JOHN JOHNSTON, ... APPELLANT.
ALEXANDER JOHNSTON, ... RESPONDENT.

1859.
Aug. 9th and 10th.
1860.
Jan. 30th, 31st, and Feb. 10th.

Jury Trial—Issue—Appeal.—Under the 13 & 14 Vict. c. 36. s. 38. a new course of procedure is prescribed for the adjustment of issues for trial by jury in Scotland. There is nothing in the Act to prevent an appeal to the House of Lords against the frame of the issue.

Semble, when an appeal is not prohibited, it is allowed.

Difference of Opinion.—Where it was doubtful whether there had been a real difference of opinion in the Court below, reference made to ascertain the fact, and certificate returned.

Costs.—The costs of an argument upon the competency of an appeal reserved till the final judgment on the merits.

Procedure.—Per the Lord Chancellor: If the immediate decision of a question of law is absolutely necessary to the determination of the matter in dispute, the Court must adjudicate upon it, however nice, difficult, and doubtful it may be; but where there are facts in controversy, bearing on this question of law, I think that the Court may direct issues instead of adjudicating on the question of law in the first instance; p. 630.

Per Lord Chelmsford: It appears to me that it was the right of the parties to have the previous decision of the Court upon the legal question; p. 636.

Judgment on Appeal.—Per the Lord Chancellor: It is the function of a Court of Appeal to pronounce the judgment which the Court below *ought* to have pronounced; p. 632.

Appeal Committee.—Per the Lord Chancellor: The Appeal Committee is to report its opinion to the House; but what is finally done is the act of the House, not of the Committee; p. 640.

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Family Settlement.—Per the Lord Chancellor: A family settlement, when *bonâ fide*, the law much favours; p. 631.

THE Respondent, having received notice of the intended Appeal, presented his petition to the House, praying that "the Appeal might not be received."

Both the petition and the appeal were, on the 6th March 1857, referred to the Appeal Committee, who, on the 25th March 1857, recommended that it should be referred to the Second Division of the Court below, "to state to the House whether there had been any difference of opinion among the Judges on pronouncing the Interlocutor complained of." The House made an order accordingly; and the same having been laid before the Judges of the Court below, they, on the 21st March 1857, returned a certificate, "that in refusing to all the Defenders the issue proposed by them, there was *no* difference of opinion (*a*); and that there was difference of opinion among them as to the issues to the Pursuer" (*b*).

On the 26th June 1857 the Respondent presented a further petition, praying dismissal of the Appeal; and the same having been referred to the Appeal Committee, the House on their report ordered that the Respondent's petitions should not be complied with, but that the Appeal should be allowed to proceed; the benefit of all objections contained in the said petitions being reserved to him on the hearing of the Appeal at the bar.

The case stood in the paper of the House for hearing on the 9th August 1859, when Mr. *Roundell Palmer* and Mr. *Anderson* appeared for the Appellant; and

(*a*) See the Defenders' issue, *infrà*, p. 628.
(*b*) See the Pursuer's issues, *infrà*, p. 628.

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the *Attorney-General* (*a*) and the *Lord Advocate* (*b*) for the Respondents.

The first question being the question as to the competency or regularity of the Appeal, the Respondent's Counsel, as originating the objection, were heard in support of it; and then, the Respondent's Counsel having addressed their Lordships, the Appellant's Counsel replied (*c*).

At the close of this argument as to the competency of the Appeal, the following opinions were delivered:—

Lord Chancellor's opinion.

1859. *August* 10*th*.

The LORD CHANCELLOR (*d*):

The question is whether there can be an appeal against this Interlocutor, which was pronounced by the Second Division of the Court of Session on the 10th of March 1857, in these terms: "The Lords having considered the draft issues in this cause, and heard Counsel for the parties, refuse the issue proposed for the Defenders (*e*), and approve of the issues proposed for the Pursuer (*f*), and find that these shall be the issues to be tried in this cause."

Now, it is allowed that this Interlocutor was pronounced under the authority given to the Second Division of the Court of Session by the 38th section of the 13 & 14 Vict. c. 36., and for the first time this mode of proceeding is prescribed by the Legislature: "Procedure for the adjustment of issues." It goes on very circumstantially and minutely to determine how the issues are to be settled; and then, if

(*a*) Sir Richard Bethell.

(*b*) Mr. Moncreiff.

(*c*) This was in conformity with what took place in *Geils* v. *Geils*, 1 Macq. Rep. 37.

(*d*) Lord Campbell.

(*e*) See the Defenders' issue, *infrà*, p. 628.

(*f*) See the Pursuer's issues, *infrà*, p. 628.

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parties do not consent, the *Lord Ordinary* shall immediately report the matter to the Inner House, by whom such issue or issues shall, upon such report, be adjusted and settled.

The Second Division of the Court of Session having, under the authority of this Act of Parliament, pronounced this Interlocutor, and having been divided in opinion upon it, *primâ facie* there may be an appeal from that Interlocutor to this House; and it is quite clear that the onus is cast upon the Respondent to show that it is forbidden. It may be forbidden; but is it forbidden?

Now, the *Lord Advocate* very fairly, as might be expected from a gentleman in his high station and of his great reputation, allows that he cannot rely upon the enactment that there shall be no appeal against an Interlocutor directing a trial by jury. This is not an appeal against any such Interlocutor, but this is an Interlocutor made under the authority of this recent Act of Parliament fixing the issues to be tried. Then, what is there to show that there is not a right of appeal? There has been a great deal of argument as to what might be done under the Act of the 6 Geo. 4., but what is there to show that what was done under the 6 Geo. 4. is at all transferred into the 13 & 14 Vict., and will apply to an Interlocutor made by a Division of the Court of Session under the authority of that Act? This is a new procedure. It is a different mode of settling issues from that which before existed, and whether there might have been an appeal before or not, I do not see anything whatever to introduce into this new mode of settling issues any restriction that there might have been when a different mode was prescribed. Therefore, it seems to me that there is no prohibition whatsoever. It seems to me

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quite clear that this Appeal is competent. It is admitted that as a general rule where the Court is divided there may be an appeal from an Interlocutor, although it does not dispose of all the merits of the case, unless such an appeal is forbidden. Now, I think it is not forbidden here.

The whole merits in some of the most important cases may depend upon whether the issue is properly framed or not (*a*). I never doubted for one moment that there was an appeal from an Interlocutor settling issues *in fine causæ;* and I think that unless there be some prohibition against an Interlocutor pending the cause, where the Court is divided, this Appeal lies, and I can find no prohibition against it.

I was at first alarmed, when I thought of the inconvenience that such a decision might occasion, because perhaps on some trifling difference of opinion among the Judges, there might be an appeal brought vexatiously to this House; by which justice would be delayed and needless expense incurred; but, on further consideration, I think that apprehension is unfounded; for it is only where there is a serious and final and express dissent among the Judges that an appeal can lie. Their opinions may differ pending the consideration of the case, but it is only when they finally differ, and are ready to certify, as they did here, that there was a difference of opinion, it is only then that the House can be resorted to. Here we have a certificate of the Judges, "that there was a difference of opinion among us as to the issues allowed to the Pursuer." Therefore, we must suppose that they did finally differ seriously, and accordingly expressed that opinion upon the Bench finally, when the

(*a*) *Melrose* v. *Hastie, suprà* vol. i., p. 698, where Lord Chancellor Cranworth lays down the same doctrine.

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issues were adjusted. I cannot say that I think there is likely to be any inconvenience under such circumstances. On the contrary, I think it is advisable where there is a serious difficulty and difference of opinion among the Judges as to what the issues shall be, that the parties should not be precluded from taking the opinion of the Court of Appeal before trial, because it leads to a strong conjecture that there may be an improper issue joined, and a failure of justice attended with great delay and very serious expense, all which might have been obviated if there had been an appeal to this House in order to determine whether the issues which the majority of the Judges of the Court below thought proper, or those which the minority thought proper, were those which were approved by this House.

I am sorry, if your Lordships should agree with me as to the competency of this Appeal, that we cannot hear the case till the next Session.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, I have nothing to add to what my noble and learned friend has said, except that I would point out that the cases that have been referred to in the argument were all cases before the last Statute. I confess that I have felt during the whole of this argument that very little of it was to the purpose; because, whether there was or was not an appeal allowable before the final end of the cause under the 6 Geo. 4., it seems to me that that question is entirely put an end to by the Statute of the 13 & 14 Vict. c. 36., which directs a new mode of settling the issues, and expressly enacts that the course of procedure in respect to matters connected with jury trials, and the settling of

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issues, shall follow the course of all other procedures in the Court of Session.

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I conceive, therefore, that an Interlocutor settling the form of the issue is to follow the fate of every Interlocutor in the Court of Session; and I have no doubt as to the competency of this Appeal.

Lord Kingsdown's opinion.

Lord KINGSDOWN:

My Lords, I entirely agree with the opinions of my two noble and learned friends.

Mr. *Roundell Palmer:* Will your Lordships permit me to refer to the question of costs of this hearing. In the case of *Geils* v. *Geils* (*a*), which was before your Lordships in 1851, you thought fit specially to reserve the costs of the objection to the competency of the Appeal until the matter was finally disposed of, and I would ask your Lordships to do the same in the present case.

Lord Advocate: I do not know that I have anything to object to that.

The LORD CHANCELLOR: Be it so.

Appeal received: Costs of the question as to Competency reserved till the Hearing on the Merits.

The hearing on the merits took place in the beginning of Session 1860.

The circumstances out of which the litigation arose were the following:

THOMAS JOHNSTON, a farmer, by testamentary trust disposition, dated 24th January 1844, conveyed "all

(*a*) 1 Macq. Rep. 36.

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subjects *of an heritable nature*," which should belong to him at his death, to his brother Alexander, the Respondent, who was, in fact, the testator's heir-at-law.

By the same instrument Thomas Johnston conveyed "all his *moveable* estate, and all debts and sums of money due and owing to him by bond, bill, &c." to his brothers George and William, and to the said Alexander, and to his niece Betsy, the only surviving child of his brother John deceased, "equally among them, share and share alike."

Thomas Johnston died on the 2nd July 1855. After the funeral the sorrowing relatives met at the house of the deceased. Mr. Robert Swan, a solicitor in Kelso, was present, and he prepared a "minute," which contained the following clause:—

> A note of the whole estate which belonged to the deceased is annexed, and subscribed by the parties, with reference hereto; and considering that it is doubtful whether the sum of 1,600*l.* mentioned in the same state be heritable or moveable, it is agreed by the said Alexander Johnston that the said sum of 1,600*l.*, which is held in trust by Messrs. George Johnston and John Johnston, shall be considered moveable, and be divided as such in terms of the said disposition and settlement."

Alexander Johnston brought the present action to have the "minute" set aside, "so far as regarded the said sum of 1,600*l.*," on the ground that Swan had represented it as moveable, when it was in fact heritable.

The following were the pleas in law for the Pursuer:—

1. The said minute and agreement having been subscribed by the Pursuer, without value or consideration,—without any legal advice or assistance, and under essential error of his legal rights and the nature and effect of the deed, the same is null and void, and reducible at the Pursuer's instance.

2. The Pursuer having been induced to subscribe the said minute and agreement by the said Robert Swan, acting for behoof

of the Defenders, or one or more of them, by misrepresentation or concealment of material facts, the same is null and void, and reducible at the Pursuer's instance.

In defence, the executor, for himself, as well as on behalf of the parties beneficially interested, put in the following pleas in law:—

1. The sum of 1,600*l.*, held in trust by Messrs. George and John Johnston, must be held to be moveable in the question as to the right of succession to the deceased Thomas Johnston, in respect,—First, that the said sum was moveable in the person of Mr. Johnston, before it was invested on the heritable bond and assignation in favour of the Messrs. Johnston by Mr. Nisbet, and in respect that as the said investment was the sole act of Mr. George Johnston, junior, in his character of manager for his uncle, and was not in any respect the act of Mr. Thomas Johnston himself, such investment cannot affect the character of the fund in the question of succession; and, second, that even supposing the investment to have been made by or with the knowledge of Mr. Thomas Johnston, the right vested in him under the declaration of trust above referred to was merely to call upon the Messrs. Johnston, as trustees, to account for and to pay over to him the said sum of 1,600*l.* in cash.

2. As the Pursuer insists in the present action solely in his character of heir in heritage of the deceased, he has no title or interest so to insist in or to follow forth the same in so far as the object thereof is to vindicate an alleged right to the said sum of 1,600*l.*, to which, as being moveable, he has in his said character no right or title.

The *Lord Ordinary* (Lord Ardmillan), having heard Counsel, pronounced the following Interloculor:—

28*th January* 1857.—Finds that it is alleged by the Pursuer that the sum of 1,600*l.* was advanced by the late Thomas Johnston, in order to be invested on heritable security; and that the said sum, along with other smaller sums advanced by other parties, was invested on the security of the assignation to the heritable bond for 2,800*l.* referred to on the record; and the assignation was taken in name of George Johnston and John Johnston, but the same was held by them in trust for the parties severally advancing the money, and, in particular, in trust for Thomas Johnston, to the extent of the 1,600*l.* so advanced by him. Finds that, assuming these averments to be correct, the right of Thomas Johnston on the heritable security to the extent of 1,600*l.* so advanced by him, and held by his trustees for him, was heritable; but that the Defenders' avermments that Thomas Johnston did

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not effect, and was not a party to the effecting the investment of the said sum on heritable security, remained to be inquired into, and are now reserved. Finds that, by the minute of agreement sought to be reduced, the Pursuer appears to have abandoned and departed from the claim for 1,600*l.* without any consideration whatever, and not on a transaction or compromise or mutual adjustment of opposing interests. Finds that the Pursuer has alleged facts and circumstances relevant to infer reduction of the said minute. Therefore repels the objection to the relevancy pleaded by the Defenders; and appoints the Pursuer to lodge issues within eight days.

On a reclaiming note to the First Division of the Court of Session, the following Interlocutor was pronounced:—

14*th February* 1857.—Recall the Interlocutor of Lord Ardmillan reclaimed against: Find that the Pursuer has averred on the record facts and circumstances relevant to be sent to probation.

Under this Interlocutor the following issues were proposed on the part of the Pursuer (Respondent in the present Appeal):—

1st. Whether, at a meeting of the relatives of the said deceased Thomas Johnston, held on 9th July 1855, the Pursuer was induced by misrepresentation or concealment of material facts, to enter into the minute of agreement in the pleadings mentioned?

2nd. Whether the said minute of agreement, so far as it relates to the sum of 1,600*l.* therein mentioned, and security therefor, was entered into by the Pursuer without value, and under essential error?

The issue proposed on the part of the Defender (the Appellant) was as follows:—

It being admitted that a sum of 1,600*l.*, which belonged to the deceased Thomas Johnston, was invested in name of George Johnston, junior, and John Somerville Johnston, under an assignation bearing date 13th April 1846, by Ralph Compton Nisbet, to a bond and disposition in security granted by George Baillie over the lands and barony of Langshaw, on which Mr. Nisbet was infeft, conform to instrument of seisin; and it being also admitted that the said George Johnston, junior, and John Somerville Johnston, executed a declaration of trust bearing date the 14th and 16th May 1846, relative to the aforesaid assignation,—

Whether the said investment was not the act of the said deceased Thomas Johnston?

On again hearing Counsel, their Lordships of the Second Division pronounced the following Interlocutor:—

10*th March* 1857.—Having considered the draft issues in this cause, refuse the issue proposed for the Defenders, and approve of the issues proposed for the Pursuer, and find that these shall be the issues to be tried in this cause.

The Appellant having been advised that the several Interlocutors before recited were erroneous, appealed to the House.

The argument upon the merits was heard on the 30th and 31st January 1860, Mr. *Roundell Palmer* and Mr. *Anderson* appearing for the Appellant; and the *Attorney-General*, with the *Lord Advocate*, for the Respondent.

On the 10th February 1860, the following opinions were delivered by the Law Peers:

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion. 1860. *Feb.* 10*th.*

My Lords, I am of opinion that the two Interlocutors of 14th February 1857 and of 10th March 1857 ought to be affirmed.

Against the former, the Appellant objects that it is erroneous, inasmuch as it does not adjudicate on the preliminary pleas in law, which allege in substance that the property in question was *moveable*, not *heritage*.

If, upon the undisputed facts alleged and admitted upon the record, it had clearly appeared that in point of law the property must necessarily be considered *moveable*, I think that the Court ought at once to have so adjudicated, and to have pronounced a decree of *absolvitur*. The Pursuer alleges that the property

(*a*) Lord Campbell.

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was *heritage*, and if upon his own showing it certainly was not *heritage*, he can have no case; for, if it was *moveable*, there could have been no "*misrepresentation*" nor "*concealment*," and there could have been no "essential error." Therefore, if the 1,600*l.* had been a sum of money alleged to be secured merely by a promissory note, so as certainly to be *moveable* and not *heritage*, I think that the Interlocutor ought, on the preliminary pleas, to have adjudged that it was *moveable*, and to have assoilzied the Defenders.

But looking to the record, if there be any grave doubt whether the property was *moveable* or *heritage*, and if the Court deemed that in furtherance of justice, and for the benefit of the parties, it would be better first to direct issues, and to try whether there had or had not been the "misrepresentation," "concealment," and "essential error," alleged, I think the Court had the power to pronounce the Interlocutor of 14th February, without then adjudicating on the question whether the property was *moveable* or *heritage*. Such, we are assured by the *Lord Advocate*, is the practice of the Court of Session in similar cases; and this practice seems to me to be reasonable. If the immediate decision of a question of law is absolutely necessary to the determination of the matter in dispute between the parties, the Court must adjudicate upon it, however nice, difficult, and doubtful it may be; but where there are facts in controversy between the parties, bearing on this question of law, I think that the Court may direct issues instead of adjudicating on the question of law in the first instance.

I shall abstain from giving any opinion, whether upon the statements on the record the property in

controversy is *moveable* or *heritage*, and I am by no means certain that the question depends merely upon the written documents.

The next objection to the Interlocutor of 14th February 1857 is, that it finds "that the Pursuer has averred on the record facts and circumstances relevant to be sent to probation."

As to the relevancy, I could not, during the argument, bring myself to entertain any doubt. The allegations of the Pursuer, "that he was induced to sign the agreement by misrepresentation or concealment of material facts, and under essential error," may be incapable of proof; but I think they are abundantly sufficient, if proved, to support the action of reduction. This was a family settlement; and a family settlement, when *bonâ fide*, the law much favours. If, as suggested on the face of this written agreement, it had been considered doubtful by the parties, whether the sum of 1,600*l.* was *moveable* or *heritage*, neither party would have been allowed to resile. But, if it was heritage, and the Pursuer had been told as a fact by Swan that it was *moveable*, and so was induced to sign the agreement under the circumstances stated, he would not be bound by it. The argument that this was *a mistake of law*, I hold to be entirely futile.

The consequence is, that the two issues which were directed are unexceptionable. The first, which is confined to what took place at the meeting of the 9th July 1855, perhaps, might have been framed more advantageously for the Pursuer, but he is contented with the wording of it; and, indeed, the second issue of itself would, I think, be sufficient to raise the real question of fact between the parties.

I have only further to consider whether the unanimous decision of the Court in refusing the issue pro-

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posed by the Defenders was right; that issue being, "Whether the said investment was not the act of the said deceased, Thomas Johnston?"

Lord Chancellor's opinion.

Now, I am of opinion that, upon the trial of the two issues which have been directed, the question must arise, and must be decided, whether the sum of 1,600*l.* in controversy was *moveable* or *heritage?* The finding on this question is indispensable to the finding, whether there was misrepresentation, or concealment, or essential error, as alleged. Hence, as far as may be material for determining this question, the state of mind and all the acts of Thomas Johnston may be given in evidence, and I cannot believe that any such ludicrous objection can be taken as "that, before evidence can be given that during the transaction of the investment he was *non compos mentis*, he must, although in his grave, be cognosced as a lunatic." Therefore, the third issue is wholly unnecessary; and on this ground the refusal of it is, I think, sufficiently defended.

I must, therefore, advise your Lordships that this Appeal be dismissed with costs (*a*).

Lord Brougham's opinion.

Lord BROUGHAM:

My Lords, I entirely agree with my noble and learned friend in the conclusion at which he has arrived, and in the grounds upon which he has come to that conclusion.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, looking to the declaration of trust, I have come to the conclusion that the sum in question is heritage; so far, I mean, as its nature is to

(*a*) In course of the argument the Lord Chancellor said: "It is the function of a Court of Appeal to pronounce the decision which the Court below ought to have pronounced."

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be ascertained on the face of the deed. Whether, though heritage on the face of the document, it may be competent to the Defender to show by evidence that it is moveable, is a point on which I give no opinion. I can discover no distinction in principle between such a trust in favour of several persons and a trust in favour of one. If the whole 2,800*l.* had been advanced by Thomas Johnston, and the declation of trust had been made in the same language as that actually adopted, only varied so as to make it applicable to one person only, there could surely be no doubt or difficulty. The deed would have run thus: "Considering that we accepted such assignation in our favour for the purpose of serving our friend to whom the whole of the aforesaid sum belongs; therefore we declare that no part of the said sum belongs to us, and we hold the said assignation merely in trust and for behoof of the said Thomas Johnston."

This would have had the same effect, so far as relates to the nature of the security, as if the assignation had been made to Thomas Johnston himself. That doctrine will hardly require authority; but it is enunciated in Bell's Principles (*a*).

It can make no difference that there are more persons than one filling the character of what in England we call *cestuis que trust.* In the one case the sole creditor might call on the trustees to denude as to the whole. In the other, every creditor might call on them to denude of an aliquot portion.

The rights of the persons interested under this deed bear no resemblance to the rights of creditors to satisfy whom the debtor has conveyed an estate upon trust to raise money by sale or otherwise. In such a case the doctrine referred to by Mr. Bell (*b*) applies. The *jus crediti* under the trust is, in such a case,

(*a*) Art. 1488. (*b*) Principles, 1482.

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merely to demand a sum of money, a share of the general trust fund, and it is, therefore, moveable. This distinction runs through all the cases cited.

In the case now before the House the money was advanced expressly on heritable security, taken, it is true, in the names of trustees; but that makes no difference as to the character of the fund.

I am, therefore, satisfied that the money was not moveable, but heritage; and I, therefore, concur with the *Lord Chancellor* in thinking that the two issues granted at the instance of the Pursuer (the Respondent) were properly framed. And I further concur with him in thinking that the other issue was properly refused. If the points which it was intended to raise, can be gone into in the present action, they must be admissible in answer to the Pursuer's second issue, for they go to show that there was no essential error.

I feel bound to add, that if I had not satisfied myself that this sum is heritage, I should have felt very great doubt whether any issues ought to have been directed. For the Pursuer does not allege that if it be moveable on the face of the instrument he has any means of varying what so appears on the document. And if according to the true construction of the declaration of trust the sum in question is moveable, the Judge, as soon as the Pursuer has closed his case, will be bound to tell the Jury whatever may have been established in proof, that without requiring any evidence on the part of the Defender, they are bound to find a verdict for him, inasmuch as in such a case there can have been no deception, no essential error. The trial, therefore, in such a case would be perfectly useless. There are precisely the same means now of deciding on the construction of the instrument as will exist at or after the trial.

It is, however, unnecessary for me to speculate on

point, entertaining, as I do, a clear opinion that the sum in question is heritage and not moveable.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, I agree in the result at which my noble and learned friends have arrived, upon the grounds which have been clearly stated by my noble and learned friend, Lord *Cranworth*.

The question which lies at the root of the whole case is, whether the sum of 1,600*l*., advanced by Thomas Johnston upon the assignation of the bond for 2,800*l*. to George and John Johnston, is a heritable or moveable subject. If it is moveable, there could have been no misrepresentation nor essential error which induced the Pursuer to enter into the agreement of the 9th July 1855. It was, therefore, not liable to reduction, and the Defender was entitled to an *absolvitur*.

It is admitted that if upon the face of the instruments the subject-matter clearly appeared to be moveable, the Court ought to have so decided; and so, I suppose, they ought to have done if it as clearly appeared to be heritage. But it is said that if the question was considered by the Court to be doubtful, it was competent to them to waive the decision until after the trial of issues of fact between the parties.

I must say I entertain serious doubt whether this course could properly be pursued. I cannot but express this opinion with some hesitation, after what has been said by my noble and learned friend, the *Lord Chancellor*. I assume that there was no probability that upon the trial of issues any fact was likely to be proved which would throw any light upon the legal character of the subject, and that the case would have come back to the Court after the trial still to be determined by them upon the construction of the

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instruments. Under these circumstances, it appears to me that it was the right of the parties to have the previous decision of the Court upon the legal question, upon which the whole case might ultimately turn. Whatever difficulty might surround the question, the *jus crediti* must have been either of a moveable or a heritable character; and if moveable, the whole case would at once have been disposed of, without the necessity of a trial. Ought not the Court to have placed the parties in a position to determine whether it was worth their while to incur the expense of an inquiry into the facts, which, in one view of the case, would be entirely thrown away? This appears to have been the opinion of the *Lord Ordinary*, who, upon the assumption that the Pursuer's averments were correct (which they certainly were, as they were proved by the written documents), found that the right of Thomas Johnston to the extent of 1,600*l.* was heritable, before he found that "the Pursuer had alleged facts and circumstances relevant to infer reduction of the agreement. The Court of Second Division, by recalling the Interlocutor of the *Lord Ordinary*, and finding that the Pursuer "had averred on the record facts and circumstances relevant to be sent to probation," intimated their opinion that it was unnecessary for them to decide as a preliminary question, whether the subject was heritable or moveable. And yet they must have proceeded upon the assumption of its being heritable, otherwise there would have been nothing to "send to probation."

Entertaining the view which I have expressed, I should have thought the Interlocutor approving of the issues proposed for the Pursuer clearly erroneous, if I were not able upon the face of the documents to ascertain that the subject-matter to which the agreement referred was heritage, and consequently that the

case was open to the allegation of misrepresentation or essential error to ground the action of reduction. There can be no doubt that the bond and disposition, the subject of the assignation to the trustees, with its obligation to infeft in the lands and barony of Langshaw and pertinents, and its precept of seisin, was a heritable security.

It was contended on behalf of the Appellant that the right of the parties under this declaration of trust was merely to demand the money from the trustees, and therefore that the heritable security which originally existed was, as between these parties and the trustees, merely moveable; and cases are cited to show that where a deed vests heritable subjects in trustees, with a right in others to demand delivery or conveyance of those specific subjects, the *jus crediti* is heritable, but that if the right be merely to demand a sum of money, the *jus crediti* under the trust deed is moveable. These are all cases of trusts which were created in favour of third persons in which the beneficiaries must of course take according to the declaration in their favour, and they hardly seem to apply to a case like the present, where the trustee is himself the object of the trust, and where the assignation is made entirely for his benefit. But the nature of the trust deed here appears to me to preclude all doubt, for it expressly declares that the assignation which includes the disposition of the heritable securities is accepted by the trustees, not for themselves, but for their friends. And this declaration cannot be affected by their afterwards binding and obliging themselves to pay the money, which is intended merely to show the amounts respectively advanced by the several parties who are to have the benefit of the assignation. Thomas Johnston and the other parties had a right under this declaration of trust to demand a delivery

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of the heritable subjects which were assigned to the trustees for their behoof, and therefore the *jus crediti* remained heritable as it was at the first. This being the case, the minute or agreement of the 9th July 1855 is open to reduction on proof of its being induced either by misrepresentation or of there being essential error as to the nature of the subject, and the Interlocutor approving of the issues proposed for the Pursuer is therefore correct.

It was pointed out in the course of the argument that the first of these issues hardly meets the question intended to be raised, as there does not appear to have been any misrepresentation, though there might have been concealment, at the meeting of the relatives of Thomas Johnston, held on the 9th of July 1855. But the Respondent is content with the issue as it stands, and the mode in which it is framed is not very important, as all that could be proved under it is contained within the comprehensive form of the second issue.

With respect to the issue proposed by the Defender, it is quite clear that it was properly refused. If the facts which it involves cannot be admitted under the Pursuer's issues, it can only be upon the ground of their being irrelevant, and then this issue, which is intended to introduce these facts, must itself be irrelevant. If these facts are admissible under the Pursuer's issues, then the issue is wholly unnecessary.

Lord Brougham's opinion.

Lord BROUGHAM:

My Lords, I had the advantage of reading my noble and learned friend's (*a*) opinion before I came into the House this morning, and I was aware that there was a difference of opinion among my noble and learned

(*a*) The Lord Chancellor.

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friends as to the reason for the affirmance. I agree in the main and entirely in the conclusion at which my noble and learned friend (*a*) arrives, and I therefore think it right that I should repeat that I take the same view of the reasons for affirmance as my noble and learned friend (*a*), and that I agree *in omnibus* with him.

Mr. *Anderson :* Will your Lordships allow me before the question is put, to remind you that there was a petition presented by the Respondent to dismiss the Appeal for incompetency which was referred in the usual way to the Appeal Committee, and by the Appeal Committee referred back again to the House. At the close of last Session we had a long discussion of two days upon the competency. The Appellant succeeded entirely upon that question, and your Lordships reserved the costs of that proceeding till the hearing of the Appeal. I submit that the Appellant ought to have the costs of that discussion upon the competency, and probably the better way will be that neither party should have costs, for the costs upon the question of competency are to a considerable amount. In *Geils* and *Geils* (*b*), where the same course was taken, your Lordships thought that where the Appellant succeeded upon the separate discussion upon the question of competency, but failed upon the merits, the right thing was to say nothing about costs.

The LORD CHANCELLOR : To say nothing about the costs incurred by that petition, but by no means if the merits are clearly with the Respondent, to deprive him of the costs to which he would otherwise have been entitled, I think that as to the costs of the Appeal, the victor should have his costs, but upon the

(*a*) The Lord Chancellor. (*b*) 1 Macq. Rep. 37.

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interlocutory matter, as to the competency, the Appellant was the victor.

Mr. *Attorney-General:* No; my Lord, with submission that was not so. I never heard of any instance, and I believe no instance can be brought forward, of any alteration as to costs being made by this House, upon the subject of a discussion touching competency, because that properly belongs to the Appeal Committee, and when the Appeal Committee thinks proper to refer it to this House, it is a decision by the Appeal Committee, that it is a proper question for the consideration of this tribunal.

The LORD CHANCELLOR: The Appeal Committee is only appointed by the House to report its opinion to the House, but what is finally done is the act of the House, not of the Committee.

Mr. *Attorney-General:* What I mean to say is, that the Committee thought it proper that the question should be discussed before the House, and that it should not be finally determined by the Committee. Now, what was done was this. The present Appeal is presented against three Interlocutors. Our complaint was that it was not competent. Your Lordships' decision given last Session was, that it was competent as to one of the Interlocutors. I have here the short-hand writer's note of the Lord Chancellor's speech on advising the House, and he puts it—"The question is, whether there can be an Appeal brought against this Interlocutor," that is the Interlocutor of the 10th of March 1857.

The LORD CHANCELLOR: I think during the whole discussion the argument was confined to that Interlocutor.

Mr. *Attorney-General:* Not quite so; the argument extended to all Interlocutors, but the decision of the

House was that the Appeal was competent against that one, because there had been a difference of opinion among the Judges below. Now, this is a most hard case, that we should have been brought to this House upon this question as to 1,600*l.* after all the litigation in the Court below. I humbly trust that your Lordships will think that we did right in calling the attention of the House to that most important question of competency. That was the opinion of the Appeal Committee, and surely it would be a very strange decision to hold, that if there be a matter fit for the consideration of the House brought forward by the Respondent, the Respondent who is wrongly brought here is to pay the expense of discussing that fit matter for the consideration of the House.

The LORD CHANCELLOR: I have often heard it said in the Courts below,—it may be a very fit matter to be discussed, but still the party who brings it for discussion, if he be wrong, ought to pay the costs. But I shall most readily defer to the opinion of my noble and learned friends upon this point.

Mr. *Anderson:* That was the course this House followed in the case of *Kerr* against *Keith* in the first volume of Bell's Appeal Cases, 386.

Mr. *Attorney-General:* There is no instance of such an order being made by the House.

Lord CRANWORTH: The correct principle would be that the Appeal as to merits should be dismissed with costs, and that the Appellant should have his costs of the discussion upon the question of competency. But what was done in the case referred to by Mr. *Anderson* was, I suppose done upon this principle, that the costs upon the one side and upon the other were nearly the same, and therefore it was thought best that to save the expense of the investigation, neither party should have his costs.

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Mr. *Attorney-General:* There is no instance of the House ordering costs in such a case as this.

The LORD CHANCELLOR: The difficulty would be in separating the costs of the Appeal from the costs of the Petition. The question I shall have to put to the House is, that the Interlocutors appealed against be affirmed with costs; and with regard to the Petition as to the competency of the Appeal, as that was decided in favour of the Appellant, that the costs of that discussion be paid by the Respondent, or rather that they be allowed as a set-off.

Interlocutors affirmed, and Appeal dismissed with Costs, except Costs of the question of Competency, which are to be set off.

RICHARDSON, LOCH, AND MACLAURIN—DEANS AND ROGERS.