The Court of Session assoilzied the defenders.

The pursuers appealed to the House of Lords on the following grounds :—1. Because, under the terms of the last will of John Wilson, his nieces were truly substituted to one another in the event of any of them dying without issue. 2. Because the children of the nieces were preferred to the residuary legatee in regard to the succession of nieces deceased. 3. Because the provision made in favour of Jean Rae by her uncle vested in her, and fell to her heirs at law upon her death, intestate and without issue, in 1825.

The respondents maintained that the judgment appealed against was well founded—1. Because according to the true construction of the deed of settlement of 27th November 1802, Jean Rae took a life interest only in the legacy of £1000 thereby provided for her and her issue, and the said Jean Rae having died without issue, the fee of the legacy lapsed into the residue. 2. Because, if the legacy did not lapse, the appellants have not made up any title of representation to the said Mary Rae or Stewart. 3. Because the appellants cannot both approbate and reprobate the said deed of settlement of the 6th day October 1848, executed by the said William Rae Wilson, and the appellants have severally approbated the said deed of settlement. 4. Because the claim of the appellants is barred by lapse of time, and the transactions and proceedings of the parties.

Collins for the appellants.—The words of reference in the deed of 27th November 1802, "payable in the same terms and under the qualifications, &c., specified in former deeds," imported into that deed all the qualifications in former deeds and codicils applicable to this bequest, and therefore a substitution of survivors. The words, "the principal to their issue in fee," also contained a good gift to the issue of such of the nieces as had issue on the death of any of the others without issue. The direction in the will "to pay to each of my nieces, Mary, Isobel, Jean, and Ann, £1000," was likewise an absolute gift of a legacy to each niece, subject to divesting if she had issue—1 Jarman on Wills, 146; *Cookson* v. *Handcock*, 1 Keen, 817; *Cator* v. *Cator*, 14 Beav. 463; *Warwick* v. *Hawkins*, 5 De G. & Sm. 481; *Dawson* v. *Bourne*, 16 Beav. 29; *Fenton* v. *Farrington*, 2 Eng. Jur. N. S. 1120.

Anderson Q.C., and *Bird*, for the respondents, were not called upon.

LORD CHANCELLOR CAMPBELL.—I must say I sympathize with the respondents in this case in being called upon by the appellant, who sues *in formâ pauperis*, to defend this judgment. The question depends entirely on the construction to be given to the sixth article of the will. The cases cited from the English Courts are not applicable, for here there are technical terms of Scotch conveyancing, which have long received in Scotland a particular application. No authority whatever has been cited to shew that the Court of Session has put a wrong construction on the will. The interlocutor therefore must be affirmed.

Lords Brougham and *Cranworth* concurred.

Interlocutor affirmed.

Cosens and Hunt, W.S. *Appellants' Agents.*—John Court, S.S.C. *Respondents' Agent.*

AUGUST 10, 1859.

JOHN SOMERVILLE JOHNSTON (Executor of Thomas Johnston, deceased), *Appellant*, *v.* ALEXANDER JOHNSTON, *Respondent.*

Appeal to House of Lords—Competency—Issues—13 and 14 Vict. cap. 36, § 38; 48 Geo. III. cap. 151, § 15; 55 Geo. III. cap. 42, §§ 1 and 7; 59 Geo. III. cap. 35, §§ 6 and 7—Process—*It is competent to appeal to the House of Lords against an interlocutor of the Court of Session adjusting issues, where there is a difference of opinion among the Judges at adjusting.*[1]

The defender having been advised that the interlocutor of the Lord Ordinary of 28th January 1857, and those of the Second Division of 14th February and 10th March 1857, were erroneous, presented a petition of appeal to the House of Lords. The pursuer also presented a petition, maintaining that the defender's proposed appeal was incompetent, and praying the House to refuse it. These petitions having been referred to the Appeal Committee, the House of Lords pronounced the following order :—"*Die Sabbati*, 21° *Martij* 1857. Upon report from the Lords'

[1] See previous reports 19 D. 706; 29 Sc. Jur. 320. S. C. 3 Macq. Ap. 619; 31 Sc. Jur. 764.

Committees appointed to consider of the causes in which prints of the parties' cases now depending in this House upon appeals and writs of error have not been delivered pursuant to the standing orders of this House, and of other matters relating thereto, and to report to the House, and to whom was referred the petition and appeal in which John Somerville Johnston is appellant, and Alexander Johnston is respondent, to consider whether it is proper that the same should be received, and to whom was also referred the petition of the said Alexander Johnston, praying that the said petition of appeal might not be received, the same being incompetent, or any order made thereon,—It is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the said petition of appeal may be presented '*de bene esse*,' and that the question of the competency of the said petition of appeal be considered next session: And it is further ordered that it should in the mean time be referred to the Second Division of the Court of Session in Scotland to state to this House whether there was a difference of opinion amongst the Judges of that Division on pronouncing the interlocutor of the 10th of March 1857, complained of in the said appeal."

The Second Division of the Court of Session returned the following certificate:—"Having regard to the foregoing reference to the Second Division of the Court of Session in Scotland, we, the Judges of that Court who were present when the said interlocutor of the 10th March 1857 was pronounced, hereby certify that, in refusing to allow the defenders to obtain the issue proposed by them, there was no difference of opinion, and that there was difference of opinion among us as to the issues allowed to the pursuer. "J. HOPE. J. A. MURRAY. J. COWAN."

Thereafter the House of Lords ordered as follows:—"*Die Lunæ*, 24° *Augusti* 1857.—Upon the report of the Lords' Committees appointed to consider of the causes in which prints of the parties' cases now depending in this House upon appeals and writs of error have not been delivered pursuant to the standing orders of this House, and of other matters relating thereto, and to report to the House, and to whom was referred the respondent's petition in the cause *Johnston* v. *Johnston*, (presented on the 26th June last,) praying their Lordships that his petition presented on the 16th of March last, might be again taken into consideration, with the certificate of the Judges of the Second Division of the Court of Session thereon, and this petition, and that the said appeal might be dismissed as incompetent, with costs; and to whom was also referred the said petition of the said respondent, presented to the House on the 16th of March last, praying that the said appeal might not be received, or any order made thereon; and also the said certificate of the Judges of the Second Division of the Court of Session in Scotland transmitted to the clerk of the parliaments on the 4th of June last, pursuant to an order of the House of the 21st of March last,—It is ordered by the Lords Spiritual and Temporal in Parliament assembled, that the prayers of the said petitions be not complied with, but that the appeal be allowed to proceed; the benefit of all objections contained in the respondent's said petitions being reserved to him on the hearing of the appeal at the bar."

The *respondent* (in his *printed case*) maintained, that whether viewing the judgment of 14th February 1857 as an interlocutory judgment, or as allowing a trial by jury, the appeal was incompetent—48 Geo. III. cap. 151, § 15; 55 Geo. III. cap. 42, §§ 1 and 7; and 59 Geo. III. cap. 35, §§ 6, 7. These provisions were unrepealed by 6 Geo. IV. cap. 120, and were kept in force by 1 Will. IV. cap. 69. The case of *Balfour* v. *Lyle*, 2 Sh. & M'L., 12, shewed that it was incompetent to appeal against an interlocutor, ordering draft issues to be lodged by a party, or against an interlocutor appointing an issue to be tried in certain terms by a jury. See also *Bald* v. *Kerr*, 3 S. & M'L. 1. If the judgment could be viewed as one disposing of the question of law or relevancy, the appeal was also incompetent, (6 Geo. IV. cap. 120, § 28,) as leave had not been given by the Court to appeal, and the judgment of 10th March 1857 was not appealable, because it was interlocutory, and no leave had been obtained to appeal.

The *appellant* in his *printed case* maintained, that as there was a difference of opinion as to the issues allowed to the pursuer among the Judges in pronouncing the judgment of 10th March 1857, the appeal was competent—48 Geo. III. cap. 151, § 15. Consequently it was maintained, in reference to the same section of the statute, that it followed that it was competent to appeal against the whole of the previous interlocutors. It was impossible to maintain that the judgment of 10th March 1857 was an interlocutor ordering a trial by jury, there being no order to that effect. It no doubt might have a trial in view, but its plain object and intention was to fix the nature and form of the issues in which the question between the parties might be tried. The form of issue was most material, and in many cases it might be of vital consequence; and therefore it was of the utmost importance that it should be open to appeal, as it clearly was under the statutes in the present circumstances. See *Melrose* v. *Hastie*, 1 Macq. 698, *ante*, p. 315.

The *Attorney-General* (Bethell), and the *Lord Advocate* (Moncreiff), for the respondent began—The point of competency is the only point now to be argued. The interlocutor of 10th March 1857 cannot be appealed against. An interlocutor approving of issues for trial is an interlocutory judgment, and an appeal is expressly excluded by 48 Geo. III. cap. 151, § 15, against interlocutory judgments, unless where there is a difference of opinion among the Judges, and

here there was no difference. Again, if the interlocutor is viewed as one granting a trial by jury, then the appeal is excluded by 55 Geo. III. cap. 42, § 4; and 59 Geo. III. cap. 35, § 15; and 6 Geo. IV. cap. 120, § 15—*Balfour* v. *Lyle*, 2 Sh. & M'L. 12; *Bald* v. *Kerr*, 3 Sh. & M'L. 1; *Adam* v. *Allen*, 3 D. 1147; *Dundee Railway Co.* v. *M'Glashan*, 10 D. 1401; *Cullen* v. *Black*, 13 D. 1184. Further, if the interlocutor is viewed as determining a question of law or relevancy, the appeal is also excluded by 6 Geo. IV. cap. 120, § 33. This section is not confined to the enumerated causes—*Per* LORD BROUGHAM, *Irvine* v. *Kirkpatrick*, 7 Bell's Ap. Cases, 186. The Statute 13 and 14 Vict. cap. 56, keeps alive those acts, so far as not inconsistent with the latter Statute. On all these points of view this appeal is incompetent.

R. Palmer Q.C., and *Anderson* Q.C., for the appellant. — This appeal is quite competent. It must be taken as a starting point, that, at common law, there is a right to appeal against everything, and it requires a statute to prevent it—*Matheson* v. *Ross*, 6 Bell's Ap. 389. The general right to appeal against an interlocutory judgment was confined by the Statute 48 Geo. III. cap. 151, § 15, to those cases where there was either leave given, or there was a difference of opinion, or there was a subsequent interlocutor competently appealed against, which allowed of all prior interlocutors being brought up.

[LORD CHANCELLOR.—Here we have a solemn certificate of the Judges that there was a difference of opinion.]

That is so. If, therefore, the interlocutor of 10th March is appealable, it enables all the prior interlocutors to be brought up at the same time. It is said that the interlocutor of 10th March must be taken as one ordering a trial by Jury, and that as such it is excluded from appeal by the Statutes 55 Geo. III. cap. 42, § 4; and 59 Geo. III. cap. 35, § 15. But it is clearly not in terms an interlocutor ordering trial by jury; it merely assumes that there has been such an interlocutor. Why, therefore, should an appeal be excluded, seeing that there is a difference of opinion? The interlocutor is of vast moment to the parties; for, if the Court has miscarried in approving irrelevant or inconclusive issues, the whole expense of an abortive trial will be avoided if the appeal can be brought at once. This view of the competency of an appeal from an interlocutor approving but not ordering issues was taken by Lord Cranworth in *Melrose* v. *Hastie*, 1 Macq. 698, 25 Sc. Jur. 319, *ante*, p. 315.

It is said that the Statute 6 Geo. IV. cap. 120, §§ 5 and 33, prohibits an appeal against interlocutors disposing of preliminary defences, and on questions of relevancy, unless there is leave of the Court. But neither of these sections touches this case, for the former section expressly reserves enough to cover this case; and the latter section applies only to the enumerated causes, of which the present is not one.—See *Magistrates of Lanark* v. *Hutchinson*, 2 Sh. Ap. 386.

Lord Advocate (Moncreiff) replied.—The word "final" in 6 Geo. IV. cap. 120, means final to all intents and purposes, and not merely, as the appellants contend, final as regards the Court of Session. There is no precedent of any appeal ever having been brought against an interlocutor approving of issues, and the practice of the Court of Session has always hitherto proceeded on the contrary supposition.

LORD CHANCELLOR CAMPBELL.—My Lords, notwithstanding the length of the able argument at the bar in this case, I must say that the question seems to me to lie in a very narrow compass —I had almost said in a nutshell. 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 March 1857, which is in these terms:—"The Lords having considered the draft issues in this cause, and heard counsel for the parties, refuse the issues proposed for the defender, and approve of the issues proposed for the pursuer, and find that these shall be the issues to be tried in this case." Then they direct that the issues shall be adjusted accordingly. The question is, whether there can be an appeal against this interlocutor.

Now, it is allowed that this interlocutor was pronounced under the authority given to the Second Division of the Court of Session by the 13 and 14 Vict. cap. 36, § 38; 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 parties do not consent, the Lord Ordinary is immediately to 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 the 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 respondents to shew 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 ordering a trial by jury, 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 shew 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 6 Geo. IV. cap. 120; but what is there to

shew, that what was done under the 6 Geo. IV. is at all transferred into the 13 and 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 quite clear that that appeal is competent. It is admitted that, as a general rule, where the Court is divided, there may be an appeal against 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.

I was very much alarmed at the Lord Advocate for one moment suggesting that there never could be an appeal against an interlocutor pronounced by the Court of Session settling issues. It would amount to a denial of justice, because the whole merits in some of the most important cases that may be brought before that high tribunal may depend upon whether the issue is properly framed or not. 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 I thought that in every case in which there might be some trifling difference of opinion among the Judges, there might be an appeal brought to this House, by which justice might be delayed and needless expense incurred. But I think that apprehension is unfounded, because it is only where there is a serious and final and express dissent among the Judges that an appeal can lie—not when their opinions may differ pending the consideration of the case, but only when they finally differ and are ready to do as they did here, to certify that there was a difference of opinion. 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 issues were adjusted. Therefore I cannot say that I think that there is likely to be any inconvenience under such circumstances. On the contrary, I think it is advisable that where there is a serious difficulty and difference of opinion among the Judges as to what the issues shall be, the parties should not be precluded from taking the opinion of the Court of Appeal upon that before trial, because it leads to a strong conjecture that there may be an improper issue joined and a failure of justice at the trial, 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.—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 before the final end of the cause under the 6 Geo. IV., when issues were settled in the mode then directed, or even if there had not been an appeal (which I never could have believed) till the matter came up finally, it seems to me that that question is entirely put an end to by the Statute 13 and 14 Vict. cap. 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 issues shall follow the course of all other procedures in the Court of Session; and it expressly directs that the Court of Session are to settle those cases themselves, instead of its being done in the way in which they were originally settled. I conceive, therefore, that an interlocutor settling the form of the issue is to follow the fate of every other interlocutor in the Court of Session. I have no doubt therefore, as to the competency of this appeal.

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

Mr. R. Palmer.—Will your Lordships permit me to refer to the question of costs of this hearing? In the case of *Geils* v. *Geils*, *ante*, p. 1, which was before your Lordships, 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 object to that.

LORD CHANCELLOR.—Be it so.[1]

Appeal received.

Appellant's Agents, Douglas and Monilaws, W.S.—*Respondent's Agent*, William Mason, S.S.C.

[1] The hearing on the merits was postponed to the next session; see *post*, p. 909.