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

as well as of lands, but it by no means follows that all the incidents of an agricultural lease will apply to a mineral lease. Now, no case has been referred to where it has ever been held that the doctrine of sterility applies to a lease of minerals, and all the cases quoted are merely cases where the subject-matter of the lease was non-existent, or had become exhausted. Here the lease shows that the parties had provided their own remedy for what has happened, and that is, that there are periodical breaks which the tenant may take advantage of if he is so disposed.

Lord Cairns—I agree with your Lordships. This case began on the view that the tenant was induced by misrepresentation to enter into the lease, but that ground entirely broke down. Then he sought to get rid of the lease on the ground of sterility, but that doctrine is obviously inapplicable. In fact, it is not quite correct to speak of a lease of minerals; it is nothing but a sale out and out of the part of the soil occupied by the minerals, and an authority to the tenant to go on the lands and take those minerals away. This is a very different thing from the ordinary mode of the cultivation of the surface of the soil by means of crops. The doctrine of the civil law about sterility extended only to cases where the land, the subject of the lease, was non-existent; it did not apply to the operations of modern agriculture, which are spread over a large surface, and often produce profits only after a great lapse of years. There is therefore no such doctrine as the appellant relies on applicable to this case; and though the Court below relied chiefly on the ground that the parties had contracted themselves out of the law, I prefer to rest my judgment on the ground that there is no common law on which the appellant could get rid of this lease.

Affirmed, with costs.

Agents for Appellant—Lindsay & Paterson, W.S.
Agents for Respondents—Hamilton, Kinnear, & Beatson, W.S.

Tuesday, February 18.

UNION BANK *v.* M'MURRAY.

(*Ante*, vol. vii, p. 596.)

Agreement—Bankruptcy.

M. & Co. being involved in the affairs of a bankrupt firm, purchased for £45,000 certain subjects from the trustee of the firm. To enable them to do so, they borrowed this sum from the Union Bank, and, by an agreement with the Bank, £7500 of the price was to be paid into the trustee's account for behoof of the personal creditors, and the balance of £37,500, less £2500, into a separate account for behoof of the heritable creditors. Thereafter, D. & Co. agreed to purchase the property from M. & Co. for £47,000, the Bank agreeing to advance this sum to D. & Co., and to credit the sum to M. & Co. in part payment of a large debt due by them to the Bank. *Held* (affirming the judgment of the First Division), that the second agreement had not superseded the first, and that M. & Co. were still indebted to the Bank in the sum of £45,000.

Bill—Principal Debtor—Cautioner—Giving Time.

Circumstances in which *held* (affirming the judgment of the First Division) that a party to a bill was principal debtor in the obligation and not cautioner, and consequently had not been liberated by the fact that time had been given to the other debtor.

There were two questions raised in this case,—(1) Whether these agreements, executed of the same date, were all valid and subsisting deeds; and (2) Whether the defender, a party to a bill, was principal debtor, or only a cautioner.

The circumstances in which these questions arose were as follows:—The defender M'Murray had, in the year 1856, become much involved in the affairs of Messrs Cameron & Co., papermakers. That firm having had their estates sequestrated, the trustee in the sequestration set up to public sale the paper-mill at Springfield, belonging to the Company, with the moveable machinery.

The defender became purchaser at the cost of £45,000. To enable him to pay for this purchase, the pursuers, the Union Bank, agreed to advance to him this sum of £45,000, of which £7500 were to be paid into the trustee's account, as the value of the moveable machinery, for division among the personal creditors; and the balance, of £37,000, less a sum of £2500, the value of certain annuities proposed to be continued on the property, into a separate account for behoof of the heritable creditors.

All this was duly carried out, and a new transaction supervened. Messrs Durham & Sons agreed to purchase the mills from the defender at the advanced price of £47,500, besides agreeing to take on themselves the annuities, estimated at £2500 more,—making in whole a profit to the defender of £5000. The Bank agreed to advance this sum of £47,500 as a loan to Messrs Durham, who were to make repayment by instalments. The sum so advanced was to be credited by the Bank to the defender in part payment of a large debt owing by him in connection with the affairs of Cameron & Co., being a debt wholly separate from that incurred by him in connection with his purchase of the property. This was accordingly done. The defender had this sum of £47,500 put to his credit in the books of the Bank, and a corresponding amount of his liabilities wiped out. The Bank took Messrs Durham as their exclusive debtors in this sum, except for a portion of it amounting to £5000, for which they agreed to take their bill endorsed by the defender, and ultimately took the joint-promissory-note of both. The three agreements concerning (1) the purchase of Springfield by the defender; (2) the resale to Durham; and (3) the arrangement for the settlement of the defender's obligation in connection with Cameron's affairs were executed on the same day, viz., on 11th November 1856; and it was in reference to them that the first question in the case arose.

The second question arose as to the balance of the bill of £5000, granted as above narrated. On this the defender pleaded that he was simply cautioner for Messrs Durham, with the fact of his being so fully known to the Bank; and that the Bank having given time to Messrs Durham for payment of this bill without his (the defender's) consent, had thereby liberated him from his obligation.

The Lord Ordinary found that the three agreements were valid and subsisting deeds, and that