grounds of fraudulent impetration and essential error, new trial *refused*.

This case involved a question as to the validity of a deed of agreement, dated in September 1857, entered into betwixt two brothers, both of whom are now dead—Mr William Gunning Campbell of Fairfield, and Mr George Gunning Campbell. The two brothers were children of the proprietor of the estate of Sorn in Ayrshire. This estate descended to William, and he acquired besides it a property called Fairfield. George was a medical man in India, where he acquired an immense fortune. The two brothers died—the one in 1857, and the other in 1858. In early life they had an inveterate quarrel, and they had been estranged for about forty years; but upon George's return from India, William invited him to Fairfield, and George some time thereafter executed a deed by which he bound himself to advance £20,000 for the purpose of purchasing additional land adjoining Fairfield, which was to be settled on the same heirs as Fairfield was, that so the possessions of the family might be increased. This was the deed challenged. George maintained before his death that he had been cheated into signing it, and after his death his trustees sought to reduce it. It was challenged on the grounds (1) of fraudulent impetration by William Gunning Campbell, and (2) of essential error induced by him.

These issues were tried before Lord Jerviswoode and a jury on the 3d, 4th, and 5th November 1864, when a verdict was returned for William G. Campbell's executors upholding the agreement.

The pursuers on the issues moved for a rule on the defenders, with a view to a new trial. The rule was granted and a hearing took place thereon.

To-day the Court intimated that although there was room for a good deal of argument on both sides of the case, they had come to the conclusion that there was not sufficient ground to disturb the verdict of the jury. The rule was therefore discharged with expenses.

Counsel for Pursuers—Mr Clark, Mr Gifford, and Mr John Hunter. Agents—Messrs A. & A. Campbell, W.S.

Counsel for Defenders — The Solicitor-General and Mr Fraser. Agents—Messrs Webster & Sprott, S.S.C.

SECOND DIVISION.

GILLESPIE *v.* YOUNG AND OTHERS.

Reparation — Relevancy — Consequential Damage — 1. Averments which held not relevant to sustain an action for reparation, in respect they contained mere expressions of opinion, not statements of facts—2. Held that the alleged damage was 'consequential' and therefore not recoverable.

This is an action at the instance of Mrs Honeyman Gillespie, the heiress of entail in possession of the estate of Torbanehill, with concurrence of her husband, Mr Gillespie, against Mr Young, manufacturing chemist, Glasgow, and two firms of chemists, of which he is a partner. The summons concludes for £32,900 of damages. The estate of Torbanehill contains a seam of a valuable mineral substance, known as the "Torbanehill mineral," which the pursuers say is a bituminous shale, and not a coal. The mineral is extensively used in the distillation of paraffine oil. The defender, Mr Young, in 1850 obtained a patent giving him the exclusive right to manufacture paraffine from bituminous coal; and after procuring his patent he advertised that it included the manufacture of the pursuer's mineral, and raised actions against several manufacturers who had purchased Torbanehill mineral for the distillation of paraffine. The pursuers, who received a lordship from their mineral tenants of one-seventh of the actual output from the mines, make the following averments in support of the action:—

"5. The Torebanehill mineral of the pursuer's estate is, as already mentioned, a peculiar species of bituminous shale, and is not in fact, or in contemplation of law, comprehended under the term "coal" used in the specification of the defender, Mr Young's invention; nor does the patent right granted to the defender, as limited by the specification thereof, give him or his assigns, for the period therein mentioned, the exclusive privilege of obtaining paraffine oil, or other products of distillation, from the said Torbanehill mineral, or from any other description of bituminous shales. On the continent of Europe, in countries where fiscal or import duties are laid on coal, the Torbanehill mineral is admitted duty free, because it is not coal, but a bituminous shale or schist. In particular, the mineral in question, *qua* a bituminous schist (schiste bitumineux), has been admitted free of the duty of coal into France, and into Prussia and Germany. More specifically still, it has been admitted in that character into the city of Paris, and into the port and city of Marseilles. It has been so admitted also into the port and city of Frankfort-on-the-Maine, there to be used; as also *in transitu* to the different cities and States of the Zollverein, all since the year 1851.

"7. Notwithstanding that the defenders' patent right is limited by the terms of the specification to the obtaining the produce therein mentioned from coal, and that the manufacture of these products from bituminous shale was public property at and prior to the date of their said patent, the defenders have for a long time, and at least for the whole period since the commencement of the year 1860, most falsely, fraudulently, and maliciously represented that their patent gives them the exclusive privilege of manufacturing and obtaining paraffine oil, or oil containing paraffine, by distillation from the Torbanehill mineral, which they term Torbanehill or Boghead coal, or Boghead gas coal, in order to give colour to their assertion of an exclusive privilege of converting the same into paraffine oil. And they have at various times during the aforesaid period threatened to institute legal proceedings against parties who were in the course of exercising their lawful right of manufacturing paraffine oil from the Torbanehill mineral, upon the pretext that such manufacture was an infringement of their alleged patent right. They have, by such false, fraudulent, and malicious representations and threatened proceedings, induced various manufacturers and others to take out licenses from them, and to pay them large sums of money as lordship for the privilege of applying their patented process to the manufacture of paraffine oil from the Torbanehill mineral; and they have, by such false, fraudulent, and malicious representations and threatened proceedings, prevented various manufacturers and other persons from engaging in or carrying on the manufacture of paraffine oil from the Torbanehill mineral, and from making purchases of the said Torbanehill mineral from the pursuers; by all which the market-value of the pursuers' mineral estate, and of the mineral wrought therein, and belonging to them, has been greatly depreciated, and the sale thereof impeded, and the pursuers injured in their rights as mineral proprie-

tors and otherwise, as hereinafter more particularly set forth. The defenders knew that the said representations which they so made were false; and, in particular, they knew that their patent did not extend to or apply to the manufacture of oil or paraffine from the Torbanehill mineral.

"3. In the autumn of 1862 the defenders caused to be inserted in the *Times*, and in various newspapers having an extensive circulation in the United Kingdom, and particularly in a number of the *Glasgow Herald*, published in Glasgow on 16th September 1862, an advertisement in the following terms:—

"YOUNG *v.* FERNIE.
"Caution.

"It having come to the knowledge of the Paraffine Light Company that the defendant in the above suit was manufacturing paraffine Oil at certain oil works at Leeswood, and at the St David's Works at Saltney, both in the county of Flint, and thereby infringing the letters patent granted to Mr James Young, an application was on the 10th instant made to the Vice-Chancellor Stuart for an injunction to restrain such infringement, and his Honour directed immediate notice to be given to the defendant of the application for such injunction against him;" and about the same time the defenders also caused to be inserted in the *Times*, and in various newspapers having an extensive circulation in the United Kingdom, and particularly in the *Glasgow Herald* of 1st October 1862, an advertisement in the following terms:—"All persons are hereby cautioned against purchasing or selling any paraffine oil, by whatsoever name it may be sold, or paraffine, made in infringement of Mr James Young's patents, and against manufacturing any such oil or paraffine; as proceedings will be forthwith taken against any person who may be found to be so offending. (Signed) J. HENRY JOHNSON, 48 Lincoln's-Inn-Fields, London, W.C., Solicitor for the proprietors of Young's paraffine oil patents." The defenders also caused to be inserted in the *Times* of 2d October 1862, and in subsequent impressions of that newspaper, an advertisement in the following terms:—"Young's Paraffine Oil.—Young and Others *v.* Fernie (The Mineral Oil Company).—All persons are hereby *cautioned* against purchasing or selling any paraffine oil, by whatever name it may be sold, or paraffine, made in infringement of Mr James Young's patents, and against manufacturing any such oil, or paraffine, as proceedings will be forthwith taken against any person who may be found to be so offending. (Signed) J. HENRY JOHNSON, 47 Lincoln's-Inn-Fields, London, W.C., Solicitors for the proprietors of Young's paraffine oil patents." The defenders further caused to be inserted in the *Times* of 4th December 1862, and in subsequent impressions of that newspaper, an advertisement in the following terms:—"Young's Paraffine Oil.—Young and Others *v.* Fernie (The Mineral Oil Company). The advertisement inserted by the defendant in the above suit, containing a statement that the motion to restrain him from manufacturing paraffine oil in infringement of Mr Young's patents has been refused, the public are hereby informed that the said motion has not been refused, but simply adjourned until the suit is heard, and that meanwhile the defendant has been ordered to keep an account. All persons are again cautioned against buying or selling any paraffine oil made according to Mr Young's patent which has not been manufactured by Mr Young or his licensees. (Signed) J. HENRY JOHNSON."

At the time when those advertisements were issued, it was matter of public notoriety that the proceedings instituted by the defenders against Mr Fernie and his partners, referred to in these advertisements by the defenders, were taken in respect of the manufacture by that company of paraffine oil from bituminous shale. The proceedings before Vice-Chancellor Stuart were published in the newspapers, and the ground of the defender's proceedings were at all events well known to persons commercially interested in the manufacture and sale of paraffine oil. By those advertisements the defenders meant to represent, and did represent, that the manufacture of paraffine oil from bituminous shale, such as the Torbanehill mineral, was infringement of the patent granted to Mr Young as aforesaid, and that persons purchasing or selling paraffine oil obtained from bituminous shale such as the Torbanehill mineral, or manufacturing oil so obtained, were liable to civil prosecution as for an infringement of their patent, and that such proceedings would be instituted against them by the defenders; and the advertisements were so understood by manufacturers and others interested in the manufacture and sale of the oil."

The alleged wrong for which damages are sought in the present action is that the defenders diminished the marketable value of that portion of the pursuers' excavated mineral which came into their own hands as lordship from their tenants. This is said to have happened partly by persons being deterred altogether from purchasing the mineral from the pursuers, and partly by others who did purchase being led to offer a smaller price than they would have given if it had not been for the proceedings complained of. The mode in which the defenders are said to have caused this injury is that they wrongfully represented that their patent comprehended the manufacture of paraffine from the pursuers' mineral, so that it could not be legally carried on without a license from them, for which they charged a tax of so much per ton of the mineral manufactured; and they thus induced the persons who purchased from the pursuers to pay that tax or license, thereby diminishing the price which they could afford to give for the mineral, and deterring others from purchasing at all, by the belief that they would be liable for damages for infringement of patent.

The LORD ORDINARY (Barcaple) held that the acts complained of did not ground an action for reparation, and dismissed the action. In his note his Lordship said:—"The Lord Ordinary does not think that this is a good ground in law for claiming reparation, or that it is made so by averring that the representations complained of were made falsely, fraudulently, and maliciously. The false representations relied on by the pursuers seem to consist in what they allege to have been stated by the defenders both as to the scope of their patent and to the mineralogical character of the pursuers mineral. These are separate and distinct representations. As to the former, it would be a strong thing to hold that an assertion openly made upon such a matter as the construction of a patent, which admitted of being immediately examined and confuted if wrong, should be the subject of an action of damages, to turn upon this question of construction. On the other hand, the character of the pursuers' mineral is matter of scientific, as the construction of the patent is matter of legal, opinion. It is not said that any underhand statements were made against which the pursuers could not defend themselves. On the contrary, the publicity of the defenders' proceedings is matter of com-

plaint; and the falsehood of the statements only consists in giving such a classification of the mineral as might seem to bring it within the patent. The mere assertion involved in their statements, however false, would not give rise to a claim for damage such as arises in a case of slander, where damage is presumed from the falsehood and defamatory nature of the statement. If a claim of damages can arise from such an assertion, it must be rested upon specific injury, as having been thereby caused to the pursuers. The injury to the pursuers is thus of the essence of such an action. But in this essential element the present case is, in the opinion of the Lord Ordinary, altogether defective. It appears to the Lord Ordinary that this is eminently a case of consequential damage. The injury resulted, according to the pursuers' own case, from parties allowing themselves to be misled on a matter in which they were as much in a position to judge as the defenders. Reference was made by the pursuers to the English action of slander of title. The Lord Ordinary does not doubt that the general principle on which that remedy is founded is recognised by the common law of Scotland; but he does not think that the present case falls under it.

The pursuer reclaimed.

ASHER (with him FRASER, GIFFORD, and JOHN M'LAREN), for the reclaimer, argued—The question being one of relevancy, the pursuer's averments must be assumed to be true. To entitle the pursuer to reparation, all that she is bound to show is that she has suffered loss, and that that loss is directly caused by a legal wrong on the part of the defender. The first question is—What is a legal wrong? The general rule of law is that every act inflicting injury upon another is a legal wrong; that follows from our adoption of the maxim *alterum non laedere*. There are, no doubt, exceptions to this rule; but all these exceptions have this quality, that the injury is done under justifiable circumstances—*e.g.*, by accident or otherwise. The question is—Are the acts complained of in this record within the general rule or the exception? They must be within the former, inasmuch as the defender's representations are averred to have been false, fraudulent, and malicious, and these qualities exclude the possibility of the loss resulting from them being held in the eye of the law justifiable. There are many injuries analogous to those set forth here which the law recognises as legal wrongs; one class of such cases is well-known in England as actions on the case for slander of title. The false representations of the defender as to his rights over the pursuer's mineral are identical with false representations as to want of title in the seller of an estate, thereby stopping the sale, which have been held in England to be actionable wrongs. Another class of cases to which the present is analogous are actions of damage for interference by force or fraud with the trade of another. The tax charged by the defender for licenses to manufacture the pursuer's mineral, directly lowered the price of that mineral in the market by the amount after the tax. The damage claimed therefor is the direct and necessary consequence of the wrongful acts of the defender. Garrett *v.* Taylor, 17 James I., 2 Croke's Reports, 567.

A. R. CLARK (with him the LORD ADVOCATE, the SOLICITOR-GENERAL, GORDON, and SHAND) answered—There is no legal wrong averred on the part of the defenders. They were entitled to make the representations complained of. These representations were that their patent gave them the exclusive right to manufacture paraffine oil from the Torbanehill mineral. These representations were not statements of fact, but merely statements of opinion; and the question whether Torbanehill mineral is a shale or a coal, being evidently a matter as to which scientific opinion is divided, the defenders were entitled to have and proclaim their opinion on the subject. Besides, the damage claimed is eminently remote and consequential. Stair 4, 45, 4.

The LORD JUSTICE-CLERK said—We have had a very ingenious argument submitted to us in support of this reclaiming note, but the point which we have to decide is singularly free from difficulty. The pursuer of the action, Mrs Gillespie, is the proprietor of an estate in the Bathgate district which produces in great abundance a substance about which we have heard a good deal—a valuable material used in the manufacture of paraffine oil. The defender, Mr Young, is patentee (his patent is dated 17th October 1852, and is now expired) of a patent for making certain improvements in the treatment of bituminous mineral, and he describes his invention as a patent for the treatment of bituminous coal so as to extract paraffine from it. Now, the first important averment made by the pursuer (reads condescendence 5). I think it is of great importance to understand what this averment means, because it is the foundation of the case. The pursuer says it is not a fact that the mineral belonging to her is comprehended under the category of coal. She says it is not coal. Now, what is meant by that is just this, that the substance is not coal, but shale. It is not said that this is settled in the scientific world, and that the classification which excludes this mineral is accepted. To us it is matter of notoriety that the question has been the cause of great dispute. Therefore, to say that this mineral is not coal is merely to say that, in the opinion of the pursuer, it is not coal, although in the opinion of multitudes of others it is. The next statement material to be attended to is a statement bearing directly on the knowledge and the good faith of the defenders. They say in the 7th article (reads). Now, there is no doubt, and it is not disputed, that the defenders did and do represent that their patent gave them an exclusive privilege of manufacturing paraffine oil from the Torbanehill mineral; but they hold it to be a coal, and they maintain that they have an exclusive right under their patent. But when the pursuers say that the defenders represented falsely, &c., it is necessary to go back to their previous averments to see in what meaning the term false is used, and we find that it is used just in as unusual and indirect a sense as the word fact is used in the 5th article of their condescendence. The fact was matter of opinion, and therefore the falsehood must be something against opinion, not against a fact; it may be more or less unsettled opinion, but still opinion. Then the pursuers, after saying that these representations were false, go on to say that the defenders acted maliciously, &c.; but these epithets must be taken to be purely ornamental, and as having reference only to opinion. The representations which are specially charged against Mr Young are contained chiefly in advertisements and cautions which he addressed to various manufacturers of paraffine oil, warning them against manufacturing paraffine oil from this kind of mineral. These views the defenders endeavoured to enforce by threatening legal proceedings—and in one case before Vice-Chancellor Stuart they actually did take proceedings—and by causing advertisements to be distributed in which they announced that whoever violated the patent would be prosecuted. And this is the conclusion of their

statement (reads article 13). Now, up to this point of the record we have nothing beyond this, that Mr Young having a patent for the manufacture of paraffine oil from coal did maintain that that patent gave him the exclusive right of making it from the Torbanehill mineral, and that this representation was against the scientific classification of this mineral, and in that sense, but that sense only, was false. Now, what conclusion is drawn from this? That it had the effect of depreciating the pursuer's mineral in the market. And I daresay it had. There are many indirect effects arising from the granting of letters-patent. So far does this go that many are of opinion that the patent laws are inexpedient. But so long as they exist no patent can be granted without inflicting a certain amount of injury upon others not the patentee; and wherever that is the case there must be an indirect effect produced on the state of the market in regard to raw material. But why any person who maintains that his patent covers a particular thing is to be made responsible for the state of the market, is to me quite unintelligible. I cannot trace the steps of the reasoning. If anybody is to be answerable for it, it may be the Queen or the law of the country. Patents are liable to different constructions; but is a patentee who takes out a patent and works upon it always to do so under the dread that he may at some future time, if it should be discovered that a particular thing is not comprehended within the patent, to be responsible for all the indirect effects that may have been produced upon the state of the market. His Lordship, referring to the mode in which the pursuers make out their claim of damage, quoted and commented upon the 17th and 18th articles of their condescendence, and said, in conclusion, that the damage claimed was eminently "consequential" damage, and therefore not recoverable—the effect of the defender's representation on the shale market, from which the damage was said to have resulted, being purely matters of speculation belonging to the domain of political economy and not of law.

The other judges concurred.

The action accordingly was dismissed as irrelevant.

Agents for Pursuers — Morton, Whitehead, & Greig, W.S.

Agent for Defenders—Webster & Sprott, S.S.C.

Saturday, May 19.

FIRST DIVISION.

PATERSON *v.* SOMERS (*ante*, vol. 1, p. 256).

Expenses—A pursuer of an action of damages for slander who obtained a farthing of damages from a jury, found entitled to expenses.

WATSON, for the pursuer, moved the Court to apply the verdict of the jury in this case, and in terms thereof to decern against the defender for the sum of one farthing. He also moved for expenses.

J. H. A. MACDONALD, for the defender, opposed the motion for expenses, on the ground that a full retractation had been made on record. He cited Arrol *v.* King, 24th November 1855, 18 D. 98; Rae *v.* M'Lay, 20th November 1852, 15 D. 30; and Gardener *v.* M'Kenzie and Others, 24th June 1846, 8 D. 859.

The COURT thought there was nothing to take this case out of the general rule. On the contrary, some things occurred in the course of the evidence especially in the evidence of the person who wrote the article, which showed that clearance by a jury was a proper thing for the pursuer to insist upon.

Agents for Pursuer—Neilson & Cowan, W.S.

Agent for Defender—Thomas Ranken, S.S.C.

WATT *v.* MENZIES (*ante* vol. 1, p. 194).

Reparation—Culpa—New Trial. Motion by defender for a new trial on the ground that the verdict was contrary to the evidence *refused.*

This case was tried before Lord Ormidale and a jury on 28th February 1866. The question was whether the pursuer, a widow residing in Glasgow, had received certain personal injuries when being set down from one of the defender's omnibuses in Argyle Street, Glasgow, on 6th June 1865, through the fault of the defender, or those for whom he was responsible. The jury found for the pursuer, and awarded her £50 of damages.

R. V. CAMPBELL (with him the LORD ADVOCATE), for the defender, addressed the Court on Thursday in support of a motion for a rule upon the pursuer to show cause why a new trial should not be granted.

The Court to-day refused the motion. The verdict was not against evidence. The preponderance of evidence seemed to be in favour of the pursuer. There was a competition going on betwixt the defender's omnibus and another, and all the witnesses concurred in saying that the pursuer was allowed to come out of the defender's omnibus when it was in motion, and the guard assisted her to get out. This was wrong. The natural consequence was just what happened, that when suddenly set down, she should stagger for a little and be unable to get out of the way of the other omnibus coming up behind.

Agents for Defender—Hamilton & Kinnear, W.S.

Tuesday, March 20.

OUTER HOUSE.

(Before Lord Ormidale).

THE LORD ADVOCATE *v.* THE EARL OF SEAFIELD.

Salmon Fishings—Prescription. Held (per Lord Ormidale and acquiesced in) that a proprietor with a general clause of fishings in his title, under which he had fished for salmon for more than forty years, had a prescriptive right of salmon fishing.

This is an action at the instance of the Lord Advocate, as representing the Commissioners of Woods and Forests, against the Earl of Seafield; and the conclusions of the action are to have it found and declared that the salmon fishing round the coast of Scotland, and in its bays and estuaries, belong *jure coronae* to the Crown, and form part of its hereditary revenues; and in particular that the salmon fishing *ex adverso* of the Earl of Seafield's lands in the county of Banff, extending along the sea-coast for twenty miles, is part of the patrimonial property of the Crown. It is admitted that Lord Seafield has no express grant of salmon fishings, but he has a general clause of fishings, and he maintains that upon that title he can prescribe a right, and that he has done so by possession for forty years. His Lordship holds his lands under the two baronies of Ogilvie and Bogue, and the fishings during the alleged period have been carried on at three different stations. A proof of possession was allowed, and a long debate