No. 24.

Colonel MATTHEW MACALLISTER, Appellant.
Lushington—Russell.

Mrs FLORA MACALLISTER, and OTHERS, Respondents.
Spankie—Dundas.

***Res Judicata.*—Circumstances in which it was held, (affirming the judgment of the Court of Session), that a decree pronounced in reference to a question of English law, on the motion of the party challenging it, constituted res judicata, although he alleged that he had acted under erroneous information as to the law of England.**

June 23. 1830.

1ST DIVISION.
Lord Meadowbank.

THE late Colonel Norman Macallister, Governor of Prince of Wales Island, was lost at sea in autumn 1810, leaving two natural daughters, Flora and Frances. He was proprietor of the estate of Cairnhill or Clachàig in Scotland, to which, in the absence of any deed of settlement, his elder brother, Colonel Matthew Macallister, the appellant, was entitled to succeed. The only deed which he left was a testament in the English form, containing inter alia the following bequests:—'I bequeath to my 'brother Matthew the sum of L.5000 sterling during his life, 'which is afterwards to revert to Flora Macallister, and her 'male heirs, and, failing them, to Frances Macallister.' After other conditional provisions in favour of the appellant, the deed contained this clause:—'I give and bequeath the whole and 'every part of my landed property and estate of Cairnhill, and 'any other lands that I may have, to my daughter Frances 'Macallister, and her lawful male heirs; and failing the said 'Frances Macallister, and her lawful male heirs, I bequeath the 'above named estate and lands of Cairnhill to my daughter 'Flora Macallister, and her lawful male heirs; and failing of 'them, I bequeath the above named estate and lands of Cairn-'hill, together with every other part of the property, to my bro-'ther Keith Macallister, and his lawful male heirs; and failing 'of them, I bequeath the above named estate and lands of Cairn-'hill to my brother Matthew Macallister, and his lawful male 'heirs; and failing them, I bequeath the estate and lands of 'Cairnhill to my nephew John Macallister, and his lawful male 'heirs; which, however, I have now burdened with one hundred 'pounds sterling a-year, for life, to my sister Peggy. All the 'rest of my property, with whatever may fall or become due to 'me, I bequeath to my brother Keith.' Independent of the above provision, a legacy of L.15,000 was bequeathed to Frances, and of L.10,000 to Flora.

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The appellant, availing himself of the informality of this deed, made up titles as heir-at-law to the estate of Cairnhill, and also claimed right to the liferent of the L.5000. In consequence of this, an action was raised in 1819, at the instance of the two young ladies, (who were then minors), and of a trustee under the deed, concluding that the appellant should either be ordained to denude of the lands 'in favour of the two ladies, in terms of the 'destination of the will; or otherwise, in the event that he should 'be found entitled to refuse to do so, that it ought to be declared 'that the said Matthew Macallister, his heirs and successors 'whatsoever, have, by so doing, forfeited and lost all right, 'title, and interest, in and to the said last will and settle-'ment, codicil, and letter of instructions, or to any legacies, be-'quests, provisions and destinations, or any clauses of any descrip-'tion conceived, and to all sums of money, estate, and effects 'whatsoever, heritable or moveable, real or personal, thereby in 'any way left or conveyed, directly or indirectly, immediately or 'eventually, to and in favour of him or of his foresaids, in any 'way, or in any event whatsoever; and that neither he, nor any 'of his foresaids, can in any event claim the same, or any of them, 'or take any benefit whatsoever under the said last will and settle-'ment, or letter of instructions relative thereto.' The appellant having resisted these conclusions, the Lord Ordinary appointed the parties 'to make out a joint case, and obtain thereon the 'opinion of one or more English Counsel on the will of Colonel 'Macallister, with reference to the second or alternative conclu-'sion of the libel.'

A case was thereupon prepared and transmitted to Mr Chalmer, the appellant's solicitor in London, who, in reference to it, wrote the following letter to the agents of the appellant in Scotland:— 'When we corresponded on this business in 1812, the question 'was supposed to be attended with some doubt, because of some 'decisions in Chancery; but I consider it now as quite settled 'adversely to your client Colonel Macallister, and that it may be 'laid down as a general rule, that one cannot act adversely to a 'will or the intention of a testator, by taking, on account of its 'informality or otherwise, what was meant for another, and at the 'same time take benefit from another part of the same instrument.' Mr Chalmer then referred to cases decided, and said,—'I am 'therefore of opinion, that it is vain for your client to contest the 'point. Were it my own case, I would not be at the expense of 'feeing Counsel on it. However, if the client or you think other-'wise, I see no objection to the Counsel proposed.' In conse-

June 23. 1830. quence of this communication, the appellant alleged that he was induced to lodge the following minute in the process:—'Upon 'the case being debated, the Lord Ordinary was pleased to order 'the opinion of English Counsel to be taken, whether the de- 'fendant, by taking the heritage, had forfeited his right to the 'provisions in the will. A joint case was accordingly prepared 'and sent to London; but before it was laid before Counsel, he 'came to the resolution of allowing the pursuers to take the bene- 'fit of the will as to the other provisions, provided they allowed 'decreet to go out, finding that the defender was entitled to take 'up the estate of Clachaig and others, as described in the sum- 'mons, and that the same are now absolutely and irredeemably 'his property. This offer the defender now accordingly makes, 'but reserves his whole pleas entire, provided the offer is not ac- 'cepted of.' In answer to this it was stated, 'that the pursuers, 'two of whom are under age, cannot enter into any agreement, 'to the effect stated in the minute, whereby a decreet should be 'pronounced, of consent, finding the estate of Clachaig the pro- 'perty of the defender. But the pursuers, without resuming the 'argument on either alternative of their summons, which they 'submitted to the Lord Ordinary when the case was debated, are 'willing that the case should go to avizandum on that debate, so 'that his Lordship may decide upon the defence as he shall judge 'right. One thing, however, it is necessary previously to state, 'viz. that, as mentioned in the minute, a joint case was, in obedi- 'ence to the Lord Ordinary's appointment, prepared by the pur- 'suers, who, after communicating it to the defender, and urging 'to have it laid before English Counsel, desisted from this, upon 'the understanding that the defender now admitted, that, by the 'law of England, the forfeiture in question took place upon his 'entering to the estate; and the pursuers expected an admission 'to this effect to appear in the minute. If, however, that admis- 'sion is not there expressly made, the pursuers submit that it is 'implied from the circumstances there stated, and may be assumed 'by the Lord Ordinary in framing his decision upon the case.'

On considering this minute, and answers, the Lord Ordinary 'decerned in favour of the pursuers, in terms of the second or 'alternative conclusion of the libel, for having it found that the 'defender, by refusing to denude of the lands of Cairnhill or Cla- 'chaig, has forfeited all right and interest to the last will and settle- 'ment libelled.' Against this interlocutor the appellant repre- sented, on the ground that it did not assoilzie him from the con- clusion to have him ordained to denude of the lands; and, on

hearing parties, the Lord Ordinary assoilzied him from that conclusion, and adhered quoad ultra. June 23. 1830.

The trustee under the deed of settlement having died on the same day on which this judgment was pronounced, and Miss Frances Macallister having been in the meanwhile married, the appellant (with the view of obviating any objection to the judgment in point of form) brought an action of transference against the representatives of the trustee; and at the same time the trustees under the marriage-contract of Frances were sisted as parties; and the decree was then repeated, and afterwards extracted.

Thereafter, in 1822, an action of multiplepoinding was brought to settle the rights of the several parties under the deed of settlement, in which claims were lodged by Flora and the representatives of Frances, (who was now dead), for the L.5000 of which the liferent had been provided to the appellant. In regard to these claims, the Lord Ordinary ordered the opinion of English Counsel to be taken; and Messrs Copley, (now Lord Lyndhurst), Shadwell, (now Vice-Chancellor), and Bosanquet, delivered this opinion:—'With regard to the liferent devised by 'the will to Colonel Macallister, we are of opinion that the life 'interest given to Colonel Matthew Macallister in the L.5000 'has not been forfeited by him, by his succession to the real 'property mentioned in the will. The will does not in express 'terms raise a case of election; and it is a rule of the English 'law, that where a will, imperfectly executed, does not in express 'terms raise a case of election, an heir of law is not put to elec-'tion merely because he is made a legatee.'

This opinion having been communicated to the appellant, he brought an action of reduction of the decree which had been pronounced in the former action, on the ground, 1. That it had been 'pronounced in consequence of erroneous information as to the 'law of England, which it was admitted ought to regulate the 'question;' and, 2. That it was informal, because the action had been brought by minors without the concurrence of any legal guardian; and the circumstance of the trustee under the deed being a party, was not sufficient to obviate this objection.

To this it was answered, 1. That the decree had been pronounced in foro, and in terms of a motion made by the appellant himself, whereby, while he was assoilzied from one of the conclusions, decree was of his own consent pronounced against him in relation to the other; and, 2. That the decree was perfectly formal; and the objection, even if well founded in fact, (which it

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was not), was irrelevant, because it was competent to the minors alone, and not to the appellant.

The Court, on the report of the Lord Ordinary, assoilzied the defenders; and thereafter, in the process of multiplepoinding, pronounced this judgment:—'Find, that the sum of L.5000 'bequeathed to Flora Macallister, subject to the liferent of Co-'lonel Matthew Macallister, is payable in Great Britain in ster-'ling money—the expense of remittance falling upon the residuary 'legatee: Find, that Colonel Matthew Macallister, having taken 'the estate of Cairnhill, has forfeited his liferent interest in the 'said sum of L.5000, and repel his claim to the said liferent 'in the present process; and find, that the liferent interest so 'forfeited by him devolved upon Frances Macallister, during 'her life, and, after her death, devolved upon, and now be-'longs to Flora Macallister, and her male heirs; and that so 'much of the liferent as devolved upon the said Frances Macal-'lister does not fall under the conveyance in her contract of 'marriage, but is payable to the trustees for her husband and 'his creditors, subject to the burden or deduction after-men-'tioned: Find, that the said sum of L.5000 bears interest at 'the rate of four per cent per annum, from 15th August 1811, 'being a year after the testator's death: Find, that the annuity of 'L.100 per annum, provided to the testator's sister Mrs Marga-'ret Macdonald, and declared to be payable out of the lands of 'Cairnhill, must now form a preferable claim against, and burden 'on, the forfeited life interest of the said sum of L.5000; and is 'payable to her in Scotland, free of the burden of the expense of 'remittance, during her natural life, or so long as the forfeited 'life interest of Colonel Matthew Macallister in the said L.5000 'shall be sufficient to answer said annuity,—beginning the first 'term's payment of said annuity on the 15th day of August 1812, 'for the year immediately preceding: Find, that the burden of 'the said annuity must be borne by the trustees for the husband 'of the said Frances Macallister and his creditors, and by the 'said Flora Macallister and her male heirs, according to their 'respective interests in the said forfeited liferent interest.'*

Colonel Matthew Macallister appealed.†

Appellant.—It is proved by the opinions of English Counsel,

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* 5. Shaw and Dunlop, 862. 871.

† He having died, the appeal was revived in name of Keith Macallister, Esq. of Bar,

and is not disputed, that the appellant was entitled to the liferent of the L.5000. His claim, therefore, is one which is founded in law and justice, and it is met by a defence which is altogether of a formal nature. It is said, that because a decree has been pronounced, it cannot, agreeably to the forms of the law of Scotland, be opened up. But this is not a rule of universal application, for wherever substantial injustice has been done, arising either from ignorance of facts or other similar circumstances, a decree may be opened up. In the present case, the appellant acted under the influence of erroneous information, and the judgment of the Court was pronounced with reference to that which was founded in error.

Lord Chancellor.—If a party has not used due diligence, does that give him a right to appeal against the judgment of the Court below?

Dr Lushington.—If your Lordship thinks it does not, I need not occupy any more of your time.

Lord Chancellor.—If you choose to act upon the opinion of your agent, and not to examine evidence, you cannot say, after the judgment is pronounced, that you have now got evidence which you did not formerly produce. That has been my opinion from the commencement of the argument. I think that, on your own shewing, the judgment must be affirmed.

The House of Lords accordingly (without calling on the respondents' Counsel), 'ordered and adjudged, that the interlocutors 'complained of be affirmed.'

Appellant's Authorities.—4. Stair, 1. 44.; 4. Mackenzie, 3. 1.; 4. Ersk. 3. 3.; 4. Bankton, 7. 22. Miller, Nov. 27. 1801, (12,176.) Malcolm, Nov. 17. 1807, (No. 17. Appendix, Tailzie.) Clark, Nov. 17. 1825; (4. S. & D. 182.) A. *v.* B. May 19. 1815, (F. C.)

Respondents' Authorities.—Kaimes' Elucid. Art. 28. Dundas, March 9. 1810, (F. C.)

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