1736.

BREADAL-BANE v. INNES, &c.

JOHN, Earl of BREADALBANE, - - *Appellant;*

WILLIAM INNES, GEORGE, Lord REAY, *et alii*, - - - - - } *Respondents.*

11*th February* 1736.

FOREIGN.—A Scotchman dying in England, where his will was duly proved by the executor therein nominated,—it was found that an executor-creditor could not recover in Scotland a debt due upon a bond to the deceased.

OATH OF PARTY.—PRIVILEGE.—A claim of debt against a Peer being referred to his oath, the Court of Session found that he was not entitled to have his examination taken upon honour. This point was not expressly decided in the House of Lords.

MAJOR SINCLAIR, by his last will and testament, appointed Anne Tibo his sole executrix, by whom, upon his death, which happened at London in 1718, the will was duly proved in the prerogative Court of Canterbury. No. 37.

William Innes, being a creditor of Major Sinclair to a considerable amount, was confirmed executor-creditor in Scotland, and thereafter raised an action against the Earl of Breadalbane, for payment of a sum of L.100, with interest, contained in a bond granted by the Earl in favour of Major Sinclair. Innes's right afterwards came, by successive assignations, to be vested in Lord Reay, the respondent.

The bond not being forthcoming, the debt was referred to the Earl's oath, (he having denied that it was due by him to the extent claimed,) and com-

1736.

BREADAL-BANE *v.* INNES, &c.

mission was granted for taking his deposition in London; but the Earl having failed to depone, the Lord Ordinary decerned against him in terms of the libel.

After some other proceedings, it was pleaded in defence for the Earl, that, by the Major's will, which had been proved in the proper Court in England, Anne Tibo was named his executrix, and therefore he could not be compelled to pay the contents of the bond to the pursuers, until she was made a party to the suit; for as the bond itself was not produced or ready to be delivered up and cancelled upon payment, he might be sued anew by her in England, and compelled to pay the debt over again.

It was answered that it was unnecessary, and indeed impossible, to make any other person than the Earl a party to the suit, because as the executrix did not reside in Scotland, she was not amenable to the Courts there. At the same time, the pursuers were willing, for his further security, to grant a discharge with absolute warrandice.

The Lord Ordinary (December 18, 1734,) "repelled the allegeance made for the Earl of Breadalbane, the defender, in respect of the answer made thereto for the pursuer; and decerned the pursuer, upon payment, to grant a discharge to the Earl, with absolute warrandice."

Upon advising a petition for the Earl, the commission for taking his oath was renewed. And another petition being presented, praying an enlargement of the time for his examination, and that the examination might be taken upon honour, according to the custom of examining peers in similar cases in England; and likewise that he might

be allowed an opportunity of making the executrix a party,—the court (Feb. 27, 1735,) refused the desire thereof, and adhered.

The appeal was brought from the interlocutors of the 20th June, 12th November, and 18th December 1734; 22d January, and 27th February 1735.

Entered March 14, 1735.

Pleaded for the Appellant:—1. Major Sinclair, from whom the money was borrowed, having by his will appointed an executrix, who has duly proved that will, she only, as his proper representative, is entitled to sue the appellant; and as she must be possessed of the document of debt, she alone can give a proper discharge upon payment of it.

The respondents, who are only creditors of the Major, have no right to sue his debtors. The executrix is the proper person against whom such a suit ought to be directed; and, at any rate, an action cannot be properly carried on against the debtors of the deceased until the executrix is called as a party to it.

For if she who is possessed of the bond, be not made a party, then the appellant may be sued a second time by her; and it would be in vain to plead in bar to such an action, raised by her in England, that the appellant had been decreed by the Court of Session to pay the debt to another person. The executrix not being a party to the present action, her interest cannot be affected by it; and the appellant has always been ready to pay whatever sum may be actually owing by him, upon receiving a proper discharge, and being effectually relieved of all claims against him at the instance of her, or any having right through her to the bond in question.

1736.

BREADAL-BANE *v.* INNES, &c.

This debt cannot be considered as part of the effects of the testator in Scotland, it having been contracted in England, and no real security given, of a nature to subject it to the Scottish Courts. The appellant, residing in England as frequently as in Scotland, is thereby exposed to action at the instance of the executrix.

2. If the appellant was to be examined, his examination ought to have been taken upon honour; he being, as a peer of Great Britain, entitled to that privilege of the peerage.

Pleaded for the Respondents:—1. As the appellant cannot pretend that he had paid the debt to the executrix in England, he cannot avoid paying it to the executor in Scotland, who has made up a proper title according to law. For as the administration in England could not vest in the executor there any right to such of the Major's property as was in Scotland, it could not stand in the way of his creditors recovering that property by the legal form. It would produce infinite inconvenience were it the rule that creditors in one part of the kingdom must, in such a case, sue the executors appointed in the other part, and be barred from recovering the effects of their debtor from persons who are within the jurisdiction in which his effects are situated. Although the bond happened to be granted in England, yet as Major Sinclair was a Scotsman, and likewise the appellant, who has his estate and ordinary residence in Scotland, the sum contained in the bond must be held to be part of the Major's effects in Scotland; and as there is no doubt that his creditors in Scotland could, during his lifetime, by arrestment and forthcoming, have compelled the appellant to pay to them without the

Major's consent, and in competition with him, it is evident that they must have the same remedy after his death, in preference to his English executor, who has not hitherto made up any proper title to such of his effects as are situated in Scotland.

2. Although in the High Court of Chancery, answers put in by the peers upon their honour, are held sufficient, yet the respondents are advised that when it is necessary for peers to give evidence in any cause, they submit to be examined upon oath. In the present case the appellant's oath is demanded *in modum probationis*, and it will be by the law of Scotland conclusive evidence for himself as well as for the respondents.

After hearing counsel, "it is ordered and adjudged, &c. that the several interlocutors complained of be, and the same are hereby reversed; and that the appellant be absolved from the present instance or libel." Judgment, February 11, 1736.

For Appellant, *William Hamilton.*
For Respondents, *Dun. Forbes* and *W. Murray.*