the clause that the testator only intended to prohibit the grantee from raising money on his life interest by way of mortgage, but not to prohibit the granting of such deeds as might be reasonably necessary for the extrication of the grantee's affairs. I therefore prefer that construction as being the one which is most favourable to the grantee's powers, the presumption being that such clauses are inserted for the benefit of the grantee.

The trust therefore, in my judgment, is well constituted, but that does not prevent subsequent creditors (whose interests are not recognised by the trust) from taking separate measures for the purpose of having the estate brought under judicial administration, and I agree with your Lordships that the clause under construction in no way strikes at the diligence of creditors, or at distribution under the process of sequestration.

The result therefore is, that I agree with the Lord Ordinary in the conclusion he has come to regarding the second action in sustaining the right of the trustee in bankruptcy to attach this estate.

LORD KINNEAR—I also concur with reference to both actions. The conclusive consideration appears to me to be that there is nothing struck at by the irritant or resolutive parts of the clause in question except deeds or instruments purporting to be sales or mortgages, and therefore whatever else may have been prohibited, the only question we have to consider under the action of forfeiture is, whether a conveyance in a trust-deed for the benefit of the whole creditors of the granter of the conveyance is a sale or mortgage? I am very clearly of opinion with your Lordships that it is not a sale. It is a mandate to sell, and undoubtedly if the trustees had carried their mandate into effect it might well have been said that the clause of forfeiture had come into operation. But then they did not carry out the mandate, because they were advised that before doing so they should ascertain what the effect of that clause was, and having brought an action into Court for that purpose they discovered they could not do what they might otherwise have done. The first conveyance therefore never was anything but a mandate to sell. It has so far not been sold at all. The mandate was never carried out, and the mandate has fallen, and therefore I am unable to say that any forfeiture has arisen on that ground. If the power to sell was not carried out, then the only effect of that first conveyance was to put the trustees into the administration of the estate.

The only remaining question therefore is, whether a deed appointing trustees to administer the liferent interest of the granters for the benefit of all their creditors is a mortgage? Now, I agree with what your Lordships have said, that "mortgage" is not as used in this clause a term of ours which has any strict definite meaning. The word is not altogether without technical ignification in the law of Scotland, because it is a statutory term for a kind of security created or allowed by Act of Parliament to be created for railway and other undertakings; but it is clear enough it is not in that sense the word is used in this clause, and therefore the only conclusion is that it is used in a popular sense as a word of ordinary language. Now, it appears to me that as a word of ordinary language it can have no definite meaning, because the persons who use it to describe securities over land are using a word without adverting particularly to the legal operation of such securities as they intended to describe, and therefore I should myself have very great difficulty in construing a clause of a deed—either of a testamentary or any other written instrument—where the term "mortgage" occurs, if it were absolutely necessary for the purpose of such construction to consider whether the security intended to be described was a security that would never need to be sold, or in what particular manner it was supposed the land affected by it was to be held. But I agree with your Lordships that, whatever else it may be, at all events it must be a particular security over land in favour of some particular creditor, and therefore cannot be extended so as to embrace a general trust of this kind for the administration of an estate for the benefit of all creditors alike.

As to the second action, I agree with your Lordships. I think it is very clear that the clause in question does not prohibit the liferenter from contracting debt. It follows that it does not protect the liferent interest from the diligence of creditors; and it follows again that if his interest is not protected from his creditors' diligence it may be held in sequestration by the vesting clauses of the Bankruptcy Act.

The Court adhered.

Counsel for Mrs Hoile and Others—J. A. Reid—Law. Agent—John Rhind, S.S.C.

Counsel for F. More — W. Campbell— C. K. Mackenzie. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, December 8.

SECOND DIVISION.

BAILLIE'S TRUSTEES *v.* BAILLIE.

Succession—Fee and Liferent—Liferent of Whole Heritable Estate—Income of Mineral Field Opened but not being Worked at Date of Testator's Death.

A husband directed his trustees to hold his whole heritable estate for his wife, and to pay her, in the event of her surviving him, "during her lifetime, the free annual proceeds of said estate, and of minerals therein." Certain parts of the estate had been opened by the testator in his lifetime with the view of being worked for minerals, but had

ceased to be worked, and were not under lease at the date of his death.

Held that the trustees were entitled to lease such portions without the consent of the person to whom the estate was to be conveyed upon the expiry of the liferent, and that the liferentrix was entitled to the rents derived therefrom.

Case of *Campbell's Trustees* v. *Campbell*, March 15, 1882, 9 R. 725, *aff.* July 6, 1883, 10 R. (H. of L.) 65, *distinguished.*

The late Sir William Baillie of Polkemmet, Baronet, died on 21st July 1890 without issue, survived by his wife. He left a trust-disposition and settlement dated 10th April 1889, which contained, *inter alia*, the following provision—"Second, My trustees shall, from and after my death, hold my estate of Polkemmet, comprehending the whole lands, teinds, and other heritages in the county of Linlithgow belonging to me for the liferent use of Dame Mary Baillie, my wife, in the event of her surviving me, and they shall pay to her during her lifetime the free annual proceeds of said estate and of minerals therein, and allow her to occupy the mansion-house, offices, and policies."

A special case was submitted to the Court by the trustees of the first part, Dame Mary Baillie, the widow, of the second part, and Sir George Baillie, Baronet, to whom the estate of Polkemmet was to be conveyed upon the death of the liferentrix, of the third part, which set forth the following facts—At the date of the said trust-disposition and settlement the minerals in certain portions of the estate of Polkemmet were let, and were being worked by the tenants thereof. These leases were still in force, and the minerals had been worked under them down to the present time. The first parties had recently received an offer from Messrs Robert Addie & Son for a trial lease of the minerals in certain other portions of the lands of Polkemmet. In the event of minerals being found which Messrs Addie might wish to work, they stipulated for a lease of thirty-one years from Martinmas 1892 at certain fixed rents, ranging from £200 to £400 per annum for the different periods therein specified, or in lieu of these fixed rents, in the option of the first parties, the lordships therein mentioned. The portions of the estate of Polkemmet referred to in the foregoing offer were the farms of Burnbrae, Swineabbey, East Whitburn, and West Foulshiels. The minerals in Burnbrae were let by the late Sir William Baillie for thirty years from Whitsunday 1857, with a break in favour of the tenant at the end of every third year for a fixed rent of £100, or in lieu thereof certain lordships. The tenant entered into possession and worked the minerals until 1865, when he gave up the lease. There was subsequently another lease of the Burnbrae minerals for twenty-four years from Martinmas 1873, but the lease was abandoned on the tenant's bankruptcy in 1881. The pit upon the farm still remained open, and could easily be made available for working. The minerals in Swineabbey were let by Sir William Baillie in 1857, at the same time as those in Burnbrae, and to the same tenant, but the tenant, after making borings to prove the mineral field, gave up the lease in terms of a reserved power to that effect without having worked the minerals. Again, in 1867, Sir William Baillie accepted a proposal for a thirty-one years' lease of the minerals in the farms of Burnbrae and West Foulshiels, and in 1886 he accepted a proposal for a twenty-five years' lease of the minerals in, *inter alia*, the farms of West Foulshiels, East Whitburn, Swineabbey, and Burnbrae. In each case the tenant gave up the lease after proving the mineral field without having worked it.

The opinion of the Court was requested upon the following questions of law—"(1) Have the first parties power to let the minerals in the portions of the estate of Polkemmet referred to for a period not exceeding thirty-one years (1st) without the consent of the third party, or (2nd) with his consent? (2) In the event of either alternative of the first question being answered in the affirmative, is the second party entitled to receive during her lifetime the free lordships or rents of the minerals in the said portions of the estate of Polkemmet?"

Argued for the first and second parties—The trustees were entitled, under the Trust Act 1867 (30 and 31 Vict. c. 97), sec. 2, sub-sec. 3, to enter into the lease proposed, and the liferentrix was entitled to receive the rents. The case of *Campbell's Trustees* v. *Campbell*, March 15, 1882, 9 R. 725, *aff.* July 6, 1883, 10 R. (H. of L.) 65, relied on by the third party, was clearly distinguishable in several points—(1) the word was here "proceeds," and not merely "produce" or fruits; (2) "minerals" were explicitly mentioned; (3) the parts it was proposed to work had been opened by the testator; which (4) gave an "irresistible indication of the testator's intention there desiderated by Lord Blackburn.

Argued for the third party—This case was ruled by that of *Campbell*, and the arguments there submitted applied. The testator knew when he made his will what parts of his estate were yielding mineral rents. It was not to be presumed that he wished his widow to have more even if the fields were opened up. There was not here the clear intention desiderated in *Campbell's* case, and the words employed were not really of a wider scope.

At advising—

LORD JUSTICE-CLERK—In this case we have to decide the effect of the provision for the widow of the testator contained in the second purpose of his settlement—"My trustees shall, from and after my death, hold my estate of Polkemmet, comprehending the whole lands, teinds, and other heritages in the county of Linlithgow belonging to me, for the liferent use of Dame Mary Baillie, my wife, in the event of her surviving me, and they shall pay to her during her lifetime the free annual proceeds of said estate, and of minerals

therein, and allow her to occupy the mansion-house, offices, and policies."

The statement of facts in the case brings out that at various times during the lifetime of Sir William Baillie the minerals had been opened up and leases given. It also appears from the statement of the case that the working of these minerals did not turn out profitably for the tenant, and that the tenant ceased to work them, and that the pit upon the farm still remains open and could easily be made available for working. That applies to the Burnbrae minerals and the Swineabbey minerals, and the question which is put to us is, whether the trustees have power to let these minerals fields which have already been opened up without the consent of the heir who is ultimately to succeed to the estate, or with his consent?

Now, the first question of course is, whether they have the right or not. This case is peculiar in this respect, that the settlement contains the express declaration that the widow is to have the free annual proceeds of the estate and of the minerals therein; and the only question put to us is, whether the mineral fields that have been already opened up are available to her as part of her liferent—whether the trustees are entitled to carry on the working of these mineral fields by letting them and to give the widow the benefit of these mineral fields. It seems to have been pretty clearly and distinctly laid down in the case of *Campbell.* I read from the opinion of the Lord President in the case of *Campbell's Trustees*, 1882, reported in 9 R. 725, "that where a mineral field has been opened up and made part of the fruits of the soil, or has provided an income during the lifetime of the testator, the liferenter of the estate is entitled to continue to have those fruits as part of the free income of the estate," but that where they have not been opened up in the lifetime of the testator, and the minerals have not practically become part of the fruits of the soil, then the liferenter is not entitled to enjoy them.

Now, I think, giving the best consideration I can to the facts stated here, that the widow is entitled to the benefit of the fruits of these fields that were opened up. They were opened up during the lifetime of the testator. He drew the fruits as long as the tenant was able to pay them. Local or temporary circumstances may have prevented the tenant carrying on the work at a profit, and they may have been stopped for a time, but they were opened up in the lifetime of the testator, and to bring the doctrine in *Campbell's* case, where the testator has given the liferent of the minerals as he has expressly done in the second head of his settlement, it is difficult to see what minerals he could have meant unless it was the mineral fields already opened up or the whole minerals. Now, it is not necessary to decide whether the trustees could open up any new mineral fields in any other part of the estate. That is not the question put to us. The question is, whether they have power to let the minerals on the estate referred to in the case, and on that matter I have come to the opinion that they are so entitled, the widow being entitled under the deed to the proceeds of the minerals, and these mineral fields having been opened up. The only other question is, whether the consent of the third party is necessary? and I am of opinion that the consent of the third party is not necessary, the question being of the nature I have indicated, and the law laid down in the case of *Campbell* being as I have stated. Therefore I think we should answer the first question in the negative, and the second in the affirmative.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—I had some difficulty about this case, but on the whole I concur.

LORD TRAYNER—By the trust-deed of the late Sir William Baillie his trustees are directed to hold the estate of Polkemmet for the liferent use of the second party, and to "pay to her during her lifetime the free annual proceeds of said estate, and of minerals therein." A direction to the trustees to pay to the second party the free annual proceeds of the estate for her liferent use would have entitled her to the rents or royalties derived from minerals which had been opened up and worked during the truster's lifetime; and I take it that something more was intended to be given to the second party by the addition of the words "and of minerals therein." Whether that would entitle the second party to insist that mineral fields should now be opened up which the truster had not worked or leased, or shown any intention to work or lease during his lifetime, in order that she might receive the rents or royalties thereof, I do not say, but I think there is here an expression of the truster's intention (which was wanting in the case of *Campbell*) that the second party should take under the provision of the trust-deed rents or royalties of minerals beyond what would have been carried by an ordinary liferent provision. In the circumstances stated in the special case before us, I think it is reasonable to connect that intention with the minerals which had been let by the truster, or which he had agreed to let, during his lifetime, and which there was ground for believing would be worked by other tenants than those who had taken them or agreed to take them from the truster but had not worked them out or even worked them at all. For these reasons I concur in thinking that the questions put to us should be answered in the manner proposed.

The Court found that the first parties were entitled to let the minerals in the portions of the estate of Polkemmet referred to without the consent of the third party, and answered the second question in the affirmative.

Counsel for First and Third Parties—W. Campbell.

Council for Second Party—H. Johnston—Macfarlane.

Agents for First, Second, and Third Parties—Tods, Murray, & Jamieson, W.S.

Tuesday, December 8.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

STUART & STUART *v.* MACLEOD.

Sequestration — Contingent Debt — Bankruptcy Act 1856, *sec.* 14—*Crofter—Crofters Holdings Acts* 1886 *and* 1887.

A creditor applied for sequestration of his debtor, founding on a debt constituted by extract decree. The debtor lodged a minute stating that the decree had been granted for payment of the arrears of rent of a croft occupied by him, and that he had applied to the Crofters Commission to fix a fair rent therefor, and to determine the amount of arrears payable by him. He craved the Court to dismiss the petition for sequestration in respect that the debt founded on was contingent.

The Court *held* that the debt was not contingent, in respect that it had been decerned for as arrears of rent of an inn let to the debtor separately from his holding as a crofter.

Opinions by Lord Adam, Lord Kinnear, and Lord Kincairney, that arrears of rent for which decree has been granted against a crofter are a contingent debt where the crofter has applied to the Crofters Commission to fix a fair rent for his holding.

Opinion by Lord M'Laren, that where a dispute arises between a landlord and tenant as to whether the latter is or is not a crofter, that dispute is outside the jurisdiction of the Crofters Commission, and can only be determined by the ordinary courts of the country.

Sequestration—Discretion of Court—Bankruptcy Act 1856, *sec.* 30.

Opinion per curiam—following opinion of Court in *Joel* v. *Gill*, 21 D. 929—that in awarding sequestration the Court is not exercising any discretion, but must award it where the statutory requisites are complied with.

This was a petition for the sequestration of Donald Macleod, residing at Scuir Inn, Island of Eigg, presented by Messrs Stuart & Stuart, W.S., the amount of the debt sworn to being £77, 18s. 7d.

The circumstances in which the application was made were as follow:—On 30th June 1890 Norman Macpherson, LL.D., advocate, Edinburgh, and Miss Isabella Macpherson, Miss Margaret Macpherson, and Miss Anna Maria Macpherson, proprietors *pro indiviso* of the Island of Eigg, brought an action against the said Donald Macleod for payment of £52, 10s., with interest thereon from the date of citation until payment.

The pursuers averred—"(Cond. 1) The pursuers are proprietors *pro indiviso* of the Island of Eigg, . . . and the Scuir Inn, of which the defender is tenant, is situated in the Island of Eigg, and forms part of the pursuers' said property." "(Cond. 2) Upwards of fifty years ago the house now known as the Scuir Inn was the house of the tenant of the farm of Galmisdale. That farm having fallen out of lease some forty or fifty years ago, it was divided among crofters, and the farmhouse was let to defender's father, the late Allan Macleod, as an inn, in place of the small cottage near the seashore then occupied by him as such. There was also at same time let to Allan Macleod a croft in Galmisdale, which is now in possession of the defender. The two subjects were let distinctly, and separate rents paid therefor. Subsequently the pursuers prohibited the said Allan Macleod from selling spirituous liquors in the inn, and in respect thereof let him occupy the house rent free. When in 1878 it was found that the inn had fallen into disrepair, and become insufficient for the requirements of the island, the pursuers at a very considerable outlay improved the house and put it into thorough repair, and agreed to give the said Allan Macleod and defender a lease thereof for three years at £15 per annum. . . . No formal lease was prepared, but the arrangement come to under the letter and minute was acted on, the proprietors repairing and adding to the house, and Allan Macleod and the defender regularly paying the agreed-on rent of £15 per annum, and that over and above and distinct from the rent of the croft in Galmisdale, £14 per annum. The explanation in answer is denied." In Cond. 6 they averred that the defender had paid no rent for said inn since Martinmas 1886, while he had paid regularly the rent of his croft in Galmisdale, and that he was accordingly due the sum sued for, being the seven half-yearly rents due for the inn from Whitsunday 1887 to Whitsunday 1890.

The defender in answer averred—"Admitted that upwards of fifty years ago the house called by the pursuers the Scuir Inn was the dwelling-house of the tenant of the farm of Galmisdale; that the said farm was then divided into crofts, and that the defender's father became a tenant of one of these. *Quoad ultra* denied. Explained that the defender's father having leased the largest croft, there was let along with it to him the said dwelling-house, which was thereafter occupied by him and subsequently by the defender. The pursuers made certain improvements on the dwelling-house about the year 1878, on the footing of a verbal agreement with the defender whereby he undertook to pay 5 per cent. on the cost after the repairs were executed. The pursuers represented that they had expended £300, and charged the defender £15 per annum of additional rent for said croft and dwelling-house. The defender and his father always complained against that increase as excessive. Admitted that the defender has continued in the occupancy of his croft and dwelling-