contract made which Mr Robertson had no power to revoke. It was distinctly remuneratory, because Mr Robertson got in return for his surrender of his right to dispose of his estate as he pleased the liferent of his wife's estate, which was considerable—I have mentioned it was over £10,000—and Mr Robertson enjoyed that from his wife's death in 1884—a period of 16 or 17 years. It cannot be said that the contract he entered into was one for which he did not receive valuable consideration, and so far as remuneration or consideration enters into the question of whether it is a contract or a testament, everything in this case points to the fact that it was contract and not pure testament.

If that view of the mutual trust-disposition and settlement is right, there is an end of the question, because wherever we find that the parties have contracted that they shall join their estates and destine them in a certain way, and do that for special benefits conferred each upon the other, and declare that this destination is not to be revocable by the one without the consent of the other, then it is irrevocable and must have effect.

LORD MONCREIFF—I am quite of the same opinion, and I have very little to add. I think this deed is contractual. It undoubtedly is contractual to certain effects, and I think it is contractual to all effects. There are all the elements which point to a contract. In the first place, it is distinctly remunerative; the wife contributed £10,000. That is an important element in such cases, because it prevents the idea of provisions made for the wife being of the nature of a donation. The wife contributed £10,000, and in point of fact the husband enjoyed the liferent of this £10,000 for fourteen years; and it is after the expiry of that time that he desires to revoke the deed, and to refuse to give the equivalent for which, I assume, the wife stipulated.

Then when we come to consider for whose benefit the spouses contributed, we find that they are the children of the marriage, and that is a matter of some importance in cases of this kind. Then there is the clause of revocation to which Lord Trayner has drawn attention, in which it is in the most pointed terms provided that while power to revoke jointly is reserved, there shall be no power after the death of the one of the parties to alter "these presents in whole or in part, it being hereby declared that should these presents stand unrevoked at the death of the first deceaser of us, then it shall not be competent to the survivor of us to alter or recal them in any way." Now, no doubt such a clause does not receive effect where plainly the deed is not of a contractual character, but I think that the existence of a clause of this kind is of considerable importance in judging whether the parties intended and understood the deed to be of the nature of a contract. On the whole matter I am of opinion that we should hold that Mr Robertson had no power to revoke this deed.

LORD JUSTICE-CLERK—I am of the same opinion. I think there are in this case all the elements which go to make up what must be held to be a contractual arrangement. Both parties contribute in a full measure to provide the fund out of which each of them was to benefit in the event of the predecease of the other, when they both agree that certain provisions shall be made for other people. It is essentially a family arrangement, and the wife made a large contribution, which, as Lord Trayner has pointed out, was long enjoyed by the husband, an incident which was in contemplation by the parties. I think the whole document constitutes a contract between the parties, and that each of them intended that after his or her decease it should not be altered. And then when we come to look at the clause which states their intention, it is not only consistent with that idea, but it is expressed in the most emphatic and complete terms for the purpose of indicating that it is not to be interfered with after the death of either of them. On the whole matter I have come to the conclusion that the questions should be answered as your Lordships have suggested.

LORD YOUNG was absent.

The Court answered the first question in the negative and the second in the affirmative.

Counsel for the First, Second, and Third Parties—H. Johnston, Q.C.—Lyon Mackenzie. Agents—Fletcher & Morton, W.S.

Counsel for the Fourth, Fifth, and Sixth Parties—Guthrie, Q.C.—Chree. Agent—William Fletcher, W.S.

Friday, June 29.

SECOND DIVISION.

[Sheriff of Chancery.

LADY HOWARD DE WALDEN, PETITIONER.

Title to Heritage—Completion of Title—Free Liferent Annuity Granted by Deceased Heir of Entail not Infeft—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94) *secs.* 3 *and* 10—"*Lands*"—"*Estate in Lands*"—*Entail—Provision to Widow—Entail Act* 1824 (5 *Geo. IV. c.* 87) (*Aberdeen Act*) *sec.* 1—*Right in Security—Heritable Security.*

An heir of entail, neither infeft nor served, and having only a personal right to the entailed lands, died after he had disponed to his wife a free liferent annuity during all the days of her life after his decease furth of the entailed lands, under the powers conferred on him by section 1 of the Aberdeen Act.

Held that it was not competent for the widow to complete her title to the liferent annuity in the manner provided by section 10 of the Conveyancing (Scotland) Act 1874, on the ground (1)

that section 10 only applies to "lands" and not to an "estate in land" within the meaning of these terms as defined in section 3 of the Conveyancing (Scotland) Act 1874, and that the widow's right was not a right to "lands" but only to an "estate in land;" and (2) *per* Lord Trayner, also on the ground that the 10th section only provides a method of making up a title to land which has been feudally vested in some-one, and the right in which the widow desired to be infeft had never been feudalised.

By section 10 of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) it is provided—"A title of an heir to, or disponee of, a proprietor of any lands who was neither infeft nor served, but vested only with a personal right to such lands by virtue of this Act, or of any person acquiring right from such heir or disponee, may be made up in like manner as if the person making up a title had held a disposition from the proprietor last infeft in the lands in favour of his immediate successor therein, and a disposition and assignation from each heir or disponee, if any, intervening between such immediate successor and the person so making up a title in favour of his immediate successor therein; and such title may be made up in manner following, viz.: The heir or disponee or other successor making up such title shall present to the Sheriff of Chancery, or to the sheriff of the county where the lands are situated, a petition which may embrace several separate lands or estates, and may be in the form of Schedule E, hereto annexed, or as nearly in that form as the circumstances in each particular case will permit, setting forth the name of the proprietor last infeft, a description of the lands, or a valid reference thereto, and the names and, so far as known, the designations of every proprietor having only a personal right therein, whether by succession, bequest, gift, or conveyance, who has intervened between the proprietor last infeft and the petitioner, and also setting forth the petitioner's own right to the said lands; and on the decree pronounced on said petition finding the facts therein set forth proved, and that the petitioner is entitled to be infeft in the said lands, being extracted in one or several extracts, and on such extract decree or decrees as the case may be being recorded in the appropriate register of sasines, the petitioner shall be held to be duly infeft in the said lands contained in the extract or extracts so recorded."

By section 3 of said Act it is enacted—"The following words and expressions in this Act shall have the several meanings hereby assigned to them, that is to say—'land' or 'lands' shall include all subjects of heritable property which are or may be held of a superior according to feudal tenure, or which prior to the commencement of this Act have been or might have been held by burgage tenure, or by tenure of booking: 'estate in land' shall mean any interest in land, whether in fee, liferent, or security, and whether beneficial or in trust, or any real burden on land, and shall include an estate of superiority."

Schedule E of said Act gives a form of petition for completing a title to "lands" where a proprietor or proprietors having only a personal right have intervened between the proprietor last infeft and the petitioner.

In a petition presented to the Sheriff of Chancery by the Right Honourable Blanche Baroness Howard de Walden, widow of the Right Honourable Frederick George Ellis Scott Baron Howard de Walden, the petitioner stated that the late Right Honourable Lucy Joan Scott Baroness Howard de Walden died on 29th July 1899 last vest and seized in the entailed lands, lordship, and barony of Kilmarnock and the other entailed lands and subjects in the counties of Ayr and Fife described in the petition; that at her death the petitioner's late husband, the said Frederick George Ellis Scott Baron Howard de Walden, succeeded to the said entailed lands as the eldest son and nearest lawful heir of tailzie and provision of the said Lucy Joan Scott Baroness Howard de Walden; that her said husband died on 3rd November 1899 unserved and uninfeft, and having only a personal right as heir of tailzie and provision foresaid to the said entailed lands, &c.; that by bond of annuity dated 12th October, and registered in the Books of Council and Session 7th December 1899, granted by her said husband as heir of entail in possession of said entailed lands in favour of the petitioner, he, in terms of section 1 of the Entail Act 1824 (5 Geo. IV. c. 87) (the Aberdeen Act), provided and disponed to the petitioner during all the days of her life after his decease, in case she should survive him, a free liferent annuity or jointure of £2000, exempt from all burdens and deductions whatsoever, furth of the said entailed lands, or any part thereof, and the readiest rents, profits, and duties of the same, and that by the said bond of annuity the said Baron Howard de Walden assigned the writs in so far as necessary to make effectual the right thereby granted, and assigned the rents and feu-duties so far as necessary to satisfy the said annuity, and bound and obliged the succeeding heirs of entail to make payment of the said annuity to the petitioner.

The petitioner prayed the Court to find the facts proved, and that she was entitled to procure herself infeft in terms of the Conveyancing (Scotland) Act 1874 in the foresaid liferent annuity or jointure of £2000.

After proof the Sheriff (CHISHOLM) on 3rd May 1900 pronounced the following interlocutor:—"Finds the facts set forth in the petition proved, but further finds that the free liferent annuity or jointure specified in the petition, and to which title is sought to be completed, is not comprehended under the expression 'lands' used in the tenth section of 'The Conveyancing (Scotland) Act 1874,' as interpreted by section third thereof: Finds the present petition incompetent under said section tenth of the said Act: Therefore refuses the prayer of the petition, and decerns."

Note.—"This petition, which is one for

authority to complete title (under section 10 of the Conveyancing Act 1874) to a liferent annuity of £2000 furth of certain lands, is the first application of the kind which has been presented to this Court. I had the advantage of hearing an able and learned argument on behalf of the petitioner, but after consideration I have come to be of opinion that it is not competent to grant the authority craved,

"The interpretation section (section 3) of the statute defines 'land' or 'lands,' and also 'estate in land.' The right which is the subject of the present petition undoubtedly falls under the latter category. It was maintained that it also comes within the definition of 'lands' in the interpretation section. It must be noted that, in defining 'lands' the words 'shall *include*' are used (as distinguished from 'shall *mean*,' which are the words employed in regard to 'estate in land'), and that therefore the enumeration of 'lands' there given is not necessarily exhaustive. Nevertheless, after considering the authorities to which I was referred in support of the contention, I am satisfied that the right in question is not of the nature included under the term 'lands.'

"When one turns to section 10, one finds that the term 'estate in land' (which is used elsewhere in the statute, *e.g.*, in section 9) does not occur there. Nor is it to be found in the relative Schedule E. Throughout the tenth section and the schedule the term used is 'lands' only. Not only is this so, but the arrangement and phraseology of both section and schedule leave no doubt in my mind that it is not possible to bring within the provisions of the section such a right as the petitioner's.

"I regret this result, as the position of the petitioner in the matter is one of some hardship, because it seems open to doubt whether there is any other mode of completing her title."

The petitioner appealed, and argued—Under section 9 of the Conveyancing Act of 1874, the right to the entailed estate vested in the petitioner's husband. He had a good right and title to grant the bond of annuity —*M'Adam* v. *M'Adam*, July 15, 1879, 6 R. 1256. The petitioner stood in the position of a disponee in terms of section 10 of the 1874 Act. The bond of annuity was a disposition, the lands being disponed in security, and under the old forms of conveyancing such a deed would have contained a *reddendo* and *tenendas*. Section 10 was a provision for the purpose of enabling an heir or a disponee of a person vested with a right under section 9 to make up his title, and the Sheriff had adopted too strict a reading of a section which provided machinery for making up a title. Schedule E merely provided a style on the lines of which the petition could be framed, and the phraseology of the example given was of no importance.

At advising—

LORD JUSTICE-CLERK — The Sheriff of Chancery has expressed his regret that he has been unable to give effect to the prayer of the petition, and it is with similar regret that I find myself unable to hold that his view of the question he had to decide is unsound. I cannot hold that under the term "lands" in the 10th section of the Conveyancing Act of 1874 a "free liferent annuity or jointure," such as the petitioner here has right to, is included. The petitioner here admittedly has a right which falls within the definition of "estate in land." But unfortunately for her the Act defines "land" and "estate in land." Now, section 10 and its schedule refers to "lands" only, and not to "estate in land," and I must hold that such a right as the petitioner possesses is not within that section. I am therefore—although with regret — compelled to move your Lordships to adhere to the Sheriff's judgment.

LORD TRAYNER—I agree with the Sheriff. It appears to me that the petitioner cannot obtain infeftment in her liferent annuity in the manner provided by the 10th section of the Act of 1874. What is there provided is a mode of making up a title to land which has been feudally vested in some-one, but transmitted by one or more subsequent proprietors who had held on a personal title. The right in which the petitioner now desires to be infeft has never been feudalised. Besides, the petitioner seeks infeftment not in "lands" but in an "estate in land," to which the section founded on does not apply. The statute distinguishes between "land" and "estate in land," and the terms of the section founded on appear to confine its application to rights in "land" alone.

LORD MONCREIFF—I am satisfied, on an examination of the 10th section of the Conveyancing Act 1874 and relative schedule that the Sheriff is right in holding that the present application is not warranted by the terms of that section. What the petitioner desires to do under this application is to utilise the procedure authorised by the 10th section in order to complete a title to a liferent annuity or jointure of £2000 which was granted in her favour by her husband Frederick George Ellis Scott, Baron Howard de Walden, who succeeded to the entailed lands in question, but died unserved and uninfeft and having only a personal right as heir of entail to the said lands.

Now, in the Conveyancing Act of 1874 the words "lands" and "estate in land" are separately defined in the interpretation clause. While an "estate in land" is interpreted as meaning "any interest in land whether in fee, liferent, or security, and whether beneficial or in trust, or any real burden on land," the words "land" or "lands" are interpreted as including "all subjects of heritable property which are or may be held of a superior according to feudal tenure."

Now, the 10th section deals only with "lands," and not with "an estate in land," and it seems to me that to judge from its whole structure it relates solely to the completion of the title of an heir or disponee to

the lands themselves, and not to heritable securities or real burdens.

The appropriate Schedule E confirms this view, because while it provides for a number of alternative cases, I find in it no words which indicate that one of the subjects to which it was contemplated that a title should be made up under it was a burden on lands, and not the lands themselves. I should have expected that if the 10th section and Schedule E were intended to extend to the completion of title to a heritable security, this would have been expressly stated, or at least that instead of the word "lands" being used, the words "estate in land" would have been inserted, in which case the interpretation of these words might have extended the scope of the provision.

There is no doubt that in virtue of the 9th section of the Act the bond of annuity granted to the petitioner by her late husband is effectual in a question with succeeding heirs of entail, and there are undoubtedly means, though perhaps not so direct as that provided by the 10th section of the Act of 1874 for making her right effectual in competition with other creditors.

I am therefore of opinion that the Sheriff's interlocutor should be affirmed.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Petitioner — Chree. Agents—J. C. Brodie & Sons, W.S.

Friday, June 29.

SECOND DIVISION.

[Sheriff of Roxburgh, Berwick, & Selkirk.

LUPTON & COMPANY *v.* SCHULZE AND COMPANY.

(et e contra.)

Sale—Sale of Moveables—Disconformity to Contract—Rejection—Right to Retain Goods and Claim Damages for Breach of Contract in Extinction of Price—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (*sub-sec.* 2), *and* 53.

Where a buyer of goods intimated rejection of them as disconform to contract, but although requested to do so refused to return them to the seller, and retained them, not for the purpose of accepting and using them as so far in fulfilment of the contract, but for the purpose of putting pressure upon the seller to supply other goods or to acknowledge a claim of damages for breach of contract—*Held*, in an action by the sellers for the contract price—(1) that the buyers, in consequence of the course which they had adopted, were not now entitled to claim damages as for breach of contract in extinction or diminution of the price under the Sale of Goods Act 1893; and (2) that having refused to return the goods they were liable for the full contract price.

The Sale of Goods Act 1893 enacts as follows:—Sec. 11, sub-sec. 2—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Sec. 53—(1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may (*a*) set up against the seller the breach of warranty in diminution or extinction of the price, or (*b*) maintain an action against the seller for damages for the breach of warranty. (5) "Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act."

In May 1899 William Schulze & Company, woollen merchants, Galashiels, ordered from William Lupton & Company, woollen manufacturers, Leeds, two pieces of tweed cloth. In response to this order Lupton and Company sent two pieces of cloth with which Schulze & Company were not satisfied, and they were accordingly returned to Lupton & Company to be replaced. Thereafter Schulze & Company ordered another piece of cloth from Lupton & Company. On 21st June Lupton & Company sent to Schulze & Company three pieces of cloth, under numbers 734, 738, and 739 respectively. 734 was sent in fulfilment of the second order, and 738 and 739 were sent in fulfilment of the original order. Schulze & Company accepted 734 as being satisfactory and conform to contract. With regard to 738 and 739 they were not satisfied, and in a letter of date 30th June they stated this to Lupton & Company. On 3rd July Schulze & Company wrote to Lupton & Company that these two pieces were "faulty throughout and totally useless." Lupton & Company replied on 4th July that they could send none more perfect. On 5th July Schulze & Company wrote, "Re-make two good pieces;" and on 6th July Lupton & Company replied that the two pieces sent were as perfect as they could supply. Meantime on 27th June Schulze & Company had ordered two other pieces of cloth, and after some demur, owing to the difficulties which had arisen as to the execution of the previous order, Lupton & Company in fulfilment of this third order on 6th July sent to Schulze & Company two pieces of cloth under numbers 732 and 736. On receipt of these pieces Schulze & Company wrote on 8th July that 736 was "all right," but that 732 was shaded from end to end. In the same letter they wrote, "Re-make 732, 738, and