1799.

(M. 4478.)

DRUMMOND, &c. *v.* DRUMMOND, &c.

MRS. SARAH DRUMMOND, Widow of the deceased JAMES DRUMMOND, Esq., of Deptford, Guardian for her Son, and WILLIAM MOLLE, W.S., her Attorney, . . } *Appellants;*

JAMES DRUMMOND of STAGAITH, Esq., and Others, Trustees of MRS. CLOW or DRUMMOND, Wife of the deceased JAMES DRUMMOND, and Others, being the Mother and four surviving Sisters of the late DAVID DRUMMOND, ... } *Respondents.*

House of Lords, 20th Feb. 1799.

HERITABLE DEBT—RELIEF AMONG HEIRS—FOREIGN DECREE—DOMICILE—RES JUDICATA.—A party, originally a native of Scotland, died domiciled in England, leaving an heritable estate in Scotland, and considerable moveable estate in England. The deceased's brother succeeded to the heritable estate in Scotland, and his mother and sisters, along with himself, to the personal estate in England. There was an heritable debt over the estate in Scotland for £2000, to pay which he sold part of the estate. He also took out letters of administration as to the personal estate in England; and the respondents having brought action there to make him account for their shares, he contended, that as by the law of England, where the deceased died domiciled, heritable bonds were a charge on the personal estate, he was entitled to deduct the heritable debt paid. The courts in England found accordingly. But the respondents thereafter raised an action in Scotland, of relief against the heir of provision in the heritable estate. Held him liable in relief, and that the foreign decree was neither *res judicata*, nor had decided the question of relief competent to the executors against the heir, who, according to the law of heritable estate and succession in Scotland, was liable to pay that debt.

Mr. Clow, Professor of Logic in the University of Glasgow, left his estates of Duchally and Pettentian, situated in the county of Perth, in Scotland, to his nephew, "David Drum-"mond, merchant in London, and the heirs of his body, "whom failing, to James Drummond, and the heirs of his "body."

David Drummond succeeded to these estates. He was a native of Scotland, but had been always domiciled in Eng-

land, engaged in business as a wine merchant. He had, after his succeeding to these Scotch estates, resorted occasionally to Scotland, and resided at the mansion-house, which was furnished, and where he had an establishment of servants, but his permanent domicile was in England.

He granted an heritable bond over both these estates of Duchally and Pettentian to Captain Birrel of Kirkaldy, for the sum of £2000 borrowed from him. He died thereafter July 27, 1791. in London, intestate, and without issue, leaving considerable moveable estate, and the real estates above mentioned.

In terms of his uncle's deed, the heritable estates in Scotland devolved on his brother, James Drummond, as heir of provision. The personal estate, if regulated according to the law of England, devolved on his mother, his five sisters, and James Drummond his only brother, the heir to the heritable estate.

James Drummond took out letters of admistration from the Prerogative Court of Canterbury to the personal estate. He also made up titles to the Scotch estates, and sold the estate of Duchally for £3800; and from the price thereof paid off many of his brother's debts, and in particular, the bond of £2000 to Captain Birrell.

The respondents, as next of kin, preferred their claim against the administrator in England, by raising an action in the English Courts to make him account for the personal estate, and to have the same distributed according to the English statute thereanent. Accordingly, the administrator was ordered to give in, and did give in, an inventory of the personal estate, but having deducted from the amount thereof the sum of £2000 paid to Captain Birrell, being the amount of the deceased's bond to him, the question came to be, Whether this debt was a charge on the real estates in Scotland, or his personal estate in England?

The next of kin contended, before the English Courts, that the deceased was a native of Scotland. That at the time of his decease, and for several years before that event, he was possessed of real estates in that country, constantly kept an establishment of servants at his mansion-house of Duchally, and occasionally resided there. That, though by the law of England, mortgages when paid, are chargeable against the personal estate, and so fall on the executors, yet the bond here was not an English bond. That this was a Scotch bond for money to be paid in Scotland, to a party domiciled in Scotland, and secured over estates there; that,

1799.

DRUMMOND, &c. v. DRUMMOND,

therefore, it fell to be regulated by the law of Scotland. which made such heritable burdens chargeable on the real estates, and consequently on the heir who took the Scotch estates so burdened. The estates having been burdened with the debt, the heir who takes these estates is both primarily and ultimately liable for the amount. In answer, it was admitted by the administrator that he had paid the £2000 bond out of the price of the Duchally estate sold; but as the deceased died domiciled in England, his personal estate was to be administered according to the English law; and as that law rendered the personal estate primarily liable for the debts due by mortgage or heritable bond, he was entitled to take credit therefor from the personal estate. The Court of England held, that "this was completely an *Eng-*
"*lish* transaction. The deceased was an Englishman, and
"the administrator an Englishman." "The payment was
"made as administrator, and he had a right to make it."

No appeal was taken from this sentence, but the respondents, conceiving that the above judgment did not bar their claim of relief against the heir of provision, who was primarily liable as such for the payment of this heritable debt, raised the present action in the Court of Session against him, concluding for relief, and payment of six-seventh parts of the £2000 (James Drummond being entitled to the other one-seventh according to the law of England).

At first, the Lord Ordinary (Lord Justice Clerk M'Queen)

Feb. 1, 1797. pronounced this interlocutor: "In respect that David
"Drummond died domiciled in England, and that letters of
"administration were taken out from the Prerogative Court
"of Canterbury by the defender, James Drummond, finds
"that the personal estate of the said David Drummond is
"to be administered according to the law of England; and,
"in respect that this question has been already tried, and
"received the decision of the Judge of the Prerogative
"Court, finds the action not now competent in this Court,
"and therefore sustains the defences."

But afterwards, on representation, his Lordship found,

Dec. 8, 1797. "that by the laws of Scotland, when a sum of money is se-
"cured upon lands by an heritable bond and infeftment,
"the lands are held to be the principal debtor; and in
"respect that the estate belonging to David Drummond,
"over which the heritable bond in question is granted, was
"taken up by James Drummond as heir to his brother: and
"that the same is of much greater value than the sum in

" the heritable bond; finds, that James Drummond is ulti-
" mately liable for payment of that heritable bond without
" relief against the personal estate of David Drummond:
" Finds, that the decree of the Prerogative Court of Canter-
" bury went no farther than to find that the sum in the he-
" ritable bond, being chargeable as a debt against the per-
" sonal estate, so James Drummond, who paid the heritable
" bond, was entitled to take credit for the contents thereof
" in accounting for the personal estate, but did not deter-
" mine the question of relief competent to the executors
" against the heir. Therefore, alters the former interlocu-
" tor, repels the plea of *res judicata;* finds, that James
" Drummond, the heir, is liable to the pursuers in payment
" of the contents of that heritable bond, and decerns."

On reclaiming petition, the Court adhered. " In respect, May 17, 1798.
" the pursuers did insist only upon a decree for six-seventh
" parts of the sum in the heritable bond." A second reclaiming petition was presented, contending that the Prerogative Court had already pronounced decree in this matter, which fell properly within its cognizance, and was exhaustive of the present question, and that, as the deceased was a domiciled Englishman, the succession to his personal estate, and the burdens to which that estate was liable, behoved to be regulated by the law of England, and consequently, that the decree of the competent Court in that country must be held to be *res judicata* in favour of the defenders. But the Court adhered with expenses. May 30, 1798.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The deceased David Drummond, though a native of Scotland, was domiciled in England at the time of his death, and having died intestate, the succession to his personal estate must be regulated by the law of England; and those who are called to the succession, by that law must take it with every debt and with every burden to which that law has rendered it liable. By the law of England, the mortgaged debt due to Captain Birrell having been contracted by the late David Drummond himself, is chargeable on his personal estate, (which is more than sufficient for answering the same), in exoneration of the real estate. This heritable debt due to Captain Birrell having been completely extinguished by the discharge and renunciation of the creditor, the heritable security was at an end, and the real lien over the lands was dissolved, and

1799.

DRUMMOND, &c. *v.* DRUMMOND, &c.

the executors had nothing more than a personal claim of relief against the heir. This claim of relief was cognizable in the Prerogative Court of Canterbury, which, as it is undoubtedly competent to take cognizance of the accounts of the administrator acting under its own authority, and to compel from him the account and final distribution at the instance of the next of kin according to their rights, so it had also an undoubted jurisdiction to take cognizance of every question necessarily incidental to such accounting and distribution; and, *de facto*, the judgment of the Prerogative Court of Canterbury, admitting the articles in the account objected to in the allegation for the respondents, was decisive as to that very claim of relief which they endeavour to make effectual by the action in the Court of Session. The point in dispute between the parties having therefore been determined by the sentence of a Court of competent jurisdiction, that sentence was to be considered as affording to the appellants the *exceptio rei judicatæ;* and, consequently, it was not competent for the respondents to insist in the action before the Court of Session, in order to make effectual that claim. And even although such action had been competent in the Court of Session, and although the judgment of the Prerogative Court of Canterbury had not stood in the way, still, as the real lien over the estate in Scotland was dissolved by the discharge and renunciation executed by the creditor, the action in the Court of Session could have been nothing more than a personal claim of relief, in which the pursuers ought to have insisted as the nearest of kin of their deceased brother, and, as such, having right to a share of his estate by the law of England; and, consequently, every personal claim competent to them *qua* nearest of kin, must have been decided by the law of England, which was the domicile of David Drummond; and as by the laws of that country the personal estate was the primary fund for the payment of any debt contracted by David Drummond, so his nearest of kin must take his succession according to that law, and cannot, by resorting to the Courts of a foreign country, compel a distribution different from that which the law of the domicile authorizes.

Pleaded for the Respondents.—By the law of Scotland, when a sum of money is secured by an heritable bond and infeftment, the land is held to be the principal debtor, and the land passes to the heir, burdened with the heritable debt, as much as with the land tax, or any other imposition

which the public law of the country lays upon it. When, therefore, James Drummond, who vested himself in the right of these lands, sold part of them, and out of the price discharged the debt due to Captain Birrel, he was only relieving himself of an incumbrance of which, had it been discharged at the expense of the executry, he himself would have been ultimately liable in the relief. But, as the debt was not paid out of the personal funds, nor is there any deficiency in the real estate, but, on the contrary, a very considerable reversion, there are no grounds for throwing this burden upon the executry in ease of the heritable property. This being a question in regard to an heritable subject situated in Scotland, the law of that country must be the rule according to which it is to be judged of. Though, by David Drummond having died domiciled in England, the personal succession must be governed by the law of that country, yet that cannot affect or interfere with the succession to his real estate situated in a different country, and governed by a different law;—land, which cannot, like moveable property, be removed from one country to another at the pleasure of the proprietor, must necessarily be subject to the rules of the jurisdiction within which it is situated; and as it can only be acquired and transferred according to the forms, and under the qualifications which the law of the jurisdiction points out, so it must be subject to all those burdens and limitations which the law imposes. Accordingly, James Drummond, when he took up these estates of Pettentian and Duchally, by a service as heir of provision, took them with the burden of Captain Birrel's infeftment; and as he became possessed of the fund out of which Captain Birrel was entitled to operate payment of his debt, so he was primarily and ultimately liable for the discharge of it, without recourse against any person whatever. By serving himself heir in a subject situated in a country in which the law imposes the payment of heritable debts upon the heir, James Drummond became as effectually bound to discharge the sum in question, without relief against the executry, as if he had entered into a contract for that purpose, both with the creditor and the other next of kin; and under that condition only he takes up the succession. And there is here no *res judicata* that can render it incompetent for the Court of Session to judge in a question which naturally and properly falls under their jurisdiction alone. The decision of the prerogative Court of Canterbury respected only the accounts of the administrator,

1799.

MARSHALL
v.
MARSHALL.

in his management of the personal funds; and in allowing him to state the contents of this heritable debt as part of this account, it went no further than to determine, that as a debt chargeable against the personal estate, he was entitled to take credit for it in accounting for that estate. The action brought against the administrator in the Prerogative Court, related solely to the personal funds; and according to the terms of the record, the accounts exhibited were of his management as administrator only, and from the limited nature of its own jurisdiction, and the proper *forum* for determining the question of ultimate relief, being the law of the place where the landed property lay, not the law of the place where the deceased died domiciled, the Court could not have intended to preclude the after discussion of the matter, neither could its judgment have that effect.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For Appellants, *W. Adam, John Bell.*
For Respondents, *W. Grant, F. Lawrence.*

(M. 16787.)

MRS ROSE ANDERSON, Wife of THOMAS HAY MARSHALL, Merchant in Perth, - } *Appellant;*

THOMAS HAY MARSHALL, - - - *Respondent.*

House of Lords, 8th April 1799.

DIVORCE—PROOF—ADMISSIBILITY OF THE *SOCII CRIMINIS* AS WITNESSES.—In an action of divorce for adultery, brought by the husband against his wife, she was charged in the libel with having committed adultery with two persons therein named. In the proof led, meetings with these parties at night, in suspicious circumstances, were proved, but no direct proof of adultery. The defender, on her part, sought to adduce the alleged paramours as witnesses in her favour. The Commissaries having considered the nature of the proof led, held them inadmissible; and this, in an advocation, was adhered to by the Court of Session. On appeal, reversed; and held, that the *socii criminis* were equally competent as witnesses for the defender, as when adduced as witnesses for the pursuer, in an action of divorce for adultery.

The respondent raised an action of divorce against his