without specifying the time and place of seduction, or two issues specifying different occasions, one in 1860 and the other in 1863.

SCOTT for pursuer.

SOLICITOR-GENERAL and THOMS for defender.

The Court observed that the time at which a woman is seduced is a definite point, and must be well known to her, and so with regard to the place. There cannot be two different occasions. It is an essential part of the pursuer's case, though it is no longer the practice to put it in issue, that up to the time of seduction she was a virtuous woman. If she was seduced in 1860 it is impossible that she could have been seduced in 1863. The occasion in 1860 is well and relevantly stated in her condescendence. She must take a single issue, and that occasion must be embodied in it.

Agent for Pursuer—D. F. Bridgeford, S.S.C.

Agents for Defender—Lindsay & Paterson, W.S.

Saturday, February 4.

FORBES *v.* THE MINISTERS OF OLD MACHAR.

(*Ante*, Vol. V, p. 335, and Vol. VI, p. 726.)

House of Lords—Petition to apply Judgment—Expenses. Where the House of Lords has pronounced a judgment exhausting a cause, and not containing any finding as to expenses before appeal, the Court will not dispose of the question of expenses.

In the process of augmentation and locality of Old Machar a question arose between the ministers and certain heritors, of whom Mr Forbes was one, as to the validity of certain decrees of valuation of teinds. The Court of Session held the valuations bad, and found the heritors liable to the ministers in expenses. On appeal, the House of Lords reversed and ordered the expenses paid by the appellants to the respondents to be repaid, but made no order as to the appellants' expenses in the Court of Session. In a petition for applying the judgment of the House of Lords, Mr Forbes now moved for his expenses previous to the appeal.

FRASER for him.

ASHER in answer.

The cases of *Stewart* v. *Scott*, 11 March 1836, 14 S. 692, and *Railton*, 12 June 1846, 8 D. 812, were referred to.

LORD PRESIDENT—This is a question on a closed record. It arose in a process of locality, but every question on which a record is made up and judgment pronounced is for all practical purposes a separate cause. The House of Lords exhausts the case, and while it orders the expenses paid by the appellants to the respondents to be repaid, it says nothing farther as to expenses. The rule laid down in *Stewart* v. *Scott* is directly applicable, that where a judgment of the House of Lords exhausts a cause and contains no finding as to expenses, it is not intended that we should dispose of them.

The other Judges concurred.

The Court applied the judgment, but refused the prayer so far as it prayed for expenses in this Court previous to the appeal.

Agents for Petitioner—Henry & Shiress, S.S.C.

Agents for the Ministers—H. & A. Inglis, W.S.

Wednesday, February 8.

GOWANS *v.* BRATHWAITE CHRISTIE AND ANOTHER.

Landlord and Tenant—Lease—Sterility—Clause—Process — Reduction — Competency. Circumstances in which a tenant, under a lease of freestone and other minerals, was held not entitled to insist in an action of reduction of his lease upon the ground of "sterility" or "non-workableness to profit," there being in the contract of lease a special machinery devised which was manifestly intended by the parties to obviate all such questions.

Observed by the Lord President, that the question of sterility in mineral leases was quite different from what it was in agricultural ones, for the former were now-a-days viewed much more in the light of contracts of hazard than the latter.

This was an action of reduction at the instance of James Gowans, railway contractor, against Mr Brathwaite Christie of Baberton and Mrs Agnes Mossman or Christie, widow and sole executrix and heir *in mobilibus* of the late Alexander Christie of Baberton. There was sought to be reduced a certain lease of the whole freestone and minerals, and all materials and substances lying under the lands and estate of Baberton, entered into in February 1866 between the said Alexander Christie of Baberton, as heir of entail then in possession of the said estate, and the said James Gowans, the pursuer.

The more important clauses of the said lease were as follows:—"The said Alexander Christie has set, and by these presents, in consideration of the rents or tack duties, and other prestations after-mentioned, lets to the said James Gowans and his heirs and assignees, all and whole the freestone and minerals, and all materials and substances, of what nature soever, lying in and under the lands and estate of Baberton, which are in the parishes of Currie and Colinton, and sheriffdom of Edinburgh, and that for the space of twenty-one years from and after the term of Candlemas Eighteen hundred and sixty-six, which is hereby declared to be the commencement of this lease, and the entry of the said James Gowans to the premises, in virtue hereof; with full power to the said James Gowans and his foresaids, at their own expense, to search for, work, win, raise, and carry away the freestone, and all minerals, materials, and substances of what nature soever, lying in and under said lands, as fully and freely as the said Alexander Christie could do himself. (then follow clauses regulating the working). Which tack, under the conditions and reservations above-written, the said Alexander Christie binds and obliges himself, and his heirs and successors, to warrant at all hands, and against all mortals, as law will: For which causes, and on the other part, the said James Gowans binds and obliges himself and his heirs, executors, and successors whomsoever, to pay to the said Alexander Christie, and his heirs and successors, for the said freestone, minerals, and substances, and materials hereby let, the sum of two hundred pounds sterling of fixed money rent per annum, and that half-yearly, at the terms of Lammas and Candlemas; and it is hereby agreed that the said fixed rent shall not be exacted for the year or period

antecedent to Candlemas Eighteen hundred and sixty-seven, declaring nevertheless that should the said James Gowans or his foresaids, during the period from Candlemas Eighteen hundred and sixty-six to Candlemas Eighteen hundred and sixty-seven, remove from the said estate of Baberton any freestone, minerals, materials, or substances, he or they shall thereby become bound, and hereby bind and oblige themselves, to pay to the said Alexander Christie or his foresaids the sum of one hundred pounds sterling in name of rent for said period; and it is hereby declared to be in the power of the lessee and his foresaids, on giving six months' notice of his intention to do so previous to any term of Candlemas occurring at the end of the third, seventh, or fourteenth years of this tack, to remove from the subjects hereby let; and this tack, on the tenant's giving such notice at any of these periods, shall cease and determine, it being hereby declared that, in the event of the tenant availing himself of the break at the end of three years, he shall be obliged to restore the ground broken up, in such a manner as that it may be ploughed up, or to a gradient of not more than one in five, and failing this, to pay such damages as may be determined by the arbiters after provided for." (Then follow clauses regulating the disposal of buildings, machinery, &c., upon the outgoing of the tenant.)

The statements upon which reduction of the lease was sought for were—"In the year 1866 the pursuer was induced, by the representations of the late Alexander Christie, then heir of entail in possession of the estate of Baberton, to enter into the lease now sought to be reduced. These representations were to the effect that there was a large stratum of freestone in the lands proposed to be let, of a superior quality, and capable of being worked to profit by a tenant, and in particular by a tenant becoming bound for the rent and under the stipulations in the said lease. The said representations were made to the pursuer not only by the late Mr Christie and his agents, but by his manager or factor. The said manager or factor informed the pursuer at the same time, and as part of the said representations, that freestone such as has been described had already been searched for, and found in the lands. On the faith of these representations, and in reliance on them, and under an essential error as to the subject of the lease which was induced by them, the pursuer, on 2d February 1866, signed the said lease. Immediately on entering into the said lease in February 1866 the pursuer commenced energetic operations in the way of searching for the said freestone by boring and otherwise; and he has continued these operations for a space of four years. The result of these exertions has been the discovery, that while there is some freestone on the lands of Baberton, there is (as the pursuer hereby specially avers) no such amount of freestone as was represented to him (on the faith of which representation he entered into the lease); nor is the said freestone, or any other mineral or material or substance in the lands so let, nor are all of the said substances together, capable of being worked to a profit in a mineral lease; and still less are said minerals capable of being remunerative at the rent stipulated for in said lease. The pursuer has tried the said lands at all points showing indications of freestone, but he has in every case been unable to turn out such a quantity as would repay his outlay, even upon the most economical methods which can be used for the efficient working of minerals. The first break in the said lease took place at Candlemas 1869. At that date the pursuer had already so far experimented on the ground as to be led to suspect or believe that the lease was not workable to profit, and that there was no such freestone or other mineral in the said lands as had been represented to him. He had not, however, been able within that time so exhaustively to experiment on the said grounds as finally to act upon this, and he declined in the meantime to acknowledge the lease as an existing one, by acting on the break provided in it. He accordingly continued his operations for another year. The defender, the present Mr Christie of Baberton (who had now succeeded his brother as heir in possession of the said entailed estate), was quite aware, as were also his agents, of the experimental and doubtful way in which the pursuer was carrying on the operations both before and after the said break. The pursuer, having continued his investigation for another year, finally ascertained the unworkableness to profit of the lands and minerals let to him. Neither during this year (to Candlemass 1870) nor previously, was the pursuer on any occasion able to turn out such a quantity of stone as covered his expenses in the particular operation, much less reimbursed him for the general outlays in searching and other preliminary work."

The pursuer farther stated that when in March 1870 he became thoroughly satisfied of the unworkableness to profit of the lands and minerals let to him, he at once communicated with the landlord and his agents, and repeatedly offered and demanded an equitable arrangement, and the determination of all questions between them under the arbitration clause of the lease; but that the defender Mr Brathwaite Christie, who in 1868 had succeeded to the estate as heir of entail to his brother, had refused to accede to any such proposals or in any way to release him from his obligations under the lease.

The pursuer pleaded—"(1) The mineral lease entered into between the deceased Alexander Christie and his successors, on the one hand, and the pursuer, on the other, being unworkable to profit, and having been so from the beginning of the said lease, the same ought to be reduced, and the pursuer found to be free from the same, in terms of the declaratory conclusions of the summons. (2) The said lease having been entered into under essential error on the part of the pursuer as to the subject of the same, which error was induced by the representations of the said Alexander Christie and those for whom he was responsible, the said lease ought to be reduced, in terms of the conclusions of the summons. (3) The rents and other prestations exigible under the said lease having been exacted from the pursuer and paid by him while the lease was really unworkable to profit, but before he had finally ascertained this, the pursuer is entitled to repetition of the same, or at least to count and reckoning in respect of the same, both against the executors of the late Alexander Christie and against the present possessor of the entailed estate. (4) In the event of the defenders denying the fact of the unworkableness to a profit of the said lease, they are bound to refer the question to arbitration, or to consent to the ascertainment thereof in such form as may be agreed to by the parties, or as the Court in its discretion may see fit."

The defenders pleaded, *inter alia*,—"(1) The pursuer's statements are not relevant or sufficient in law to support any of the conclusions of the summons, or at least the same are not relevant or sufficient to support the said conclusions in so far as the same are directed against the present defender. (3) The action cannot be maintained, in respect that the pursuer did not avail himself of the break at Candlemas 1869, but continued to work the freestone after as well as before the said break.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 2d November* 1870.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, Finds that the pursuer's statements are not relevant or sufficient in law to support the conclusion in the summons for reduction of the lease, on the grounds set forth in the pursuer's second plea in law, and therefore repels the said second plea in law for the pursuer: *Quoad ultra*, before answer, allows the parties a proof of their respective averments, and to each a conjunct probation; and appoints the cause to be put to the roll, in order that a day may be fixed for taking the proof.

"*Note.*—The pursuer avers that he entered into the lease libelled on under essential error, induced by the representations of the late proprietor of Baberton, and of his agents and factor. These representations, it is said, were to the effect that there was a large stratum of freestone in the lands of Baberton proposed to be let, that it was of superior quality, and that it was capable of being worked to profit by a tenant, and in particular by a tenant at the yearly rent of £200 under the stipulations of the lease.

"The alleged representation that there was a large stratum of freestone in the lands of Baberton is very vague and indefinite. It is not averred that there is no such large stratum of freestone, and that the representation was false and fraudulent. The pursuer's statement is only that while there is some freestone in the lands, there is 'no such amount of freestone as was represented to him.' No particular amount of freestone is said to have been represented to him, and whether a stratum of freestone is large or small is a matter of opinion, as to which there may be much difference. It is not averred by the pursuer that the freestone is not of a superior quality. Then, as regards the representation that the freestone was capable of being worked to profit by the tenant, such capability depends upon many contingencies, as, for example, the skill and capital of the tenant, the rate of wages, the state of the market, costs of transit, and many other elements of hazard. Such representations are, it is thought, a mere matter of opinion, which, even if erroneous, could not form a good ground for reducing the lease. It is not stated that the alleged representations were fraudulent; but it is averred by the pursuer that he was not, at Candlemas 1869, that is after three years' possession and trial of the freestone, satisfied that there was no such freestone in the lands as had been represented to him, and that he accordingly did not avail himself of the break in the lease at that term, but continued his operations, although the next break did not occur until Candlemas 1873. The present action was not raised until fifteen months thereafter—that is, until after the pursuer had been upwards of four years in possession of and working the subject of the lease.

"In these circumstances, the Lord Ordinary is of opinion that the pursuer's averments in regard to representation and essential error as to the subject of the lease, are not relevant or sufficient in law to support the rescissory conclusions of the summons.

"The defender further maintained that the pursuer's remaining statements in regard to the freestone or minerals having all along been unworkable to profit were not relevant or sufficient in law to support the conclusions of his summons. But, after careful consideration the Lord Ordinary is of opinion that the proper course is to allow a proof before answer of these statements. *Edmiston* v. *Preston*, 13th January 1675, Dict. 15,172; *Gray* v. *Hogg and Bennet*, 11th January 1706, 4 B. Sup. 635."

Against this interlocutor, so far as it allowed a proof before answer, the defenders reclaimed, and contended that, looking to the terms of the lease, and the conduct of the tenant, the action should have been dismissed *simpliciter*; and that it was no case for an investigation into the question of unworkableness to profit.

SHAND and BALFOUR for Mr Brathwaite Christie.

SCOTT and BRAND for Mrs Christie.

SOLICITOR-GENERAL and TAYLOR INNES for Mr Gowans, the pursuer.

Senior counsel were not called upon for the defenders.

At advising—

LORD PRESIDENT—The exposition of the law which we have just had from the pursuer's counsel, Mr Innes, is most instructive, and I think, on the whole, perfectly sound. There is no doubt at any rate of these two propositions—namely, 1st, That if the tenant does not receive possession under his lease, he cannot be called upon to fulfil his part of the contract; and, 2d, that though he receive possession, if the subject cease to have any existence at all, as when a house is destroyed by fire, or at any rate cease to have any profitable and useful existence, as when a seam of coal is worked out, the result is the same. Even though the exhaustion be not absolutely complete there may be grounds for applying the same principle, though how far the doctrine of sterility as submitted to us on the part of the pursuer may safely be applied in all its details to such a case is a question which still remains without authoritative decision in this Court. Its application to agricultural subjects is one thing, but its application to mineral leases is a very different matter, and one which, in my opinion, would be attended with very great difficulty. But there are some considerations which are applicable to mineral leases in general, and to this one in particular, which enable us fortunately to arrive at a conclusion in the present question without entering upon the above vexed and perplexing point of law. They are these — A mineral subject is attended with greater risk, both to proprietor and tenant, than the subjects of most other leases, and certainly than that of an ordinary agricultural lease; and though it may very well be that a lease of minerals should be so expressed as to bring it within the ordinary rules of leases generally, and render it subject to the usual effect of a warrandice clause, still I think that under ordinary circumstances it is more desirable and appropriate that minerals should be dealt with more or less as the subject of a contract of hazard. I say more or less advisedly, for of necessity the amount of risk

varies considerably according to the conditions of lease. For instance, during a period of trial, when the field is newly opened, the risk may be laid on the landlord; but when the field is once opened and proved, the risk may be transferred to the tenant; or there may be many other stipulations regulating the risk necessary to be incurred.

Now in the present case the parties have provided in a very suitable and commendable manner for the risk which was inseparable from the enterprise on which they were embarking. They agreed that for the first year no rent should be paid by the tenant, unless he should remove from the estate any freestone, minerals, &c.; but that if he should so remove any of the freestone, minerals, &c., he should then pay £100, being one-half the fixed rent payable annually during the currency of the lease. They farther agreed, that at the end of the first three years the tenant should be entitled to renounce the lease, merely upon giving six months' notice, and on condition of restoring the ground to a ploughable state. Again, at the end of seven years, and after that at the end of fourteen, it is provided by the lease that the tenant shall be entitled to renounce it under certain very moderate conditions as to restoring roads, &c., and this in all cases without the necessity of assigning any reason, or going into any proof on the subject. Now in the fair construction of the document before us, I am bound to say that I view these clauses as having being introduced into the contract for the purpose of disposing of all questions as to risk which might arise between the parties, without the trouble and the expense which an inquiry into the matter, either judicially or by arbitration, would necessarily involve. The manifest and true intention was that after the first year, which he might employ for experiments if he liked, provided he removed nothing from the lands, the tenant was to take his chance up to the end of the third year. That during this period the risk was to lie upon him however things might turn out. At the end of that time, it was to be expected that he would be able to judge of the prospects of the undertaking, and it was to be at his option to abandon if he chose. If, on the other hand he retained the lease, the risk for the next four years was to be entirely upon him. But again at the expiry of these four years, that is at the end of the seventh year of the lease, he was to be entitled to abandon. In like manner during the next period of seven years the risk was to be entirely the tenant's, but with a like option of abandoning at its termination, failing which he must continue in it until the completion of the whole twenty-one. years. In conjunction with all this, there is no option given to the landlord at any time of putting an end to the lease. Now looking at this arrangement, I cannot help saying that it is not only a convenient, but a fair way of obviating the difficulties which may occur in such a lease. It is in fact far more advantageous to the tenant than the stipulation in most mineral leases. He is given a fair opportunity during the first three years of seeing whether he can make anything of the lease. He has afterwards three several opportunities of backing out of it if he finds that his former judgment was erroneous. Now it is a very great advantage to a tenant to be entitled to abandon in this way, without being put to the expense of a proof. I look upon it as a very high privilege conferred upon him indeed; and I observe again that there is no counter-privilege or advantage conferred on the landlord. His tenant might during the currency of the lease be amassing a large fortune, and the landlord would be unable to interfere, but must content himself with his bare rent of £200 a-year, as he has stipulated no lordship. I think the tenant must be viewed as having bought that privilege by undertaking that during the first three years, and again during the subsequent periods of four, seven, and seven, he would continue to pay the stipulated rent whatever might occur, without seeking to back out of the lease in any way.

That being my view, I think that the tenant's averments are irrelevant to sustain an action of reduction of this lease. He has let slip the first period at which he might have freed himself from his obligation at his own option, and he must now wait for the arrival of the next. That is enough to decide the matter at present before us, and I do not feel called upon to enter on the many questions which might arise upon another lease of the same subjects differently expressed.

The other Judges concurred.

Action dismissed.

Agents for Pursuer—Lindsay & Paterson, W.S.

Agents for Mr Christie—Hamilton, Kinnear & Beatson, W.S.

Agent for Mrs Christie—D. F. Bridgeford, S.S.C.

Wednesday, February 8.

SPECIAL CASE—ANDREW HEATLIE'S TRUSTEE AND OTHERS.

Trust-Deed—Clause—Construction—Legacy a Burden on Heritage or Moveables? Circumstances in which it was *held* that the ordinary rule of law, viz., that where both heritage and moveables are left under a general trust-disposition and settlement the legacies are payable out of the moveable estate, should receive effect, as the truster had not clearly manifested his intention to invert that rule; but that, contrary to the general rule, the trustee had manifested his intention of making the heritage security for full payment of the legacies in case of the moveables proving insufficient.

Held, farther, that an annuity, being a recognised burden on heritage, and not inconsistent with its nature, the presumption of law was, that the truster intended to lay it upon the heritable estate, as in the former case, and lay the legacies on the moveable.

The parties to this Special Case were John Henderson, the only surviving and accepting trustee, and the beneficiaries under the trust-disposition and settlement of the late Andrew Heatlie, weaver in Selkirk. The questions submitted to the Court arose upon the construction of this trust-deed.

By it Heatlie disponed to his trustees (1) a small heritable subject in the Kirk Wynd of Selkirk, worth about £14, 10s. per annum gross rental; (2) another small heritable subject in the Town Head of Selkirk, worth about £18, 17s. per annum of gross rent; and (3) his moveable property, which was stated as amounting to about £135, after payment of debts, funeral expenses, and expenses of the trust. The main purposes of the trust were thus expressed:—"*Secondly*, I appoint my said trustees, from the rents, profits, and interests of my said estate, to pay to Isabella