suer did not ask that this course should be taken but maintained that the full rate should be allowed. But on consideration I can see no legal justification for this middle course."

The pursuer appealed, and argued that the contract was not one for a lump sum, but for a sum to be calculated at fixed rates.

The respondent argued that he had made the contract upon the faith of the lump sum contained in the offer, and that otherwise he would have accepted an offer which, though apparently higher, in reality proved to be lower than the pursuer's.

At advising—

LORD YOUNG—If it had not been for the judgment of the Sheriff I should not have thought this case arguable. The pursuer contracted to do a certain amount of work at prices according to rates put down in a schedule. The schedule was made out in the ordinary form, and, as usually happens, the price of each item was calculated on the estimated amount of work according to the schedule rate, and the whole summed up at the end. The parties assumed that it was correctly so summed up. The contract, however, was not a contract to do the work for a lump sum, but a contract for a sum to be fixed when the work had all been finished and measured, so as to show what amount of work was actually done, and the schedule rates applied to that actual amount of work. Well, that was what was done here, and the sum sued for is the balance still due on the sum so brought out. The answer which the defender makes to the action is, "Oh, but in your original offer you made an *error calculi* in applying the schedule rates to the estimated amount of work to be done, bringing out a smaller total than you were entitled to charge, and I am entitled to have the difference deducted from your account." I think that is an extravagant proposal, but to excuse its extravagance the defender says that when he had the pursuer's offer before him he also had another offer to do the work for a somewhat larger sum than the pursuer's, as it then erroneously appeared to be, but which was smaller than the sum now claimed by the pursuer, and the defender says that he would not have accepted the pursuer's offer had he not been induced to do so by the pursuer naming the smaller total sum. I do not think that is a good plea—the work was honestly done and ought to be paid for. No injustice therefore will be done by giving the pursuer the decree which he asks. But I do not proceed on that ground only. I think that the contract was a contract for a sum to be fixed according to measurement, and not for a lump sum.

LORD CRAIGHILL—I concur. I think the contract was one, not by which for a slump sum the contractor undertook to execute the digging, mason, and brickwork that was provided in the specification, but, on the contrary, was a contract by which he became bound to do the work at certain rates which were specified. What was to be due to the contractor depended upon the extent of the work done, as multiplied by the rates which which were specified. Now the brickwork was measured at the end of the day as was provided for by the contract. The fact that there was to be a measurement of the work after it was done shews that it was in the view of the parties that the quantities in the specification were not to be conclusive. If anything was to be conclusive it was a second measurement, by which the extent of work done was to be ascertained, and a charge made at the specified rates. It is true that an error was committed, but it seems to me that that error is of the same legal character as an error in addition.

It seems to me, therefore, that the Sheriff-Substitute was right, and the Sheriff was wrong, when the one held, and the other did not, that the contract was one for work done as at certain rates, and that the contractor was entitled to the sum sued for notwithstanding the error that had been committed.

LORD RUTHERFURD CLARK—I concur in the judgment proposed. There are only two questions to determine—namely, what is the contract? and what is due under the contract? The pursuer's claim is for work done under the contract, measured according to the contract, and at rates specified in the contract. Now, I cannot see my way to resist the argument by which that claim is supported. But what the defender says is, that he had a lower offer which he would have accepted but for the fact that the total sum for which the pursuer offered to do the work was £31 less than that now sued for. Well, that may be so, but that rather points to a different remedy. I am not going to say whether or not there is a claim for damages on the part of the defender for being led to reject an offer to do the work for a less sum than the pursuer is entitled to under the contract. Nor would I say that such an action should be brought; but it seems clear on the present contract, and on this record, that the pursuer must get paid for work brought out by the measurement which has been made, at the rates which he stipulated for.

The LORD JUSTICE-CLERK concurred

The Court sustained the appeal, repelled the defences, and decerned in terms of the conclusions of the summons with expenses.

Counsel for the Appellant—Macfarlane. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Respondent—Wallace. Agent—Adam Shiell, S.S.C.

Tuesday, November 15.

FIRST DIVISION.

RAMSAY *v* RAMSAY.

Heritable and Moveable—Heir and Executor.

A person purchased heritable subjects burdened with debt, but died intestate prior to the payment of the price. *Held*, in a question between the heir and executor of the deceased, that the executor was liable for the price without relief against the heir.

John Chalmers Ramsay, wine and spirit merchant, Kirkcaldy, died intestate and without

issue on 6th August 1885. He was possessed of considerable estate both heritable and moveable.

Shortly before his death he had purchased certain mills and machinery, over which there were bonds to the extent of £5000.

The articles of roup, *inter alia*, provided that upon payment of the price, the sellers were to exhibit a certificate of searches for incumbrances affecting the said subjects for twenty years prior to the date of entry, and to purge the subjects of all incumbrances appearing on the searches affecting the same, and to grant a valid disposition.

By the minute of sale Mr Ramsay bound and obliged himself to implement and fulfil the whole obligations on him as purchaser in every respect. Immediately, after purchasing the mills, Mr Ramsay attempted to dispose of them; and, at the time of his death, which happened suddenly, he was negotiating, and had almost completed, a sale to Mr David Yule, merchant, Arbroath.

At the date of Mr Ramsay's death the price of the subjects had not been paid, nor had any conveyance been granted in his favour, while the heritable debts on the subjects remained undischarged.

William Smith Ramsay was the immediate elder brother and heir-at-law of the deceased, and upon 18th September 1885 he sold the subjects as described in the articles and conditions of sale above referred to at the price of £6000. A question having arisen between Andrew Ramsay the executor-dative, and William Smith Ramsay the heir-at-law of the deceased, as to the liability for the price of the subjects agreed to be paid by the deceased under the articles of roup and minute of sale above referred to, the present special case was presented, to which the executor was the party of the first part and the heir-at-law was the party of the second part.

The second party contended that while the right to the subjects acquired by the deceased, under the purchase by him, was heritable and vested in the second party as his heir-at-law, the price which was not paid at the time of his death formed a burden on his executry, and fell to be paid out of his moveable estate. The first party, on the other hand, maintained that the subjects having been burdened at the time of the sale with heritable debts amounting to £5000, the second party as heir-at-law of the deceased was only entitled to the subjects under burden of these bonds which he himself must discharge, and was not entitled to have any part of the price paid out of the executry.

The questions submitted for the opinion and judgment of the Court were—"Whether the executry estate of the said John Chalmers Ramsay is liable for the foresaid sum of £5100, agreed to be paid by him as the price of the said subjects without relief from the second party? or, Whether the second party, as heir-at-law of the said John Chalmers Ramsay, takes the said subjects under burden of the heritable debts thereon, and is not entitled to have the price or any part thereof paid out of the executry?"

Argued for the first party—The question was simply one of succession between the heir and the next-of-kin. There were certain well known rules which regulated such cases, and the question here was whether any specialty could be shown such as to enable the heir to escape from his ordinary liabilities. The property had been purchased by the deceased with the bonds upon it, and having died intestate, he did not indicate any intention as to whether the burden was to fall upon his heir or executor If anything could be gathered from his intention it might be presumed, as he attempted to sell the property, that he did not intend the bonds to be a burden on his executors. The Court might look at the intention of the deceased in a case like the present if in any way that was indicated by his actings—*M'Nicol*, June 16, 1814, F.C.; *Ross* v. *Clayton*, November, 12, 1824, 3 Sh. 191 —*aff.* 2. Wil. & Sh. 40.

Counsel for the second party was not called upon.

At advising—

Lord President—This is no doubt rather a hard case, but I cannot see that there is anything more to be said than what has been urged by Mr Reid, and that has certainly failed to convince me that the executors in this case are entitled to any relief. The debt which Mr Ramsay was owing at the time of his death was not heritable, but, on the contrary, was a personal obligation, and that of course transmitted to his executors. There was a bond and disposition in security in which the seller was debtor, and which he was bound to discharge before conveying the property to the deceased purchaser. The position of the purchaser was simply this — he was entitled under the articles of roup to get an unencumbered estate, and in return, he was taken bound to pay £5100. I cannot see therefore that there was anything here of the nature of a heritable debt, to the effect of enabling the executor to get rid of his burden. On the contrary, I think that he is bound to free the heir from all liability for the price of this property.

With regard to the cases cited by Mr Reid, it appears to me that the first referred to, that of *M'Nicol*, is conclusive of the present question. As to the case of *Ross* v. *Clayton*, the circumstances in it were somewhat peculiar. There the purchaser took upon himself the heritable debt due by the seller, and granted a bond of corroboration, thus constituting a difference between that case and one where there is merely an obligation on the purchaser to pay the price. In those circumstances the Court held that the debt was heritable, and that it formed a burden on the heir. As regards the present case, I have no difficulty whatever in answering these questions adversely to the executor.

Lords Mure and Shand concurred.

Lord Adam—In disposing of this case we must follow the rules applicable to intestacy. Were we to do otherwise, we should be making this a testate succession.

The Court answered the first question in the affirmative.

Counsel for the First Party—Asher, Q.C.—Reid. Agents—Waddell & M'Intosh, W.S.

Counsel for the Second Party—Strachan—Guthrie. Agent—David Hunter, S.S.C.