Nov. 12, 1830. the Interlocutors complained of be affirmed, with L.100 costs.

MEGGISON and POOLE,—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 39. MRS MEAD or MACKENZIE and Husband, Appellants.—*Brougham—Knight.*

WILLIAM ANDERSON, Respondent.—*Spankie—Robertson.*

Heritable or Movable.—Where a party sold heritable subjects by missives, and the price, payable at a future period, was declared a burden on the subjects: Held (affirming the judgment of the Court of Session) that the price was heritable, and not carried by an English testament.

Nov. 16, 1830.

2D DIVISION. Lord Medwyn.

THE late Henry Anderson, who resided in England, was one of several pro indiviso proprietors of certain heritable subjects situated in Broughton, immediately adjacent to Edinburgh. In virtue of a power of attorney granted by him and certain other of the proprietors to Mr Thomas Baillie, W. S., that gentleman sold to Mr James Pedie, W.S., on the 2d of November, 1822, by missive letters, their shares of the property, at the price of L.2700. In the offer by Mr Pedie it was stipulated that the price should be 'payable as follows, viz. two-thirds thereof two 'years after Whitsunday next, which is to be my term of entry 'to the premises, and to bear interest from said term of Whit-'sunday 1823 at four per cent, and to remain a burden over the 'property until paid, and the remaining third part of it to be 'payable at Whitsunday next.' In October, 1823, Mr Anderson died, at which time no farther title had been granted to Mr Pedie. Mr Anderson left a will, in the English form, dated in 1819, in favour of his niece, the appellant, Mrs Mead or Mackenzie. The disposing clause was in these terms: 'I give, 'devise, and bequeathe, all, and every, my freehold estates in 'England, or elsewhere,' and in general his whole property and effects, wherever situated. His brother, the respondent, William Anderson, was his heir at law. A competition then took place between these parties in regard to that part of the price which had been declared a burden on the property, and remained in that situation at the death of Mr Henry Anderson—the appellants contending that it was to be regarded as movable, and so carried by the will, while Mr Anderson maintained

that it was heritable, and could not be so transmitted. To settle this question, Mr Pedie brought a multiplepoinding, in which the Lord Ordinary found, 'That quoad the two-thirds of the 'price which were to remain a real burden over the property, till 'paid, there was no change from heritable to movable, in conse-'quence of the sale of the property, and that the same cannot be 'carried by the said will, just as little as Henry's share in the 'property would have been if he had died before the sale, but 'that it belongs to the heir of the said Henry Anderson; and ap-'pointed the cause to be called to apply these findings.' To this judgment the Court, on the 27th of June, 1828, adhered.* Nov. 16, 1830.

Mrs Mackenzie and Husband appealed.

Appellants.—1. By the sale to Mr Pedie, Mr Henry Anderson was completely divested of the property, which, although not formally, yet substantially, was thenceforth vested in Mr Pedie. The right which now belonged to Mr Anderson was a claim for the price. But such a claim is of a movable, and not of an heritable nature. It is true that Mr Pedie stipulated for indulgence as to the term of payment, and agreed that, for the security of Mr Anderson, the price should remain a burden over the property; but this cannot affect a question of succession arising on the death of Mr Anderson. By the act of converting the heritable into a movable subject, Mr Anderson clearly demonstrated his intention and will that his property was to be considered as movable. The circumstance that Mr Pedie found it inconvenient to pay the price, and offered security, cannot affect the question as to the animus of Mr Anderson. Besides, the price was never made, in proper form, an heritable or real burden.

2. Although power was conferred on Mr Baillie to sell the property, and so convert it from an heritable to a movable subject, yet there was none bestowed upon him to defeat that which was the evident intention of Mr Anderson, by taking the price payable in such a form as to alter the order of succession.

3. But assuming that there was such a power, still the price was merely created a burden on the property; and there is no authority for holding that such a burden is heritable in a question of succession. Even if it were so, it was transmissible by assignation; and as the testament gave, bequeathed, and devised

---

* 6 Shaw and Dunlop, 1034.

Nov. 16, 1830. all Mr Anderson's effects to the appellant, it was effectual to transfer the price to her.

Respondent.— 1. In judging of a question of succession the rule of law is, tempore mortis inspiciendum. The sale was made in November, 1822, and Mr Anderson lived till October, 1823, during which time, and in particular at that latter period, the price remained an heritable burden over the property. A burden of this nature is not one created like an ordinary heritable bond, by advancing money, and so constituting for the first time an heritable right; but is a reservation or continuation of the heritable right created by the infeftment of the seller;—so that, until it be discharged, his right in the property remains as completely heritable as if he had never sold it. But if an heritable bond would have gone to the heir, (which it would undoubtedly have done,) a fortiori must a reserved burden. The argument, therefore, of the appellants, that the property was actually converted into money, is rested on an erroneous assumption.

2. Full powers were bestowed on Mr Baillie to dispose of the property as he should see fit; and by the nature of the transaction, the actual and complete transfer of it was postponed for the period stipulated in the missives; and as Mr Anderson lived for nearly twelve months thereafter, he must be presumed to have approved of the transaction.

3. It is undoubted law that a burden created over an heritable subject is heritable in a question of succession; and it is equally clear that an heritable right cannot be carried by a testament.

Lord Wynford.—My Lords, when this case was argued the other day, I requested your Lordships to allow a little time for the consideration of it; because, although it did not occur to me that there was any great difficulty in it, yet in a case where the question involves a practice which has long existed, and by which real property is governed throughout all Scotland, it appeared to myself, and to the noble Earl * whose assistance I had upon that occasion, that it would be as well to consider what the practice and understanding of the profession had been upon this point. My Lords, this is an action of multiplepoinding—a term which is not very intelligible to English ears, and, perhaps, I may not make myself better understood to some of your Lordships when I say, that it is like a bill of inter-pleader in this country. When a man is called to pay money to different persons, he says, I am ready to pay whoever shall be entitled to it; and as A and B both lay a claim to it, I beg that A and B will settle

---

* The Earl of Raduor.

it between themselves, and, when they have done so, I shall pay to whom- Nov. 16, 1830.
soever shall be found entitled. This is the nature of the present proceeding. A Mr Anderson was possessed of some real property, which became divisible into seven different parts ; and, without stating to your Lordships the details of the division upon the present occasion, it is only necessary to say, that three parts became the property of the present appellant's uncle, and one part became the property of the present respondent. The question for the decision of your Lordships to-day, arises with respect to the three parts which came to the appellant's uncle. Before the uncle's death, this property was all sold to the person who is the pursuer in the action of multiplepoinding. After the sale, the uncle made a will. If it is to be considered as movable property, it is passed by that will to the appellant. If it is to be considered as what we call real, or what is called in Scotland heritable property, it would not pass by that will, but would become the property of the respondent. Therefore, the real question for your Lordships to decide is, Whether the price of this estate is to be considered as heritable or movable property ? Now, before I call your Lordships' attention to the law upon this subject, it will be material to state to your Lordships the instruments of sale of the property. Your Lordships are aware that a sale is completed in Scotland without the solemn deeds required in England. A letter-missive, as it is called, and the answer to it, constitute a sale. Now the offer of sale is in these words. It is written by Mr Pedie, a writer to the signet in Edinburgh : 'Edinburgh, 2d November, 1822.—Sir, I hereby offer you for 'the three fourth parts of the property at Broughton, belonging to your 'clients, Messrs Anderson and Mrs Mackenzie, the sum of L.2700 ster-'ling, payable as follows, viz. two-thirds thereof two years after Whitsun-'day next, which is to be the term of my entry to the premises, and to bear 'interest from said term of Whitsunday 1823, at four per cent, and'—these are the material words—'and to remain a burden over the property till 'paid ; and the remaining third part to be payable at Whitsunday next.' That is all that is material of the letter. Then, in answer to this, a note is written by Mr Baillie to Mr Pedie :—'Edinburgh, 2d November, '1822.—I accept your offer, before written, on the part of my constituents.' These notes constitute a conveyance of this property. The testator did not die till after the first instalment, which was payable at Whitsunday, had been actually paid ; and, therefore, there is no dispute about that. The dispute is with respect to the remaining three parts, which are a charge, in the words I have read to your Lordships, 'to remain a burden over the property till paid.' Now, on the part of the appellants, it is contended that the Court below were wrong in deciding that this is to be considered as heritable property. On the part of the appellants it is contended, that though this, whilst it existed as an estate, was unquestionably heritable property, yet, by the act of sale, a disposition is shown to convert that which was heritable property into movable property, and therefore that it became movable property. On the other hand, it is said, No, it is not converted into movable property ; but that, by the operation of the words, (which I have read to your Lordships,) though

Nov. 16, 1830. the estate be gone, that is, though the land be gone, there is an heritable property in the price of that estate, created by the use of those words. The appellants insist, also, before your Lordships, that, to create an heritable property, certain solemnities are necessary in the instruments by which that is to be effected; and it will be material for me to mention that, in support of that argument, the appellants refer to a very learned writer, Mr Bell.* Now, I beg your Lordships to attend to what Mr Bell says; and I think your Lordships will find that the very authority to which they have referred decides that point against them. There can be no doubt that, if a new heritable estate was to be created, all the solemnities pointed out by the appellants would be necessary to give effect to that estate; and therefore, if that were the case, your Lordships would have to say, that, whatever the testator intended, he has not carried that intention into effect by sufficient legal forms; and it seems to me that that objection, if it were well founded, would dispose of that part of the case. But then it is said, on the other hand—We admit that, if the ancestor had not any heritable interest in this property, this instrument would not have created an heritable interest; but we say that the heritable interest that was in him remained in this part of the property till the money was paid. The question is—Whether there did not remain in him an heritable interest out of the old estate, which is not got rid of till the price of that estate is paid? Now, my Lords, it was very ingeniously argued at your Lordships' bar, that, in this case, the whole interest in the land was parted with, and that nothing but the burden upon the land remained. But it occurred to me, I confess, at the time, that the burden upon the land must constitute an heritable interest in the land. The burden enables the person who had that burden to possess himself of the estate, in case the price should not be paid—otherwise what security is it? If the man had no security against the land, of what avail would be those words, "to remain a burden over the property till paid?" It appeared to me, therefore, that, upon that principle, it was not to be considered that the whole heritable interest was gone, and that this was a mere lien upon it, but that a sufficient heritable interest remained in the person who is the seller of the estate, in order to entitle him to get possession of the estate, in case the price should not be paid. My Lords, I am borne out in this by the learned writer whose name I have already mentioned. Mr Bell says—'The price may be allowed to remain unpaid, 'secured over the land The security may be constituted either by an 'heritable bond, or by rendering the *price a burden in the conveyance.*' Now, this is not a security constituted by an heritable bond, as I have said; but the question is—Whether it is a security constituted by rendering the price a burden in the conveyance? The words which I have read to your Lordships clearly do render the price a burden upon the conveyance. 'In the latter case,' says the same learned writer, 'where a

---

* Bell on Completing Titles, 93.

'price is declared to be a real burden on the estate by reservation, Nov. 16, 1830.
'not only is the purchaser's right burdened; but the seller's origi-
'nal right is reserved to the extent of the debt, so that the debt stands
'secured on the seller's own infeftment;' and he afterwards observes, that
'in the constitution of a lien by reservation, there are two feudal estates.
'There is one feudal estate conveyed to the purchaser, standing on his
'infeftment, but burdened with the price; the real right in the lands, for
'security of the price reserved in the person of the seller, forms another
'feudal estate, standing on the seller's original infeftment.' The seller's original infeftment remains still in the representatives of the seller; and if it does, this is an heritable estate. My Lords, I have, as it is my duty to do, since I heard this case argued, looked at every one of the cases that have been cited on the part of the appellants. In every one of them there is this distinction between them and the present case, that there the property is conveyed away without a conveyance creating an heritable burden; and then, it is admitted by the respondent that there is no charge upon the land. All the cases referred to, on the part of the appellants, on this part of the case, (with the exception of one I will just mention, before I have done,) are cases where the seller has not, as he has done in this case, reserved any charge upon the land. These authorities, therefore, do not appear to me to bear upon the present case. There is one case, however, that has been mentioned, which I think it right to notice. That is the case of Waugh *v.* Jamieson, (Mor. 5524,) upon which the appellants mainly rely. They say, that the sum may be movable, and yet it may be heritably secured; and that case is referred to for the purpose of proving, that, though heritably secured, yet it may be movable. In the case of Waugh *v.* Jamieson, it is stated by the reporter that their Lordships came to the following resolution:—That it is consistent that a sum should be movable, and yet that it should be considered heritably secured. Now, my Lords, if this case bore more immediately upon the point than it does, I should be bound to state to your Lordships, that that is not the point decided in the case. This is a mere obiter dictum of the Judges; and your Lordships well know that the obiter dicta of the Judges are not entitled to that consideration which their opinion, expressed upon the point they are called upon to decide, is entitled to. But if the case be examined still further, your Lordships will find it does not touch this point at all; because, what was decided? Why, that it is consistent that a sum should be movable, and yet heritably secured; and the instance they put is this, 'as in the case of bygone annual-rents, 'due upon infeftment of annual-rents.' Your Lordships know that an infeftment of annual-rents makes the annual-rents an heritable property, just as a rent-charge in this country is real property. In England, if a man grants to another a rent-charge, that rent-charge will descend to the heir of the grantor; but if there are bygone rents which become due in the lifetime of the grantor, these are said to be fruits-fallen, and go to the executor of the grantor. That is precisely the case upon an infeftment of annual-rents. The property in which the party is infeft is heritable property; but any bygone annual-rents which become

Nov. 16. 1830. due in the lifetime of the owner of the rent, will belong to his executor.' It appears to me, that, giving full effect to this case, it does not touch the price of the estate. The price of the estate here is precisely in the situation of the infeft annual-rents spoken of in this particular case; and then, so far from this decision being against the judgment which has been pronounced by the Court below, it appears to me that it is a decision that goes in support of that judgment. My Lords, for these reasons, I am humbly to submit to your Lordships that the judgment ought to be affirmed. I have already stated to your Lordships that I considered it very important that we should deliberate before we pronounced a decision in this case; because, although the matter in dispute in this case is not large, yet, when your Lordships recollect what confusion would be introduced into property, if we were to decide now that that goes to the executor, which hitherto, according to the practice of Scotland, has gone to the heir, your Lordships cannot but perceive how greatly the descent of property in Scotland would be disturbed; and I conceive that nothing is more mischievous than to disturb any settled rule which has been once established, regulating the descent of property. For these reasons, I humbly submit to your Lordships that the interlocutor in this case should be affirmed. At the same time, I think this is a hard case; because it was the intention of the owner of this property (and if he had used the proper means, he might have carried that intention into effect) to have given this to the lady instead of the gentleman. I think that, considering the hardship of the case, your Lordships will agree with me, that the interlocutor should be affirmed, and that the appeal should be dismissed without costs.

The House of Lords accordingly 'ordered and adjudged that 'the interlocutors complained of be affirmed.'

Appellants' Authorities.—2 Ersk. 3. 17. Forbes, Nov. 1683, (5531.) 2 Bell Com. 9. 10. Wilson, 29th November, 1808. (F. C.) Waugh, 18th February 1676, (5524.) 1 Bell Com. 585. Stewart, 18th May, 1792, (4649.) Winram, 13th February, 1694. (4 Brown, Sup. 53.) Stewart, February, 1615, (5488.) Watson, February 7, 1635, (5489.) M'Nicol, 16th June, 1814. F. C. Lamont, Dec. 4, 1789, (5494.) 1 Bell's Com. 690.

Respondent's Authorities.—2 Ersk. 2. 20. 3 Ersk. 8. 20. 3 Stair, 2. 3. 2 Ersk. 2. 5. and 17. Bell on completing Titles, 93. 94. M'Nicol, 31st Jan. 1816. (F. C.) 3 Ersk. 9. 48.

J. and A. SMITH,—J. CHALMER,—Solicitors.