paid by the appellants ought to be returned; and, with that declaration, the cause will be remitted to the Court of Session.

LORD CHANCELLOR.—The Clerk of the Parliaments will draw up the order in proper form.

Interlocutors reversed accordingly.

For Appellants, Loch and Maclaurin, Solicitors, London; John Archibald Campbell, C.S. Edinburgh.—*For Respondent*, Robertson and Simson, Solicitors, London; William Steele, Solicitor, Edinburgh.

FEBRUARY 10, 1860.

JOHN SOMERVILLE JOHNSTON, *Appellant*, *v.* ALEXANDER JOHNSTON, *Respondent.*

Reduction—Error—Fraud—Jus Crediti—Jury Cause—Issue—*At a meeting of friends after the death of a party, the heir at law signed a minute prepared by the agent for the executor, agreeing to hold a sum of £1600, part of the succession, to be moveable. He afterwards brought an action to reduce the agreement, on the ground of misrepresentation and essential error. Form of issues adjusted to try the question. A defence that the sum of money was moveable, and that the conversion of it into an heritable form was not the act of the deceased, in respect that he was at the time insane, and incapable of managing his affairs.*

HELD (affirming judgment), *Not to be pleadable* ope exceptionis, *as that question was premature at such a stage.*

OPINION—*That the* jus crediti *in the sum was heritage: Per* LORD CRANWORTH *and* LORD CHELMSFORD.

Appeal to House of Lords—Competency—Expenses—*An appellant having succeeded in a petition against the competency of an appeal, and the respondent having succeeded on the merits, the respondent*

HELD *entitled to the costs of the appeal, deducting the appellant's costs of the petition as to competency.*[1]

The Lord Ordinary pronounced the following interlocutor:—"28th *January* 1857.—Finds that it is alleged by the pursuer, that the sum of £1600 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 £2800 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 £1600 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 £1600 so advanced by him, and held by his trustees for him, was heritable; but that the defender's averments, that Thomas Johnston did not effect, and was not a party to the effecting, the investment of the said sum on heritable security, remain 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 £1600 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."

The Second Division recalled this interlocutor, and held, that the pursuer had averred relevant facts, and ordered issues to be tried as to whether the pursuer was induced by misrepresentation or essential error to enter into the agreement.

The defender appealed to the House of Lords, and the competency of the appeal has been decided. See *ante*, p. 895; 3 Macq. Ap. 619: 31 Sc. Jur. 764.

On the merits of his appeal the defender maintained in his *printed case* that the interlocutors of the Court of Session should be reversed, for the following reasons:—1. The sum of £1600 held in trust for the deceased Thos. Johnston, was moveable in the person of the latter, as in a question of his succession. Consequently, the interlocutors appealed from were erroneous, in respect effect was thereby refused to the first plea in law stated as preliminary for the appellant,

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[1] See previous reports 19 D. 706; 29 Sc. Jur. 320. S. C. 3 Macq. Ap. 619: 32 Sc. Jur. 286

in so far as rested on the second ground therein set forth, and to the second plea stated as preliminary, as the same were reserved to be disposed of along with the merits, by the interlocutor of the Lord Ordinary, of date 17th June 1856. 2. No averments sufficient or relevant to support the reductive conclusions of the action were set forth by the respondent; and the interlocutor of the Lord Ordinary of the 28th of January, and also the interlocutor of the Second Division of the Court of Session, dated 14th (signed 17th) February 1857, were erroneous, in so far as the relevancy of the respondent's averments was thereby sustained to any effect whatever. *Purdon* v. *Rowats*, 19 D. 206. 3. The issues, approved of by the Court below, were incompetent in point of form, and irrelevant in substance, and, further, they were not warranted by the facts set forth on the record on the part of the respondent. *Railton* v. *Matthews*, 3 Bell's Ap. 56; *A* v. *B*, Mor. 16,312; *Ross*, Mor. 5545; *Graham*, Mor. 5599.

The pursuer supported the interlocutors of the Court of Session on the following grounds:—"1. Looking at the nature of the case and the averments of the respondent on the record, the course followed by the Court in repelling the appellant's pleas, and allowing the case to go to trial upon the issues for the respondent, was both according to law and practice, and was the most expedient for both parties. 2. The issue proposed for the appellant was neither relevant as a defence to the respondent's action, nor was it supported by allegations on the record sufficient to raise such an issue."

R. Palmer Q.C., and *Anderson* Q.C., for the appellant.—The sum of £1600, held in trust for the deceased Thomas Johnston, was moveable in his person. There is no absolute rule of law which applies in such cases; but every question depends on its own circumstances, and the terms of the deeds on which the right is founded. In Bell's Principles, § 1482, it is laid down, that "if the *jus crediti* be merely to demand a sum of money or share of the general trust fund, it is moveable." Here the sole right to demand anything vested in Thomas Johnston, and what he was entitled to demand, was merely to have an account of the sum of £1600. The trustees were not bound to convey to him the heritable security itself, but merely to pay him the money—*Carfrae* v. *Carfrae*, 4 D. 605; *Scott* v. *Scott*, 8 D. 892.

If, therefore, the *jus crediti* were moveable, the interlocutor of the Lord Ordinary was wrong in finding it to be heritable. The question, however, whether it was heritable or moveable, was one of law, and therefore the mistake would not be material—See *Midland Great Railway Co.*, v. *Johnson*, 6 H. L. C. 798.

[LORD CHANCELLOR.—I think it is clearly a question of fact.]

Whether a right is heritable or moveable must be a question of law, depending entirely upon the construction of deeds. If, therefore, the question was one of law, an error will not affect the transaction. An agreement entered into on the supposition of a doubtful right is binding—*Hope* v. *Dickson*, 12 S. 222; *Dickson* v. *Halbert*, 16 D. 586; *Wilson* v. *Sinclair*, 4 W.S. 398; *Dickson* v. *Monkland Railway Co.*, 5 W.S. 445.

There are no averments of any misrepresentation or concealment which are relevant to go to trial. At all events, the counter issue proposed by the appellant ought to have been allowed. The issue set up the point that the late Thomas Johnston was not *compos mentis*, but was suffering under mental imbecility—*Kennedy* v. *Kennedy*, 6 D. 40. It was not necessary that a separate action of reduction should be raised for this purpose.

The *Attorney-General* (Sir R. Bethell), and the *Lord Advocate* (Moncrieff), for the respondent.—As to the first point, there are abundant relevant allegations of fraud and misrepresentation to suffice for going to trial. As to the issue proposed for the appellant, it is incompetent, for the late Thomas Johnston was admitted to be *sui juris* at the date of the investment. His imbecility cannot be established by way of defence or exception.

R. Palmer replied.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, I am of opinion that the two interlocutors of 14th February and 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 and 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 absolvitor. The pursuer alleges, that the property was heritage, and if, upon his own shewing, it certainly was not heritage, he can have no case; for, if it was moveable, there could be no "misrepresentation" nor "concealment." Therefore, if the £1600 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 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 their 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 allegation 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 £1600 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 it 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 9th July 1855, perhaps might have been framed more advantageously for the pursuers; 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 proposed by the defenders, was right, that issue being, whether the said investment was or was not the act of the said deceased Thomas Johnston?

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 £1600 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.

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

LORD CRANWORTH.—My Lords, looking in this case 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 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 shew 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 £2800 had been advanced by Thomas Johnston, and the declaration 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 surely could have been no doubt or difficulty. The deed would have run thus:—"Considering that we accepted said 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 that 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 to Thomas Johnston himself. That doctrine will hardly require authority, but it is enunciated in Bell's Prin. § 1488.

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 (Prin. § 1482) applies. The *jus crediti* under the trust is in such a case 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 granted. 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 shew that there was no essential error.

I feel bound to add, that, if I had not satisfied myself that this sum is heritable, 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 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 the point, entertaining, as I do, a clear opinion that the sum in question is heritage, and not moveable.

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 £1600, advanced by Thomas Johnston upon the assignation of the bond for £2800 to George and John Johnston, is an heritable or a 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 of July 1855. It was, therefore, not liable to reduction, and the defender was entitled to an absolvitor.

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 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 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 an 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 on the heritable security to the extent of £1600 was heritable, before he found that "the pursuer had alleged facts and circumstances relevant to infer reduction of the agreement." The 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 sought to be reduced 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 an heritable security. For the convenience of the parties advancing the money to the original creditor, it was arranged that the assignation to the security should be taken in favour of George Johnston and John Johnston, and the several other parties, according to their respective interests therein. The assignation was accordingly taken in this matter, both of the bond and disposition, and also of the lands and pertinents therein contained, and was duly registered on the 18th May 1846. The Johnstons, by a declaration of trust, reciting the assignation of the bond and disposition in security, and reciting also that, by the bond, the lands and barony of Langshaw were disponed in further security, and that they had accepted the assignation in their favour for the purpose of serving their friends, declare, that no part of the £2800, the amount of the bond, belongs to us, except £360, and that we hold the assignation merely in trust and for behoof of the parties after mentioned, for their respective interests, according to the sums advanced by them, to whom, and their heirs, "we hereby bind and oblige ourselves, and our successors as assignees, to account for the principal sums advanced by them to us for the purpose of obtaining the said assignation, viz. to Thomas Johnston for £1600, and to the other parties the amount advanced by each of them."

It was contended on behalf of the appellant, that the right of the parties under that 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 were cited to shew, that where a deed vests heritable subjects in trustees, with a right in others to demand delivery or conveyance of these 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 were 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 shew 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 of the heritable subjects which were assigned to the trustees for their behoof; and, therefore, the *jus crediti* remained heritable as it was at 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 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.—My Lords, I had the advantage of reading my noble and learned friend's 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 friends as to the reasons for the affirmance. I agree in the main entirely in the conclusion at which my noble and learned friend 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 on the woolsack, 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 that 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 of a considerable amount. In *Geils* v. *Geils*, *ante*, pp. 1, 170; 1 Macq. Ap. 36,255, the same course was taken. Your Lordships thought, that where the appellant succeeded upon the separate discussions on the question of competency, but failed upon the merits, the right thing was to say nothing about costs.

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

The *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.

LORD CHANCELLOR.—The Appeal Committee is only appointed by the House of Lords to give its opinion to the House; and what is finally done is the act of the House, not of the Committee.

The *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 these 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 10th March 1857.

LORD CHANCELLOR.—I think, during the whole discussion, the argument was confined to that interlocutor.

The *Attorney-General.*—Not quite so; the argument extended to all the 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 £1600 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.

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 on this point.

Mr. Anderson.—That was the course followed by this House in the case of *Kerr* v. *Keith*, 1 Bell's App. 386.

The *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.

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

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 this House is, that the interlocutors 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, with costs, the respondent to pay the costs of the question as to competency.

Appellant's Agents, Loch and Maclaurin, Solicitors, London; C. Douglas and A. G. Monilaws, W.S., Edinburgh.—*Respondent's Agents*, Deans and Rogers, Solicitors, London; William Mason, S.S.C., Edinburgh.