loss of testimony from other causes, the railway company would be put to serious disadvantage in rebutting the claim now made, I am of opinion that the claim is barred by *mora* and taciturnity, and that the proposed arbitration cannot be allowed to proceed. The interdict already granted will therefore be declared perpetual."

The interlocutor was acquiesced in.

Counsel for Complainers — Lord Advocate (Watson) — Balfour — Strachan. Agent—Adam Johnston, Solicitor.

Counsel for Respondents—Robert Johnstone and Henry Johnston. Agents—Leburn & Henderson, S.S.C.

Friday, January 12.

SECOND DIVISION.

[Lord Craighill, Ordinary.

CUMMINGS *v.* MACKIE AND OTHERS (SKEOCH'S TRUSTEES).

Issue—Reduction of Deed—Where the Ground of Reduction was that the Witnesses did not see the Subscription.

In an action of reduction of a testamentary deed on the ground that the witnesses did not see its subscription, the pursuers proposed the following issue, which was approved of by the Lord Ordinary:—"Whether A B and C D, the alleged witnesses to the said trust-disposition and settlement, or either of them, did not see the said W S subscribe the same, and did not hear him acknowledge his subscription?" The defenders reclaimed, and proposed to add the words "or that he did not acknowledge it in their presence," on the ground that the testator might have acknowledged by a sign or a nod. The Court *adhered*, holding that the issue as adjusted was in the usual form, and that the words used included any sufficient acknowledgment of his signature by the testator.

Counsel for Pursuers (Respondents)—Nevay. Agent—Robert Broatch.

Counsel for Defenders (Reclaimers)—Guthrie Smith—Gebbie. Agents—Adamson & Gulland, W.S.

Wednesday, January 15.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

LOCHGELLY COMPANY (LIMITED) *v.* LUMPHINNANS IRON COMPANY.

Trade-Mark—Trade Name—Property in Trade Name—Interdict.

The Lochgelly Coal and Iron Company raised a suspension and interdict against the Lumphinnans Company asking the Court to interdict them from selling any coal under the name of "Lochgelly coal" except what came from the complainers' pits. It was proved that the Lochgelly Company and their predecessors had for a number of years sold all their coal, though raised from various seams, under the name of "Lochgelly coals;" that it was favourably known in the market, and the only coal known under that name. It was also proved that the Lumphinnans Company were owners of part of a seam called the "Lochgelly splint seam," which extended over a considerable area, part being also owned by the Lochgelly Company. *Terms* of interdict granted against the respondents in these circumstances.

The complainers in this action, the Lochgelly Coal and Iron Company (Limited), carried on business as coal and iron masters at the works of Lochgelly, in Fife. They had acquired in 1872 a lease of the minerals in the estate of Lochgelly, which did not expire till 1903. They stated on record that the Lochgelly collieries had been established at great cost, and had been in operation for upwards of a century; that the coal derived from them had acquired a wide reputation, and was known both in this country and on the Continent under the name of "Lochgelly coal," and was the only coal so known in the market; that it was known by various distinguishing names, *e.g.*, "Lochgelly steam coal," Lochgelly splint coal," according to its kind and quality, but that they were alone entitled to describe coal by the name of Lochgelly, which the public understood as denominating exclusively coal produced at their collieries. They further averred that for many years they and their predecessors had selected and prepared coal for shipment abroad, and that this coal was favourably known by the name of "Lochgelly coal."

They had recently discovered that the respondents, the Lumphinnans Iron Company—who were lessees of the coals and other minerals in the lands of Lumphinnans adjoining Lochgelly—had begun to sell at home and to ship to the north of Europe and elsewhere coal from their colliery as "Lochgelly coal," and had also issued circulars offering for sale coal procured from their collieries under the name of "Lochgelly coal." This was stated to be an infringement of the complainers' rights, and it was said that the name had been adopted for the purpose of misleading the public.

This note of suspension and interdict was therefore presented, in which the Court were asked "to interdict, prohibit, and discharge the said respondents from designating, advertising, selling, shipping, or exporting, and from causing to be designated, advertised, sold, shipped, or exported as 'Lochgelly coal' any coal worked or raised by the respondents from their works at Lumphinnans or elsewhere, or any coal other than that worked and sold by the complainers at their Lochgelly collieries, and from using the name of 'Lochgelly' either by itself or in combination with other words to designate any coal sold, shipped, or exported by them other than coal worked and sold by the complainers as aforesaid, and from in any manner of way infringing the sole and exclusive right of the complainers to use the name of 'Lochgelly coal' for the purpose of designating the coal wrought by them as afore-

said, or to do otherwise in the premises as to your Lordships shall seem proper."

The respondents stated *inter alia*—"The names of the coals specified in the circular complained of have no reference to those supplied by the Lochgelly Iron Company, but merely indicate the names of the various coals by the names of the respective seams from which they are produced. There is a seam of coal in the district known by the name of 'Lochgelly' seam, sometimes called 'Lochgelly splint,' and sometimes 'Lochgelly splint and parrot.' The 'Lochgelly seam' of coal is not confined to the pit of the Lochgelly Iron and Coal Company, but is worked under that name at various other collieries as well as by the respondents. In particular, it is worked and known as the Lochgelly seam or the Lochgelly splint coal at Cardenden, Denend, Dundonald, Foulford, Cowdenbeath, Little Raith, Donibristle, and Hill of Beath collieries."

They also averred that they had worked the Lochgelly seams, and described them as such for twenty years, and that it was in accordance with the usage of trade that the name of a seam or of the coal raised from it should not be confined to the particular place or district from which the name might originally have been derived.

The circular complained of was headed "Lumphinnans Coal and Iron Works, by Lochgelly, Fife," and included among other kinds of coal "Lochgelly splint coal" and "Lochgelly steam coal."

A proof was allowed to the parties, from which, *inter alia*, it appeared that "Lochgelly coals" had acquired a considerable reputation both at home and abroad; that if coals were so quoted in the market the interpretation put upon it would be that they were coals from the complainers' collieries; that in point of fact the public had been misled to some extent by the respondents' circular. That the complainers had several collieries bearing different names, but all their produce was sold as "Lochgelly coals" with the distinctive name of the colliery or of the kind of coal attached. That the seam called "Lochgelly splint" extended for a considerable distance and under a great many estates. That the complainers in exporting sent away no "Lochgelly splint" pure and simple; that what they mainly exported, and what was known as "Lochgelly coal," was steam coal, which was a manufactured, or rather a selected and mixed article, and which was called "Lochgelly steam coal," no matter what colliery it was derived from.

It was stated by Mr Spowart, chairman of the Fife Coalmasters Association, that what he would understand by the term "Lochgelly coal" was coal worked on the Lochgelly estate, and that alone; and that coalowners in Fife designated coals by the name of the colliery or firm which put out the coal. This was corroborated by several witnesses.

The further import of the proof sufficiently appears from the Lord Ordinary's note.

The Lord Ordinary (RUTHERFURD CLARK) pronounced the following interlocutor:—

"*Edinburgh*, 16*th July* 1878.—The Lord Ordinary having considered the cause, interdicts, prohibits, and discharges the respondents from designating, advertising, selling, shipping, or exporting, and from causing to be designated, advertised, sold, shipped, or exported as Lochgelly steam coal any coal raised by them at their works at Lumphinnans, or any coal other than steam coal sold by or obtained from the complainers: *Quoad ultra* repels the reasons of suspension, and refuses the interdict, and decerns," &c.

He added this note:—

"*Note.*—The purpose of this application is to restrain the respondents from using the word 'Lochgelly' on the sale and advertisement of their coals. The complainers allege that that word has been appropriated by them to denote the coals which are sold by them at their works at Lochgelly.

"The complainers are the tenants of the minerals in the lands of Lochgelly and in the adjoining lands of Raith. The respondents, again, are the tenants of the minerals in the lands of Lumphinnans, which march with Lochgelly.

"The seams of coal in all these lands are the same. Indeed the same coal measures in that locality extend over a considerable area. There is one seam which is called the Lochgelly splint coal. This seam is known by that name not only in so far as it is in the lands of Lochgelly, but in a variety of other lands, including the lands of Lumphinnans.

"The complainers have both a home and foreign trade. The latter consists mainly, if not exclusively, in the export of steam coal. This coal is not the product of any one seam, but is a mixed coal.

"Before this process was fixed the respondents were in use to export coal under the name of 'Lochgelly steam coal.' It is true that it was described as the Lumphinnans Iron Company's Lochgelly coal. But in the opinion of the Lord Ordinary this was a plain invasion of the rights of the complainers, and it is not now justified by the respondents. They were using a name which denoted a mixture or manufacture of the complainers. So far the Lord Ordinary is of opinion that the complainers are entitled to interdict.

"But the respondents maintain that they are entitled to sell the coal raised from the seam known as Lochgelly splint coal under that name. They contend that they may lawfully use that name to distinguish it as the produce of a particular seam, as well as to distinguish it from other splint coals raised in their mineral fields, as, for instance, the Dunfermline splint coal.

"The complainers contend that they have appropriated the name 'Lochgelly,' or at least that they have appropriated it for the purposes of their foreign trade.

"It does not very clearly appear from the proof when the Lochgelly splint was first given to the seam now known by that name. But it is older than the complainers' company; and within the district in which the complainers' and respondents' coal-fields are situate it is the only known name for that seam. The complainers do not suggest how orders could be given for this particular coal under any other name than the Lochgelly splint, but they go the length of contending that if the respondents received such an order they could not invoice the coals under the name of the seam. This contention seems to the Lord Ordinary to be without foundation.

"The case of the complainers is that they have

used the name 'Lochgelly' to denote a coal sold from their works in whatever fields it has been raised, and that in consequence Lochgelly coal is only known in the market as the produce of their collieries. So far as the home trade goes the evidence on this point is very slender. It consists chiefly in the statement of coalmasters and others to the effect that it is the custom in Fife to sell coals under the name of the colliery. But it is very general, and does not exclude the custom of selling coal which has a known name under that name. It is true that the complainers maintain that the name 'Lochgelly splint coal' is not a commercial name, but rather a geological term. But it is certainly a name in common use amongst coalmasters and miners.

"The most reliable evidence is, however, to be found in the circulars issued by the complainers to their customers. In these they do not use the word Lochgelly as distinctive of the coal in which they deal. On the contrary, they profess to sell Lochgelly, Foulford, and Raith coals. It is only in a circular issued after this process was raised that they described all their coal as Lochgelly coal.

"A number of witnesses have been examined, chiefly, if not exclusively, engaged in the foreign trade, who say that Lochgelly coal is only known in the market as the coal raised by the complainers. It is remarkable that the right of the complainers is made to depend rather on the name which others have given to that coal than on the name which they themselves have used. But it seems to the Lord Ordinary that these witnesses are all speaking of steam coal, which is the only coal that is exported. Their evidence therefore does not seem to be material in the question whether the respondents are entitled to sell coal under its ordinary name of Lochgelly splint coal.

"On 20th June 1878 the respondents intimated that they would cease to sell coal as Lochgelly steam coal. To that date the Lord Ordinary has given the complainers their expenses; after it he thinks that the respondents are entitled to their expenses."

The complainers reclaimed, and argued—The *onus* lay on them to prove that they had made the name "Lochgelly" their own, but this *onus* they had fully discharged. The Lord Ordinary had prohibited the respondents from selling their coal as "Lochgelly steam coal," but it was not the use of the word "steam" that they objected to, but the word "Lochgelly." Property in such a name existed whenever it was shown that the company had sold their coal under it for four years, and that the public associated the name with the produce. The respondents no doubt owned part of the Lochgelly splint seam, but they had taken advantage of this to induce the public to believe that the coal they sold was raised on Lochgelly estate; and in point of fact they had so succeeded, as the evidence showed. If the respondents would undertake to sell only "Lochgelly splint" as "Lochgelly coal," and to prefix a distinguishing name, as *e.g.*, "Lumphinnans," the complainers would be satisfied.

Authorities—*Singer Manufacturing Company* v. *Kimball & Morton*, January 14, 1873, 11 Macph. 267; *Singer Manufacturing Company* v. *Wilson*, March 1876, L.R. 2 Ch. Div. 434, *rev.* December 1877, 3 App. cases 376; *Leather Cloth Company* v. *American Leather Cloth Company*, 11 H. of L. cases (Clark & Finelly, 2d series), 523 (Lord Kingsdown, 538); *Seixo* v. *Provezende*, L.R. 1 Ch. App. 192; *Wotherspoon* v. *Currie*, L.R. 5 H. of L. E. and I. App. 508; *Radde* v. *Norman*, L.R. 14 Eq. 348; *M'Andrew* v. *Basset*, 33 L.J. Ch. 561 (Lord Westbury); *Schweizer* v. *Atkins*, July 16, 1868, 16 Weekly Reporter, 1080.

Argued for respondents—It was never intended to sell steam coal from the respondents' collieries under the name of "Lochgelly steam coal," because that would undoubtedly be wrong. The circular complained of, from its terms clearly showed that there was no intention to deceive the public. The respondents were simply selling an article under its proper name, *i.e.*, Lochgelly splint, and none of the cases quoted was to the effect of in any circumstances preventing this, if there was no intention to mislead the public. In *Singer's* case the sewing machines were made by him, and any others making machines and calling them Singer's, could only do so for the purpose of leading the public to believe that the machines were made by Singer. In the case of *Burgess* v. *Burgess*, 3 De M. and G. 896, it was held that a man could use his own name as a manufacturer of any article, although it might be the name of another celebrated manufacturer of the same article, if he did not try to induce belief that he was the original man. In the Glenfield case (*Wotherspoon* quoted *supra*) the intention to deprive Wotherspoon of his property by the sale of a starch made at Glenfield, but not by Wotherspoon, was evident from a variety of other circumstances indicating an intention to deceive.

Additional authorities—*Ragret* v. *Findlater*, 17 L.R. Eq. Cases, 29; *Charleson* v. *Campbell*, Nov. 17, 1876, 4 R. 149.

At the close of the discussion the case was continued to give parties an opportunity of settling, and next day no settlement having been agreed upon, the Court, without delivering opinions, pronounced the following interlocutor:—

> "Recal the interlocutor of the Lord Ordinary; suspend the proceedings complained of; and interdict, prohibit, and discharge the respondents from designating, advertising, selling, shipping, or exporting, and from causing to be designated, advertised, shipped, sold, and exported as 'Lochgelly coal' any coal worked or raised by the respondents from their works at Lumphinnans or elsewhere, or any coal other than that worked and sold by the complainers at their Lochgelly collieries, and from using the name 'Lochgelly,' either by itself or in combination with other words, to designate any coal sold, shipped, or exported by them, other than coal worked and sold by the complainers as aforesaid, excepting coal raised from the Lumphinnans works, from the Lochgelly splint seam, and then only under the designation of Lumphinnans' splint coal, Lochgelly seam: Find the complainers entitled to expenses incurred by them prior to 20th June 1878: *Quoad ultra* find no expenses due to either party," &c.

Counsel for Complainers (Reclaimers)—Trayner—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents—Asher—Keir. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Thursday, January 16.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'DONALD (PETITIONER) *v.* M'DONALDS.

Entail—Disentail—Value of "Expectancy or Interest" in Entailed Estate—Statute 38 *and* 39 *Vict. c.* 61 (*Entail Amendment Act* 1875), *sec.* 5.

In an application for disentail a remit was made to an actuary to value the "expectancy or interest" of the second and third substitute-heirs of entail under section 5 of the Entail Amendment Act 1875. It appeared that the first substitute-heir was not a good life, and after an examination by a medical man, to which course the heir offered no objection, the actuary in computing the value to be placed upon his chance of succeeding to the entailed estate added twenty years to his actual age. The Lord Ordinary (Adam) found in terms. The Court in the special circumstances *adhered—diss.* Lord Gifford, who held that in computing the value the actual age must be taken, as a statutory value should not be made to depend upon the willingness or unwillingness of a person to be medically examined.

In valuing the "expectancy or interest" of substitute-heirs of entail under the 5th section of the Entail Amendment Act 1875 the Court will not take into consideration the chances of the heirs in question succeeding to the estate in fee-simple.

Observations *per curiam* on the case of *Wilson* v. *De Virte*, Dec. 19, 1877, 15 Scot. Law Rep. 239; 5 R. 328.

Major-General A. M. M'Donald on 13th November 1877 presented a petition to the Court under the Acts 11 and 12 Vict. c. 36, 16 and 17 Vict. c. 94, and 38 and 39 Vict. c. 61, for authority to record an instrument of disentail of the estates of Dalchosnie and others, of which he was heir of entail in possession.

The petitioner was born on 22d March 1830, and the three nearest heirs of entail who at the date of the application were entitled to succeed were the petitioner's brother Captain John Alan M'Donald, born March 1834, and his two sisters Misses Elizabeth Moore Menzies M'Donald and Adriana M'Donald, born respectively on 10th June 1827 and 30th November 1828. The only other heir of entail in existence was another sister Miss Jemima M'Donald, born in June 1832.

The petitioner produced a consent to the disentail by Captain M'Donald, but the two next heirs, the Misses M'Donald, refused their consent.

The Lord Ordinary (ADAM) remitted to Mr T. B. Sprague to inquire and report as to the value of the "expectancy or interest" of these two ladies in the entailed estate.

Mr Sprague's report was, so far as need be noticed, to the following effect:—The valuation roll was taken as the basis of calculation, and under it the net annual value of the estate was brought out to be £1672, 7s. 1d., and the actual value £48,000.

It was stated that a sum of upwards of £5000 had been expended on improvements which had not been yet constituted and charged on the estate, as, though a petition had been presented for that purpose, proceedings in it had been suspended since the present application had been made. This charge was objected to, and the actuary made his calculations on the alternative principles of allowing and disallowing it as a deduction.

The petitioner was a bachelor, and Captain M'Donald was married without issue. The latter was stated to be in good health, but to have formerly suffered from ailments which would tend to shorten his life. Upon a report by a medical man who had examined Captain M'Donald, who had offered no objection to that course being taken, the actuary in calculating Captain M'Donald's interest added twenty years to his actual life, making his calculations on the assumption that he was sixty-four instead of forty-four years of age The actuary further, looking to the fact that there was only one heir of entail in existence after the second and third substitute-heirs, added to the money value of their interest the value of the chance of their succeeding to the estate in fee-simple, which had the effect of more than doubling the estimate of their interests.

To this report both parties lodged objections, the objections for the petitioner being as follows:—1. Because the sum expended on improvements had not been allowed as a deduction. 2. Because the value of the privilege of delaying the charging of that expenditure for twenty years under the Entail Amendment Act 1875 had not been taken into account. "3. In respect that the actuary has made any deduction whatever in estimating the value of the life of Captain John Alan M'Donald . . . and has not made the valuation of his interest and expectancy, enuring to the petitioner by virtue of Captain M'Donald's consent to the disentail on the footing of his being of his actual age. 4. Alternatively to the last objection, in respect that the actuary has greatly over-estimated the number of years which should . . . be added to Captain M'Donald's age . . . and has dealt therewith as if he were 'dealing with proposals for insurance on the lives of persons whose expectation of life is below the average.' . . . 5. In respect that the actuary in estimating the expectancy of the second and third heirs has assumed that Captain M'Donald will have no issue, and has greatly under-estimated the expectancy of the petitioner having issue. 6. In respect that the actuary has made his calculations on the footing 'that the ages of the several heirs to be employed in the calculations should be those at the birthday, whether last or next, which is nearest to the' 14th November 1877, the date of the first interlocutor in the application. 7. In respect that the actuary has estimated the value of the 'chance' of the second and third heirs 'acquiring the fee-simple of the estate by surviving all the other heirs in the entail,' and