of £700 then made to these parties by the said Company. At the date of this loan there subsisted an assignation to the said fund in favour of the City of Glasgow Assurance Co., in security to them of the sum of £500, borrowed by Mr M'Kay in April 1868 before his sequestration. At the date of the transaction with the second company, M'Kay was an undischarged bankrupt, a fact which he did not make known to them when he effected the loan for £700; and, accordingly, while they stipulated for and obtained a discharge for the loan of £500, in security of which the City of Glasgow Co. held an assignation to the fund *in medio*, they took a new assignation from M'Kay to this fund in security of their then loan for £700. As, however, the fund, subject to the burden of the security held by the City of Glasgow Co., had passed to the trustee on M'Kay's sequestration in 1869, the bankrupt had no right or power to deal with the fund in 1871, and hence, on the documents founded on by the General Assurance Co. as they stand, they have no legal claim to the fund in competition with the trustee, to whom the fund had passed, subject to the security held by the City of Glasgow Co. The security having been discharged in 1871, the right of the creditors to the fund had become absolute by the extinction of the only security by which it was burdened at the date of the sequestration. It is therefore on grounds of equity alone that the General Assurance Co. can maintain their claim to the fund, and their contention is, that having entered into the transaction and carried it through in ignorance of the sequestration, and of M'Kay being an undischarged bankrupt, and through the concealment of that fact by him, they are entitled to be dealt with in this competition on the same footing as if, instead of taking a deed of discharge from the City of Glasgow Co., they had obtained an assignation to the debt of £500 and the securities for repayment thereof held by that Company.

I am of opinion that, on principles of equity, the General Assurance Co. are entitled to have the redress which they claim, subject to the condition after explained. Had the Company been aware of the position in which M'Kay stood at the time, they never would have allowed the transaction with him to have assumed the form which it did, the effect of which was to make the security on which they calculated in lending the £700 useless and effete so far as the fund *in medio* was concerned, and to leave the fund, unburdened by the money which they advanced to pay the loan to the City of Glasgow Co., to be claimed by the creditors. The concealment or fraud practiced on the General Assurance Co. by the bankrupt alone led to the form which the transaction in 1871 assumed, under which—instead of an assignation from the City of Glasgow Co. of their security when the loan of £500 was paid—a deed of discharge was taken from them, by which means alone the inequitable position in which the parties are relatively placed has been effected. Equity forbids that such a result should be allowed to stand. The trustee and creditors cannot be allowed to be benefited by the fraudulent conduct of the bankrupt. In so far as the General Assurance Co. have suffered loss, and the creditors of the sequestrated estate got benefit, by the transaction as it stands, the Court are entitled and bound to give restoration or redress.

While I am of the opinion now expressed, I am not satisfied that the Lord Ordinary has fully appreciated and properly applied the equitable principle now explained. He has decerned for payment of the fund to the General Assurance Co. in absolute and unconditional terms, without adverting to the fact that the General Assurance Co., and also the City of Glasgow Co., held other securities for payment of their respective loans, in addition to the assignation of the fund *in medio*—1st, an assignation by Mrs M'Kay of her liferent interest in the sum of £3000, subject to the deduction therein stated, to which she was entitled under the settlement of Mr Sceales, free of her husband's *jus mariti* or right of administration; and 2d, policy of insurance effected on Mrs M'Kay's life, the premiums on which, if not paid by her, the Company were entitled to pay to themselves, charging the same in accounting with Mrs M'Kay for their intromissions with her liferent interest in said sum. There were thus two securities besides the policy of insurance held by the Assurance Company for their respective loans; and the question is, how, on equitable principle, the respective rights of the two competitors should be adjusted? On the one hand, it does not seem consistent with sound principle that the Assurance Co. should be at once preferred, as the interlocutor does, to the whole fund *in medio*, to the entire defeat of the claim advanced by the trustee under the sequestration. And, on the other hand, the creditors cannot be preferred to the fund which has been liberated through inadvertence, the effect of which admits of being redressed, free of the security with which the fund was burdened at the date of the sequestration. There must be an equalization effected of the burden attaching to each of the two securities held by the Company. At least this is a matter requiring consideration, and to which the argument of the parties was not addressed, and probably this part of the case may require farther discussion.

The other Judges concurred.

Counsel for Reclaimer—Solicitor-General and Trayner. Agent—J. C. Irons, S.S.C.

Counsel for Respondent—Watson and Strachan. Agent—J. S. Mack, S.S.C.

Tuesday, March 11.

SECOND DIVISION.

JAMES COLQUHOUN GRIEVE AND OTHERS, PETITIONERS.

Petition — Removal of Trustee — Appointment of Judicial Factor.

A trustee furth of Scotland, and of whom nothing had been heard for nine years, *removed* from his office, and a judicial factor appointed to administer the trust-estate.

This was a petition at the instance of all the surviving children of the late Robert Grieve, town clerk of Dumbarton, who are now resident in this country. Four of the family reside furth of Scotland, and edictal citation of the petition on them was prayed. Certain trustees were appointed by the trust-disposition of Mr Grieve, and they assumed one of his sons, Thomas Grieve. All the trustees, except the said Thomas Grieve, are now dead, and he has been for upwards of nine years abroad, in New Zealand or elsewhere, without

communicating with any of the family. It therefore has become necessary for the protection of the estate that Thomas Grieve should be removed from the office of trustee, and that a judicial factor should be appointed to administer the trust-estate.

The Court granted the prayer of the petition.

Counsel for Petitioners — H. J. Moncrieff. Agents—Murray, Beith, & Murray, W.S.

Friday, February 14.

HOUSE OF LORDS.

(Before Lord Chancellor Selborne, Lords Chelmsford, Colonsay, and Cairns.)

GOWANS *v.* CHRISTIE AND ANOTHER.

(*Ante*, vol. viii, p. 341.)

Landlord and Tenant—Mineral Lease—Sterility—Reduction—Clause of Interruption.

In a case where a mineral tenant sought to reduce his lease, which contained periodical breaks, on the ground of sterility — *held* (affirming the judgment of the First Division of the Court of Session) (1) that sterility was not a ground of reduction at common law unless the subject-matter was non-existent; (2) that by the clause of interruption in the lease the parties had themselves provided a remedy.

This was an appeal from a judgment of the First Division. The action was raised by the appellant, who was the lessee of the minerals on the estate of Baberton, in order to reduce the lease, on the ground that the freestone with which these lands had been represented to abound was in such small quantities that it could not be worked to profit. The First Division held that the appellant had undertaken all the risk of failure of the minerals by protecting himself with breaks in the lease, and he ought to have resorted to the remedy which he had provided for himself.

The pursuer appealed.

Mr Pearson, Q.C., and Mr Taylor Innes, for him.

Solicitor-General (Jessel) and Mr Glasse, Q.C., for the respondents.

At advising—

Lord Chancellor—My Lords, this is a case in which the Lord Ordinary thought it right to allow a proof before answer, such proof being offered in support of certain averments by the appellant that his lease of this freestone at Baberton could not be worked at a profit. The respondent raised the point that the appellant's averments were not relevant, and the Inner House thought that this was a case in which the heavy expenses and delay caused by going into evidence ought not to be thrown upon the respondents, inasmuch as the averments, even if proved, would have been utterly irrelevant, and in so deciding I think the Court was quite right. The real question for your Lordships is, Whether the Court was right in holding these averments to have been irrelevant? The appellant under this action was bound to prove, what was certainly not an easy thing to do, that the freestone now to be found in these lands could not be worked at a profit, and that, inasmuch as there was no subject-matter for the lease to operate upon, that lease ought to be reduced. This is certainly a startling proposition to make, for in looking at the terms of the lease the appellant seems to have got a lease from Mr Christie of all the freestone and other minerals whatsoever in the estate. Now, the principal argument of the appellant is, that by the Roman law, which he says is followed by the law of Scotland, there is an implied warranty in the lease that the tenant shall get possession of subject-matter that is capable of producing profits. No doubt in some respects this is reasonable enough. It is reasonable that when a lease is granted there shall be a subject-matter in existence, for, as it is said in England, if the consideration of the contract wholly fails, there shall be an end of the contract, but it is quite a different thing to contend that because the subject-matter exists only in small quantities, and there cannot be a profit made by working it, therefore the whole lease is to be reduced and treated as void. There were various old authorities and cases referred to, but all these will be found to amount only to this, that if the subject-matter is non-existent, or has become exhausted, no rent can be claimed. The risk as to the quantity or value of the fruits or profits is said plainly to be the risk of the tenant. Now, this is not a case of that kind. It is true the freestone does not exist in the large quantities expected, but there is some, and the mere fact that what there is cannot be worked at a profit is no ground for reducing the lease. The lease is so drawn that it contains breaks, of which the tenant may take advantage, and these breaks were held by the Court below to be designed to meet sufficiently the risk of sufficient freestone not being found. The appellant might have broken his lease at the end of three years, but he failed to do so, therefore on both grounds, viz., that there is no such common law right as he contends for, and that his lease provides the remedy, I think the judgment of the Court below was right, and ought to be affirmed.

Lord Chelmsford—I entirely concur. The law of Scotland is shortly stated in Bell's Principles, and it does not justify the contention of the appellant. When the older authorities speak of sterility as being a ground for a tenant getting rid of his lease, they obviously mean absolute or permanent sterility, such as that no mineral exists, or if it once existed has become exhausted. Moreover, it is obvious that sterility was merely a ground for abatement or suspension of rent; even when it was applicable, it was extremely difficult to apply it. Lord Deas says in his judgment that if an Egyptian had taken a lease which began with seven years of plenty, it would be hard to say that when the seven years of famine followed he was to get quit of the lease, and all the loss to fall on the landlord. The present lease seems to provide a sufficient remedy for the circumstances in giving the tenant the option of breaking the lease at the end of three, seven, or fourteen years. I think the decision of the Court below was right, and ought to be affirmed.

Lord Colonsay—I agree with your Lordships, and have very little to add to what has been said. The appellant has quite failed to make out a relevant case. This was a contract between two parties. No doubt a lease can be granted of minerals