No. 53. WEDDERBURN DUNDAS, Appellant.—*John Campbell—Jervis.*

ROBERT DUNDAS and OTHERS, Respondents.—*Knight—James Campbell.*

Approbate and Reprobate—Foreign.—A domiciled Scotsman having executed, in Scotland, a deed of settlement conveying to trustees his whole property, including an English estate, which was probative according to the law of Scotland, but defective in point of form as to the conveyance of the English estate: found, (affirming the judgment of the Court of Session,) that the heir to the English estate could not take it, and at the same time claim a provision made to him in the trust deed.

Dec. 22, 1830.

2d DIVISION. Lord Cringletie.

THE late General Francis Dundas, a native of Scotland, was proprietor of the estate of Sanson Seal, in England, and also of a small landed property near Edinburgh, besides considerable moveable funds. He resided, and was domiciled in Scotland, where he married, and had several children. On the 14th of April, 1818, he executed, according to the forms of the law of Scotland, a disposition and deed of settlement in favour of trustees, by which he specially conveyed to them the estate of Sanson Seal, and his whole other heritable and moveable property, for the purpose of converting them into money, and dividing the free residue among his children in such proportions as he should direct, 'and failing any such appointment 'or division by me, equally and proportionally share and share 'alike among the said children.' This deed was tested in presence of only two witnesses, whereas, in order to form an effectual conveyance of the English property, it ought to have been subscribed before at least three witnesses. He died in January, 1824, leaving four children; the appellant was the eldest. The value of the English estate was estimated at L.14,000, while the heritable and moveable property in Scotland amounted to about L.37,000.

In consequence of the informality of the deed, the appellant, as heir-at-law, claimed right exclusively to the English property, and he also claimed an equal share of the other funds. This was resisted on the part of the younger children, who maintained that he was bound either to collate the English property, or to abandon all claim under the deed. To settle this question, the trustees brought an action of multiplepoinding and declarator before the Court of Session, concluding, 'That it should be 'found and declared that the said Wedderburn Dundas is not 'entitled to an equal share with the other children of the said 'General Francis Dundas of the lands, estates, heritages, debts,

'means, and effects, conveyed as aforesaid by his said father, Dec. 22, 1830.
'or to any benefit whatever under the foresaid trust-disposition
'and settlement, without collating the foresaid property called
'Sanson Seal, with the pertinents, and bearing, in respect of
'that property, a proportional share effeiring to its value or
'yearly free rental, of the expenses of management incurred,
'or to be incurred, by the pursuers during the existence and
'continuance of the foresaid trust, and of the sums expended,
'or to be expended, in payment of debts,' &c.; 'and in gene-
'ral to all the burdens to which the said subjects may be ex-
'posed; and in the event of the said Wedderburn Dundas
'refusing to collate as aforesaid, he ought and should be pro-
'hibited and interdicted from interfering with or molesting
'the pursuers in the management of the other estates, lands,
'heritages, debts, funds, and effects conveyed to them by the
'foresaid trust-disposition and settlement.' In defence the appellant contended that he was not bound to collate, and was, notwithstanding, entitled to an equal share of the fund over and above the English property. The Lord Ordinary reported the question to the Court on Cases, and issued the subjoined note of his opinion.*

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* 'On the merits of the case, the Lord Ordinary has not a doubt; and considers
'that the last case decided by the Court in circumstances not similar to this, but re-
'quiring the application of the principles of law recognised in questions of this sort,
'places this case in a very clear point of view. The Lord Ordinary alludes to
'Trotter *v.* Trotter, 5th December 1826, quoted by Wedderburn Dundas. In that
'case, it was admitted, on all hands, both by English and Scotch lawyers, that the
'law of approbate and reprobate in Scotland, and the law of election in England,
'are to the same effect, and that they both apply wherever it is clear that a testator
'has intended to bequeath or convey a subject, but has failed to do so in a legal
'technical manner. If, in such case, the person to whom that subject belongs or
'falls, through the failure of the proper technical conveyance, and which he would
'not have got if the deed had been technically formal, has also a separate interest in
'the deed; and, while he claims that separate interest, claims also the subject con-
'veyed away from him informally, he will not be permitted to take both. In Scot-
'land, the law of approbate and reprobate applies: in England, that of election.
'Both go to this, that the person may make his election, and take one, viz. either
'take the share arising out of the deed, if the testator's whole intentions have effect,
'or the subject not technically conveyed; but not both.

'Now, in this case, there is no question that the law of Scotland is the rule of
'guidance. The late General Dundas was a native of Scotland, and domiciled in it,
'and left a deed executed in the Scotch form. There is no room for questioning his
'intentions with regard to the property called Sanson Seal, situated within the Ber-
'wick bounds. It is conveyed by specific description to his trustees, along with all
'the rest of the landed property situated in Scotland. It may be true, and is ad-
'mitted to be so, that, owing to the deed not having been executed in the form
'required by the English statute of frauds, it is not in form to carry the Sanson
'Seal to the trustees, and that Mr Wedderburn Dundas is entitled to claim it. But

Dec. 22, 1830. On advising the cases the Court, on the 14th of January, 1829, found, 'That if Wedderburn Dundas (the appellant) 'shall ultimately take the estate situated in England without 'surrendering the same to the purposes of the trust, he cannot 'be entitled to claim under the trust-deed any share of the 'heritable and moveable estates in Scotland thereby conveyed 'to the trustees.'*

Wedderburn Dundas appealed.

Appellant.—It is admitted both by the respondents and in the judgment complained of, that there has been no legal conveyance of the English property, and that the appellant has the exclusive right to it. But it is said that he cannot take benefit under the first deed unless he shall collate the English property. To make out this proposition it is maintained, that although the deed be improbative to the effect of transferring the estate, it is probative to the effect of establishing that it was the intention of the testator to convey the property to the trustees, and that the appellant cannot, in the face of that declared intention, take the English property exclusively, and also claim in virtue of the trust-deed. But the true view of the case is, that the deed being improbative as to the alleged act of transfer, it must be read as if that property had not been mentioned in it; and, in that case, it is not disputed that the appellant would have been entitled to a share of the trust funds without collation, as was decided in Trotter *v.* Trotter. It is said, however, that this case must be decided by the law of Scotland; and this gives rise to these questions, 1st. Whether it is to be governed by the law of that country or of England; and, 2d. Whether there be legitimate evidence of the alleged intention; and, 3d. Whether the taking of a foreign property can bar a party from claiming under a Scotch deed.

In regard to the two first of these propositions, it is clear that as the question relates to an English estate, and to the probative nature of a deed of conveyance under the law of England, it must be judged of by that law. It was so held in the cases of

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'there being no doubt that his father did not intend that he should have that subject 'and a share of all the others, the law of approbate and reprobate applies, whereby 'he must make his choice either to abide by the Sanson Seal, or let it be sold by the 'trustees, and take his share of the whole estate, real and personal, left by his 'father.'

* 5 Shaw and Dunlop, p. 241.

Robertson *v.* M'Vean, and Ross *v.* Aglianby. Again, with reference to the last proposition, the appellant offered to show, that, according to the law of England, there is no such case of election raised as to prevent him from availing himself of his rights as heir-at-law, and also taking benefit under the deed. Dec. 22, 1830.

But supposing that the question were to be decided by the law of Scotland, there is no legal evidence of the intention to convey. It is admitted that there is no such evidence of the actual conveyance, and it is somewhat incongruous to maintain, that while there is no such evidence there is legal proof of the will of the testator to convey. Assuming, however, that there were such evidence, the circumstance of taking an English estate does not bar a party from claiming benefit under a Scottish deed, even where the intention to convey has been clear. This was so decided by this House in the above case of Ross, and in those of Gibson, Dundas, and Henderson, and the rule was recognised in Crawford *v.* Coutts.

The authorities on the part of the respondents are inapplicable to a case of this nature. In the cases of Kinloch, and of Drummond, the question related not to one of succession, but to the right of a creditor to proceed against the heir of his debtor. In that of Robertson *v.* M'Vean a party claimed the benefit of the Scottish right of collation in regard to heritage in Scotland, but declined to collate Jamaica property, and being thus in the position of demanding a benefit of a peculiar nature under that law, he was met by the equitable plea that he was not entitled to it unless he gave equal benefit under that law. But in the present case the appellant does not ask any peculiar benefit conferred by the law of Scotland. He founds on the express terms of a deed conferring upon him a share of the funds. In the cases of Cunningham and Kerr the deeds were not null, but only reduceable on extrinsic objections peculiar to the law of Scotland.

Respondents.—The construction of a deed must be regulated by the law of the country in which it was executed—a rule established by the cases of M'Hargs, Murray, and Trotter. The deed in question was executed in Scotland by a native domiciled Scotchman; and although ineffectual, according to the terms of a foreign law, to transfer a foreign property, yet being probative by the law of Scotland, it affords legal evidence of its contents, and consequently of the intention of the testator —a rule established by the cases of Cunningham and Kerr. The question therefore is, whether a party is entitled to take benefit

Dec. 22, 1830. under a deed, and at the same time to defeat the avowed intention of the maker. The negative of that proposition has been settled by the cases of Kinloch, Drummond, Balfour, Robertson *v.* M'Vean, and Robertson *v.* Robertson. In all of these it was held that the Scottish rule of approbate and reprobate was applicable; and therefore, that if a foreign property was included in a Scottish deed, but was, from defect of form, not effectually conveyed, the party availing himself of this defect, could not also take benefit under the deed. The decision of this House in the case of Ross was not intended to affect the general rule, but had reference to the construction of the statute 1681, cap. 10, it being held that that statute did not, in consequence of a conventional stipulation in a marriage contract relative to foreign property, bar a widow of her legal rights over property in Scotland.

In the course of the argument, the

LORD CHANCELLOR asked—Do not the English Courts take upon themselves to dispose, in a sense, of English land where the will is attested by fewer than three witnesses? Suppose I have an estate of Blackacre, worth £50,000, and I have also money in the funds, or other personalty, to the amount of £50,000, and I give and devise, by a will so insufficiently attested, my estate of Blackacre to B, and I give my money in the funds to A, my heir-at-law, upon condition that he shall take none of my real estate; B cannot read the will in an action of ejectment to entitle him to recover possession of Blackacre, as devisee; but A, coming to the Court of Equity for his legacy, must take it under a condition of giving up the estate of Blackacre to B; it is not just that, because the will touching Blackacre is good for nothing, and cannot be used by B, therefore the heir-at-law should deal with the will so as to take the legacy under it, and the land in spite of it. The answer to him is, "Take your choice,—either give up Blackacre to B; or do not take the £50,000 that has been left you:" and in this way the will operates on land. Now, does the Scotch decree affect the English estate here, any more than the English decree would affect an English estate in the case put? It is an express condition.

After the argument:

LORD CHANCELLOR.—In this case, my Lords, I shall state what occurs to me as the proper advice to give your Lordships with respect to the decision you should pronounce, and I should do so now, having certainly a strong opinion upon the subject. But as there is said to be the appearance of a clashing between the decision of the Court of Session and something that fell from a Noble and Learned Lord, who formerly presided in this House, and who advised your Lordships in the cases of Coutts and Crawford and Ker *v.* Wauchope; and as it is very much to be wished that there should not be the slightest discrepancy

between what has passed before and now on the law of Scotland, in a matter of such importance, I shall postpone the further consideration of the present question, until I have had an opportunity of looking into those cases again; and if I should be of opinion that there is any thing of difference between the decision of the Court of Session now, and the decision which your Lordships came to on the former occasions, I shall take an opportunity of talking with the Noble and Learned Lord who proposed the judgment of the House in those cases. Dec. 22, 1830.

On this point the English law is settled, but not perhaps upon the most natural and obvious principle; for undoubtedly, not only in the case of Barry *v.* Brodie, but in several other cases, and particularly in the case of Ker *v.* Wauchope, in which my Lord Eldon felt a good deal on the subject of the principle laid down by Lord Hardwicke in Herle *v.* Greenbank, that principle has not been deemed so substantially founded on what may be called natural reason and plain common sense, as to make it considered the principle which should have been adopted had the question been new. It was not so regarded by Lord Eldon, who seemed to think that there was a very unsubstantial and shadowy distinction involved in it. But this distinction has been taken in the case of Boughton; and in the case of Carey *v.* Askew, (a correct note of which was taken by Sir Samuel Romilly, and confirmed by the recollection of Lord Eldon, who referred to a note of his own, which he said he found fully confirmed the accuracy of Sir Samuel Romilly's note.*) That decision was pronounced by a most eminent Judge, Lord Kenyon—and there the distinction was followed as in the case of Herle v. Greenbank, and never since deviated from. It is laid down by Lord Kenyon, that where there is an unattested will, you are not at liberty to look into a devise, which, being ill executed, under the statute of frauds, is void and ineffectual to disinherit the heir—for the purpose of putting him to his election; yet, where there is a condition with respect to the real property, affecting the real property—and there is annexed a bequest of personalty to the heir, whether you call it the doctrine of election or not, does not signify—you are entitled to make an exception to the rule, that an unattested will does not put the heir to his election. If you make that exception, you let in the condition which touches the realty. You let in that condition for the purpose of forfeiting the personalty by the legatee, to whom both were given, unless, with that condition affecting the realty, he chooses to comply. So that you may really say, it is the doctrine of election with an express condition—the doctrine of election, in the more ordinary sense of the word, referring to an implied, not an express condition. With this distinction Lord Kenyon professes himself not to be well satisfied; but finding it to be the law, he felt himself bound, as we are bound, to administer it. Now, there does not appear in this case any thing affecting the doctrine of the English law in any judgment

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* 1st Cox's Reports, p. 241.

Dec. 22, 1830. which this House may be advised to pronounce. The question which arises much more resembles that in Barry *v.* Brodie, than in Carey *v.* Askew; and I only introduce what I have said, with respect to the case of Carey *v.* Askew, in order to meet the argument of the learned Attorney-General, who contended that the argument he was opposing led to what certainly would be a monstrous proposition—that the Scotch Courts would by their decision set aside the statute of frauds, in respect of the important branch of the execution of a will touching real property in England. If this decision should stand, it will not by any means tend to show that the Court of Session has a right to set aside in any manner the statute of frauds as to a will, with respect to an English freehold estate. In the case of an heir-at-law by the law of England, under a will not executed according to the statute of frauds, it will not tend to show that the Scotch Courts have, any more than the Court of Chancery here, such a power. In the case put by Lord Kenyon in Carey *v.* Askew, of a condition affecting realty, and annexed to a bequest of personalty, that bequest giving to the heir as legatee, but requiring him either to give up the legacy, or to give up his right to the real estate, although the will, being unattested by three witnesses, cannot touch the real estate, and cannot even be read in an action of ejectment to oust the heir of possession, yet, substantially, it may be said to produce a similar effect:—for we say to the heir, "You have a right to this land—this will cannot take it from you—no devisee can maintain an ejectment on this will—he cannot even read it in a Court of justice; nevertheless, we are dealing with a personal legacy, not with a real devise. We say, take your choice; if you choose to insist upon your right as heir-at-law, and take the land, then you cannot have the money." That is all the Court of Chancery would do in this case, and which the Court of Chancery did do in the case of Barry *v.* Brodie, and other cases. It appears to me at present, that the Court of Session have done nothing more to affect the real estate within the liberties of Berwick, than the Court of Chancery would do in the case I have put. They have only said, You come to us, not for the real estate, not to decide on the real estate in England, which we have no power to do; but you come to us as a legatee—you want to enjoy your fourth share under the will of the personal funds, and the heritable funds in Scotland; we have jurisdiction over them, and we put you to your election—either take the whole, according to the principles of the Scotch law—or reject the whole—take the legacy cum onere, or reject both the burden and the legacy. That is all the Court of Session has done. In the case of Carey *v.* Askew, the proposition refers to an express condition. The Scotch law, upon the doctrine of approbate and reprobate, does not appear to be the same. But the decision does not infringe on the English law; it operates only on Scotch personalty and Scoteh realty, over which the Scotch Courts have an undoubted right; and they say; "We, according to your principle, take the whole of this deed together. We do not say the deed has any effect on landed estates, any more than Lord Kenyon said, in the case alluded to, that

the will would affect an English estate. We do not say that this would take, in an English Court, from the heir-at-law his landed estates; but we are called upon to construe, according to the principles of our law, this Scotch deed; and knowing it to be a Scotch deed, we say, by the principles of Scotch law, not that you shall not have your estate in England, but that you shall not have your Scotch share, unless you will bind yourself to fulfill what we call, and construe to be the plain intent of the party."—It is taking up the matter upon the condition; the personal and real estate in Scotland the Court of Session can deal with, but not the English landed estate, except so far as the Court makes the vesting of the Scotch real and personal estate, or the share of it, to depend upon the voluntary act of relinquishing the English right. Now, as I am not prepared to say that the Scotch Court has not that power, and as I am prepared to say that they can exercise that power without violating the English law upon the ground stated, I should incline humbly to advise your Lordships to affirm the judgment. Nevertheless, wishing, if I can, to reconcile the affirmance of that judgment with the authority in those two cases of Ker *v.* Wauchope, and Coutts *v.* Crawford, I shall look into them before I finally dispose of this case; and if I should still entertain a doubt, which would go to shake the opinion which I have now formed, then I should ask leave to consult the noble and learned person who advised on those cases, with respect to any discrepancy which may seem to exist. I will now only move your Lordships that the further consideration of this case be postponed. Dec. 22, 1830.

Thereafter, on the motion of the Lord Chancellor, the House of Lords ordered and adjudged that the interlocutors complained of be affirmed.

Appellant's Authorities.—Robertson, Feb. 18, 1817, (F.C.) Ross, June 20, 1797, (4631). Crawford, (2 Bligh, 655). Trotter, Dec. 5, 1826, (5 S. and D. 78). Earl of Dalkeith, Feb. 1729, (4464). Dundas, Feb. 25, 1783, (15,585); reversed, May 21, 1783. Henderson, Jan. 31, 1797, (15,444;) reversed, May 29, 1802.

Respondent's Authorities.—M'Hargs, July 22, 1760, (4611). Cunningham, Jan. 17, 1758, (617). Kinloch, July 12, 1739, (4456). Drummond, June 7, 1798, (4478). Balfour, March 11, 1793, (2379). Robertson, Feb. 18, 1817, (F.C.) Robertson, Feb. 16, 1817, (F.C.). Trotter, Dec. 5, 1826, and June 10, 1829, (ante, III. 427). Kerr, May 3, 1819, (1 Bligh, I.)

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