he would there state his objection, or if he found that the business could not be got through at that meeting, he would have notice of the adjournment of his case, and distinct and personal notice upon the subject of the adjournment of the question of the rate. Therefore it appears to me that, upon this point, the case of *Scadding* v. *Lorant* is conclusive; but, without the case of *Scadding* v. *Lorant*, I should be clearly of opinion that there was not the slightest objection here, on the ground of the want of notice of the *agenda* or purpose of the adjourned meeting.

Affirmed, with costs.

For Appellant, Durnford and Co. Solicitors, London; Auld and Chalmers, W.S. Edinburgh. —*For Respondents*, Deans and Rogers, Solicitors, London; J. F. Wilkie, S.S.C. Edinburgh.

FEBRUARY 10, 1860.

THE COMMERCIAL BANK OF SCOTLAND, *Appellants*, *v.* JOHN RHIND; *Respondent.*

Banker—Evidence—Payment—Probative Writ—Bank Pass Book.—*A brought an action against the bank, with which he dealt, for payment of* £66 8s. 10d., *as the balance shewn by his pass book with the bank to be due to him since the last balance was struck. The bank, in defence, stated, that while the entries in the debit and credit side of the pass book generally were correct, an error had been committed by a clerk in entering a sum of* £80 *twice to the credit of A on the same day; and that, deducting one of these sums, A was their debtor in* £13 11s. 7d. *The bank brought no reduction of the erroneous entry in the pass book, but pleaded, in the action for payment, that nothing was due; that the pass book did not afford sufficient evidence to substantiate A's claim; that the* onus *lay on him to prove his case, or, at all events, that they were entitled to a proof in order to shew the error.*

HELD (reversing judgment), *That the pass book was not a probative document* in re mercatoriâ *equivalent to a receipt, but was only* primâ facie *evidence liable to be rebutted, and that the bank were entitled to proof* prout de jure *of their averments.*[1]

This action was raised by the pursuer, who is a farmer at Tomich, near Invergordon, against the Commercial Bank, for payment of the sum of £66 8s. 10d., being the balance alleged to be due on his cash account.

The defence was, that, instead of anything being due, the pursuer had really overdrawn his account to the amount of £13 11s. 2d.

The point at issue between the parties was, whether a sum of £80, entered to the pursuer's credit in his pass book on 5th June 1855, was to be taken into account or not.

The entries on the last page of the pursuer's pass book to his credit were as follow:—

"1855.		Forward,		£467	2	6
June 5.	Eighty pounds,	,,	A. M. G. MacG.	80	0	0
	Eleven pounds,	,,	A. M. G. MacG.	11	0	0
6.	Eighty pounds,	,,	A. M. G. MacG.	80	0	0
19.	Twenty pounds,	,,	A. M. G. MacG.	20	0	0
July 12.	Twenty-five pounds & 10d.	,,	A. M. G. MacG.	25	0	10"

These entries were all averred by the pursuer to be genuine *bonâ fide* entries, verified by the initials of the two proper bank officials.

The statement by the defenders was:—"The entries in the pass book of the cash paid into bank by or on account of the pursuer, after the 31st of October 1854, are correct, with the exception of the entry of £80, under date the 6th of June 1855. No such sum was paid into the bank, or was received by the defenders, or any of their officers or clerks, at Invergordon, either from the pursuer or on his account, on that date, and the entry was a mistake committed by Mr. George M'Gregor, the defender's accountant at Invergordon, who inserted it in the pursuer's pass book, with reference to a sum of £80, which had been paid in on account of the pursuer on the evening of the 5th of June 1855, after bank hours, and which the accountant did not observe had been already credited to the pursuer in the said pass book, on the said 5th of June.

Then further details as to the mistake were set forth.

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[1] See previous reports 19 D. 519; 29 Sc. Jur. 254. S.C. 3 Macq. Ap. 643; 32 Sc. Jur. 283.

The Court of Session held that the pass book, being a writ *in re mercatoriâ*, was equivalent to a formal receipt and was entitled to all the privileges of such a document.

The bank thereupon appealed, maintaining, in their *printed case*, that the judgment of the Court of Session should be reversed for the following reasons:—1. The entries in the pass book to the credit of the respondent, subsequent to 31st October 1854, the date of the last balance; and, in particular, the entry of £80 on the 6th of June 1855, were not, by the law of Scotland, probative or privileged writings. 2. The third plea in law of the respondent, maintaining that these entries could not be cut down, contradicted, or explained, except by his writ or oath, was unsound. 3. The appellants were entitled to a proof of their averments, that they only received one sum of £80 fron the pursuer in June 1855, and that the entry of 6th June 1855 was a duplicate entry of that in the pass book of the 5th of June 1855, and was made by mistake.—1 Bell's Com. 823; Erskine, 3, 2, 22, &c.; *Johnston* v. *Grant*, 6 D. 875; *Shaw* v. *Picton*, 4 B. & C. 715.

The *respondent* in his *printed case*, supported the judgment on the following grounds:—1. According to the system and practice of banking in Scotland, a pass book or written record of money transactions between a bank and its customer, contains, *inter alia*, the written receipts of the bank granted to that customer for each sum of money deposited therein to his credit. The receipts so granted are equivalent to separate formal receipts and are entitled to all the privileges and effect of such documents. Further, these entries of money deposited to the credit of a customer are so written and authenticated in the bank pass book as to constitute a holograph receipt of the bank. Consequently they possess all the qualities and privileges in law of holograph writings—16 Vict. c. 20; Tait on Evidence, 307, 336; Stair, 4, 43, 4; Erskine, 4, 2, 20; 3, 2, 24; 3, 4, 4; *Devaynes* v. *Noble*, 1 Meriv. 535. 2. The entry of deposited money in the pass book here being a bank receipt, it neither requires to be stamped in terms of the Stamp Act, nor to be attested in terms of the act 1681, in order to render it probative; but it is a privileged writ *in re mercatoriâ*, and therefore probative, notwithstanding that the signatures are in the form of initials. Moreover, it is privileged and probative in respect of being a holograph writ, and followed by *rei interventus*—16 and 17 Vict. c. 59; 1 Bell's Com. 53, 45, ed. 1858; *Thomson* v. *Gilkison*, 9 S. 27; Tait on Evidence, pp. 122-124; Erskine 3, 2, 24; Dickson on Evidence, pp. 360, 409, 412; 1 Shaw's Bell's Com. 54; *Buchanan* v. *Dennistoun*, 13 S. 841. 3. The fact of the deposit of the money having been verified by the production of a probative writ of the bank, and the respondent having thereby fulfilled the *onus* of proof that lay upon him, it is not competent for the bank to redargue the evidence of their own writ by parole, or to lead a proof *prout de jure* for that purpose. *Watt* v. *Macfarlane*, 15th February 1828, F.C.; *Wilson* v. *Sinclair*, 4 W.S. 398-409; Bell's Prin. § 534, p. 208. 4. It is not competent for the bank to superinduce upon, or conjoin with, the present process, reductive conclusions to cut down their own *ex facie* probative writ, there being no allegation upon the record of this process of falsehood, fraud, or error *in essentialibus* of the said writ, capable of founding a reduction of the same.

The *Attorney-General* (Bethell), and *Anderson* Q.C., for the appellants.—The interlocutor of the Lord Ordinary had put the case on its right foundation, and the interlocutor of the Second Division was against the first principles of justice, and could not be supported by any authority. The circumstance, that the entries to the credit of the customer were initialed by the officers of the bank, was introduced as a protection to the bank itself, and not for the purpose of making these entries any more binding upon them than if the initials had not been there; and these initials could not preclude the bank from establishing that the entries were double entries of the same identical payment. Assuming the appellants' averments to be true, which must be done in this question of relevancy, the conduct of the respondent amounted to a gross fraud, and, according to the general rule, evidence *prout de jure* was admissible in all such cases. Had the appellants brought an action of reduction, this could scarcely have been disputed, and if so, the question resolved itself into one of procedure rather than of principle. But there was no necessity for a reduction. It was impossible to contend that the entries were in the nature of probative writs, so as not only to bear faith in judgment, and therefore to be binding, but also to be *probatio probata* until reduced and set aside. Let it be assumed that the pass book and the entries therein were writings *in re mercatoriâ*, this did not make them probative in the sense contended for, but merely privileged to the effect of being obligatory, but not to the effect of standing against every impeachment until formally set aside in an action of reduction. A bill of exchange is undoubtedly an instrument *in re mercatoriâ*, and therefore privileged. But it is well established, that it may be impeached on the ground of mistake or fraud, by evidence *prout de jure*, and a reduction is not necessary—*Campbell* v. *Dryden*, 3 S. 320; *Crichton* v. *Watt*, 9 S. 516; *Fraser* v. *M'Naughton*, 9 S. 720; *Flockhart* v. *Lawson*, 9 S. 873; and 10 S. 472; *per* Lord Wynford in *Hunter* v. *George's Trustees*, 7 W.S. 339; *Macdonald* v. *Langton and Co.*, 15 S. 303; *Burns* v. *Burns*, 3 D. 1273; *Little* v. *Smith*, 8 D. 265; The same has been ruled in regard to a bank cheque or order—*Crawford* v. *Munro*, 2 S. 243. These cases did not proceed on the specialty, as alleged by the respondent, of the document being negotiable. This consideration

could not be maintained. If admissible at all, it would have an opposite tendency and effect. But further, the action of the respondent is brought for the balance of a current or open account, not of a settled or fitted account, and it is only where an account is "fitted" that the doctrine of Erskine, (3, 2, 24,) relied upon, is applicable. The respondent must admit that the entries to his debit in the account were not conclusive as against him; but, if so, it is impossible that the entries to his credit can be so. The account, as such, must either be probative *in toto*, or not at all. The account, moreover, is that which is kept with the bank. The pass book is only a copy, and the appellants do not dispute that the copy, as appearing from the pass book, is *primâ facie* evidence against them, and it may well be, that the *onus probandi* is thrown upon them. But they are willing to discharge themselves of that *onus* by evidence of the true state of the account, and of the source of the mistake whereby the two entries came to be introduced into the pass book. The books of the bank contain another copy of the account; and these books, if regularly kept, are admissible in evidence *valeant quantum*—See cases referred to in Dickson on Evidence, p. 592. They have been produced, and contain only one entry of £80.

Rolt Q.C., and *Mark Napier*, for the respondents, contended—that it was an old established rule of the law of Scotland, that a loan of money, or a deposit of money, cannot be proved except by writing. Writing is the only voucher, and where such writing exists as is sufficient for a voucher, it is proof positive, and its effect can only be taken away by the writ or oath of the party in whose favour the writing is conceived—Stair, 4, 43, 4; Ersk. 4, 2, 20; *Gray* v. *Grant*, M. 4474; Second Report Mercantile Law Commission, 1855, pp. 6, 7, Appx. pp. 54, 55. Parole evidence is not competent, even for a collateral purpose—*Stewart* v. *Syme*, 12th December 1815, F.C.; and such evidence is not admissible to prove allegations of fraud, so as to cut down a proper written voucher for payment of money. But here the two entries initialed by the officers of the bank are in the nature of probative writs, and just as effectual for all purposes as if they had contained the requisites of the act 1681, c. 5. *First*, They are so, because they must be taken to be holograph of the bank. The bank agent in whose handwriting the entries are, and by whose initials and the initials of the accountant they are verified, must be taken to have represented the bank itself; and it being a corporation or public company, it could only make a holograph writing by its authorized officer, and thus the bank's holograph is the same as the bank's duly attested bond—Ersk. 3, 2, 22. *Second*, The entries are probative as being *in re mercatoriâ*. Transactions between a banking company and their customer, a merchant or dealer, are undoubtedly mercantile, and if they be so, any written obligation relative thereto has the same effect as a deed—Ersk. 4, 2, 4; 1 Bell's Com. 53. The two entries are entitled to precisely the same effect as separate receipts for money granted by the bank's officers would have had. Until set aside by reduction, these two receipts would have been conclusive of their contents, and the bank must account for the money in both, unless they should disprove the respondent's title on a reference to his oath—*Anderson* v. *Forth Marine Insurance Company*, 7 D. 268; *Wright* v. *Paterson*, 6 Paton's App. 38.

The only exception to this rule was in the case of bills of exchange, where evidence *prout de jure* may be given in a suspension or ordinary action; and the reason of this exception is, because bills of exchange were negotiable.

Anderson Q.C., in reply.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, this is certainly an important case; but its importance has, I think, been considerably exaggerated. The appeal raises a question of procedure rather than of principle. The appellants admit that the entries in the pass book are *primâ facie* evidence against them; and the respondent admits that these entries are not finally conclusive. The only dispute at present is as to the time and manner in which the appellants may impeach the accuracy of these entries; the appellants contending that they are entitled to do so *ope exceptionis* as a defence to the present action; and the respondent contending that this can only be done by bringing a cross action, namely, an action of reduction.

It would, indeed, be a reproach to the law of Scotland, if, there being satisfactory evidence that, by the mistake of a clerk, there had been, in the pass book, a double entry of the same sum to the credit of the respondent, the mistake could, in no way, be shewn by the bank, and if he were entitled fraudulently to extort from them £80 beyond the amount of what is justly due to him. But it is conceded that if, in the present action, the bank should be precluded from any defence except *scripto vel juramento*, by written documents, or by the pursuer in this action being put upon his oath, and confessing the scandalous fraud with which he is charged,—the bank, by bringing an action of reduction, would be permitted, *prout de jure* (*i. e.*, by any credible evidence) to prove that the pursuer had paid into the bank only one sum of £80; that this sum was, by mistake, twice entered to his credit; that, in his dealings with the bank, the balance was against him; and that (the present action being suspended) the judgment in favour of the bank, in the action of reduction, would then be a complete defence to the present action for recovering the balance claimed.

Although I may venture to say that the more expedient course would be to admit proof of the mistake and fraud as a defence to the present action, if the rules of Scotch procedure would allow this course to be adopted; yet we are bound in this appeal to decide, as best we may, in the circumstances. There is no doubt that, in Scotland, by the act of 1681, deeds, when executed with certain solemnities, and by the common law certain mercantile writings, such as receipts, are denominated probative, and are to be received in evidence without proof that they are genuine; and that, when sued upon as genuine, they cannot be redargued in that suit except *scripto vel juramento.*

We are to consider whether this action is brought on a probative instrument. The summons says that the defenders should be ordained to make payment to the pursuer of the sum of £66 8*s.* 10*d.* sterling, being the balance due to the pursuer *on a current cash account* between the defenders and pursuer, the first item of which is dated 31st October 1854, and the last item, the 21st July 1856, conform to the said account itself, which will be produced at the calling hereof, and is hereby specially founded upon with the sum of 16*s.* 8*d.*, being the interest due on the said account at the rate allowed by the defenders on current cash accounts.

In his condescendence the pursuer states that he was supplied by the defenders with a pass book, in which were entered various payments and receipts occurring between him and the bank of the respective dates at which those were made. He afterwards adds, "that the payments made by him, according to the pass book, amount to £683 3*s.* 4*d.*, while the sums received by him and charged against him by the defenders amounted to £606 14*s.* 6*d.*, leaving a balance due to him of £66 8*s.* 10*d.*, conform to the said account or pass book herewith produced."

Accordingly the pass book is produced, and is in evidence, and the part of it relied upon between 31st October 1854 and 12th July 1855 is set out, and is headed, "*Dr.* The Commercial Bank of Scotland in account with Mr. John Rhind, *Cr.*" It contains 16 items on the debtor side and 25 items on the creditor side, those on the debtor side being initialed by the agent and accountant of the bank. There is no balance struck, and no signature at the foot of the account. Including the double entry of £80 on the debtor side, the balance of £66 8*s.* 10*d.* is in favour of the pursuer, as he alleges; but striking out one £80, there is a balance of £13 11*s.* 2*d.* in favour of the defenders.

The defenders, by their pleas in law, insisted that they were entitled to prove, *prout de jure*, that there had been the double entry of a sum of £80—first on the 5th June; and again on the 6th June; the mistake having arisen from the payment having been made late on the 5th after banking hours.

Now, I am clearly of opinion that the account or pass book on which the action is brought, is not probative. Erskine says that "fitted accounts" are probative; but the respondent's counsel admit that this is not a "fitted account;" it is an "account current" not signed and not settled. It is an open or current account, and used in opposition to a fitted or settled account. The proposition is too monstrous to be hazarded, that this document as a whole is probative, so as, like the Great Seal of England, to prove itself.

The respondent's counsel, therefore, were driven to contend that all the credit side of the account was to be discarded, and that each of the sixteen items on the debit side was to be taken separately as a probative writ. But this seems to me to be inadmissible. The account cannot thus be bisected vertically. The pursuer himself treats it as one entire document; and, for the purpose of making out his balance of £66 8*s.* 10*d.*, uses as evidence the whole of the credit side. Can the proposed conversion of the debit side into sixteen separate and independent receipts be allowed? Take the two entries respecting the £80, and what do they indicate:—"June 5, £80 A. M. C. MacG. £80 0*s.* 0*d.*" "June 6, £80 A. M. C. MacG. £80 0*s.* 0*d.*" These are supposed to be two perfect writings, *in re mercatoriâ*, which tell their own story, and do not require any, the smallest adminicle of evidence, and which can only be impugned *scripto vel juramento.*

An accountable receipt for a deposit with a banker in the usual form may well be probative; for giving faith to it, the story which it expressly tells is complete, and it is deliberately given to be used by itself as a proof of the deposit. But these entries in the pass book, whether on the debit or credit side, are merely items in an account current afterwards to be examined, adjusted, and fitted. According to the mode of operating proposed, the customer might take a pair of scissors, and, cutting off all the items in which the bankers take credit for payments, give in evidence the other side of the account, and so make at least a *primâ facie* case against the bankers to recover the full amount of all his payments into their hands for the last six years.

Considering that this pass book (as its name indicates) is a book which passes between the bankers and their customer, being alternately in the custody of each party, I think entries to the credit of the bank may be as good *primâ facie* evidence for the bankers, as those on the other side are *primâ facie* evidence against them.

Having come to the conclusion that this action is brought to recover no particular deposit, but a balance alleged to be due as appears by the pass book, and that the pass book is not probative, and that the pass book is only *primâ facie* evidence, liable to be rebutted *prout de jure*, I do not

deem it necessary to examine the cases cited, in which, on a charge of fraud, evidence has been admitted for the defendant *ope exceptionis*, without an action of reduction. It is conceded that this may be done in all actions on negotiable securities, though probative; and there seems great difficulty in seeing why the same liberty should not be given with respect to other mercantile instruments, although it may be properly withheld where the action is brought on a deed probative under the act 1681, by which the deed is required to be executed with such solemnities that it may be considered to be in the nature of a record. But the pass book not being within the category of probative writs, there is no ground for contending that an action of reduction is necessary for letting in proof of error in any of its statements.

I do not understand the great alarm alleged as likely to occur in Scotland by our reversing the view of the Court of Session. The customer still proves his deposit by the initialed pass book; and this pass book, according to the learned Judges who reversed the interlocutor of the Lord Ordinary, is not absolutely conclusive, for they allow that, by bringing an action of reduction, all the entries in the pass book may be questioned, and, *prout de jure*, proved to be erroneous.

I will only further observe that, in my opinion, a direct stigma has been attempted to be thrown on the bankers for defending this action. In my opinion, if they were convinced, that the pursuer was knowingly trying to avail himself of the mistake of a double entry, they acted meritoriously in seeking to resist and to expose the fraud of which he was guilty.

Upon the whole, I must advise your Lordships to reverse the interlocutor appealed against, and to remit the cause to the Court of Session, with directions to admit the appellants to a proof *prout de jure* of their defence.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the course which he recommends your Lordships to take in this case.

LORD CRANWORTH.—My Lords, I have only a very few words to add, concurring, as I do, entirely with my noble and learned friend. The entries in the pass book, whereby the appellants charge themselves, are, in the mode in which they are entered, sufficient to enable the customer to charge them. But when he sues, as substantially he does, on the pass book as a current account, it must surely be open to the appellants to shew, that they are entitled to add to their credit on the side of the account, opposite to that in which they are charged, a sum of £80 as due to them for any reason from the respondent. The pass book, as an account current, is not of itself a probative document; and, not being so, there can be no reason why the appellants should not be at liberty *ope exceptionis* to defend themselves by shewing the error according to the fact.

LORD CHELMSFORD.—My Lords, I entirely agree in the view of this case which has been taken by my noble and learned friend, the LORD CHANCELLOR. It is admitted, that the mistake (if it be a mistake) of the entry of the same sum twice over in the respondent's pass book, may be corrected in some other proceeding. But it is said, that the entries, being of the character of probative writings, no defence can be allowed in the present action, which is not founded upon proof *scripto vel juramento*.

It appears to be conceded, that if this were an account current of an ordinary description, it would be open by any species of proof to establish its incorrectness; and the Lord Justice Clerk observes, that "the effect of the entries cannot be got rid of in the shorthand and easy way of treating it as a mere account current, or copy of one;" thereby, as it seems to me, conceding that if it could be treated as a mere account current, the effect of the entries might be got rid of.

Now it is impossible to deny, that this account was a current account, as contradistinguished from a fitted or settled one. For the pursuer in his summons proceeds for the balance of an account, which he expressly calls "a current cash account;" and which account, he says, will be produced, and is hereby specially founded upon.

But it is said, that although the account may be a current account, yet it is one not of an ordinary character; and that from the peculiar nature of the entries of the sums paid in to the bank, each entry is equivalent to an accountable receipt, and is in itself a probative writing. And in support of this argument, the printed rules of the bank were referred to, by one of which it is declared, "That for money paid into the account the entry in the pass book must be initialed by both the agent and accountant, to make the receipt complete and binding on the bank." The object and effect of this rule appear to me to be, that the bank will refuse to recognize any receipt of money which is not vouched in a particular manner, but not that, if it is so authenticated, it shall be taken to be conclusive, and subject to no ordinary exception. This provision for the security of the bank, therefore, does not appear to me to change the character of the account from an ordinary banking account to one of such an extraordinary and unusual description as to justify the assertion of the respondent, that it would be competent to him to cut off the side of the account which vouches the payments made to him, and to found himself solely upon the entries in his favour, or upon any one of them, which he might choose to select, and which would be probative against the book.

I should have had very great doubt whether, if the action had been brought to recover the exact sum of £80, upon which the dispute arose, it would have been treated as an insulated

transaction, unconnected with the rest of the account, and so entitled to whatever character would have belonged to it, if it had stood alone. But the nature of the action appears to me to preclude the view taken by the respondent. It is founded on the whole account expressly described as a current account. The account itself is brought by the pursuer before the Court, and it would be unreasonable, as well as unjust, to say, that the different sides of such an account should have a different effect, when the balance which is claimed can only be arrived at by a due investigation of the whole account.

The passages cited from Erskine and from Stair to shew, that the testimony of witnesses is not admissible to prove a borrowing, and that payment cannot be established without a voucher, do not apply, as this is neither a case of lending nor a defence of payment. It is the claim of a balance, the existence of which depends upon the fact of the deposit of a particular sum of money, which is met by the denial of such a deposit having been made. If the bankers had given an accountable receipt for the £80, that would have been a privileged mercantile writing, which, by the law of Scotland, would be probative; and if the authenticated entries in the pass book could have been assimilated to such receipt, they would have been entitled to the same weight. But, for the reasons which I have already given, I think that the whole account must be looked at in the same manner, and that being open and unsettled, it must be subject in this action to every description of proof, by which its accuracy and correctness can be impeached. For these reasons, I am of opinion that the interlocutor appealed from ought to be reversed.

The *Attorney-General.*—My Lords, we have paid costs in the Court below. These, of course, will be directed to be returned; and your Lordships will give us, I have no doubt, the costs of the reclaiming note presented by the present respondent, on which the erroneous interlocutor now reversed was pronounced. If so, the order will be,—"Reverse the interlocutor appealed from; refuse the reclaiming note for respondent with expenses, and order the costs paid by the appellant to be returned;" and then remit to the Court below with the direction stated by my LORD CHANCELLOR.

Mr. Rolt.—The only observation I would make upon that would be, that probably your Lordships would leave the expenses in the Court of Session to be dealt with by the Court of Session.

LORD CHANCELLOR.—We ought always to pronounce the decree which we think ought to have been pronounced by the Court of Session. The only doubt I have is as to the costs of the reclaiming note.

The *Attorney-General.*—The Lord Ordinary's interlocutor tallies with what your Lordships are now pleased to say was right. Against that interlocutor the present respondent presented a reclaiming note to the Court of Session, and, on that application, the Court of Session made the present erroneous order. What the Court of Session ought to have done should have been, as I humbly submit, to refuse that reclaiming note with expenses. And what they ought to have done I humbly ask your Lordships now to do.

Mr. Rolt.—All that we say is, that we went with a reclaiming note to the Court, and we thought that we went there rightly; that there was sufficient doubt upon the question to entitle us to do so; and we submit, that your Lordships would not give the expenses in the Court of Session against us, it being a unanimous judgment.

LORD CHANCELLOR.—If those expenses ought to have been given by the Court below, we ought to give them now.

Mr. Rolt.—They ought not to have been given there, even assuming the judgment which the House has now given.

LORD CHELMSFORD.—Ought they not to have refused the reclaiming note with expenses?

The *Attorney-General.*—The costs must follow the event.

LORD CHANCELLOR.—If it would have been in the discretion of the Court below to have refused or allowed the costs of the reclaiming note, it may be open to a question; but if *de jure*, the costs would follow the decision in favour of one party, then those costs ought to be given now.

Mr. Rolt.—It is not a matter of course to give costs in refusing a reclaiming note; the Court may determine to refuse a reclaiming note without costs.

LORD CHANCELLOR.—The general principle is, that if the Court of Appeal affirms what has been done below, it affirms with costs.

LORD CRANWORTH.—Lord Cottenham was quite right in laying down, that the giving of costs ought not to be treated as punishment, but only as saying that the party is wrong, and must pay the expenses.

The *Attorney-General.*—Nothing is more to be deprecated than a discretionary power.

LORD CHANCELLOR.—The return of the costs to the appellant, I suppose, would follow the judgment as a matter of course; but there will be no objection to include that in the order.

The *Attorney-General.*—Your Lordships must make an order for it.

LORD CRANWORTH.—The House will declare, that the Court of Session ought to have pronounced an interlocutor dismissing the reclaiming note with expenses, and that the money

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