him indemnity, and the discharge to which the Sheriff has found him entitled does not depend on the existence or non-existence of a reserved claim against him, but on the express provision of the statute that if the workman claims against one he cannot claim against the other.

I would only add with regard to the case of *Oliver* (19 T.L.R. 607) that I agree with your Lordship and Lord Adam that the decision in that case does not apply to the circumstances of the present case at all.

The Court answered the question in the case in the affirmative and refused the appeal.

Counsel for the Appellant—Campbell, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Watt, K.C. —Horne. Agents—Connell & Campbell, S.S.C.

Wednesday, November 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'MURRICH'S TRUSTEES *v.* M'MURRICH'S TRUSTEES.

Proof—Writ or Oath—Innominate and Unusual Contract — Admissibility of Parole—Transference of Right of Succession — Agreement to Divide Funds Destined to Survivor.

Under a private Act of Parliament certain funds were destined to the survivor of A and B. After A's death his representatives brought an action against B, concluding for declarator that it had been agreed between A and B that on the death of either, one-half the funds should belong to the representatives of the deceased, and one-half to the survivor. They averred that an agreement to this effect had been entered into, and that a draft of a deed giving effect to it had been prepared, but that A had died before the draft was signed by either party. *Held* that these averments could only be proved by the defender's writ or oath—*per* the Lord Ordinary and the Court, on the ground that they set forth a contract of an innominate and unusual character; and *per* Lord M'Laren, on the ground that it was not competent to prove by parole a transference of a right of succession conferred by writing.

This was an action at the instance of Marcus John Brown, S.S.C., Edinburgh, and others, trustees of the late James M'Murrich, who resided near Tarbet, Dumbartonshire, against Peter M'Murrich, residing at Faskadail, Dunblane. During the course of the action Peter M'Murrich died, and his testamentary trustees were sisted as defenders in his stead.

The following narrative of the facts of the case is taken from the opinion of the Lord Ordinary (KINCAIRNEY)—"In the year 1879 the lands of Stuckgown were sold under a private Act of Parliament, and the price was invested in the hands of trustees under a destination specified in the statute, in terms of which James M'Murrich became liferenter of the funds, and he was so in 1902. At that time the fund stood destined in fee to the survivor of James M'Murrich the liferenter, and of Peter M'Murrich, who was apparently his nephew. Both were old men, James being 90 and Peter 76.

"James M'Murrich died on 9th October 1902, and if the succession to the fund were regulated by the statutory destination Peter M'Murrich would have taken the whole funds, amounting to £30,000 or thereby.

"But the representatives of James M'Murrich claim one-half of the funds, and they have raised this action to enforce that claim. They make that demand on the following grounds—They aver that in October 1902 an agreement was made between James and Peter M'Murrich to the effect that on the death of either the fund should be divided equally between the survivor and the representatives of the deceaser, instead of the whole passing to the survivor. They state that this agreement got the length of being embodied in a draft and was ready for signature when James M'Murrich died, it is said, suddenly. It does not appear that either draft or deed was submitted to Peter M'Murrich.

"Defences to this action were lodged by Peter M'Murrich, who denied that he assented to the agreement averred, and the question raised by the record is whether the alleged agreement for equal division is established or not. That resolves into a question as to the mode of proof."

The exact terms of the pursuer's averments so far as material are fully stated in the opinion of the Lord President, *infra*.

The defenders pleaded, *inter alia*—"(4) The agreement alleged to have been entered into being an innominate contract of an unusual kind and of great importance can only be proved by probative writing."

On 31st July 1903 the Lord Ordinary pronounced the following interlocutor—"Finds that the averments of the pursuers as to the alleged agreement between James M'Murrich and Peter M'Murrich can only be proved by writ or oath of party."

Opinion.—[*After stating the facts ut supra*]—"I am of opinion that this alleged agreement is only provable by writ or oath. The contract averred is innominate, it is important, and it is certainly unusual, and

it involves, besides, the substitution of a parole agreement for a formal written destination. It is not, it is true, a complicated agreement, but, on the contrary, is simple and easily understood. That consideration, however, loses much of its weight when one considers the age and frailty of the parties; and I think, also, the circumstance that various parties, more or less interested, seem to have busied themselves in effecting the arrangement. Many cases, showing the application of the rule that innominate and unusual contracts cannot as a general rule be proved by parole, were cited. The most important of these, and most applicable to the present case, seem to be *Edmonstone* v. *Edmonstone*, June 7, 1841, 23 D. 995, and *Muller & Co.* v. *Weber & Schaer*, January 29, 1901, 3 F. 401. It appears to me that this is a case in which parole evidence cannot be allowed. I shall merely make a finding to that effect. I am informed that Peter M'Murrich has died since the action was raised, and it is not improbable that the pursuers may have some difficulty in establishing their case,"

The pursuers reclaimed, and argued—There was no absolute rule in the law of Scotland that innominate contracts could only be proved by writ or oath. The real distinction was that if a case averred stipulations which would not naturally flow from the contract alleged, then the proof was limited.—Ersk. iv. 2, 20; *Forbes* v. *Caird*, July 20, 1877, 4 R. 1141, 14 S.L.R. 672; *Downie* v. *Black*, December 5, 1885, 13 R. 271, 23 S.L.R. 188. The cases cited by the Lord Ordinary, and others of the same class, were all special, or were illustrations of the rule that the terms of a written contract could not be varied by parole. Thus *Edmonston* v. *Edmonston*, June 7, 1861, 23 D. 995, and *Johnston* v. *Goodlet*, July 16, 1868, 6 Macph. 1067, were cases of nuncupative testaments, while *Muller and Co.* v. *Weber and Schaer*, January 29, 1901, 3 F. 401, 38 S.L.R. 305, was a case of altering the terms of a written contract by parole. The modern tendency was to admit parole proof where the only objection to it was that the contract was innominate and unusual.—*Moncreiff* v. *Sivewright*, March 11, 1896, 33 S.L.R. 456; *Jack* v. *M'Growther*, June 18, 1901, 38 S.L.R. 701. An agreement to enter into a contract could be enforced.—Ersk. iii. 2, 2, and iii. 2, 4; Bell's Comm. (M'L. ed.) i. 345; *Erskine* v. *Glendinning*, March 7, 1871, 9 Macph. 656; *Rossiter* v. *Miller*, 1878, 3 App. Cas. 1124.

Argued for the respondent—The case fell within the rule that agreements of an innominate and unusual character could only be proved by writ or oath.—*Edmonston* v. *Edmonston* and *Johnston* v. *Goodlet*, *cit. supra*; *Stewart and Craig* v. *Phillips*, February 2, 1882, 9 R. 501, 19 S.L.R. 356; *Garden* v. *Earl of Aberdeen*, June 24, 1893, 20 R. 896, 30 S.L.R. 780. Apart from this, what was here averred was a transference of an incorporeal right. That could only be accomplished by writing, unless the value was less than £100 Scots.—Act 1579, c. 80; Dickson on Evidence, sec. 560. It was not disputed that an agreement to enter into a contract might be enforceable, but if the contract could only be proved by writ or oath, the same limitation as to the mode of proof must apply to the agreement. If not, the rule as to limitation of proof would be absolutely inoperative, because it would always be possible to prove the agreement.

LORD PRESIDENT—The Lord Ordinary in this case has found that the averments of the pursuers as to an agreement which they allege to have been entered into between James M'Murrich and Peter M'Murrich can only be proved by writ or oath of party, and that interlocutor is not, as I understand, objected to by the defenders. The case is certainly a very peculiar one. In 1879 a private Act of Parliament was obtained under which the lands of Stuckgown were sold and the purchase price invested in trustees. James M'Murrich was in 1902 the liferenter of these funds, and the fee stood destined to the survivor of James and Peter M'Murrich. James was then ninety and Peter seventy-six years of age. The allegation of the pursuers is that James and Peter M'Murrich entered into an agreement in regard to the disposal of the funds held in trust under the Act. It is important to note the precise averments on record as to the meetings and the alleged agreement, because it was certainly an agreement of a kind by no means usual. It is alleged that at a meeting which was held on 1st October 1902 in the office of Mr Currie, in Glasgow, a proposal was made to the effect set out in the condescendence, providing for the destination of the funds; and it is alleged that Mr Currie and Mr Brown had the special instructions and authority of the respective parties to enter into and conclude an agreement to the effect stated on their behalf. Mr Currie despatched a telegram to Dr Barty, the well-known solicitor in Dunblane, the law-agent of Peter M'Murrich, proposing an appointment for the following day to adjust a deed embodying the agreement. It had been quite recognised by the parties that it was an agreement of such a character that it should be reduced to writing. Dr Barty replied that he would attend on the following day, and it was arranged that Mr Marcus Brown should at the same time attend on behalf of Mr James M'Murrich; so that James was represented by one solicitor and Peter by another. There are sufficient averments of the employment of these two gentlemen by their respective clients, and I did not understand that employment was disputed as regards either of them. Down to this point there is very little specification of the terms or tenor of the agreement. In condescendence 7 it is alleged that, in anticipation of the meeting with Dr Barty, Mr Brown proposed a draft minute of agreement between James M'Murrich and the defender, setting forth the terms of the agreement, that the meeting "was duly held in Mr Currie's office in Glasgow, when the terms of the agreement were discussed, and Dr Barty agreed to it in prin-

ciple, but stated that he desired to take the opinion of counsel on one or two points." It is plain that down to that time the parties had not agreed as to the terms in which the alleged agreement should be expressed. An agreement in principle is one thing, but in a case of this kind—a very delicate case—until the parties had arranged definite terms, nothing obligatory had been done. Time was very naturally wanted with the view of settling the points which required to be settled, in order to make an effective agreement; and accordingly Mr Brown, on 9th October 1902, received a telegram addressed to his firm by Dr Barty in the following terms:—"We hope to call for you to-morrow afternoon at three with Currie. It might be well that Cullen should be present to save time in adjusting agreement." It is plain that down to this time no agreement had been concluded.

In Cond. 10 it is alleged that a meeting was held in Edinburgh at which fully authorised agents on both sides were present. In the answer to that article it is stated that "neither Mr Currie nor Mr Barty had any authority or instructions from the defender (Peter M'Murrich) to conclude any agreement on his behalf, and in point of fact they concluded no such agreement." I advert to this for the purpose of pointing out that the parties diverge here, it being in effect denied that Dr Barty had any authority except to negotiate, to make a provisional arrangement which would still, in so far as Peter M'Murrich was concerned, be subject to his approval or rejection.

In article 11 of the condescendence it is stated that consideration of the draft was continued, with the result, according to the averment, "that Messrs Barty's draft was, with slight modifications, of no material importance, which modifications Mr Barty there and then approved of, agreed to, accepted, and initialed by Mr Brown as revised on behalf of James M'Murrich," and that "a final agreement to the effect stated in the summons was at said meeting concluded by their respective agents for the parties." I assume that the averment means that the terms arranged were reduced to writing in the draft; but the draft was only a draft and it was only initialed as such; it was not executed by any signature either of the agents or of anyone else, the intention of course being that it should be extended and that the principal writ should be duly executed by the parties if agreed to by them. Down to this point therefore it seems to me that there are no averments of anything except negotiation, and no allegation of any finally adjusted agreement which would be effectual in law. The statement that a final agreement was concluded can only mean that a parole agreement was come to, which the parties intended should be embodied in a formally executed writing. Then follows this somewhat peculiar averment—"Said agreement was intended to be, and was thenceforth, and is now, binding upon the parties and their representatives, and that apart altogether from the execution of the formal deed expressing its terms." That can mean nothing more than that a parole agreement was entered into by agents without their principals being present.

It seems to me there are two points which require to be proved, and as to the mode of proving which the parties are at variance. There is in the first place the alleged agreement between the M'Murrichs, which was never reduced to writing, and there is also the allegation that the agents had authority to make an important and delicate agreement of the kind here alleged without recurring or referring to their principals. Is that a thing that can be done without some written authority, or if there is no written authority, can an agreement of such a very special character be proved otherwise than by writ or oath? If proof at large was admissible on both or either of these points any amount of parole evidence might be adduced in regard to matters of a very delicate kind—both the mandate to the agents and the agreement said to have been arrived at by the agents.

Then the next and I think the only remaining averment requiring to be noticed is this in condescendence 12—"It was at said meeting arranged, in consequence, as the narrative in the said draft-deed sets forth, of both parties being in feeble health, that the deed should be extended and signed forthwith, but it was the intention of parties, and it was agreed, that there was to be no suspension of the said agreement pending execution of the formal deed, but that both James M'Murrich and the defender should be bound in the meanwhile." Now, that is just stating again with some greater amplitude the proposition that there were these two parole agreements, and that it was agreed that until the parties got the length first of adjusting a deed—for that had not been finally done, and secondly, of executing it according to law—until that should be done the parole agreement should be binding. This is certainly a very peculiar situation with respect to two agreements, first the agreement of mandate, and secondly the agreement between the parties, and in regard to the latter, with which alone the Lord Ordinary deals, he has found that proof by writ or oath is alone competent. I am of opinion that the view taken by the Lord Ordinary is correct, because the matter is of a character usually reduced to writing, and it is common ground that the parties intended that the agreement should be reduced to writing. I could have conceived that there were fair grounds for contesting the relevancy of a good many of the pursuer's averments here, but I have no doubt a proper discretion was exercised in not doing that. But it is not necessary to go into that matter if we take the view that the limitation of the mode of proof has been rightly made by the Lord Ordinary. For these reasons it seems to me that the conclusion arrived at by the Lord Ordinary is sound and that his judgment should be affirmed.

LORD ADAM concurred.

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 should 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