to have acted. Accordingly, I am of opinion on the whole matter that this ground of reduction completely fails.

The benefit of the will to Mr Guthrie is however a material fact to be taken into account in coming to a conclusion, and I think it is right to observe that, at the best, the benefit he could procure under the will would be extremely small. I do not desire to go into exact figures on these questions, because there has as yet been no accounting and we have no sufficient evidence to enable us to determine the precise amount Mr Guthrie would have to account for if he were ordered to account under this action, but the evidence, so far as it goes, seems to indicate that after paying the legacies and after making good the *mortis causa* gifts—if one may so describe them—which he had been entrusted to give, and deducting certain expenses, which from his evidence may have been considerable, he would have derived but small benefit from the residuary bequest in his favour. But then I am afraid that even that small benefit must be very greatly reduced, because the pursuers have brought this action to enforce, as an alternative claim—failing their right to obtain an accounting for the whole estate—their right to legitim, and I do not find on record any plea against the validity of that claim. Accordingly, it does appear to me very doubtful whether, if the defender has to account for the portion of the estate which goes in legitim to the children, there will be any material residue left for him. That, however, is a question with which we are not concerned at present.

I think on the whole matter the defenders must be assoilzied from the reductive conclusions, and that the case must be remitted to the Lord Ordinary to proceed as shall be just to dispose of the conclusions for legitim. I think I need hardly say that in the observations I have made on these conclusions I am not expressing any opinion on the question—which has not been argued to us—whether the claim for legitim can be made good or not, but there is no plea on record against the claim, and if there is any doubt about it the parties will have an opportunity for discussing it before the Lord Ordinary when the case goes back to him for further procedure.

LORD PEARSON—I concur in the opinion just delivered.

LORD M'LAREN—I also concur in the opinion of Lord Kinnear.

The LORD PRESIDENT was absent.

The Court recalled the Lord Ordinary's interlocutor, assoilzied the defenders from the reductive conclusions of the summons, and remitted to the Lord Ordinary to dispose of the conclusion for payment of legitim.

Counsel for Pursuers (Respondents)—Wilson, K.C.—Mitchell. Agents—John C. Brodie & Sons, W.S.

Counsel for Defenders (Reclaimers)—Hunter, K.C.—A. M. Hamilton. Agents—Sharpe & Young, W.S.

Thursday, July 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'FADZEAN'S EXECUTOR *v.* M'ALPINE & SONS.

Proof — Contract—Innominate Contract—Workmen's Compensation Acts—Agreement to Give up All Claims Arising out of an Accident on Receipt of a Sum of Money—Proof by Writ or Oath, and Prout de jure.

The executor of a deceased workman, who had been in receipt of weekly payments of compensation under a recorded agreement under the Workmen's Compensation Acts, brought an action against the employers to recover £40 on the following averment:—"(Cond. 3) On or about 16th December 1905, after sundry negotiations, the said deceased, through his law agent, offered to accept £40 in full settlement of all his claims, whether under the statutes or at common law, against the defenders, and on or about 29th December 1905 the defenders, through their law agent, accepted said offer. A binding contract was thereby completed between the parties for payment to the deceased by the defenders of the sum of £40."

Held that the averment, read as meaning that the one party had promised to pay £40, and the second party had departed from all other claims, there and then constituting a concluded bargain and making the £40 immediately exigible, was relevant and must be remitted for probation, but that the proof being of an innominate contract of a peculiar character, must be, oath being impossible, by writ.

Question—If, or how far, parole proof is competent to prove an innominate contract? *Downie* v. *Black*, December 5, 1885, 13 R. 271, 23 S.L.R. 188, *questioned.*

Opinion that no obligation to pay money not incidental to one of the well-known ordinary consensual contracts is provable by the law of Scotland otherwise than by writ or oath.

On July 3rd 1906 Thomas M'Fadzean, labourer, Germiston, Glasgow, *qua* executor-dative of the deceased Malcolm M'Fadzean, labourer, brought an action in the Sheriff Court at Glasgow to recover, *inter alia*, £40, against Robert M'Alpine & Sons, contractors, 188 St Vincent Street, Glasgow.

The following narrative is taken from the opinion of the Lord President:—"The pursuer here, Thomas M'Fadzean, is the executor of Malcolm M'Fadzean, a labourer who was engaged in the service of the defenders at Provanmill Gasworks, Glasgow. While engaged in such service he met with an injury, and he made a claim under the Workmen's Compensation Act. The parties seem to have come to an agreement without resorting to arbitration, and com-

pensation was paid—first, at the rate of 9s. 1½d. per week, and latterly at 3s. 1½d. per week—and a memorandum of agreement as to compensation was recorded in the Sheriff Court Books under the terms of the Workmen's Compensation Act. Matters so standing, in the month of December 1905 the parties seem to have begun negotiations as to whether they might not come to some sort of a settlement which would, by a payment of a lump sum, get rid of the weekly payments that had still to be made under the Workmen's Compensation Act.

"The pursuer's averment on this matter is contained in Cond. 3, and it is this—'On or about 16th December 1905, after sundry negotiations, the said deceased through his law agent offered to accept £40 in full settlement of all his claims, whether under the statutes or at common law, against the defenders, and on or about 29th December 1905 the defenders, through their law agent, accepted said offer. A binding contract was thereby completed between the parties for payment to the deceased by the defenders of the sum of £40.'

"The answer to that is—'(Ans. 3 and 4) Admitted that on or about 16th December 1905 the deceased's law agent offered to accept £40 in redemption of the payments due in terms of the said decree. *Quoad ultra* denied. Explained that on or about 29th December 1905 the law agent of the deceased Malcolm M'Fadzean met with the law agents of the defenders, when they informed him they had not yet obtained their client's instructions to accept of said offer, but that they hoped to get definite instructions shortly. It was then arranged that the defenders' law agents should inquire what procedure was necessary to have the decree terminated in the event of a settlement being come to. On 9th January 1906 the defenders' law agents received instructions to complete the arrangement, and on 10th January they wrote the agent of deceased with a memorandum of agreement for his client's signature, which after being signed by him and defenders required to be registered with the Sheriff-Clerk in order to terminate the decree. The pursuer is called upon to produce said agreement. A receipt in general terms for signature by the deceased was also sent. On 12th January the pursuer's agent replied stating his client had died suddenly on Saturday 6th January 1906. The pursuer's statements in answer are denied.'"

On 23rd October 1906 the Sheriff-Substitute (FYFE) sustained the defenders' plea 2—"The action is incompetent,"—and dismissed the action.

Note.—". . . (*After narrating that the deceased held a Court decree for 3s. 1½d. per week under the Workmen's Compensation Act and that his and defenders' solicitors had been negotiating for the redemption of this award and had agreed upon £40 as the sum.*) . . . But before this arrangement had been formally concluded M'Fadzean died. I do not think there is any room for pursuer's plea that a new and binding contract had been completed. M'Fadzean might have changed his mind, as workmen so often do. So might the employers. Till the Court had reviewed the 3s. 1½d. award it stood, and that payment would only have been ended upon the £40 having been actually paid over. The situation amounted to no more than this—that the law agents had arrived at a basis upon which they would advise their clients to concur in ending the weekly payments. But this was not a new contract. Indeed the legal situation was not altered at all. All that was proposed was that instead of paying the compensation in 256 instalments of 3s. 1½d. each, the employers should pay it in one sum of £40. It was not a new contract, but rather a new way of implementing the existing contract."

The pursuer appealed.

The defender objected to the competency, and argued—The question between the parties was with regard to compensation payable under the Workmen's Compensation Act 1897, and came under Sched. 1, section 13, which dealt with redemption of the weekly payments, and provided for the redemption money being fixed by arbitration. It ought, therefore, to have come before the Sheriff *qua* arbiter, and have been settled in the Sheriff Court—*Cochrane* v. *Traill*, March 16, 1900, 2 F. 794, Lord Ordinary Low at p. 797, 38 S.L.R. 848. It was quite contrary to the whole scheme of the Act to have an ordinary action with the consequent appeals based on it—*Binning* v. *Easton & Sons*, January 18, 1906, 8 F. 407, Lord Kyllachy at 415, 43 S.L.R. 312. The action therefore should be dismissed. The only agreement here was to pay under the Act—*cf.* Lord Young in *Cochrane* v. *Traill*, *cit. sup.*—for the averments otherwise only disclosed that a basis for agreement, not a concluded agreement, had been reached. If, however, it were to be held that there was a concluded agreement outside the Act it was an agreement which was no longer prestable, because the workman being dead could no longer fulfil his part to free the employers, the decree arising out of the compensation agreement still standing. In any event the proof must be limited. The alleged agreement was an innominate contract of a very peculiar character and proof must be by writ or oath. Parole proof was incompetent to prove a promise to pay—Dickson on Evidence, 3rd ed., section 596, Act 1579, cap. 80. Reference to the party's oath was now impossible, and to his agent's who was said to have made the agreement was incompetent—*Sawers* v. *Clark*, May 27, 1892, 19 R. 1090, Lord President Robertson at 1093, 29 S.L.R. 738. Proof, therefore, if allowed, must be by writ.

Argued for the appellant (pursuer)—The agreement averred here was not under the Workmen's Compensation Act. It was an agreement whereby all claims arising out of the accident were given up. The action, therefore, was an ordinary action with the consequent right of appeal. The agreement averred was further a concluded and completed agreement. The workman thereby gave up all his claims, which was his part

of the bargain, and he received the promise to pay. Proof should therefore be allowed and it should be *prout de jure*. The agreement was not an innominate contract but a compromise similar to the settlement of an action. But even an innominate contract was not restricted to proof by writ or oath provided there were no extraordinary stipulations—*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; *Reid* v. *Reid Brothers*, June 8, 1887, 14 R. 789, 24 S.L.R. 560—and there were no such stipulations here. The opinion of Lord Young in *Cochrane* v. *Traill*, *cit. sup.*, that an agreement such as this must be proved by writ or oath, stood alone. A general proof should therefore be allowed, but in any event the appellant was entitled to one by writ, and the Sheriff-Substitute's interlocutor must be recalled.

At advising—

LORD PRESIDENT—. . . [*After narrating the facts quoted supra*] . . . Now, that is the averment and the answer, and the pursuer, of course, asked a proof of his averment. The case was dismissed by the learned Sheriff-Substitute, who sustained the second plea-in-law for the defenders, which second plea-in-law is that the action is incompetent. There are other pleas—that there was no completed agreement, and that the agreement was personal and did not transmit to the representatives of the deceased. But the plea sustained is that the action is incompetent. I have not been able to see exactly on what ground that plea can be sustained, and I am bound to say the learned Sheriff-Substitute's note which he has appended to his interlocutor does not help me, for it seems to be not a criticism of competency but of relevancy, which is a different thing. After stating the facts he says— . . . [*quotes, supra*] . . . Now, all that does not seem to me to go to the competency at all, but only to the relevancy of the agreement as averred, and therefore I cannot see my way to sustain the judgment on the grounds on which it at present stands.

But that opens the question of what ought to be done with the case. Now, I am bound to say that I do not think the averment of the pursuer is very satisfactory, because it does not bring out clearly what he alleges the contract really was. But the contract must have been one of two things. The contract may have been a contract that, in respect of a payment of £40 the deceased man would take such steps as would free the employers from the obligations under which they at that time stood in virtue of the recording of the memorandum, and also relieve them from any claim in the future whether at common law or under the statutes. Well, if that was the contract it is quite obvious that the action cannot stand, because it was a contract with mutual prestations, and M'Fadzean by dying has put it out of his power to fulfil his part of the bargain, and consequently the defenders are free of the contract. I think that is the view the learned Sheriff has taken of the contract, but his disposal of the case on that view is based really on irrelevancy and not on incompetency, in respect that the pursuer has not set forth the possibility of carrying out M'Fadzean's part of the contract.

But then that is not the contract that I take it the pursuer wishes to make out, and though, as I say, I do not think his averment is very clear on the point, it was perfectly clear in the mouth of his counsel. He wants to infer the second of the two views of the contract that I have referred to—viz., that a concluded bargain was come to under which one person said "I will pay you £40," and the other person said "You have promised to pay me £40, I therefore cry quits for any other claims I may have against you in respect of this accident"—and that there and then a concluded bargain having been come to the £40 was immediately exigible and so was *in bonis* of the deceased. That is the only theory on which the executor can maintain the claim he makes in this action.

Now, in that view of the contract the question of what is to be done with the case is a delicate one, but I have come to the conclusion that a contract of that peculiar description—for it is peculiar; it is not likely that a person would bind himself to make a payment of £40 down under these conditions; it is much more likely that he would not—a contract of that description can only be proved by writ or oath, and, accordingly, I propose that we recal the interlocutor of the Sheriff-Substitute and remit to him to allow a proof by writ of the averments in condescendence 3. The law upon the question of what can be proved by parole is perhaps not in a very clear state, and if this case had been a case of a larger character I should not have been unwilling that the whole matter should be carefully considered by a larger Court, especially having regard to the decision in *Downie* v. *Black*, 13 R. 271, which, so far as I am concerned, I should like to have an opportunity of reconsidering. But I may say that I know of no case which is authority for the view that an obligation to pay money, not incidental to one of the well-known ordinary consensual contracts, is provable in the law of Scotland otherwise than by writ or oath; and the learned counsel who pleaded this case was unable to point to any such decision. I cannot say that I find that the law has ever been exactly laid down on that formula, but I do say that I know of no case in which an obligation to pay money has been allowed to be proved otherwise than by writ or oath except where the payment is an essential part of one of those contracts which can be proved by parole. I am fortified in the view I take of this case by the opinion delivered by Lord Young in *Cochrane* v. *Traill*, 2 F. 794, and by the opinion indicated by some remarks of Lord Kyllachy in the case of *Binning* v. *Easton & Sons*, 8 F. 407.

LORD KINNEAR—I have had considerable difficulty in dealing with this case. I have

some doubt whether there is any relevant averment of contract at all, in this respect, that the averment seems to me to be so wanting in specification that it may reasonably be considered as meaning either of two different agreements, and I have some doubt whether the framer of this condescendence had any distinct idea in his own mind what contract he meant to aver. But it has been said to us with perfect distinctness at the bar that what the pursuer now wishes to prove is an agreement to the effect your Lordship has stated, and therefore, as I am not disposed to criticise the averments too strictly in cases of this kind, I assent to your Lordship's proposal that this case be sent to proof.

I agree also that the law in regard to cases in which proof ought to be limited to writ or oath is so unsettled that, if the amount of money involved in this case was sufficient it might be very proper that the recent decisions should be reconsidered by a Court of Seven Judges. But it would manifestly be altogether improper to subject a litigant in the circumstances of this pursuer to such expense as would be involved in that proceeding. I therefore think we must do the best we can on the law as it now stands, and, though not without considerable hesitation, I agree that we should follow the opinion expressed by Lord Young in the case to which your Lordship referred.

The LORD PRESIDENT intimated that LORD DUNDAS, who was absent at advising, concurred in the judgment.

The Court recalled the interlocutor of the Sheriff-Substitute, and remitted to him to allow to the pursuer a proof of his averments by writ.

Counsel for the Pursuer (Appellant)—Crabb-Watt, K.C.—A. M. Anderson. Agent—C. Strang Watson, Solicitor.

Counsel for the Defenders (Respondents)—Wm. Thomson. Agents—Connell & Campbell, S.S.C.

Thursday, July 18.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

BOORD & SON *v.* THOM & CAMERON, LIMITED, *et e contra.*

Trade-Mark — Process — Infringement — Defences — Mode of Pleading — Defences (a) that Complainers' Mark ought not to be on the Register, (b) That Respondent has Himself Right to be on the Register—Necessity for Pleading Rectification of Register.

While an alleged infringer of a registered trade-mark may plead in defence to an action for interdict that the register should be rectified, either (*a*) by expunging the entry of the trade-mark as being common property, or (*b*) by adding an entry of the mark as being also his, he can only raise such defence by making rectification a positive crave. *Dewar* v. *Dewar & Sons, Limited*, December 6, 1899, 2 F. 249, 37 S.L.R, 188, *commented on.*

Trade-Mark — Infringement — Defence of Common Property—Effect of Registration —Onus—Evidence.

In an action of declarator and interdict to prohibit alleged infringement of a registered trade-mark, to establish the defence that the register should be rectified by expunging the entry on the ground that the mark is "common property," (1) the onus is on the defender by the mere fact of registration and is increased by the length of time the entry has been on the register, and (2) it is not sufficient to prove a few isolated sales, but to constitute "property" the mark must have become associated in the market with the goods.

Evidence held insufficient to establish common property in a registered trade-mark.

Trade-Mark—Resemblance—Long Association—Interdict.

B. & S., a firm of spirit merchants, had as their registered trade-mark a device consisting of a cat with one paw uplifted standing on a barrel placed on its bilge, and proved that by long use their goods had become associated with the cat and barrel device.

Held that in deciding whether certain labels were or were not an infringement, the Court should keep in view the long association of B. & S.'s goods with the device, and consequently not require too strict a similarity before granting interdict.

Labels held to be practical infringements of a registered trade-mark, though not very similar to it.

The circumstances in which these actions arose, as stated by the Lord Ordinary (Salvesen), were—"On 1st July 1904 Messrs Boord & Son raised an action against Thom & Cameron, Limited, in which they sought (1) declarator that they were the sole proprietors of certain trade-marks and (2) interdict against infringement of same. There was also a conclusion (3) to the effect that Thom & Cameron should be interdicted from using the words 'Cat and Barrel,' or the representation of a Cat and Barrel, in connection with the sale of gin and other liquors. About a year later Thom & Cameron replied by an action of declarator and reduction, in which they sought (1 and 2) to have Boord & Son's trade-marks removed from the register, or otherwise (3) a decree that the latter have no exclusive right to use the device of a Cat, or of a Cat and Barrel, on labels or advertisements in connection with the sale of 'Old Tom' gin and other liquors. Both cases were ultimately sent to trial together, and I thought it right that Thom & Cameron should lead in the proof, on the ground that the registration of the trade-marks threw