In my opinion the appeal should be allowed with costs.

LORD KINNEAR concurred.

Their Lordships sustained the appeal and restored the judgment of the Sheriff-Substitute.

Counsel for Appellant—Douglas Knocker—Duffes. Agents—T. M. Pole, Solicitor, Edinburgh—John Cuthbert, London.

Counsel for Respondent—Moncrieff, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C., Edinburgh—R. S. Taylor, Son, & Humbert, London.

COURT OF SESSION.

Friday, February 9.

FIRST DIVISION.

[Lord Hunter, Ordinary.

PENDER-SMALL *v.* KINLOCH'S TRUSTEES.

Contract—Sale—Property—Sale of Heritage—Error—One Contract or Two—Remedy.

An annuity of £50 payable to the Free Church of Scotland "so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland" was constituted a real burden upon the lands of B by heritable bond of annuity. While the Churches' litigation was *sub judice* the lands were sold. The price was £7000, but of that only £5333, 6s. 8d. was to be paid in cash. The balance, which was the capitalised value of the annuity, was to be liquidated by the buyer taking the lands under burden of the annuity. Thereafter the Churches' case was decided, and as a result of the decision there ceased to be a church in Glenisla parish in connection with the Free Church of Scotland. In an action brought against the buyer, founding on mutual error, and concluding for decree that the annuity had lapsed, and that the buyer was liable in repayment of the balance of the £7000, *held* (*rev.* Lord Hunter) that (1) the contract was one and indivisible, and the arrangement as to the annuity was not a separate and severable contract; (2) the remedy sought was inappropriate, (*per* the Lord President, Lord Johnston, and Lord Mackenzie) because it amounted to re-formation of the contract, not recission thereof; (*per* Lord Skerrington), because it amounted to a reduction in part of an indivisible contract; (3) (*per* the Lord President and Lord Johnston) there was no essential error, the contract being one in which each party took the risk of the decision in the Churches' case; (4) (*per* Lord Johnston) the action was incompetent in respect that *esto* the pursuer could succeed, the defender's title to the property could not be effectively cleared of the burden as the creditors therein were not parties to the action.

John Stewart Menzies Pender-Small of Dirnanean, with consent and concurrence of James Stewart Robertson and another, testamentary trustees of the late James Small of Dirnanean, *pursuer*, brought an action against (1) William Joseph Starkey Barber-Starkey of Aldenham Park, Shropshire, and another, marriage-contract trustees of Sir John and Lady Kinloch, *defenders*, and (2), for any interest they might have, the Free Church of Scotland and others, and also (3), for any interest they might have, the General Trustees of the United Free Church of Scotland, concluding for decree that "(first) it ought and should be found and declared by decree of the Lords of our Council and Session that the real burden created on all and whole these four-sixth parts of the lands of Bellaty, one of which is commonly called Wester Neids, . . . as also all and whole that other sixth part of the lands of Bellaty . . . of old within the barony of Glenisla and now within the barony of Lundie, parish of Glenisla and sheriffdom of Forfar, by a heritable bond of annuity by the trustees of the late Thomas Rattray, dated 10th May and recorded in the General Register of Sasines 19th December 1866, for payment of the sum of £50 sterling yearly on the 15th day of March in each year to the treasurer for the time to the association in the parish of Glenisla in connection with the congregation of the Free Church of Scotland in Glenisla, to be by the said treasurer paid to John MacDonald, Esquire, general treasurer of the Free Church of Scotland, or to the general treasurer of the Free Church of Scotland for the time of the Sustentation Committee of the General Assembly of the Free Church of Scotland, so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland, had already lapsed as at 11th November 1903, and has lapsed and ceased to be effectual or exigible to any extent in all time coming; and (second) that the said defenders William Joseph Starkey Barber-Starkey and Archibald Hamilton Donald, as trustees foresaid, ought and should be found liable, by decree of our said Lords, to pay to the pursuer the sum of £1666, 13s. 4d. sterling, with the legal interest thereon from 11th November 1903 until payment."

The *facts* of the case were—The late Thomas Rattray, proprietor of the lands of Bellaty in the county of Forfar, died in 1856, leaving a codicil to his trust-disposition and settlement in the following terms:—"I specially declare that the annuity of £50 bequeathed to the Sustentation Fund of the Free Church of Scotland in Glenisla shall not be postponed, but that payment thereof shall be made by my trustees to the treasurer for the time to the association in the parish of Glenisla in connection with the congregation of the Free Church of Scotland in Glenisla, to be by the said treasurer paid to John MacDonald, Esquire, general treasurer to the Free Church of Scotland, or to the general treasurer of the Free Church of Scotland for the time of the Sustentation Committee of the General Assembly of the Free Church of Scotland; and I declare that

payment of said annuity shall commence on the first 15th day of March which shall happen after my death, and shall continue to be paid yearly on the 15th day of March so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland. . . . The said annuities shall be created real burdens on a portion of my heritable estate sufficient to secure payment thereof for the objects for which they are intended, the title to be taken to the said real burdens in the name of any person or persons whom my trustees shall select, and I direct the title to be taken as soon as may be convenient to my trustees after my death." His trustees, in fulfilment of the provisions of the codicil above quoted, executed a heritable bond of annuity, dated 10th May and recorded 19th December 1866, over all and whole the lands of Bellaty in favour of the Earl of Dalhousie and others, the general trustees of the Free Church of Scotland, binding themselves and Patrick William Small and his successors in the lands to make payment "of the said annuity of £50 yearly on the 15th day of March in each year so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland." Thomas Rattray further bequeathed the residue of his estate, including the lands of Bellaty, to Patrick William Small. To him the trustees conveyed the said lands under burden of the bond of annuity by disposition dated 26th February and registered 14th March 1867. Patrick William Small died on 25th September 1870, and was succeeded by James Small, who died in 1900, leaving a trust-disposition and settlement under which James Small-Pender succeeded to his estates, including the lands of Bellaty. The trust-disposition and settlement empowered the trustees therein appointed to sell the heritable property of the said James Small, and by minute of sale dated 3rd and 7th November 1903 the trustees sold the lands of Bellaty under burden of the annuity to the defenders.

The *minute of sale* provided — "*First.* The price shall be £7000 sterling, payable by the [defenders] at Martinmas (11th November) 1903, which shall be the term of their entry to the subjects, with interest at 5 per cent. per annum from the said date of entry till paid, which price shall include all trees, shrubs, woods, and plants at present growing on the said farms and lands hereby sold, and also all fixtures, fittings, and other property belonging to the [trustees] upon the farms, if any, hereby agreed to be sold as aforesaid. . . . And the [trustees] shall purge the records of all incumbrances affecting or which may be found to affect the said subjects or the successive proprietors thereof excepting a heritable bond of annuity for the sum of £50 per annum granted by the trustees of the late Thomas Rattray in favour of the trustees of the Free Church of Scotland for behoof of the Sustentation Fund of the Free Church in Glenisla, dated 10th May and recorded in the General Register of Sasines 19th December both in the year 1866, which annuity capitalised at 33⅓ year's purchase shall be imputed to account and form part of the said purchase price of £7000."

The *disposition* in implement of the minute of sale set forth—"We . . . the trustees of the said deceased James Small . . . and as such trustees heritable proprietors of the lands subjects and others hereinafter disponed, in consideration of the sum of Seven thousand pounds sterling as the agreed on price of the said lands subjects and others sold by us to . . . the [defenders]. . . . of which price the sum of Five thousand three hundred and thirty-three pounds six shillings and eight pence has been instantly paid to us as trustees foresaid by the [defenders] . . . whereof we as trustees foresaid hereby acknowledge the receipt and discharge them, and the balance of the said price, being One thousand six hundred and sixty-six pounds thirteen shillings and four pence, is the capitalised value of the annuity aftermentioned affecting the portion of said subjects hereinafter disponed in the first place (primo), which annuity is to remain a burden on the said subjects, do hereby sell and dispone to and in favour of the said . . . trustees and trustee foresaid and the assignees whomsoever of the said trustees or trustee heritably and iredeemably All and Whole . . . the lands of Bellaty . . . And we as trustees foresaid grant warrandice from our own facts and deeds only, and we bind the trust estate under our charge in absolute warrandice but excepting therefrom (First) a bond of annuity affecting the subjects hereinbefore disponed [being the bond of annuity above referred to]. . . ."

James Small Pender died on 4th January 1914 without having received a conveyance of the subjects from James Small's trustees, but leaving a trust-disposition and settlement under which the pursuer succeeded to him. James Small's trustees made up a title to the heritable property and conveyed it so far as unsold to the pursuer.

The pursuer *averred*—"(Cond. 14) On 30th October 1900 the majority of the members of the General Assembly of the Free Church entered into an incorporating union with the United Presbyterian Church under the name of the United Free Church of Scotland. A minority of the members declined to enter into the said union, and on 14th December 1900 a summons at their instance was signeted by which declarator was sought that the minority legally represented the Free Church of Scotland as it existed prior to 30th October 1900, and as such were entitled to all the property held by or for behoof of that Church at that date. The summons was called before Lord Low, who after sundry procedure decided on 9th August 1901 that the pursuers were not the 'Free Church of Scotland,' and therefore dismissed the action. This judgment was appealed to the Second Division, who on 4th July 1902 granted absolvitor to the defenders the United Free Church of Scotland. Thereafter the case was appealed to the House of Lords, who on 1st August 1904 decided that the pursuers in the case lawfully represented the Free Church of Scotland as it existed prior to 30th October 1900

and so were entitled to all property held by or for behoof of that Church at that date. (Cond. 15) The minority of the members of the Free Church of Scotland was so small that it could not adequately administer the property which it took under this judgment, and by the Churches (Scotland) Act 1905 a Commission was set up for the purpose of allocating the property belonging to the old Free Church as at 30th October 1900 between those who had entered the union and those who had not done so. The church buildings in Glenisla were all along occupied by the supporters of the union—the minority being so far as is known unrepresented in the district—and on 14th July 1908 the Commissioners issued an order formally allocating the church buildings in Glenisla to the trustees for behoof of the United Free Church of Scotland congregation there. (Cond. 16) On 9th December 1909 the Commissioners also made an allocation of the funds and assets held by the general trustees, together with the whole revenue accrued or to accrue thereon, and among the assets conveyed by that order to the United Free Church was the above-mentioned bond of annuity. The order was declared to take effect as from 30th October 1900. . . . (Cond. 18) There was in 1903, the date of the purchase of the said lands of Bellaty, no church in existence in Glenisla parish in connection with the Free Church of Scotland, and there has been no such church in the parish ever since. The said burden or annuity had accordingly then lapsed and has finally lapsed, and the pursuer asks declarator to this effect in the first conclusion of his summons. (Cond. 19) At 11th November 1903 the said real burden or annuity having already lapsed and ceased to exist, the consideration in respect of which the said sum of £1666, 13s. 4d. was retained by the defenders out of the agreed-on price of £7000 did not exist. Both parties to the said agreement, whereby it was arranged that the said sum of £1666, 13s. 4d. should be retained out of the purchase price of the said lands by the defenders in respect of the said burden affecting the lands, were under mutual and essential error. Both parties then believed that the said burden at the date of the purchase was a subsisting and exigible burden affecting the said lands. Since the date of said sale no payment of said annuity has been made. The said balance of the price of £7000, namely, £1666, 13s. 4d., is accordingly now payable by the defenders to the pursuer with interest, and as the defenders first called refuse or delay to pay said sum the pursuer is obliged to sue therefor in terms of the second conclusion of the summons."

The pursuer *pleaded, inter alia*—"1. There being at 11th November 1903 no church in Glenisla parish in connection with the Free Church of Scotland, and there having been no such church ever since, the said real burden had then already lapsed and has finally lapsed, and the pursuer is entitled to decree in terms of the first conclusion of the summons. 2. The said sum of £1666, 13s. 4d. having been retained by the defenders as part of the agreed-on price for the lands of Bellaty in respect of the supposed burden upon part of the said lands to pay the said annuity, and said annuity having lapsed prior to the purchase of the said lands by the defenders, and being then no longer exigible, the pursuer is entitled to decree in terms of the second conclusion of the summons. 3. The agreement condescended on whereby the said sum of £1666, 13s. 4d. was retained by the defenders out of the purchase price of the said lands having been entered into under mutual and essential error the pursuer is entitled to payment of the sum so retained."

The defenders pleaded, *inter alia*—"2. The action being incompetent should be dismissed. 3. The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed."

On 24th February 1916 the Lord Ordinary (HUNTER) sustained the second plea-in-law for the pursuer and granted decree in terms of the first conclusion of the summons, and with regard to the second conclusion found the defenders liable to the pursuers in payment of the sum of £1666, 13s. 4d. with interest thereon at 3 per cent. per annum from 11th November 1903 until payment.

Opinion.—"This is an action brought for recovery of the sum of £1666, 13s. 4d. in somewhat unusual and peculiar circumstances. The pursuer in the action is the party vested in the residue of the estate of the late James Small. The trustees of that gentleman acting under his trust-disposition and settlement consent to the action. In the year 1903 they effected a sale to the defenders of a portion of James Small's estate. The part of the estate sold was sold for the price of £7000, and it was provided with reference to that price that £5000 odd should be paid, and as regards the balance of the price, namely, £1666, 13s. 4d., it was to be retained by the defenders as representing the capitalised value of an annuity of £50 over the estate. The disposition describes the annuity as an annuity which is to remain a burden upon the subjects. The annuity to which reference is made was an annuity granted by a former proprietor of the estate burdening the estate with a sum of £50 a-year in favour of the Free Church of Scotland "so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland." The position of the Free Church and the United Free Church, the litigation between them, and the adjustment of their rights following upon the decision of the House of Lords in 1904, are referred to on record. I need not mention these matters in detail. Suffice it to say that on the statement of these facts I am satisfied now that as at the date when the disposition was granted by the late Mr Small's trustees there was no annuity in existence for the reason that there was not a church in Glenisla in connection with the Free Church of Scotland. Had there been any question of fact with reference to this matter that would have thrown light upon it I should have allowed a proof, but neither party asked a proof, and I do not understand that the defenders

really disputed any of the averments made by the pursuer. The situation therefore is that at the date of the disposition there was no annuity which burdened the estate that was sold. What then are the rights of the parties? The pursuers claim that they should get payment of this sum that was retained by the defenders as part of the purchase price on the ground that it was retained in respect of a consideration that did not exist. The defenders maintain with some force—although neither side in the course of the argument cited any authority, but left me to decide the question upon principles of law to which each side appealed—that the transaction is to be looked at as a whole, and that so looked at what they purchased was an estate for the sum of £5000 odds and an undertaking to pay a burden which appeared upon the record. They maintain that a petitory action is an incompetent form of process under which to recover this sum of £1666, 13s. 4d., and that the remedy, if any, that is open to the pursuers was a reduction, although I think they admitted, as they were bound to admit, that a reduction had very little chance of success in the present instance where the estate had passed into the hands of the defenders and had been possessed for many years by them. I do not think that the defenders' pleas are really sound. No doubt I must look at the transaction as a whole, but then the transaction was a sale for a price of £7000. As regards the portion of this price retained by the defenders for a specific purpose, as it turns out that there was at the time no burden over the estate there appears no reason in law why the pursuers should not recover that part of the price; otherwise the defenders will simply get this estate at a very much less price than they agreed to pay and that although there never was an existing effective annuity over the estate. The situation would be different if the annuity had been in existence for some time, however short, after the transaction and had then terminated. The defenders would then get the benefit of what was to them a good bargain. But I do not think that is the situation here, because both parties contemplated, as shown by the terms of the disposition, that the annuity was valid and in existence at the time. That was a mutual error on the part of both with reference to the retention of the price, and it can be set right now by the defenders paying the part of the price they retained to meet the annuity. I see no technical difficulty in the way of giving effect to this claim, which appears to me to be founded on equitable considerations. The defenders will not really suffer because of their having a defective title. Neither of the Churches concerned makes any claim to this annuity. The defenders have never had to make any payment of the annuity, and the effect of my judgment giving effect to the conclusions of the summons will be to preclude the possibility of either of the Churches laying claim to this annuity.

"In one respect I think the defenders are entitled to consideration, and that is as regards the interest on the sum claimed. The pursuers ask for payment of the principal sum with 5 per cent. interest since 1903. They have been a considerable time making this claim, and although that does not bar their claim I think there should be a modification of what is looked upon as the legal interest of 5 per cent. In a case in the House of Lords where there had been considerable delay a rate of 3 per cent. was sanctioned, and I think in the present instance that rate would be a fair rate to allow. I shall therefore give decree for the sum concluded for with interest at the rate of 3 per cent. from 1903.

"In the special circumstances of this case I shall find no expenses due to or by either party."

The defenders reclaimed, and argued—The action was laid upon mutual error but there was no relevant averment of error. There was no error as to the subject-matter or the price; both parties knew the subjects sold were subject to the bond, and it was expressly excluded from the warrandice clause; neither party was in error as to the capitalised value of the annuity. Further, both parties knew at the date of the sale that the question between the Churches was *sub judice*, and they took the risk of the decision being one way or another. An error in fact was impossible, for the fact only became known after the decision in the Churches' case. The pursuer's estimate of the probabilities of which he took the risk had not turned out as he expected. But that was not an error which in law could give him the remedy he sought—*Boyd & Forrest* v. *Glasgow and South-Western Railway*, 1915 S.C. (H.L.) 20, 52 S.L.R. 295; *Izzat-un-Nissa Begam* v. *Kunwar Pertab Singh*, L.R., 1909, 36 Indian Appeals 203; *Soper* v. *Arnold*, 1889, 14 A.C. 429. There were not two separate bargains. The whole was one and indivisible; the price paid was £7000 minus the annuity, and the reference to the annuity in the consideration clause was solely to satisfy the requirements of the statutory laws. Like the bond, the feu-rights and leases were excluded from the warrandice clause, and if a feu-right or a lease turned out to be invalid the whole transaction could not be opened up. Each party took the risk of the result of the Churches' litigation and of what might follow upon that, and neither knew what would happen. The defenders were not free from risk, and it was even yet impossible to say what may happen. There might again be a Free Church at Glenisla, and in that case the defenders' liability might be revived. *Free Church of Scotland* v. *Macknight's Trustees*, 1913 S.C. 36, 50 S.L.R. 55, was referred to. The remedy sought was incompetent. The only competent remedy, if it were possible, was recission of the contract, but what the pursuer sought was reformation of the contract, for he sought to recover part of the price without reduction of the contract. But recission of the contract was impossible for restitution was impossible. The defenders stipulated to get £1666, 13s. 4d. at 3 per cent. in perpetuity. They could at the date of the contract have

got that otherwise than from the pursuer but they could not do so now for the current rate of interest was 5 per cent. In any event, if the pursuer succeeded the defenders' property must be effectively disburdened, and that could not be done in an action in which the creditors in the annuity had not appeared.

Argued for the pursuer (respondent)—Reformation of the contract was admittedly incompetent, but there were two separable bargains, one was the sale of the lands for £7000, the other was superimposed upon the former and was the agreement as to the annuity. The latter was void from essential error—*Stewart's Trustees* v. *Hart*, 1875, 3 R. 192, 13 S.L.R. 105. The error consisted in the fact that both parties believed that in 1903 there was a congregation of the Free Church of Scotland in Glenisla whereas as a matter of fact there had been no such congregation since the union in 1900, for that was what was declared by the House of Lords in 1903. The fact was that the parties knew of the dispute and considered it was irrelevant for they chose a particular annuitant and no such annuitant existed. There was always an implied condition *non subesse*. Even if there might again be a Free Church in Glenisla the annuity would not revive, for it had ceased to exist in 1900—*Bannerman* v. *Bannerman's Trustees*, 1896, 23 R. 959, 33 S.L.R. 695. The words "so long as there shall be" meant during the existence of what then existed, and were not equivalent to "whenever there may be from time to time." Had that been intended it would have been expressed.

At advising—

LORD PRESIDENT—The defenders here are proprietors of the lands of Bellaty, which they acquired in the year 1903 from the trustees of the late James Small. The disposition in their favour is dated in November of that year. The consideration was £7000 payable in cash so far as £5333, 6s. 8d. was concerned and payable *quoad* the balance in the form of the capitalised value of an annuity which affected part of the subjects. The burden of that annuity was taken over by the buyers. If I have accurately described the consideration money there is an end of this action, because it was frankly conceded by the pursuer that the remedy which he sought here was incompetent unless it could be shown that there are two separate bargains embraced in the disposition—that the bargain relative to the price was separate and separable; whereas on the face of the disposition it clearly appears that it was one and indivisible.

The pursuer in the action is now vested in the residue of the estate of the late James Small, and he alleges that at the date of the disposition the buyer and seller were under the belief that the annuitant was alive, whereas he was dead. And accordingly he asks in this action to have payment of the capitalised value of the annuity, £1666, 13s. 4d. In other words, he seeks to enforce a bargain which the parties themselves never thought of. If there was here, as he alleges, mutual essential error in their entering into the purchase and sale, then the appropriate remedy would be rescission of the contract, and he would be bound to tender payment to the buyer of £5333, 6s. 8d., and on the other hand the buyer would be bound to restore to him the property, burdened or unburdened as the case may be. But he seeks his remedy standing the disposition. In his view the disposition is to remain expressing a valid and binding contract, and he asks the Court to give him decree for payment of a sum which the buyer never undertook to pay. In other words it is a very palpable attempt on the part of the pursuer to invite this Court to make a bargain for him which the parties never dreamt of making.

If we were to enter upon the merits of this controversy I confess that I should have very small difficulty in deciding the question raised, for a close examination of the record has failed to satisfy me that there was the faintest trace of mutual error at the time when this contract was made.

The annuity to which I have referred was one granted by a former proprietor of the estate burdening the estate with a sum of £50 a-year in favour of the Free Church of Scotland "so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland." Now at the date when the disposition was executed there was in point of fact a church in Glenisla parish in connection with the Free Church of Scotland, but no one knew whether or not there would continue to be one. Both parties were fully aware of the facts of the situation. Both parties knew that if the judgment of the Court of Session in the Church case were sustained then there would be a church in Glenisla answering to the description in the deed. Both parties were well aware that the judgment was under appeal. Both parties were well aware that if it were reversed then there would cease to be as from the date of union a church answering this description.

It was an entire fallacy to suppose that the annuitant was dead but that neither party knew of it. Neither party knew that the annuitant was dead. Neither party knew that the annuitant was alive. Both parties knew that it was impossible to tell, until the House of Lords pronounced judgment, whether the annuitant was dead or alive; and accordingly both parties took their chance of the fact, for both were well aware of the contingency on which the annuitant's life or death depended. That the stroke of fortune favoured the buyer does not affect the question. It might, of course, have been the other way. Had the parties intended that, if the judgment was reversed and the annuity consequently ceased to be paid, the £1666, 13s. 4d. should then be paid in hard cash by the buyer to the seller, they would certainly have so contracted. They did not so contract for the best of all possible reasons—they both deliberately took their chance.

On the other questions raised in this case I have formed and offer no opinion, but I

am not to be held as assenting to the view that this annuity has lapsed.

I am for recalling the interlocutor of the Lord Ordinary; sustaining the defender's third plea-in-law; and dismissing the action.

LORD JOHNSTON—The defenders, the marriage-contract trustees of Sir John and Lady Kinloch, in November 1903 acquired from the trustees of James Small, of Dirnanean, the lands of Bellaty, in Glenisla. The price was £7000. It is the method of payment which raises the present question. In point of fact payment was made in cash to the extent of £5333, 6s. 8d. and the balance by the defenders undertaking the burden of an annuity of £50 secured on the land sold, the value of which, capitalised at £1666, 13s. 4d., exhausted the balance of the price. The pursuer John Pender Small, now of Dirnanean, as in right of James Small's trustees, in respect that, as alleged by him, the said annuity has lapsed, has raised this action for recovery of the said capitalised sum of £1666, 13s. 4d., being the balance of the price.

It is necessary to note accurately both the conclusions of the action and certain dates. But I should explain, first, that the annuity in question, secured over the lands of Bellaty, was in the bond of annuity declared to be payable to the General Trustees of the Free Church of Scotland or to the General Treasurer of that Church for the time being, "on the 15th day of March in each year so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland." This annuity had been bequeathed by Thomas Rattray, former owner of the lands, by his trust settlement of 1856, and it was properly secured by his trustees, and made a real burden upon the lands of Bellaty, by the said bond of annuity in 1866, in the terms above quoted.

There is a discrepancy between the terms of Mr Rattray's bequest and the terms of the bond of annuity which has evidently given the pursuer's advisers some trouble, for they have adopted in their summons those of the bequest and not those of the bond by which it was feudalised, and on which it has stood for more than the years of prescription. But I do no more than notice this, as the case admits of being disposed of on other and more general grounds.

The action is directed by Mr Pender-Small, with consent and concurrence of the late James Small's trustees, against (1st) Sir John and Lady Kinloch's trustees, (2nd) the Free Church of Scotland, convened by its Moderator and Principal Clerk of Assembly, *for any interest they may have*, and (3rd) the General Trustees of the United Free Church of Scotland; and the conclusions are that it should be declared "that the real burden created over" the lands of Bellaty in favour of the Free Church of Scotland "had already lapsed as at 11th November 1903, and has lapsed and ceased to be effectual or exigible to any extent in all time coming." This is followed by a petitory conclusion for the above sum of £1666, 13s. 4d., with legal interest from 11th November 1903. The action was raised in November 1915, twelve years after the transaction of sale and purchase had been completed. It has to be observed, then, that it is essential to the pursuer's success that he establish that the annuity in question had already lapsed as at Martinmas 1903, the date of the conveyance, and that it would not aid him to establish merely that it had lapsed at a subsequent date. That was conceded. It is also essential in my opinion that he establish that if the annuity had lapsed at or prior to Martinmas 1903 it had so lapsed once and for all, and so that it could never again become effectual or exigible to any extent in all time coming.

The sale and purchase of Bellaty in 1903 took place during the currency of the litigation between the Free Church and the United Free Church, and it is indeed the circumstances of that litigation which have given rise to the question. The following are the dates to be noted:—The union between the Free Church and the United Presbyterian Church took place on 30th October 1900. Action was raised by the minority of the Free Church challenging its validity and effect on 14th December 1900. Lord Low in the Outer House gave judgment in favour of the United Free Church on 9th August 1901. The Second Division affirmed that judgment on 4th July 1902. An appeal to the House of Lords was taken by the Free Church in ordinary course. The minute of sale was dated 3rd and 7th November 1903. The disposition was dated 6th and 7th and recorded 14th November 1903. The House of Lords reversed the judgment of the Court of Session on 1st August 1904. The Churches (Scotland) Act of 1905 was passed on 11th August 1905. Lord Elgin's Commission, sitting under that Act, are said to have made on 9th December 1909 a deliverance allocating the funds and assets held by the General Trustees of the Free Church, and to have conveyed by that order to the United Free Church, *inter alia*, the above-mentioned bond of annuity, said order to take effect as from 30th October 1900. This allocation was, however, subject always to section 2 (5) of the Churches (Scotland) Act of 1905, under which it was common ground that whatever the effect of the allocation as between the Churches might be it was not to prejudice or affect the rights and liabilities of third parties. Hence it was accepted that the allocation gave no right to the General Trustees of the United Free Church to exact the annuity from the owners of the lands of Bellaty.

With regard to the existence or non-existence of a church in Glenisla in connection with the Free Church of Scotland, the pursuer's averment was that in 1903, at the date of the sale and purchase of the lands of Bellaty, there was no such church in existence in said parish, and that there has been no such church in the parish ever since. As the question at present before us falls to be decided on the relevancy of the record read in the light of the deeds which are referred to therein, this averment must be assumed to be true, though its admission by the defenders is subject to qualification. The conclusion sought to be drawn by the pursuer

is, as I have said, that the annuity secured on Bellaty had lapsed prior to the date of the sale and purchase of Bellaty, and has so lapsed for all time coming. As in a question between the defenders as proprietors of Bellaty and the Free Church of Scotland that question has never been determined, and I do not think that this process is one in which it can competently be determined. Decree in this action would not clear the record of the bond of annuity in a question with the Free Church, and would not render the defenders safe to part with the £1666, 13s. 4d. Nor would it enable them to give an unimpeachable title if they came to sell. This is a further difficulty in the pursuer's way. But again I do not find it necessary to deal with the plea to the pursuer's title to sue, and to the competency of the action which appropriately raises it.

The learned Lord Advocate on behalf of the pursuer perilled his case on the contention that there had been in the sale and purchase two separate contracts, one superimposed upon the other, viz., the first a contract for sale of the lands at a price; the second a contract making acceptance of the liability for the annuity a surrogatum for the payment of a portion of the price, such surrogatum being fixed at the capitalised value of the annuity at thirty-three and one-third years' purchase. He admitted that if the contract were one and inseparable his plea of mutual and essential error would not avail him, for he disclaims reducing the contract as a whole. What he seeks to do is to separate the contract of sale into two contracts, so that he can stand on the alleged primary contract of sale and enforce it, while at the same time getting rid of the alleged superimposed contract regarding the annuity on the ground of mutual and essential error. He is indeed forced to this attitude, for if the contract is one and inseparable he must elect to reduce it as a whole, which, if he could do so, would apparently not suit his client; or to stand by it as a whole, for anything else would mean asking this Court to re-form the contract, a thing which we could not competently do, and which, even if it was within our competency, we could not with justice to the defenders do in the circumstances of this case.

It is perfectly true that the agreement which provides for the annuity is separable to this effect, that it could, particularly if we go back to the missive of sale, be written out of the general contract of sale and purchase, and still leave the essentials of such a contract. But at the same time it could not be so written out without leaving as a residue a totally different contract from that into which the parties entered, that is to say, without re-forming the contract.

I take it, however, that the question depends upon the terms of the disposition which was granted at Martinmas 1903, and which embodied the contract according to the parties' conception of it. I do not think that it is competent to make reference to the minute of sale. The disposition is the final and operative deed; it bears no reference to the minute of sale; it is complete in itself and unambiguous in all its terms. It bears that the trustees of the late James Small, in consideration of the sum of £7000 as the agreed-on price of the lands sold by them to Sir John and Lady Kinloch's trustees, of which price the sum of £5333, 6s. 8d. had been instantly paid to them by the Kinloch trustees, and the balance, being £1666, 13s. 4d. is the capitalised value of the annuity after mentioned affecting the lands after disponed, "which annuity is to remain a burden on the said subjects, do hereby sell and dispone to and in favour of the said . . . trustees heritably and iredeemably All and Whole the lands" of Bellaty. And accordingly Mr Small's trustees grant warrandice from their own facts and deeds only, and bind the trust estate under their charge in absolute warrandice, but excepting therefrom the bond of annuity in question. Let the annuity have lapsed as completely as the pursuer maintains, it is impossible to say that this imports a contract to make payment in any other way than that specified, viz. by the payment of so much in cash and by taking over as the equivalent of the balance an obligation for an annuity assumed to be a burden on the lands. There is no reservation or provision whatever to meet the case of the annuity lapsing, nor obligation in any circumstances to pay the balance of the price in cash. The Kinloch Trustees purchased in consideration of making a payment down and taking over an obligation. What they are asked to do is to pay the whole price down and take over no obligation. That is not their contract, and therefore cannot be enforced against them. The position may be illustrated in this way. I know that the Kinloch trustees were able and willing to pay down £5333, 6s. 8d., for they actually did so, and to take over an obligation which though it might turn out to be perpetual had always within it an element of contingency. I do not know that they were either able or willing to pay down the whole price. But I do know that they did not contract to do so. Hence it is impossible to give effect to the pursuer's contention without injustice to the defenders, for it would amount to the enforcing of a contract which was never made, and of which I cannot tell that it ever would have been made.

But there is another way of looking at the case which would lead to the same result even if one could view the two parts of the contract of sale and purchase as separable, and that is by considering whether the pursuer has any ground for saying that there was mutual essential error. At the date of their contract the position was that both parties knew all about the Union of the Free Church and the United Presbyterian Church. They knew also that the validity of that union was disputed, and the property of the Free Church claimed both by the United Free Church and by the minority of the Free Church. They knew that this Court had sustained the validity of the Union, and at the same time the right of the United Free Church to the whole property of the Free Church. They

knew also that the judgment was under appeal to the House of Lords. They may have assumed that the appeal would fail, and that the United Free Church would therefore step into the shoes of the Free Church, and become in right of the annuity, or they may not. But it was always possible that the appeal might be sustained, and it would then be a question which only the future could solve, whether the minority of the Free Church would re-establish themselves in Glenisla, and whether they could then be entitled to claim the annuity. The contract about the annuity was therefore not a contract about a thing which did not exist, but a contract of risk, and I cannot see where the mutual essential error is to be found. There is no more essential error than there would have been if the Free Church in Glenisla had dissolved a year after the contract of sale and purchase was made. Equally that was a contingency or risk, and equally it would have turned to the benefit of the party whom fortune favoured.

I am therefore in agreement with your Lordship that the defenders' third plea should be sustained.

LORD MACKENZIE—[*Read by the Lord President*]—The pursuer brings this petitory action to recover payment from the defenders of the sum of £1666, 13s. 4d., with interest from 11th November 1903. This sum represented the capitalised value of an annuity of £50 affecting the estate of Bellaty, which was purchased by the defenders from the pursuer's predecessor in that year. By the contract of sale the annuity was to continue a real burden on the estate. The annuity was to be paid so long as there should be a church in Glenisla parish in connection with the Free Church of Scotland. On the merits the pursuer's case is that at the date of the sale the real burden had already lapsed, as there was no such church. The first question to be determined, however, is whether the pursuer is entitled to the remedy he asks in this action. This depends on the proper construction to be put upon the disposition of the subjects sold. This is the only document which regulates the rights of parties.

The disposition bears that it is "in consideration of the sum of seven thousand pounds sterling as the agreed-on price . . ., of which price the sum of five thousand three hundred and thirty-three pounds six shillings and eightpence has been instantly paid to us . . . and the balance of the said price being one thousand six hundred and sixty-six pounds thirteen shilling and fourpence is the capitalised value of the annuity after mentioned affecting the portion of said subjects hereinafter disponed in the first place (*primo*) which annuity is to remain a burden on the said subjects do hereby sell and dispone." Then there is excepted from the warrandice clause the bond of annuity.

There is not, it will thus be seen, first, an obligation to pay the sum of £7000, and second, a separate bargain to pay as to so much in cash and as to the balance by assuming the burden of the annuity. The only obligation is to pay so much in cash and the balance in the manner stipulated. The contract is not separable. *Non constat* that the purchasers would ever have agreed to give £5333, 6s. 8d. in cash unless they were to get the balance of £1666, 13s. 4d. at 3 per cent. in perpetuity. The present position brings out strongly the impossibility of giving a remedy in the manner asked.

The defenders, a body of marriage-contract trustees, are called upon to pay the capitalised value of an annuity as the figure stood in 1903. But in order to raise this capital sum now the interest they would have to pay would be not £50 but £83; or put in another way, the present capitalised value of an annuity of £50 would be only £1000. It might be said that this is accidental, and that the decision of the case does not depend upon the present condition of the money market. It brings out, however, strongly the necessity for an action of reduction of the contract as a whole if the pursuer desires to seek a remedy. The contract is so expressed that to seek by way of exception to set it aside in part is to attempt to re-form the whole bargain. This in my opinion is incompetent, and the action ought therefore to be dismissed.

LORD SKERRINGTON—Unlike some of your Lordships I am not prepared to say that this was a contract of risk, or to negative the pursuer's contention that there was here mutual essential error. But I have not thought it my duty to form a definite opinion upon these questions, because it seems to me that the pursuer's case fails upon another ground. The learned Lord Advocate admitted that his client had no case unless he could demonstrate that the contract for the purchase of the property was separable. He seemed, however, to think that he had done all that was necessary when he took either the disposition or the minute of sale and said, "Here is a clause which, standing by itself, either expresses or implies an obligation to pay £7000 in cash," and then reading further on found another clause which modified that obligation and authorised the retention of £1600 in respect that the property was to remain burdened with an annuity. That seems to me to be too technical a way of looking at the question. One must consider the substance of the contract and not the form of the instrument. To my mind the pursuer cannot succeed unless he can demonstrate that for some period of time, however short, the defenders were under obligation to pay £7000 in cash as the price of the property. If that could be made clear, and if a subsequent contract authorising the retention of £1600 could be set aside, the original obligation to pay the whole price in cash would revive. Unless that is the situation of matters the pursuer would profit nothing by setting aside the agreement for the retention of the £1600, because he would not thereby constitute any liability against the defenders to pay that sum in cash. In other words, his sole remedy, if he had one, would be to set aside the contract as a whole.

For these reasons I agree with the result at which your Lordships have arrived.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for the Pursuer (Respondent)—Dean of Faculty (Clyde, K.C.) — Brown. Agents—Russell & Dunlop, W.S.

Counsel for the Defenders—Chree, K.C. —Hamilton. Agents—Skene, Edwards, & Garson, W.S.

Tuesday, February 13.

WHOLE COURT.

ANDERSON'S TRUSTEES *v.* ANDERSON AND OTHERS.

Succession — Construction — Heirs — Heir Referable to Date of Death of Settler of Fund or to Date of Payment.

In an antenuptial marriage contract the wife in return for provisions in her favour by the husband, after settling a fund upon herself and thereafter upon her husband in liferent, directed the trustees, upon the death of the longest liver of herself and her husband, and upon the youngest child of the marriage having reached majority, to convey the capital of the fund to the children of the marriage, vesting being expressly postponed until the death of the longest liver of the spouses and until the youngest child of the marriage reached majority; and in the event of there being no children of the marriage alive at the death of the longest liver of the spouses, or in the event of all the children dying before reaching majority, the trustees were directed to pay, convey, and make over the capital of the fund to the heirs and assignees of the wife. The wife was survived by her husband and an only child of the marriage. The child, without attaining majority, predeceased the husband. On his death, *held* in a special case (*dis.* Lords Salvesen, Mackenzie, Ormidale, and Anderson) that the "heirs" of the wife meant the persons who were her heirs at the date of her death, not at the date of the husband's death when the fund became payable, and consequently that the husband's executors were entitled to the fund to the exclusion of the wife's intestate heirs as at the death of the husband. *Muirhead's Trustees* v. *Towie*, 1913 S.C. 85, 50 S.L.R. 182, *overruled.*

James Black Anderson and others, the trustees acting under the antenuptial marriage contract entered into between the late William Fleming Anderson and the late Amelia Thomson (afterwards Mrs Amelia Thomson or Anderson), *first parties;* Mrs Jeannie Ann Duncan or Anderson, sometime third wife of the late William Fleming Anderson, and now his widow, and Janie Logan Young Anderson, daughter of the third marriage of the late William Fleming Anderson, as executrices of the late William Fleming Anderson, *second parties;* and Mrs Elizabeth Cooper Thomson or Bisset, with consent, and others, being the sisters, the only surviving brother, and the only child of a predeceasing brother of Mrs Amelia Thomson or Anderson as at the date of death of the late William Fleming Anderson, *third parties*, brought a Special Case to decide who were the "heirs" entitled to certain funds held by the first parties.

The *marriage contract*, after various provisions by William Fleming Anderson in favour of his intended spouse, provided — "For which causes and on the other part the said Amelia Thomson hereby, with the special consent and concurrence of the said William Fleming Anderson, assigns and conveys to the said trustees the share of residue falling to her under the trust-disposition and deed of settlement of her deceased father the said Alexander Thomson, dated the eighteenth day of August Eighteen hundred and sixty-five and recorded in the Books of Council and Session the twenty-seventh day of March Eighteen hundred and seventy-five, to the extent of Twelve hundred pounds of the principal or capital thereof, and which sum of Twelve hundred pounds shall be held by the said trustees in trust always for the ends, uses, and purposes following, viz. (first) The said trustees shall pay over the free annual income of the said sum to the said Amelia Thomson upon her own receipt alone during the whole days and years of her life and after her decease survived by the said William Fleming Anderson to the said William Fleming Anderson during his lifetime as an alimentary provision unassignable by them and unattachable for their debts or deeds or by the diligence of their creditors; (second) The said trustees shall, upon the death of the longest liver of the said William Fleming Anderson and the said Amelia Thomson, and upon the youngest child of the said marriage having reached twenty-one years of age, convey the capital of the said sum to the children to be born of the said marriage, jointly with the lawful issue *per stirpes* of any of them who may predecease the time of payment leaving issue, such issue succeeding equally to the share to which their parent would have been entitled if in life, which capital shall be divisible among such children in such proportion and subject to such restrictions and conditions as the said Amelia Thomson may appoint by any writing under her hand, and failing such appointment then equally among them: Declaring that the fee of said provision in favour of the children of the said marriage shall not vest till the death of the longest liver of the said William Fleming Anderson and Amelia Thomson and until the youngest of such children surviving the longest liver shall have reached twenty-one years of age; . . . (third) In the event of there being no children of the said marriage alive at the death of the said William Fleming Anderson and Amelia Thomson, or in the event of the whole of such children predeceasing the period of vesting above provided, the said trustees shall pay, convey, and make over