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

followed upon it. A considerable part of the discussion also turned upon the sufficiency of the defender's statements, the pursuer maintaining that it was nowhere said that the baronies of Ogilvie and Boyne had ever been united. The pursuer admitted the import of the proof to be, to show that fishing had been carried on at the station of Straline for upwards of forty years, but contended that there was no evidence from which it appeared that that point was embraced within any of the defender's baronies. A map was produced by the defender, and admitted by the pursuer, in which the station in question was included as lying within the defender's lands.

The following statements were made by the defender:—1. The defender's lands extended along the sea coast of Banffshire from the Burnmouth of Rathven, near Buckie, to the Burnmouth of Boyndie, near Banff, a distance of about twenty miles. The defender's said lands form part of the lands and barony of Ogilvie, which were erected into a barony by Crown charter in 1698, and of the lands and barony of Boyne. Of both of these baronies the defender is proprietor, and he holds the same under a regular series of titles flowing from the Crown. 2. The said baronies of Ogilvie and Boyne, belonging to the defender, comprehend a variety of lands united into a barony by Crown charter. These lands, so far as they adjoin the sea, are held by the defender under the Crown, with grants of the fishings connected therewith. In particular, the Crown Charter of Resignation, written to the Seal, sealed and registered 1st May 1750, in favour of James Lord Deskford, afterwards Earl of Findlater and Seafield, the defender's ancestor, contains a grant by the Crown in favour of the said James Earl of Findlater and Seafield, and his heirs and successors therein mentioned, of, *inter alia*, All and Whole the following lands and fishings. (Then follows a description of the lands, containing general clauses of fishings applicable to various portions of the barony lands.) The said charter of 1750 was produced by the defender, and contains a clause of union of the two baronies of Ogilvie and Boyne. The defender also produced all his various titles and infeftment since that date, showing that the description of lands in the charter is the same as that given in the succeeding titles.

The LORD ADVOCATE, the SOLICITOR-GENERAL, and T. IVORY, for the Crown, argued—It is undeniable that the proof establishes that the right of salmon fishing has been exercised by the defender during the prescriptive period at the station of Straline. If therefore the defender can show that that station is situated within any of his baronies, that will establish his right over the whole barony in which it is situated, because it is a proposition in law which cannot be controverted, that possession in any part of the barony will cover the whole. But it does not appear that the station is within any of the baronies, and the defender has led no evidence to that effect. Further, he has not averred that his two baronies were at any time joined; on the contrary, the case which he has disclosed on record is, that the two baronies are distinct from one another. And even assuming that they were once joined, there is no evidence that they continued so during the prescriptive period. There is no evidence of continuous possession at the station of Cullen, in the barony of Ogilvie, or at Boyne, in the barony of Boyne, and therefore the defender's right is not established there, unless he can show, as to the former, that Straline is in the barony of Ogilvie; and fails absolutely as to the latter, because the right in one barony will not constitute the right in another. The defender's case depends entirely upon possession, because a barony title, even with a clause of fishings, does not *per se* carry a right of salmon fishing which belongs to the Crown. Neither does a barony title, with a clause of "parts and pertinents," carry the right without possession. Erskine, 2, 6, 18 and 1 and 3; Bell's Prin., 5th edit., sec. 754; Duff's Feudal Conveyancing, p. 63; Menzies' Convey., 3d edit., pp. 545, 546, and 548.

GORDON, GIFFORD, and W. A. BROWN, for defender, answered—A fair construction of the defender's averments does not exclude the reading upon which he maintains his case, that he holds his lands under one united barony, and not two; he is, therefore, entitled, in order to explain his averments, to refer to the Crown charter of 1750, which is produced in process, and that shows that the barony of Boyne, after being disunited from every other, was joined to the barony of Ogilvie. The defender has produced all his titles since the date of the charter, and the description of lands is in all identically the same. It is not open to the pursuer to maintain that the fishing station of Straline is not within the defender's lands, because he has admitted the accuracy of a map produced in process which geographically explains the lands of the defender, referred to in his first statement of facts as lying within certain points within which that station is embraced. Straline, accordingly, is either in the barony of Boyne or the barony of Ogilvie; and it is immaterial for the defender's case in which it is, because the Crown charter of 1750 establishes that the baronies were then united, and the pursuer has conceded that possession in one part of a barony will establish the right over the whole, and at the same time conceded, as matter of fact, that fishing has been exercised at Straline during the prescriptive period. In regard to the other two stations, the proof establishes that there has been continuous possession for at least thirty-four years back from the date of the summons. There is also evidence of possession by the defender at a much more remote period; and there being no evidence of interruption in the interval, the rule applies, *extremis probatis media presumuntur*. Even the possession for thirty-four years will give the right; because if there is no evidence of interruption before that period, and that is as far back as the witnesses can go, the law presumes that the right was exercised during the previous portion of the necessary prescriptive period. Further, a barony title without possession will carry salmon fishings. Stair, 2, 3, 45 and 61; Kelly *v.* Ramsay, Hailes' Rep., vol. ii., p. 722; Rogers *v.* Harvie, July 8, 1828, 3 W. & S. 251; Magistrates of Elgin *v.* Robertson and Grigor, January 17, 1862, 24 D. 301.

The Lord Ordinary (Ormidale) pronounced the following interlocutor, by which he assoilzied the defender. That judgment was not reclaimed against, and has in consequence become final.

"*Edinburgh, 20th March* 1866.—The Lord Ordinary having heard counsel for the parties, and considered the argument, the record, proof, and productions, Finds, as matters of fact, that the lands in question, belonging to the defender in the county of Banff, are now, and have for a period prior to 1750 and since, been held by him and his authors, under a regular series of titles flowing from the Crown, with parts and pertinents, and also with fishings; that said lands and others form

part of the baronies of Ogilvie and Boyne, and in 1750 were all united by Crown charter to the barony of Ogilvie: Finds also, as matter of fact that for forty years or for time immemorial, prior to the institution of the present action, the defender and his authors have, in virtue of their said titles, possessed and enjoyed by themselves and their tenants the salmon fishings in the sea *ex adverso* of their said lands: Finds that in these circumstances the pursuer is not in law entitled to decree against the defender, as concluded for: Therefore assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, allows him to lodge an account thereof, and remits it when lodged to the auditor to tax and report.

(Signed) "R. MACFARLANE."

"*Note.*—The state of the titles by which the defender's lands are and have been held by him and his authors is set out in the 1st and 2d articles of his statement of facts, both of which are admitted by the pursuer. Keeping in view the statement thus admitted, as illustrated and explained by the title-deeds themselves in process, there seems no substantial ground to question the findings in the interlocutor bearing on that subject.

"It was suggested, however, at the debate, on the part of the pursuer, that the defender did not distinctly aver that the two baronies of Ogilvie and Boyne had ever been united, or if united, that they have for the requisite period been so held with the salmon fishings *ex adverso* of them by the defender and his authors. The defender's statement of facts is certainly neither so full nor so explicit as it might have been, but the Lord Ordinary cannot think that, looking to the whole statement in connection with the titles produced, there is any such defect as to exclude the defence, and entitle the pursuer, who is *in petitorio* and bound to make out his case to prevail.

"The controversy, as the Lord Ordinary views it, does not raise any questions of pleading, or of law, about which serious difficulty can be entertained, but a question of fact merely, depending for its solution on the proof which has been adduced by the parties.

"The real question—and it is entirely one of fact—is, whether the defender and his authors have possessed and enjoyed for the prescriptive period the salmon fishings *ex adverso* of the lands in question, or any part of them.

"It was conceded at the debate, and is at any rate clearly proved, that in point of fact the defender and his authors have for the prescriptive period possessed and enjoyed what is called and known as the 'Straline fishing,' or, in other words, the salmon fishings *ex adverso* of that part of the defender's lands denoted on the plan as the 'Well of Stralind or Straline.' It will be observed that on page 40 of the printed proof it is recorded that the counsel for the pursuer stated 'he admitted that salmon fishing had been carried on continuously at Straline station since the year 1829,' and the proof, especially the uncontradicted testimony of the defender's witnesses, George Patterson, John Smith, George Rose, Peter Fraser, and Miss Mary Munro Innes, shows conclusively that this portion of the disputed fishings has been possessed and enjoyed by the defender and his authors for greatly more than the prescriptive period. The evidence of Miss Innes is, indeed, complete in itself to this effect.

"It was observed, however, for the pursuer at the debate, that there was nothing to show that Straline formed part of the defender's lands, or whether it belonged to the barony of Ogilvie or the barony of Boyne, and therefore that proof of possession of the fishings there was not conclusive of anything. The Lord Ordinary cannot adopt this view. In the first article of his statement of facts, admitted by the pursuer, the defender avers that his lands, forming the baronies of Ogilvie and Boyne, extend 'from the Burnmouth of Rathven, near Buckie, to the Burnmouth of Boyndie, near Banff;' and the plan, the accuracy of which is also admitted by the pursuer, shows that the 'Well of Strolend or Strathline' is comprehended within these limits, being a little to the east of the Burnmouth of Rathven. The evidence of Miss Innes, as well as that of some of the other witnesses, likewise shows that the Straline fishings are within the bounds and limits of the defender's lands. And if the two baronies of Ogilvie and Boyne were united in 1750, it is truly of no consequence in regard to the present dispute to which of the original baronies the Straline fishings belong; for it cannot be questioned, and was not at the debate questioned, that possession of the fishings *ex adverso* of any part of the united barony was equivalent in its legal consequences to possession of the fishings *ex adverso* of the whole. But, supposing that possession of the Straline fishings can secure to the defender the fishings *ex adverso* of the lands only of the original barony to which it specially pertains, then, in that view, the Lord Ordinary thinks there is sufficient in the pursuer's admissions, taken in connection with the plan and the title-deeds, especially in the absence of all evidence to the contrary, to entitle the Court to infer that Straline is part of the barony of Ogilvie, and therefore that possession of the Straline fishings for the prescriptive period is, at any rate, sufficient to establish the defender's right to the salmon fishings *ex adverso* of all his barony of Ogilvie.

"On the same assumption—viz., that the Straline fishings can only establish the defender's right to the salmon fishings *ex adverso* of his barony of Ogilvie—there remains the question, Has he established his right to the salmon fishings *ex adverso* of his lands forming the barony of Boyne?

"In regard to this question, it is important to observe that the inquiry has been very much limited by the admission of the pursuer, given in the course of the proof (printed proof p. 6) that 'the salmon fishing on the coast between the mouth of the Boyndie and the mouth of the Boyne had been carried on continuously by the defender and his predecessors, or on their behalf, since the year 1829.' Now, the present action having been raised in February 1864, there is thus an admitted continuous possession of the fishings by the defender *ex adverso* of his lands, composing the barony of Boyne for about thirty-four years, leaving only about six years of the prescriptive period of possession to be otherwise established. In regard to these six years it does not appear to the Lord Ordinary that there is much, if any, room for doubt. Four years of the six are, indeed, at once accounted for by the pursuer's own witness James Sutherland, who was examined on 3d May 1864, and who, after stating that he is eighty-one years of age, and has resided in Portsoy since 1800, and that he knows the coast from the mouth of the Boyndie to Cullen, depones—'The first continuous fishing began about eight-and-thirty years ago'—that is, in or about 1826. Taking this testimony of one of the pursuer's own witnesses in connection with the defender's proof, and especially the testimony of the

defender's witnesses, Alexander Findlay, John Smith, Ann Smith or Badenoch, and William Johnstone, as corroborated by the written evidence, the Lord Ordinary is of opinion that enough has been established to support the defence.

"If the Lord Ordinary is right in his view of the facts—if he is correct in holding that the defender and his authors have for forty years, or time immemorial, possessed and enjoyed the salmon fishings *ex adverso* of his barony lands, under grants or charters from the Crown of these lands, with parts and pertinents and fishings—it follows in law that the present action is not maintainable against the defender, and that he has been rightly assoilzied therefrom.

(Intd.) "R. M'F."

Agent for the Crown—Donald Horne, W.S.

Agents for the Earl of Seafield—Mackenzie, Innes, & Logan, W.S.

Tuesday, May 22.

FIRST DIVISION.

PROUDFOOT *v.* LECKY (*ante*, vol. i., p. 240).

Expenses. In an action of damages for wrongous dismissal of a servant, in which the jury found for the pursuer, with one farthing damages, neither party found entitled to expenses.

This case was tried before Lord Barcaple and a jury, on the 23d, 24th, and 26th March 1866. The question was whether the pursuer had been wrongfully and illegally dismissed from the service of the defender, to his loss, injury, and damage. The defender pleaded justification. The jury found for the pursuer—damages one farthing.

A. MONCRIEFF moved the Court to apply the verdict of the jury, and in terms thereof to decern against the defender, with expenses.

PATTISON (with him the LORD ADVOCATE) opposed the motion for expenses, on the ground that the verdict of the jury substantially represented the amount of patrimonial loss incurred by the pursuer, and was not intended as a vindication of his character. He cited Paterson *v.* Ronald, January 31, 1820, 2 Murray's Reports, 188; and Paterson *v.* Walker, November 29, 1848, 11 D. 167.

A. MONCRIEFF (with him GIFFORD) argued that the case was assimilated in principle to cases of slander, in which nominal damages carried expenses; and in support of this quoted Balfour *v.* Wallace, December 3, 1853, 16 D. 110; Ross *v.* Macvean, June 2, 1860, 22 D. 1144; and Borthwick *v.* Gilkison, November 21, 1863, 2 M'Ph. 125.

The Court refused the motion. In the case of Borthwick, malice had been found by the jury. There was nothing of the sort here.

Agents for the Pursuer -- Wilson, Burn, & Gloag, W.S.

Agent for the Defender—R. P. Stevenson, S.S.C.

MACDONALD'S TRUSTEES *v.* MUNRO, *et e contra* (*ante*, vol. i., p. 259).

Expenses—The pursuers of an action who succeeded before a jury to the extent of one-half of their claim, found entitled to expenses.

These are counter actions betwixt the trustees of the late Captain Ronald Macdonald, who resided in Portobello, and Archibald Innes Munro, who was the deceased's servant. In the one action the trustees claimed payment from Munro of £600, being the contents of four bank cheques which he had uplifted from bank for his late master and failed to account for. In the other action, Munro claimed payment from the trustees of a legacy of £100 bequeathed to him in Captain Macdonald's will, and of a sum of wages due to him.

The first action was tried before the Lord President and a jury in April. The question submitted to the jury was limited to two of the cheques which were for £200 each. They jury returned a verdict for the pursuers for £200.

In the other action the only defence insisted in by the trustee was that Munro was in possession of funds belonging to them more than sufficient to pay the legacy and wages which he claimed.

The COURT to-day conjoined the actions, applied the verdict of the jury, and decerned against Munro for £200, under deduction of the sums claimed by him in the action at his own instance. In regard to expenses,

The LORD PRESIDENT said—Thes two cases stand in different positions. In regard to the first which I tried, I have looked at my notes of the evidence, and it appears to me that the defender Munro must be found liable in expenses. I take into consideration the whole evidence, the demand for explanations made by the trustees before the litigation commence, Munro's refusal to give them, the nature of his defence, and of the evidence by which it was supported. The defender had the means of giving the information which the trustees asked, and he should have given it. His own evidence does not seem from the result to have been at all satisfactory to the jury. In the other action the sums sued for were admittedly due, but the trustees contended that Munro was liable to them in a larger sum. In this they have proved to be right. Their action was first raised. If Munro had given an account in regard to the money drawn from bank, I think it is pretty clear that there would have been no litigation. The fair result is therefore, that in the second action neither party should be found entitled to expenses.

The other Judges concurred, and the trustees were found entitled to expenses in the action at their instance, and in the other neither party was found entitled to expenses.

Counsel for the Trustees—Mr Clark and Mr Shand. Agent—Mr J. T. Mowbray, W.S.

Counsel for Munro—Mr Gifford and Mr Deas. Agent—Mr John Robertson, S.S.C.

PATERSON *v.* THE PORTOBELLO TOWN HALL COMPANY (LIMITED).

Lease—Public Officer—Conflicting Interest. Commissioners of Police having entered into a lease with a Joint-Stock Company of which some of them were directors, held that the lease was not illegal. Case distinguished from Blaikie *v.* Aberdeen Railway Company.

This action is raised at the instance of Alexander Paterson, clerk to and representing the Magistrates and Town Council of Portobello, as Commissioners of Police of the burgh of Portobello, against the Portobello Town Hall Company (Limited), and concludes for reduction of, *First*, a pretended tack bearing to be entered into between the defenders and the then Magistrates and Council of Portobello as Commissioners of Police for the burgh of Portobello, and bearing to be dated the 10th and 12th days of February 1863, whereby the defenders are said to have let to the said Magistrates and Council of Portobello, as Commissioners foresaid, and their successors in office, certain parts and portions, therein specified, of a large building in the High Street of Portobello therein described, and