JULY 28, 1859.

Mrs. MARY STEWART or PATERSON and Husband, *Appellants*, *v.* Mrs. ANN CATES or RAE WILSON and Others (Trustees of the deceased W. Rae Wilson), *Respondents*.

Trust Deed—Clause—Vesting—Liferent and Fee—Residue—*A testator directed his trustees "to pay to each of his nieces, Mary, Isabel, Jean, and Ann, £1000 sterling, payable the interest thereof to each in liferent, and the principal to their issue in fee, payable in the same terms, and under the qualifications, limitations, and conditions specified in any former deeds in their favour." One of the nieces having died intestate and without issue,*

Held (affirming judgment), *That she had only a liferent of the £1000, and that that sum fell, as part of the general trust funds, to the residuary legatee.*[1]

The late John Wilson of Kelvinbank, who died in 1806, left his property by certain deeds in trust, directing the reversion, after payment of legacies and annuities, to be made over to the late William Rae Wilson, his nephew.

The sixth purpose of the (last) trust deed, which was executed in Nov. 1802, was—"to pay to each of my nieces, Mary, Isobel, Jean and Ann Raes, £1000 sterling, payable the interest thereof to each in liferent, and the principal to their issue in fee, payable in the same terms, and under the qualifications, limitations and conditions specified in any former deeds in their favour hereby referred to."

The most important previous provisions to the nieces were in his original deed of settlement in Aug. 1792—"To Mary, Isabella, Jean and Ann Raes, also children of my said sister and the said Patrick Rae, and to any other daughter or daughters procreated or to be procreated of the body of my said sister, equally among them, share and share alike, and the heirs of their respective bodies, the sum of £2000 sterling, payable on their respectively attaining to marriage or majority, or one year after my decease, which of these shall last occur, with interest thereof from my decease till payment; and in the event of the decease of any of my said nieces without heirs of her own body, before succeeding to her said legacy, or before marriage or majority, or without disposing of the same after the succession opens to her, and after her marriage or majority, I appoint her legacy to be paid to her sisters equally, or such of them as may be then alive, and to the issue of such of them as may be dead, in right of the parent.

In this deed there also occurred the following clause:—"And in explanation of the foresaid clauses substituting my said nephews and nieces to the legacies of each other, in case of the decease of any of them without issue, I declare my intention and will to be, that none of them shall have power to convey their legacies to any except their own issue by any deed that may be executed before the succession opens to them, nor afterwards, till after majority or marriage; and in case of the death of any of them after marriage or majority without issue, and without disposing of their bequest, the substitution before established shall take effect."

In another deed, executed in May 1797, there occurred the following provision in reference to his nieces: "And likewise, instead of the legacies formerly left to Mary Rae, Bella Rae, Jean Rae and Ann Rae, I leave to them, and any other female issue of my said sister, £2800 sterling equally among them, share and share alike; and I provide that the annuities and legacies now constituted in lieu of those in my former deeds, shall all of them be payable in the same manner, and subject to the like limitation, qualification, conditions and substitutions as are annexed to the former annuities and legacies, which are here holden as repeated for shortness sake."

Of the nieces Jean Rae died in 1825, after having attained majority, without issue and intestate.

William Rae Wilson, to whom, as principally interested, John Wilson's trustees had devolved the management of the estate, treated the legacy of £1000 to his sister Jean Rae as a lapsed legacy. After his death in 1849, the pursuer Mrs. Mary Stewart or Paterson, who was the only daughter of the now deceased Mary Rae or Stewart, the eldest sister of Jean Rae, and who had survived till 1847, brought the present action against Mr. Rae Wilson's trustees, in which she claimed right to one-third part of Jean Rae's legacy, in virtue of the substitution contained in John Wilson's trust deeds.

[1] See previous report, 26 Sc. Jur. 609. S.C. 31 Sc. Jur. 722.

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.