ment of trade labels, the following issues were adjusted:—

"1. Whether, between 1st January 1865 and 23d April 1866, the defender sold certain powders in packets of 2 oz. or thereby, having printed labels thereon made in imitation of the labels used by the pursuer, with the fraudulent purpose of passing off the said powders as the pursuer's manufacture, whereby persons were induced to buy such powders under the belief that they were powders of the pursuer's manufacture, to the loss, injury, and damage of the pursuer?

"2. Whether, between 1st January 1865 and 23d April 1866, the defender sold certain powders in packages, containing twelve packets or thereby, of 2 oz. each or thereby, such packages having printed labels thereon made in imitation of the labels used by the pursuer, with the fraudulent purpose of passing off the said powders as the pursuer's manufacture, whereby persons were induced to buy such powders under the belief that they were powders of the pursuer's manufacture, to the loss, injury, and damage of the pursuer?"

Damages laid at £1000.

The summons, besides the pecuniary conclusions, contained a conclusion for interdict. A motion was made by the pursuer for interim interdict under the conclusion for interdict.

The Lord Ordinary (Jerviswood) refused the motion *in hoc statu*.

The pursuer reclaimed.

The SOLICITOR-GENERAL and SHAND for him argued—There is nothing incompetent in this motion, although it cannot be instructed by precedent that the course proposed has ever been followed in Scotland. There is no reason why interdict should not be granted under an ordinary action as much as in a process in the Bill Chamber. In England the practice is in accordance with the motion of the pursuer.

GORDON and THOMS, in reply, contended for the incompetency of the motion, and that the pursuer had no right to interdict until his right has been ascertained under the action.

At advising—

The LORD JUSTICE-CLERK—It is necessary to explain formally the grounds upon which our judgment proceeds. In cases of this sort it is a competent remedy for the party at one time to ask an immediate interdict, and at other times not to ask interdict until he has established his whole right by action, including in action a process disposed of on a passed note of suspension. The pursuer here is complaining of a fraudulent invasion of his fair trading privileges, of a deception practised on the public, which has the effect of interfering with his lawful rights, and he stands pretty much in the position of a patentee complaining of an infringement of the privileges secured to him by his patent. The question is, whether he is entitled to immediate protection, or must, in the first place, establish his right to get interdict? When a party thinks he is entitled to immediate remedy he goes to the Bill Chamber with a note of suspension; but if not, he raises an action for establishing his right, or he brings a suspension and interdict without asking interim interdict in the Bill Chamber. After the question has been tried in all this class of cases, it follows necessarily, on the establishment of the pursuer's right, that the pursuer should have an interdict for the future. The question here is, In which of these two positions the pursuer has placed himself. The summons is not raised on the footing that the pursuer is entitled to interim interdict. It is framed on the footing that the pursuer must establish his own right and the fraud of the defenders as preliminary. It must be observed that the form of action, whether it be one of damages or declarator, makes no difference. In cases of copyright, a party does not bring a declarator of copyright, but an action of damages. So here this gentleman brings an action of damages, and I cannot concur with the Solicitor-General that the conclusions of the summons are not in terms of the Act 13 & 14 Vict. c. 36. I think they are consistent with the first schedule appended to the Act. I can say, from my own experience, that after the passing of the Act the universal interpretation put upon the words of the schedule was not that they were limited to a liquid document of debt, but were intended as an illustration of the manner in which the conclusions should be put. I think, therefore, that the conclusions are right, as showing that the action is one of damages. And in the absence of all precedent, I think, without saying whether this motion is incompetent or not, that it ought to be refused.

The other Judges concurred.

The motion was accordingly refused.

Agents for Pursuer—Webster & Sprott, S.S.C.

Agent for Defender—Wm. Officer, S.S.C.

Thursday, July 5.

FIRST DIVISION.

DEMPSEY *v.* E. & G. RAILWAY COMPANY.

Jury Trial—Special Jury. Motion by a party for a special jury *refused.*

This case was set down for trial at the ensuing sittings. It is an action of damages for injury sustained through the alleged fault of a railway company.

The SOLICITOR-GENERAL for the defenders (BLACKBURN with him) moved for a special jury to try the case. There was no particular reason why it should be so tried, except that it was a case against a railway company; but the Court were in use to grant such a motion if made by either party. The railway company were willing to pay any additional expense thereby caused.

CATTANACH for the pursuer opposed the motion.

The Court refused it. There was no reason assigned for it, and as cases to be tried by a special jury had to be set down for a particular day and then tried, the arrangements of the Court for the sittings would be interfered with.

Agent for Pursuer—Alexander Wylie, W.S.

Agents for Defender—Hill, Reid, & Drummond, W.S.

BROATCH *v.* JENKINS.

Fraud — Concealment — Misrepresentation — Relevancy—Issue. (1) Averments of fraudulent concealment which held irrelevant, there being no averment of a duty to communicate. (2) Averments of fraudulent misrepresentation which sustained as relevant. Issue adjusted.

This is an action of reduction of a minute of reference, and an award following thereon. The defender David Jenkins is a writer in Kirkcudbright, and was law-agent for the late Adam Rankine, who incurred various business accounts to him. After Adam Rankine's death, which happened on 1st November 1862, his son and heir-at-law employed the pursuer, also a writer in Kirkcudbright, as his law-agent. In consequence of this employment the pursuer had various interviews with the defender in regard to the settle-

ment of his accounts, and the transfer of Mr Rankine's title-deeds. And the pursuer averred—

Cond. 6. After several unsuccessful attempts to adjust the balance due, an agreement was ultimately come to between the pursuer, as acting for James Rankine on the one part, and the defender, David Jenkins, on the other, that, in consideration of the pursuer or his client paying to the said defender the sum of £50 to account of the balance due to the latter, and of the pursuer becoming bound, as cautioner for the said James Rankine, for payment to the defender of the remaining balance due to him, as it may be ascertained, a reference should be entered into between the said James Rankine and the pursuer, as his cautioner, on the one part, and the said defender, on the other, to Mr Anthony Mackenzie, writer in Kirkcudbright, as referee, to fix and ascertain the sum due.

Cond. 7. When the pursuer agreed with the said defender to become cautioner for James Rankine for payment to him of the balance that might be ascertained by Mr Anthony Mackenzie to be due to the defender, the defender fraudulently concealed from, at least did not explain to, the pursuer that he had any other or farther claims against the late Adam Rankine than those contained in his rendered accounts and states of debt, nor did he make any such explanation till after the reference had been entered into, and was in progress before the referee. The pursuer agreed to enter, and eventually did enter, into the reference as cautioner for James Rankine, solely on the understanding, induced by the defender's having fraudulently concealed from him, at least not having communicated to him, that he had any claims against the late Adam Rankine beyond what he had rendered; that the accounts which the defender had so rendered were alone to be the subject of reference, and that he was to become bound, as cautioner, only for such balance as might be ascertained to be due on those specific accounts

Cond. 8. Not only so, but on the 10th day of November 1863, being the day on which the minute of reference sought to be reduced was subscribed, the said defender exhibited to the pursuer his ledger, wherein were entered the originals or copies of the accounts, abstracts, and states which he had rendered to Mr Adam Rankine as before mentioned; and he pointed out to the pursuer the balance of £195, 5s. 10d. as what was claimed by him to be due, and the sum of £15 which had been paid to account of that balance by Mr Adam Rankine as already mentioned; and he fraudulently led the pursuer again to understand that the pursuer was to become cautioner for payment to him only of such balance as might be due on an adjustment of the accounts on which the balance before them was brought out, reduced to £180, 5s. 10d. by the payment of £15 to account of it by Adam Rankine as aforesaid.

Cond. 9. The pursuer accordingly, on 10th November 1863, made payment to the said defender of the sum of £50 to account of such balance as might be due on the foresaid accounts and states of debt, and on the faith of the representation contained in the said accounts and states, that the sums therein specified contained the defender's whole claims, the pursuer, on or about the same day, entered into the minute of reference which is the first document called for in the summons and sought to be reduced. In subscribing that minute of reference the defender did not reserve to himself the right to increase his claim by inserting new charges and making out new accounts after the death of his employer for business alleged to have been done for the deceased, and the pursuer understood that he was becoming cautioner, and intended to become cautioner, only for payment of such sum as might be ascertained by the referee to be due to the defender, Mr Jenkins, on an adjustment of the accounts which had been rendered by the said defender to Mr Adam Rankine, on which a balance of £195, 5s. 10d. was brought out, subject to deduction of the £15 paid by Adam Rankine to account as aforesaid.

Cond. 10. In so far as the said minute of reference in its terms binds the pursuer as cautioner for James Rankine for payment to the defender, David Jenkins, of anything further than the balance that should be ascertained to be due on an adjustment of the accounts and states which had been rendered to Adam Rankine as aforesaid, the pursuer's subscription thereto was obtained by fraudulent concealment on the part of the said defender of the extent of the claims for which he contemplated attempting to make the pursuer liable as cautioner; at least the pursuer was induced to subscribe the same under essential error, on his part, as to the amount of liability which he was thereby undertaking, induced by the defender's concealment or failure to communicate information (which in law he was bound to communicate) that he meant to claim, in the said reference, further sums, or a greater amount, than he claimed as due in the accounts which he had rendered to Adam Rankine.

The pursuer proposed the following issue :—

Whether the defender David Jenkins, by fraudulent concealment of claims by him against the defender James Rankine, induced the pursuer to become a party to the minute of reference, No. 29 of process as cautioner for the said James Rankine?

The Lord Ordinary (Barcaple) reported the case with the following

Note—The defender does not object to the form of the proposed issue, but he maintains that there are not relevant averments to entitle the pursuer to take it. His contention is, that owing to the alternative form of the statement in article 7 of the condescendence, the pursuer is not entitled to an issue on the first and higher averment of fraudulent concealment. It appears to the Lord Ordinary that there is a substantive averment of fraudulent concealment, separate from the lesser and alternative averment of non-communication, and that the pursuer is entitled to an issue in regard to the former, which, from the nature of the case, is alone relevant. E. F. M.

J. H. A. MACDONALD, for the pursuer, was heard in support of the issue proposed, and

PATTISON in support of the defender's objections to it. He argued that in alternative pleading both alternatives must be relevant (Drummond's Trs. *v.* Melville, 8th Feb. 1861, 23 D. 450). Here there was no sufficiently specific averment of fraud, and it was not said that there was any duty of disclosure in regard to the matter said to have been concealed.

The LORD PRESIDENT—In cases of fraudulent concealment there is always imported a duty of communication. There may be a duty to communicate, and a failure to do so, which is fraudulent. The most palpable cases of this kind are those of insurance, in which a party making an insurance is aware of a fact which he does not communicate, and which it is his duty to communicate. In such cases non-communication may be fraudulent, but the failure to communicate may be

because the party himself had not made himself aware of the fact which it was still his duty to communicate, and in such a case a plea of liberation from the contract would be taken and sustained. I do not recollect of any case of fraudulent concealment in which it did not appear from the statements on record that there was a duty to communicate. I think that is not set forth here. But there may be a case of fraudulent misrepresentation on this record which, though not amounting to express words of assurance, would yet entitle the pursuer to an issue. Thus, if in answer to a question, What is the balance for which the pursuer was to become bound? the defender gave him his ledger, and said, there is my ledger, and pointed out the page, that would amount to a case of misrepresentation; and if the defender knew that the balance stated in the ledger was not the true balance, that would amount to a case of fraudulent misrepresentation. Concealment may aid a case of misrepresentation, but misrepresentation will not aid a case of concealment. I am not prepared to say that there are not materials for an issue of misrepresentation here, but I should like to see the issue the pursuer proposes.

The pursuer thereafter proposed the following issue :—

"Whether the defender, David Jenkins, by fraudulent misrepresentation as to the number and extent of the accounts claimed by him from the defender, James Rankine, induced the pursuer to become a party to the minute of reference, No. 29 of process, as cautioner for the said James Rankine?"

He also asked leave to add the following plea in law :—

"The defender David Jenkins, having made fraudulent misrepresentations as to the accounts and claims for which the pursuer was to become cautioner, the pursuer is entitled to have his obligation reduced and set aside."

PATTISON for the defender argued—There is no statement on record to support an issue of misrepresentation. No plea to that effect was stated in the closed record. The representation referred to in Cond. 8 is said to have been made on the same day as the minute of reference was signed—whether before or after is not mentioned—but in Cond. 6 it is stated that the parties had previously agreed to refer to Mr Mackenzie. Besides, the issue asked is too general in its terms, and ought to contain the date of the representation referred to in Cond. 8.

The Court altered the issue to the effect of inserting after the words "extent of the accounts," the words "and the amount of the balance." Expenses were reserved.

Agent for Pursuer—John Thomson, S.S.C.

Agent for Defender—James Sommerville, S.S.C.

Friday, July 6.

FIRST DIVISION.

KENNEDYS *v.* MACDONALD.

Proving the Tenor—Casus Amissionis. Averments that certain testamentary writings had been destroyed by the maker of them, or by others under her directions, when she was in an unsound state of mind, or without her authority, of which a proof allowed before answer.

This action was brought to prove the tenor of four testamentary writings executed by the late Mrs Macdonald of Lassintullich, in and prior to October 1860, which the pursuers founded on as containing their title to sue an action of reduction on the ground of facility and circumvention of a disposition and deed of settlement executed by Mrs Macdonald in favour of the defender, her son, on 9th May 1863. The reduction had been sisted by Lord Kinloch until the present action was brought and disposed of (*ante*, vol. i. p. 88). The pursuers averred—

Cond. 8. The said Mrs Macdonald was a very old woman, being upwards of eighty years of age, and in or about the beginning of the year 1862, her infirmities both of body and mind had so much increased as to render her an entire imbecile, of unsound mind, memory, and understanding, incapable of managing her affairs, or of performing or understanding the effect of any legal act. She continued in this state, gradually becoming worse, till her death in January 1865.

Cond. 9. While the said Mrs Macdonald was in the said imbecile and unsound state of mind, the pursuers believe and aver that the four writings above-mentioned, which constituted her settlement, were destroyed or otherwise made away with, either without her authority by those about her, or by herself, or under directions obtained from herself, at a time when she was imbecile and of unsound mind, and incapable from mental infirmity of understanding what she did.

Cond. 10. More particularly the pursuers believe and aver that upon the marriage of the pursuer, Mrs Kennedy, which took place in May 1862, the said deceased Margaret Macdonald (a sister of the female pursuer and of the defender), and thereafter the defender David Macdonald, obtained complete possession of the said Mrs Macdonald, and of her house in which she lay bedridden, as she had done for some years, and having access to her repositories, and possession of all her papers, the said Margaret Macdonald and David Macdonald, or one or other of them, did fraudulently, and without authority from the said Mrs Macdonald, destroy or otherwise make away with the four deeds of which the tenor is sought to be proved in the present action.

Cond. 11. Otherwise the said deeds were destroyed by the said Mrs Macdonald, or by the said Margaret Macdonald or David Macdonald, or some other person or persons, under directions obtained from the said Mrs Macdonald, at a time when she was imbecile and of unsound mind, memory, and understanding, incapable of understanding what she did, or of performing any legal act.

Cond. 12. Otherwise the said deeds were destroyed by the said Mrs Macdonald, or by some other person or persons, under directions obtained from her, when she was in a weak and facile state of mind, and easily imposed upon, and they were so destroyed or directed to be destroyed by means of fraud and circumvention employed by the said Margaret Macdonald or David Macdonald, who, or one or other of whom, took advantage of the said Mrs Macdonald's weak and facile state of mind to impetrate and obtain from her the destruction of the said deeds to her lesion.

Cond. 13. The said deeds, however disposed of, were not in the deceased's repositories at her death, and are now lost and cannot be found, although the most diligent search has been made for them, and the pursuers are therefore under the necessity of instituting the present action to prove their tenor.