of the fishings at that time. That fact is of importance in this case in this respect, that we are not to look at the case as one in which the Crown is to be assumed never to have made a grant of the fishings. Throughout the case it has been argued very much on the part of the Crown, as if that were the stand point from which it was to be regarded; but that is clearly a mistaken view of the case. When we find that the Crown parted with the right of fishings at an early period, and we find no evidence whatever of its being re-conveyed or re-assumed by the Crown (unless it is in 1761), the assumption that they are to be held as never having been given out of the Crown is excluded from the case; and the main foundation for the argument on the part of the Crown is most materially shaken by that state of facts.

Then again, we see that for a long period, from 1700 downwards, there has been a title on which prescriptive right could have been sustained on the part of this gentleman and his predecessors. I do not think it necessary to go through the intervening titles, some of which indicate the presence of the right of salmon fishing directly, and some more indirectly. But we have in 1700, a long way back, a clear conveyance of a right of fishing, which could be converted into a right of salmon fishing; and we have immemorial possession under that right.

I think that the argument for the Crown consisted very much of criticisms on the rights and titles of the defender, as if everything was to be presumed against him, and everything in favour of this right having still rested in the Crown, and never having been given out. As, for instance, when the right of wadset was given, and when it came to be redeemed, it is said that the reversion did not expressly mention "fishings." But the right of wadset did give the fishings. That right of wadset is, in the first place, a clear proof of the exercise of the right of property in the party who granted the wadset; and then, when the creditor who had obtained possession (which in this case was of the nature of what is called a proper wadset), renounced the right in respect of having obtained satisfaction of his debt from his debtor, and the debtor came to redeem his right, the natural and reasonable construction of the grant of the reversion is, that it replaced the debtor in possession of all that which he had previously given to the creditor.

Then, again, when we come to the civil charter of 1761, which is the only point at which it can be said that the Crown had re-acquired the right of fishing, what is that but a charter by progress, in which the party is completing or making up his own title? It is not a resignation by him for the purpose of making over his right to the Crown, but a resignation by him with the view of getting a new right in his own favour.

Now the question has been raised, whether the word "pertinents" in that title can be held or construed to comprehend the salmon-fishing? It is clear that in ordinary cases it may not be so held. It will require that it should be stated. But the position of this title was peculiar. The description had been, in various steps of it, by reference to former titles; and when this party came to the Crown in order to get a renewal of his title, then it was the duty of those who were acting for the Crown to look at the right that was in him at the time, and to see what was the character of it, and what it was that was to be renewed. And the reasonable presumption is, that whatever was thus surrendered to the Crown for the purpose of being re-granted to the vassal, was re-granted to the vassal. It has been said that there is no mention of fishings in the dispositive or conveying clause of this charter, but that it occurs only in the *tenendas*, and we had the remark made (clearly sound in law) that the *tenendas* is not a conveying clause, and that it is generally not enough by itself. That certainly is a doctrine which hardly required much authority, but we were referred to very high authority on that subject, and among others to a most recent authority, I mean the late Professor Menzies, whose Lectures on Conveyancing are of the highest value, in which he lays down that doctrine as he found it in all the institutional writers. But it does not follow from that, that the mention of "fishings" in the *tenendas* is of no use in any case whatever if the fishings are not mentioned in various parts of the deed. On the contrary, in that very dissertation, Professor Menzies lays down this "at the same time, while the *tenendas* cannot transmit a right, it may in some cases raise a presumption in favour of the grantee so as to entitle him to establish a right by evidence of possession; but it is certain that without such possession no right is conferred"—(Menzies, 1st ed., p. 529). Now, that is the very position in which we are in reference to this case. I therefore hold that the transaction of 1761 is to be regarded as one which replaced the vassal in the right which he previously had in these fishings. But if it were otherwise, it cannot be set aside by placing an inconsistent construction on the surrender of the vassal by holding that those expressions which cover his surrender are not equally competent to cover his replacement. If there was no replacement, I think it is clear that there was no surrender. At all events, I think he had the option, and he has now the right, of ascribing his possession to that title which he may regard as most secure. And therefore, whether the Crown insist that the rights were then surrendered or not, I think, in either view of the case, that the vassal has defended his right successfully against the challenge that is made on the part of the Crown.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Agents for Appellant—A. Murray, W.S., and Horace Watson, Westminster.

Agents for Respondent—G. L. Sinclair, W.S., and Grahame & Wardlaw, Westminister.

Thursday July 11.

GILLESPIE *v.* YOUNG AND OTHERS.

(In Court of Session, 4 Macph., 715.)

Reparation—Patent—Consequential Damage. Action of damages by a proprietor of a mineral estate against a patentee, on the ground that the patentee having a patent for a certain limited purpose falsely and maliciously asserted that the patent included the mineral of the pursuers' estate, dismissed on the ground that the summons disclosed no relevant ground of action.—(Aff. C.S.)

This was an action of damages raised by Mrs Gillespie, heiress of entail in possession of the lands of Torbanehill, and by her husband, against James Young, E. W. Binney & Company, and E. Meldrum & Company, and partners, manufac-

turing chemists at Bathgate and Glasgow. The ground of action was, that the defender Young, the holder of a patent for the manufacture of paraffine oil from bituminous coal, had falsely, fraudulently, and maliciously represented, by advertisements and otherwise, that his patent extended to the "Torbanehill" mineral of the pursuer's estate, which was not, and which he knew was not, a coal; and that he had, by threats of litigation, induced manufacturers to make payments to him in the shape of a royalty for license to manufacture paraffine from Torbanehill mineral, whereby the market value of Torbanehill mineral was lowered to that extent. The other defenders had acquired from Young a right along with him to the patent. It was disputed among scientific men whether the mineral of the pursuer's lands was a coal or a shale.

The defenders pleaded (1) that the pursuer's averments were irrelevant and insufficient in law to support the conclusions of the summons; (2) the record did not contain any good ground or cause of action against the defenders, and they were entitled to absolvitor; (3) the facts, as averred by the pursuers, did not show that any legal wrong or injury was done to them by the defenders, or that the pursuers had sustained any legal wrong or injury in respect of which the defenders were liable to them in damages.

The Lord Ordinary (BARCAPLE) sustained these three pleas, and dismissed the action.

The Second Division of the Court recalled that interlocutor; sustained the first and third pleas, and dismissed the action.

The pursuers appealed.

ATTORNEY-GENERAL (ROLT) and ASHER for appellants.

DEAN OF FACULTY (MONCREIFF), Sir ROUNDELL PALMER, Q.C., and GROVE, Q.C., for respondents.

LORD CRANWORTH said this was an action brought by the owner of the Torbanehill estate, which contained a mineral of great value as yielding paraffine oil. The applicant had granted a lease of the coal in the estate to a tenant, and for a great many years litigation had gone on between landlord and tenant as to whether this mineral was included in the lease of the coal. The decisions were very conflicting, but the parties had at last the good sense to come to some arrangement by which the tenant agreed to pay a certain royalty on this mineral, which, to avoid committing either party, was called between them "the disputed mineral." Now, the respondent in the present appeal had obtained a patent for extracting paraffine oil from coal, and the contention arose, whether these patentees had the exclusive right to extract oil from the Torbanehill mineral, or whether they had not. The appellants alleged in their present action that the respondents had falsely represented that their patent gave them the exclusive privilege of manufacturing paraffine oil from the Torbanehill mineral, and had threatened to institute legal proceedings against the parties who were in the course of exercising their lawful right of manufacturing paraffine oil from such mineral, upon the pretext that such manufacture was an infringement of their patent; that they had induced manufacturers to pay them license-duties for this alleged privilege, and had prevented many persons from purchasing the Torbanehill mineral; —by all which the market value of the mineral estate had been greatly depreciated, and the sale impeded, and the appellant, as mineral proprietor, injured; and that the respondent knew the said representations were false; and, in particular, that their patent did not extend to the manufacture of paraffine oil from the Torbanehill mineral. The question was, whether this allegation set out a complaint which a court of law could entertain? Now he (LORD CRANWORTH) was far from disputing that all courts should scrupulously insist on the truth being strictly adhered to in allegations, not only as regards individuals but as regards the public, and if it had been alleged that the respondent, well knowing that his patent did not include this mineral, represented that it did, and so prevented purchasers from purchasing it, he (LORD CRANWORTH) would have been reluctant to hold that his misrepresentation, coupled with injury to the appellants, would not give them a cause of action; but that was not the ground of action alleged here. Taking all the allegations together they amounted to no more than this, that the respondents said they believed the Torbanehill mineral to be within their patent. That was, however, not, strictly speaking, a fact in the ordinary sense, and there was no distinct allegation that the respondent did state it as a fact, but all he said was, "If you don't pay me the royalty, I will institute legal proceedings against you to have it declared that my patent includes the Torbanehill mineral." What happened was that some people, rather than enter into litigation about so uncertain a matter, chose to pay the license-duty. But the allegation of knowledge of the falsehood of the representation was far too vague, especially when it was considered that the whole matter was one of scientific opinion, and not a fact in the ordinary sense which was susceptible of precise and definite knowledge one way or the other. The ground of action, therefore, altogether failed, and the judgment of the Court below, dismissing the action, was right.

LORD WESTBURY not having heard the whole of argument, took no part in the judgment.

LORD COLONSAY—My Lords, this case come before us as a case of relevancy. The judgment of the Court below is not one which has assoilzied the respondents from any such allegations as can be relevantly made against them in regard either to this mineral or the patent of this defender. All it does is to dismiss this action on the ground that the record does not contain sufficiently relevant statements. This appears very plain, because the interlocutor of the Lord Ordinary, which sustained these defences, one of which was that the defender was entitled to be assoilzied, was not affirmed in the Inner-House. On the contrary, the interlocutor of the Lord Ordinary is recalled, and an interlocutor is pronounced which deals with the first plea and dismisses the action. I think that the Lord Ordinary himself intended so to deal with the case, for his interlocutor is one dismissing the case, not assoilzing the defender; but this becomes tolerably clear from the recal of the interlocutor which sustains the second defence. Whether the pursuer will be able in any other attempt to make out a relevant case is a matter we have not got to do with; but the question is, whether we are to sustain this action as approving of this record—whether we are to give judicial sanction to this record as one which sets forth, as it ought to do, sufficient grounds of action, so as to raise a liability against the defender? It appears to me that this record does not do so. I think there are several elements wanting in order to make it sufficient. The substance of the allegations which the pursuer proposes to make the ground of action is this, that the defender, having a patent for a certain limited

purpose, falsely and maliciously alleged that the patent comprehended the mines of which the pursuer is a large proprietor, and that it precluded parties from making paraffine oil from that mineral. Now, there are two things I should desire to see stated before I could support the relevancy of such an action—first, in which respect was this allegation false? and secondly, when, and where, and in what form did the defender make that false allegation? I think the reasoning of the pursuer seems to be this:—"the substance that is dug out of my lands, and it is admitted to some extent out of other lands, is a bituminous shale. Your patent is limited to distillation from coal; bituminous shale is not coal, and my mineral in particular is not coal." He further says—"You knew that your patent did not extend to shale;" and I think that is admitted by the parties; but the other step of the allegation which was necessary was, "that you knew that the substance was shale, and that it was not coal." I don't think that there is a sufficient and distinct allegation of that on this record. I think it was a simple thing to state that absolutely, and I don't think any roundabout way from which it might be deduced is enough from a pursuer asking damages. I think the record defective in that respect. Then, I think it is further defective in respect of the statement of the occasions on which these false allegations are represented to have been made, for, like my noble and learned friend who has addressed the House, I cannot find any such allegation in the condescendence. The other defect in this record is the very peculiar kind of falsehood that is alleged here. It is not a single allegation of a fact patent to any one. It is an allegation, in the first place, as to the construction of a patent—which is matter of law. It is an allegation, in the next place, of a particular class of mineral as being coal or shale—which is a matter more or less scientific—and therefore it required a very definite statement to support the falsehood of such an allegation. Both parties have referred to a case that had occurred between the pursuer in this action and his tenant Mr Russell, in 1853. That case was raised upon the issue stated on this record, as to whether the minerals which Mr Russell was digging out of these lands were comprehended within his lease. He had obtained a lease which gave him a right to various minerals in these lands, one of which was coal, but an action for damages was raised against Mr Russell for digging out of the lands what was not coal; and I think that the pursuer is correct in stating that the result of that case was not any decision upon the scientific question whether this mineral was or was not coal. That question was made the subject of a very great deal of scientific evidence. A great many scientific persons were examined from various parts of the country. I think I sat for six days during merely scientific evidence on the question. I see it reported on this record—there were geologists who described the strata of the ground where coal is found, and where this mineral is found; there were mineralogists who spoke to the colour, lustre, and streak of this mineral; there were chemists who had analysed this mineral, and who had analysed coal, who spoke to the products, who analysed the products and the sub-products of coal; there were gentlemen who, by the aid of the microscope, discovered certain specks in this substance, and spoke to what were to be detected in coal, and what in this mineral. I may say the array of gentlemen on each side was about equal. This testimony was about equally divided. One division of them said it was coal, the other said it was not coal. I only state this as showing the nature of the question in this litigation. Now, I think it appears further from this record, that after that trial had taken place, and the question was left to the jury, no action was raised for the purpose of setting aside the lease as obtained by fraud. We have also the minute under which the matter was adjusted between the parties, and up to the date of that minute, and at the date of that minute—it appears that was in 1859—it was a disputed question whether this was to be called coal or not. At the date of the trial in 1850 no name had been discovered for it but coal; but at that time, it is stated in the minute, the pursuer insisted that it was not coal, and called it Torbanehill Mineral, and the parties adjusted it by giving it a third name—the Disputed Mineral. All this shows this was not an open and patent fact. But, notwithstanding all these disputes and questions, it is said that Mr Young, the patentee, who was not a party to the action at law, said—I think it was not coal but shale. Well, then, that ought to have been very distinctly stated, not by doubtful inference, on the record; so I also require that a party, in order to entitle him to damages, should show the occasions on which the means were taken of preventing the mineral from being sold. I do not find that here. In regard to these advertisements, they are said to have occurred at the time the trial was going on in this metropolis between Mr Young and somebody else. If that trial was upon the question whether this was coal or not, it is plain that was then a matter *sub judice;* and even if that was not so, the advertisements were only a caution generally not to infringe Mr Young's patent. That is not an obligation that would enable the pursuer to maintain an action for damages. On the whole, I think it would be very unwise, and altogether contrary to the procedure we have been induced to follow in the other part of the island with a view to accuracy of procedure, if we should allow the relevancy of this action. A pursuer should make his allegations so specific that there could be no doubt as to what was meant, and clearly within the scope of the record. I therefore entirely agree that the interlocutor appealed from should be affirmed, and this appeal be dismissed, with costs.

Appeal dismissed, with costs.

Agents for Appellants—Morton, Whitehead, & Greig, W.S., and Loch & Maclaurin, Westminster.

Agents for Respondents—Jas. Webster, S.S.C., and John Graham, Westminster.

Tuesday, July 16.

CAMPBELL *v.* CAMPBELL.

(In Court of Session, 4 Macph., 867.)

Husband and Wife—Marriage—Legitimacy—Service—Presumption—Proof. In competing claims for service as heir of entail, the title of one of the claimants was objected to on the ground that his father was illegitimate, his parents never having been lawfully married. Held (aff. C. S.), on consideration of the whole evidence, that although the cohabitation of the claimant's grandparents was adulterous in its origin, and continued so for three years, it changed its character some time thereafter, when the parties became free to marry, and