with the hardship to the pursuer if it be the case that she is able to maintain, with the help of her friends, an action here which she is practically unable to maintain in England. But that is a consideration which we are not at liberty to give effect to. The action is founded on something done by an English railway company in England. I do not think it matters that the company are owners of some heritable property in Scotland. The action is against an English company, and the ground of it is something done by them. There is no doubt we have jurisdiction against the defenders in respect of the arrestment of their funds in Scotland by the pursuer, in virtue of the peculiar doctrine of our law that the moveable property of a person not otherwise subject to the jurisdiction of the Court may be attached to the effect of founding it, and it is unquestioned that we have jurisdiction to entertain an action founded on such grounds. My own opinion has ever been that this was, generally speaking, an inconvenient sort of jurisdiction, and I have been surprised at the readiness with which the Court has entertained actions by domiciled citizens against foreigners, or foreigners against foreigners, founded on arrestments of small sums of money or articles of small value. We had lately an instance, where a ship had suffered an injury somewhere off the north of England—about Shields, I think,—of an action brought, not in Germany, where the owners were domiciled, but in Scotland, which they had nothing to do with. Jurisdiction was sustained pending some abortive proceedings in the Courts in Germany, and on the failure of these the Court here pronounced judgment. The case against the *Saturday Review* (*Longworth* v. *Hope*) is another strong case of the Court entertaining an action between two parties not connected with Scotland. But so enamoured do Scots lawyers seem to be of so bringing actions between foreigners into the Courts here that the practice was extended to the Sheriff Courts by a clause in the Sheriff Court Act of 1877, which says that an action which would have been competent against a Scotsman subject to the Sheriff's jurisdiction, shall be maintainable against a foreigner there, provided that a ship which belongs to him, or of which he is part owner or master, shall have been arrested within the sheriffdom, the effect being that if a share of a ship be arrested in Glasgow, or say in Orkney, belonging to a merchant resident in London, any action on any ground may be brought against him in the Sheriff Court there.

I am myself very favourable to the Court taking a large and liberal view of such questions as we have here—that is to say, where, although jurisdiction does exist, it appears that it is not convenient nor fitting for the interests of the parties to entertain any individual case, then I think the Court should not listen to any such appeal as the pursuer makes here. The Court, indeed, has been slow to entertain this view hitherto, except in the case of foreign executors. Nevertheless, it is a sound principle that the Court may decline to exercise its jurisdiction on the ground that it is not convenient for both parties that it should be so, and I agree with your Lordship that that ground—that it is not convenient—exists in this particular case, which is, as I said, against a foreign company carrying on business in England for something done by them there. I think we are not entitled to listen to that appeal to our feelings which has been made by the pursuer, which nevertheless does touch us somewhat, since in consequence of our decision a poor widow, living in Leith, whose husband has been killed in England, may be practically deprived of any remedy at all. But, that consideration apart, I have really no difficulty in agreeing with the conclusion at which your Lordship has arrived, that it is not convenient that we should exercise our jurisdiction in this case.

Lord Rutherfurd Clark—I am of the same opinion. It is conceded that the remedy sought by the pursuer is as applicable to her case in England as in Scotland, so the only question is, whether she is to be forced to go there instead of coming here. It is stated that the case requires the decision of an English question of right-of-way. I think nothing could be more inconvenient than to try this case—involving the decision of such a question—in Scotland, and therefore I think this is not a convenient *forum*.

Lord Craighill was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the second plea-in-law for the defenders, and dismissed the action.

Counsel for Pursuer (Reclaimer)—Watt. Agent—Alexander Clark, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh — Graham Murray. Agents — Cowan & Dalmahoy, W.S.

Friday, February 29.

FIRST DIVISION

[Lord Fraser, Ordinary.

ORR EWING AND OTHERS *v.* ORR EWING'S TRUSTEES.

Jurisdiction—Foreign—Trust—Executor—Confirmation and Probate Act (21 *and* 22 *Vict. c.* 56), *secs.* 9 *and* 12—*Treaty of Union, Art. XIX.*—Forum Conveniens.

A domiciled Scotsman died leaving a trust-disposition and settlement executed in the Scottish form, by which he conveyed his estate to six trustees, all Scotsmen, of whom two were resident in England and the others in Scotland. The estate consisted chiefly of personal property, whereof £435,314 was situated in Scotland, and £25,235 in England. The testator had no English creditors, and none of the purposes of the trust required to be performed elsewhere than in Scotland.

The trustees gave up an inventory in Scotland, including the English as well as the Scottish estate, and were confirmed as executors by the commissary of the county in which the deceased died domiciled, in terms of section 9 of the Confirmation and Probate Act 1858. They then had the confirmation stamped with the seal of the Probate Court in England under section 12 of the same Act.

The trustees had realised and transmitted

to Scotland £22,535 of the English estate, leaving £2700 still there, when an administration suit was commenced in the Chancery Division of the High Court of Justice in England against them at the instance of a person as next friend of an infant nephew of the testator, who was a special and also one of the residuary legatees under the settlement. An order for service out of the jurisdiction having been obtained, three of the trustees resident in Scotland were served there, the fourth being personally served in England, where service was also made on the other two.

After sundry procedure the Court of Appeal on 29th November 1882 made an administration order in ordinary form, and ordered complete accounts and inquiries to be taken and made.

On 5th July 1883 four brothers of the infant plaintiff, who had the same beneficial interest in the trust-estate, raised an action in the Court of Session against the trustees for declarator that the trust-estate should be administered in Scotland according to the law of Scotland, and that the defenders were not entitled to remove any part of the estate or the titles, writs, and securities, with conclusions for interdict against their doing so, or that the estate should be sequestrated and a judicial factor appointed. Prior to the raising of this action, the balance of £2700 had been remitted from England to Scotland.

On 30th November 1883 the House of Lords affirmed the order of the Court of Appeal.

On 29th February 1884 the Court of Session *granted* decree of declarator, sequestrated the estate, appointed a judicial factor, suspended till further orders of the Court all administration on the part of the defenders, and interdicted them, until the estate should be fully vested in the judicial factor, from removing any part of it beyond the jurisdiction of the Court, on the ground that as the deceased died domiciled in Scotland and his estate was held under the Scottish title of confirmation, it must be administered in Scotland.

Observed per Lord President — That in proper questions of jurisdiction "the judicatories of Scotland and England are as independent of each other, within their respective territories, as if they were the judicatories of two foreign states."

Observed per Lord President, on the terms of the Confirmation and Probate Act 1858 — "That the effect of the statute, and of a confirmation under the statute embracing English personal estate in the inventory given up on oath to the Scottish Commissary Court, is to enable the executors to administer the English estate along with and as part of the Scotch estate, and to exempt the executors from being subject to English jurisdiction by reason of a part of the executry estate having been locally situated in England at the death of the testator."

Observed per Lord President — "In the present case the judgment of the House of Lords would not have been pronounced in the terms which are before us had it not been for the rules and precedents of the English Court of Chancery. But such practice can have no influence whatever on the independent judicatories of another part of the United Kingdom, or on the House of Lords sitting in review of their judgments."

John Orr Ewing, merchant in Glasgow, and owner of an estate in Dumbartonshire, died upon 15th April 1858. He was a Scotsman, and died domiciled in Scotland, leaving a trust-disposition and settlement, which was a Scottish deed and executed in Scottish form, dated 17th November 1876, and with two codicils thereto dated respectively 16th November 1877 and 15th January 1878, recorded in the Books of Council and Session 27th April 1878.

The trustees, who were all Scotsmen, nominated and appointed by this trust-disposition and settlement (who were also nominated executors) were William Ewing, merchant in London, residing in London; Archibald Orr Ewing of Ballikinrain, Stirlingshire, merchant in Glasgow, and member of Parliament for the county of Dumbarton; James Ewing, residing in London; William Ewing Gilmour, residing at Croftingea, Dumbartonshire; Henry Brock, partner of the firm of Messieurs John Orr Ewing & Company, turkey-red dyers and manufacturers, Glasgow; and Alexander Bennett M'Grigor of Cairnoch, writer in Glasgow.

By the sixth purpose of the trust thereby created the trustees were directed to hold and apply the sum of £60,000 for behoof of the children of the testator's brother James Ewing, for their alimentary liferent use allenarly, equally, share and share alike, and their heirs in fee, but with power to the said children on their attaining twenty-four years of age in the case of sons, or attaining that age or being married, whichever of these events should first happen, in the case of daughters, to test on the portions of the said sum of which they respectively enjoyed the liferent. By the eighth purpose of the trust the testator directed his trustees, after duly providing for the thereinbefore-going provisions and purposes, to realise and convert into money, as early as practicable and prudent, the whole residue and remainder of his means and estate thereby conveyed, and to hold and apply the same for behoof of the children of his said brother James Ewing, and for their alimentary liferent use allenarly, equally share and share alike, and to their heirs in fee, but with power to the said children on their attaining twenty-four years of age in the case of sons, or on attaining that age or being married, whichever of these events should first happen, in the case of daughters, to test on the said shares of residue of which they respectively enjoyed the liferent, and under further and other provisions and declarations therein specified.

The testator was survived by six children of his brother James Ewing, viz., William Ewing (who attained the age of twenty-four years and thereafter died); John Orr Ewing of the Rookery, Preston Deanery, Northampton, Archibald Orr Ewing younger, and Hugh Moody Robertson Ewing—turkey-red dyers in Glasgow; James Robert Ewing, Ardardan, Cardross, Dumbartonshire; and Malcolm Hart Orr Ewing.

All the trustees accepted office, and they

entered on the management of the trust-estate.

Section 9 of the Confirmation and Probate Act 1858 provides—"It shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland or both, provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile; provided also that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein wheresoever situated within the United Kingdom."

Accordingly an inventory including the English as well as the Scottish estate, the whole being moveable property, was, along with an extract of the trust-disposition and settlement and relative codicils, duly recorded in the Court Books of the Commissariot of Dumbarton upon 13th May 1878, and thereafter upon the 18th of the same month the trustees were duly confirmed executors-nominate conform to testament-testamentar of said date by the Commissary of the county of Dumbarton in their favour.

By this confirmation the Commissary gave and committed "to the executors full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally, every other thing concerning the same to do that to the office of executor-nominate is known to belong, providing always that they shall render just count and reckoning for their intromissions therewith when and where the same shall be legally required."

From this confirmation it appeared that at the testator's death the value of his estate situated in Scotland amounted to £435,313, 17s. 10d. or thereby, and of that in England to £25,235, 12s. 6d. or thereby.

On 25th May 1878 the confirmation was sealed with the seal of the Probate Division of the High Court of Justice in England in terms of section 12 of the Confirmation and Probate Act 1858, which provides—"When any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate."

On 25th February 1880 a writ of summons was issued against the executors from the Chancery Division of the High Court of Justice in England, at the instance of a certain George Wellesley Hope, in name and as next friend of Hugh Moody Robertson Ewing, James Robert Ewing, and Malcolm Hart Orr Ewing, all then in minority, as legatees under the testator's settlement, and for himself as legatee under the will of the deceased William Ewing younger, son of James Ewing, one of the trustees, and as such one of the residuary legatees under the testator's settlement, to have an account taken of the personal estate of the testator, and to have the same administered. An order for service of the writ out of the jurisdiction was obtained; it was served, and the executors entered appearance as defendants in the suit. On 11th June 1880, however, the Master of the Rolls issued an order directing inquiries as to whether the suit was properly instituted, and was for the benefit of the infants; and the summons was thereafter amended by striking out the names of Hugh Moody Robertson Ewing and James Robert Ewing, two of the infant plaintiffs, and of the plaintiff George Wellesley Hope, so that the action might be prosecuted by the infant Malcolm Hart Orr Ewing, and by George Wellesley Hope as his next friend. Thereafter a statement of claim was lodged for the said plaintiffs in which they prayed (1) That the personal estate of the said testator might be administered, and that the trusts of his said will, or testament and codicils thereto, might be carried into execution by and under the direction of the said Chancery Division of the said High Court of Justice in England; (2) That it might be declared that the defendants were jointly and severally liable to make good, and that they might be ordered to make good to the said estate, a loss alleged to have resulted, or to be about to result thereto, by reason of their accepting certain discharges therein specified; (3) That accounts might be taken against the defendants upon the footing of wilful default; (4) That for these purposes all necessary and proper accounts might be taken, directions given, and inquiries made; and (5) for such further or other relief as the nature of the case might require. A statement of defence was lodged for the defendants (the truster's executors) in which they denied that they had committed any *devastavit*, or been guilty of any default, or in any way caused loss to the said estate, or were liable to make good any sum whatever thereto, and pleaded that such an administration was wholly unnecessary, and would be a needless expense, inasmuch as there were no assets of the testator in England; that all questions with regard to the administration of said estate would be questions of Scottish law, and must necessarily be decided according to the opinion of a Scottish and not an English court; that proceedings had been duly instituted, and were then pending, before the proper Scottish Court against the defendants in regard to a question in dispute between the parties, and that in like manner all questions relating to the administration of the said estate could be satisfactorily disposed of by a Scottish tribunal conversant with the law of the country according to which such questions must necessarily be decided, and that in the circumstances the said Chancery Division of the said Court had no jurisdiction to make such an order as was claimed by the plaintiffs, or, at all events, only jurisdiction to make such an order as regards the English personal estate of the said testator.

After further procedure the proceedings in the said suit were stayed by order, dated 18th February 1882, of Mr Justice Manisty, who held that the Court had a discretion as to whether the order for administration should be made in England, and that it was not, in the circumstances of the case, expedient to order it. The plaintiffs having thereupon appealed to the Court of Appeal, that Court (L.R., 22 Ch. Div. 456) reversed the judgment, and pronounced on 29th November 1882 the following order:—"Declare that the trusts of the will or testament, and codicils thereto, of the above-named testator John Orr Ewing of Glasgow, North Britain, merchant, deceased, ought to be performed and carried into execution, and doth order and adjudge the same accordingly, and it is ordered that the following accounts and inquiries be taken and made;" and then followed an administration decree ordering complete accounts to be taken, and inquiries of an exhaustive character to be made.

On 5th July 1883 an action was raised in the Court of Session by the said John Orr Ewing, Archibald Orr Ewing younger, Hugh Moody Robertson Ewing, and James Robert Ewing, special and general legatees under John Orr Ewing's trust-disposition and settlement, against the trustees and executors, to have it found and declared that the trustees were bound, as trustees and executors foresaid, "to uplift, receive, administer, and dispose of the whole estate and effects of the said deceased John Orr Ewing, and to give effect to and carry out the purposes of his said trust-disposition and settlement and relative codicils in Scotland, and according to the law of Scotland, and under the authority and subject to the jurisdiction of the Scottish courts alone; that the defenders, as trustees and executors foresaid, were not entitled to place the said estate and effects under the control of the Chancery Division of the High Court of Justice in England, or to administer the same under the directions of the said High Court of Justice in England, or any of the divisions thereof, or of any other foreign court or tribunal furth of Scotland, and having no jurisdiction in Scotland, or to place the said estate and effects beyond the control of the Scottish courts;" that the defenders were bound to count and reckon whenever legally required in Scotland, according to the law of Scotland, and under the authority and subject to the jurisdiction of the Scottish courts alone; and that the defenders were not bound nor entitled to render any accounts of the said estate to the High Court of Justice in England, or any foreign tribunal furth of Scotland, and having no jurisdiction in Scotland, nor bound nor entitled to part with the custody of any of the title-deeds, writs, or evidents of the said estate, or deposit them in custody of any court furth of and having no jurisdiction in Scotland, or beyond the jurisdiction and control of the courts of Scotland; and that the defenders should be interdicted from withdrawing and removing the said estate and effects, and any of the title-deeds, writs, or evidents, furth of Scotland, and beyond the jurisdiction of the Scottish courts; and from giving up the same, or any part thereof, to any person, to be so removed beyond the custody and control of the defenders and the courts of Scotland, or beyond the reach of any process or legal diligence competent to the pursuers and other beneficiaries interested in said estate and effects; and from rendering any accounts of the said estate to, or otherwise placing the administration thereof under, the authority and control of the said High Court of Justice in England, or of any tribunal or court whatsoever other than the courts of Scotland; or otherwise, and alternatively to the conclusions for interdict, and whether decree were pronounced as concluded for in the declaratory conclusions or not, that the defenders should be removed from the office of trust and executry; or otherwise, and whether the defenders were removed or not, that the whole estate and effects should be sequestrated and a judicial factor appointed thereon, with all the powers necessary for carrying into effect the will of the testator and the purposes of the trust-disposition and settlement."

The pursuers stated that as special and general legatees of the testator they were largely interested in his estate, and in the administration thereof, and in the preventing of unusual and unnecessary expense in the carrying out of the administration, and that it was the duty of the defenders to carry out the administration in Scotland according to the law of Scotland; also that the defenders were not entitled to devolve the duties of the administration upon any third party, and particularly that they were not entitled to devolve their duties upon any court or tribunal outwith Scotland.

They then set forth in their condescendence the proceedings in the Chancery Division, above narrated, and the terms of the administration order, which was followed by this averment:—"It is believed and averred that the defenders have taken steps to implement the said order, and have lodged, and are in course of lodging, various accounts of the said estate now under their charge with the officers of the said Court. It is further believed and averred that they have produced, or may be called upon to produce, and will produce in the said Chancery Division of the said High Court of Justice in England, along with said accounts, the various title-deeds, writs, evidents, and securities of the said estate under their custody, and beyond their own control and custody, and beyond the jurisdiction of the courts of Scotland, and thereby defeat the diligence and process otherwise competent to the pursuers, and tend to lessen, if not to destroy, the value of their interests in the said estate. Further, the making up of said accounts, and the production of said title-deeds, writs, and evidents, has caused, and will continue to cause, great and unnecessary expense to the said estate, and so tend seriously to diminish the amount of the share thereof to which the pursuers are entitled as residuary legatees foresaid."

The defenders admitted that they had lodged an account in terms of the order of the Court of Appeal, and stated that otherwise they would have become liable in serious penalties; that it was not known to what extent they might be called upon to produce the writs and evidents of the trust-estate. They also admitted that the production of the accounts would cause expense to the trust-estate, which otherwise might have been avoided.

The pursuers further averred that the defenders, in pretended obedience to the administration order of the English Court, held themselves not entitled to make any payment out of the estate until they

should first have obtained the authority of the English Court, or of some official thereof, and that the sure payment of the legacies due to the pursuers was therefore endangered.

The answer for the defenders to this averment was, that so long as the said order stood unreversed they held themselves bound not to make any payments out of the trust-estate without the authority of the said Court, or an official thereof, but that they denied that the payment of the legacies due to the pursuers was thereby endangered; that they had from the beginning been anxious to retain the administration in Scotland, as it appeared that administration in Scotland would be less expensive to the trust, and more convenient to the beneficiaries and the defenders themselves. Accordingly, that they had realised such investments as the trust-estate had in England, and remitted the proceeds to Scotland, and when the administration suit above narrated had been raised, they had objected to the jurisdiction of the Court, and also to any order for an account being made. Further, that they had appealed to the House of Lords, and that said order of the Court of Appeal had been affirmed on 30th November 1883 (9 L.R., App. Ca. 34).

The pursuers pleaded—"(1) The said estate being entrusted to the defenders by the courts of Scotland, to be administered by them in accordance with the law of Scotland and the procedure of the Scottish courts, the defenders are bound so to administer it, and are not entitled to devolve that duty upon any foreign tribunal, or to place the said estate or its title-deeds, writs, and evidents in the custody of any person or court outwith Scotland, and not subject to the jurisdiction or control of the Scottish courts. (2) The defenders, having been nominated and appointed to their said office by the will of a domiciled Scotsman, and the said estate having been committed to their custody by and under the authority of the courts of Scotland, to be administered by them in accordance with the testator's directions in Scotland, and in accordance with the laws of Scotland, and subject to the jurisdiction of the Scottish courts, are guilty of breach of their duty in accounting for the said estate, or giving or preparing to give accounts thereof to a foreign tribunal, and ought to be removed from their office as concluded for."

The defenders pleaded—"(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (2) *Separatim*, The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons, as regards that portion of the trust-estate which was situated in England at the commencement of the administration suit, and as regards those defenders who were resident there at that time. (6) The decision of the House of Lords on said appeal is conclusive of the question that the Chancery Division of the High Court of Justice had jurisdiction to pronounce the order complained of; at all events, it is conclusive of that question for the purposes of the present action."

The Lord Ordinary (FRASER) pronounced this interlocutor:—"Finds and declares that the defenders, as trustees and executors of the now deceased John Orr Ewing, are bound as such to uplift and administer the whole estate and effects of the said deceased John Orr Ewing, so far as the same were situated in Scotland at the time of his death, and to give effect to and carry out the purposes of his trust-disposition and settlement, and according to the law of Scotland, and under the authority and subject to the jurisdiction of the Scottish courts alone: And further, Finds and declares that the defenders are not entitled to place the said estate and effects, so far as the same were situated within Scotland at the time of John Orr Ewing's death, under the control of the Chancery Division of the High Court of Justice in England, and to administer the same under the directions of the said High Court of Justice in England, or to place the said estate and effects beyond the control of the Scottish courts: Further, finds and declares that the defenders are bound to render just count and reckoning for their intromissions with said estate and effects situated as aforesaid, whenever the same shall be legally required in Scotland, and according to the law of Scotland, and under the authority and subject to the jurisdiction of the Scottish courts alone; and that the defenders are not bound nor entitled to render any accounts of the said estate and effects to the said High Court of Justice in England, nor bound nor entitled to part with the custody of any of the title-deeds, writs, or evidents of the said estate, or to deposit the same in the custody of any courts situated furth of Scotland, and having no jurisdiction in Scotland, or to place the same beyond the jurisdiction or control of the courts of Scotland: Interdicts and prohibits the defenders from withdrawing and removing the said estate and effects, and any of the title-deeds, writs, or evidents thereof, furth of Scotland, and beyond the jurisdiction and control of the Scottish courts, and from giving up the same, or any part thereof, to any person or persons to be so removed, or otherwise to be put beyond the custody and control of the said defenders and the said courts of Scotland, or beyond the reach of any process or legal diligence competent to the pursuers and other beneficiaries interested in said estate and effects, and from rendering any account or accounts of the said estate to, or otherwise placing the administration thereof under the authority of, the said High Court of Justice in England, and decerns: Finds the defenders, *qua* trustees and executors, liable in expenses to the pursuers.

"*Opinion.*—John Orr Ewing at the time of his death, on the 15th of April 1878, was domiciled in Scotland. He left a trust-disposition and settlement, whereby he conveyed over to six persons—the defenders in the present action—his whole estates in trust, for payment of debts and distribution amongst legatees. He also nominated his trustees to be his executors. The trustees accepted office, and gave up an inventory of the personal estate 'situated in Scotland and England, amounting in value to £460,549, 10s. 4d.,' in the Sheriff Court of Dumbarton, and were confirmed executors by the Sheriff within whose commissariot the deceased resided at the time he died. By this confirmation the right of the executors was raised to the character of a real right, and they thereby became vested in the estate in the same manner as the deceased himself had been. The Sheriff gave and committed 'to the executors full power to uplift, receive, administer, and dispose of the said personal estate and effects, grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of executor-nominate is

known to belong, providing always that they shall render just count and reckoning for their intromissions therewith when and where the same shall be legally required.' Of the sum contained in the inventory there were £435,314 in Scotland and £25,235 in England; and in consequence of the latter fact it became necessary to obtain probate in England, or its equivalent, as enacted by 21 and 22 Vict cap. 56, sec. 12. Therefore on the 25th of May 1878 the probate was sealed with the seal of the principal registry of the High Court of Justice in England. The statute declares that this Act shall have the like force and effect in England as if a probate or letters of administration had been granted by the Court of Probate. The whole of the funds in England have been received by the defenders, and are held by them in Scotland for the purposes of the trust; and there are no English creditors unpaid.

"The defenders were in course of discharging their duty of executors when on 25th February 1880 there was issued against them a writ of summons from the Court of Chancery in England at the instance of a legatee,—which having been served upon them, certain proceedings took place in the English courts, which terminated in an order by the Court of Appeal, dated 29th November 1882 (subsequently affirmed by the House of Lords), whereby that Court ordered certain accounts and inquiries to be taken and made, which are set forth in the order itself. The effect of this order is stated by the pursuers to be, that it will cause the making up of accounts which are totally unnecessary, by sending to England the title-deeds, writs, evidents, and securities of the estate under their custody, and so put them beyond their control and beyond the jurisdiction of the Scottish courts, and thereby defeat the diligence and process otherwise competent to the pursuers, and tend to lessen, if not destroy, the value of their interest in the estate. Further, that it will cause great and unnecessary expense to the estate, and diminish the amount of the residue to which the pursuers are entitled. It is also averred that the defenders, in obedience to the administration order of the English Court, hold themselves not to be entitled to make any payment out of the estate unless and until they shall first have obtained the authority of the English Court, or of some official thereof.

"It is admitted by the defenders that this is the effect of the order—and such appears to be the case without such admission. Lord Blackburn, in delivering judgment upon the appeal in the House of Lords against the order, expressed himself as follows:—'Such an order does and must hamper the trustees, cause delay and expense, not necessarily great delay and expense, but always some; and where the trustees have not done, and it is not suggested that they are going to do, any thing wrong, I doubt whether it is always for the benefit of all concerned to make such an order. And I am confirmed in this doubt, because, so far as I can learn, you cannot in Scotland throw a trust into the Court of Session in the same way as you can throw it into Chancery in England—at least, if it can be done, it is not done. But though I should have had this doubt if it were new, I think it has been too long the course of Chancery to treat this as a right which the plaintiff has *ex debito justitiæ*.'

"The whole funds are in Scotland, four of the executors are domiciled Scotsmen, and the trust-disposition is a deed in the form of Scottish conveyancing. It was therefore not surprising that the executors determined to resist these proceedings in Chancery, and accordingly pleaded that they were incompetent, or at all events inexpedient, and therefore ought not to be allowed. But the Appeal Court in England, and the House of Lords, who affirmed their deliverance, have held that by the practice of the English Court of Chancery the executors must comply with the order, not merely as regards the £25,000 that were in England at the testator's death, but also with the whole of the Scottish funds that never were in England at all, which are included in the Scottish confirmation, and which were only ingathered in consequence of that Scottish confirmation. It is said that this is the settled practice of that court, and must be upheld, however inconvenient and however expensive it may be. Lord Blackburn suggests as the only remedy two courses—one the alteration of the Chancery practice, the other the intervention of the Legislature. The pursuers have thought that there is another mode of remedying the grievance of which they complain, and that is by the present action. It has various conclusions, but the important one is the conclusion for interdict against the executors removing the estate or the title-deeds and writs from beyond the jurisdiction and control of the Scottish courts, and from rendering any account of the estate to, or otherwise placing the administration of it under, the authority of the High Court of Justice in England. If decree be pronounced in terms of this conclusion, there is an immediate collision between the courts of the two countries, and it is therefore necessary precisely to see how this matter is dealt with, as a point of international law, in other countries than England by the courts of civilised nations.

"It is perfectly clear that if the practice of the Court of Chancery in England is inconsistent with international law, no court of a foreign country is bound to respect it. When this case was before the Appeal Court, the late Master of the Rolls stated that it was an error to consider Scotland in this question as a foreign country. He described it as a foreign jurisdiction. He was a very learned Judge in regard to the law of England, but he obviously knew little of the law of Scotland or of Scottish history; and his opinion, so far as he touches upon this matter, does not represent him fairly. He adverted to the fact that the judgments of the English courts could be enforced in Scotland, and *vice versa*; and that in regard to any other foreign country there was a difficulty in ascertaining what its law was which did not exist in reference to Scotland and England, seeing that a case might be sent by the Supreme Court of the one country for the opinion of the Supreme Court of the other. This is no doubt all quite true, but all these convenient arrangements—the suggestion of which came from Scottish lawyers—did not arise from the union between the two kingdoms. Until recent days the judgments of English courts could no more be enforced in Scotland than those of the courts of France. This was effected simply by an Act of Parliament for the convenience of the people of both countries. And so also it was by Act of Parliament that the practical way of

ascertaining the law of one country by sending a case for the opinion of the Supreme Court of the other was created. Scotland in regard to its laws is a foreign country, and except where jurisdiction is created in the manner recognised according to international law, or by Act of Parliament passed since the Union, no person in Scotland can be cited to the English courts. Though the two countries be now governed by the same Sovereign, and be subject to the same Parliament, yet this was under the condition, as set forth in the 18th article of the Treaty of Union, that while 'the laws which concern publick right, policy, and civil government may be made the same throughout the whole United Kingdom, but that no alteration be made in laws which concern privat right, except for evident utility of the subjects within Scotland.' And this is followed up by the provision in the 19th article, which positively declares 'that no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other court in Westminster Hall.' Whether all this made Scotland a foreign country *quoad* its laws, or as a country having courts exercising a foreign jurisdiction, is a question not material to solve. The two expressions do in this connection mean the same thing. Scotland has a law different from that of England; and *quoad* that law it is an independent state, entitled to demand from England adherence to the rules of international law which determine the rights of natives of foreign states which may be made the subject of action in her courts.

"Now, then, in what manner does the law deal with the case of a party who dies possessed of moveable estate situated in different countries. Until this assertion of right on the part of the Court of Chancery to compel administration of an estate, merely because a portion of it was found at the death within England, the answer would have been simple enough. It is a rule of the law of nations that an executor is not entitled to collect the estate of the deceased until his right to do so has been confirmed by the competent court of every country where there is property to ingather. However clear may be the nomination of the executor by the deceased's will, yet confirmation or probate must be obtained. If an Englishman have funds in Scotland, at his death his executor must confirm in Scotland—Ersk. iii. 2, 42; *Smith*, 24 D. 1142; *Hastings* v. *Hastings*, 14 D. 489—and so likewise must the executor of a Scotsman obtain probate in England; and the same rule is enforced in the United States with reference to properties belonging to a citizen of one State which are situated in another, or of foreigners who have assets in the United States—Story, sec. 513.

"But there are two kinds of administration. There is the administration by the executor of the domicile of the deceased, and the administration by the executor appointed in the country where there was no domicile, but where there were assets. The ground for the appointment of a person in reference to the latter case has been attributed to different principles. Wharton, in his treatise on the 'Conflict of Laws' (sec. 605), says that property is primarily subject to the law of the territory wherein it is found. The sovereign power there is guardian of all such property within its bounds, and it is its duty to see that its use is secured to the proper owner. Hence those who meddle with it when occupancy has been closed by death must first obtain the sanction of the court of the place under whose control it is. Story (sec. 512), on the other hand, traces the practice to the hardship that would result to creditors in the country of the *situs* if it were allowed to the executor or administrator of the domicile to withdraw funds from the foreign country without the payment of debts there, 'and thus to leave the creditors to seek their remedy in the domicile of the original executor or administrator, and perhaps there to meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of the local law.' The reason for the practice is in no way material, seeing that the practice is settled and approved in all countries. The material point is to ascertain what is the effect of the grant of administration in another country than that of the domicile.

"The executor confirmed in the domicile is the principal administrator of the estate. The executor appointed in a foreign country who has taken out probate or letters of administration there has a right to ingather the estate within the territory of the court that gives him probate. He is entitled and obliged, from the proceeds of his recoveries, to pay all the debts of creditors in that foreign country. Questions of nicety have arisen as to whether he is entitled to pay the creditors there in full if the estate, taken as a whole—that of the domicile and that of the *situs*—be insolvent, while the assets in the country of the ancillary administration may be sufficient to pay in full the creditors there. It is unnecessary further to refer to this point, because no such question arises in the present case. The ancillary executor is bound to account to the court which gives him probate for all the money that he has recovered within its jurisdiction, and the executor of the domicile is not entitled to demand from him these moneys before such accounting. This was the decision of the House of Lords in *Preston* v. *Melville*, 2 Rob. App. 88. But after having accounted to the court where the funds were found, he is bound to remit any balance that may be in his hands to the executor of the domicile—the general administrator of the estate.

"Now, all this is perfectly established practice among nations. So far as can be discovered, no such pretension as that which has been set up by the Court of Chancery in England has ever been asserted by the courts of any other country. None of the States of America have asserted the right to bring into the courts of the ancillary administration, and to administer there, the estate of a citizen domiciled in another State of the Union, merely because he had dollars invested in the State of the ancillary administrator. Nor is there any instance of any of the French courts compelling an Englishman, who had moneys in the French rentes, to account for the whole of his estate in the French courts. On the contrary, as regards France, the courts of that country do not hold themselves competent to entertain any suit for the division of a succession of a foreigner who may have died in France, and who may have personal estate there, if his domicile were in a foreign country. All that the French courts consider themselves entitled to do is to maintain the *status quo* by sequestrating the estates in

France until the administration of the succession be settled in the country of the domicile—See Bar's International Law (Gillespie), 536; Note by Foderé to Droit International Privé of Fiore, p. 709; Fœlix, sec. 159; *Margo* v. *MacHenry*, March 1, 1881, as in Journal du Droit International Privé, vol. viii. p. 432; *Falvez* v. *De Souza*, March 31, 1876, *ibid*, vol. iv. p. 429.

"As recognised in the courts of Scotland, the law was thus stated with reference to the succession of the Marquis of Hastings, whose mother had obtained in England letters of administration to the estate there, and who sought confirmation in Scotland with reference to the Scotch estate. 'It is,' said Lord Justice-Clerk Hope, 'a fixed rule of great importance, that the moveable property of a deceased party, in whatever country locally situate, shall be regarded as to succession, whether testate or intestate, by the law of the country to which he belongs—that is, of his proper domicile. The moveable property forms one *universitas* for succession, whether through the operation of his testament or of the law which regulates his succession. Between these two cases there is no distinction as to this point. In like manner, unless there are some peculiar specialties or clear convenience, the administration is also to be that of the domicile. It may be that in the first instance the collection of the moveable funds either must be, or may be, by a different party from that administering in the country where he is domiciled, and so there may be a different title for collection and discharge. But even then the funds must be sent to the country where the succession is to be settled, unless by special arrangement. Hence in principle it is clear that the party in whom the title of administration is vested should be the same in both countries, since in the foreign country it is only a title for collection, and not for final distribution.'—*Hastings* v. *Hastings*, 14 D. 480.

"As to how this matter is regarded in the American States, a few citations from American jurists and from American judicial opinions will be sufficient.

"The practice of nations is thus stated by Story (sec. 513):—'The right of a foreign executor or administrator to take out such new administration is usually admitted, as a matter of course, unless some special reason intervene to vary or control it; and the new administration is treated as merely ancillary or auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution of them. Still, however, the new administration is made subservient to the rights of creditors, legatees, and distributees who are resident within the country where it is granted, and the *residuum* is transmissible to the foreign country only, when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law, in the application and distribution of the assets found there.'

"The learned writer (Story) cites with approval a judgment of Mr Chief-Justice Parker of Massachusetts, who states the law in regard to the principal and ancillary administrations as follows:—After laying it down that the judge who granted the ancillary administration can make the administrator to account, the Chief-Justice says—'This cannot be construed to mean that in all cases a final settlement of the estate shall take place here'—[the country of the ancillary administration]—'if it did, then, if there were no debts here, and none to claim as legatees or next-of-kin, it would be necessary for all such to prove their right and receive their distributive shares here, notwithstanding the settlement must in such case be made according to the laws of the country where the deceased had his domicile. But we think in such case it would be very clear, that the assets collected here should be remitted to the foreign executor or administrator; for it seems to be a well-settled principle that the distribution is to be made according to the laws of the country where the deceased was domiciled.' He adds in a subsequent part of his opinion this hesitating statement:—'In the several cases which have come before this court, where the legal character and effects of an ancillary administration have been considered, the intimations have been strong that the administrator here shall be held to pay the debts due to our citizens.'—*Dawes* v. *Head*, 3 Pick. R. 128. This is clearly the law and practice of the courts of those countries which recognise ancillary probate; and it is not disputed in the present case that the defenders could not have carried away the £25,000 which belonged to Mr Ewing from England to Scotland without satisfying the English Court of administration that to the extent of that sum the English creditors were paid.

"Mr Wharton, in his 'Treatise on the Conflict of Laws,' expresses himself as follows in regard to this matter (sec. 619):—'As to the regulation of ancillary administrations, the *lex rei sitæ* must necessarily prevail. But while this must be conceded, several subordinate questions of interest arise. When the funds in the hand of the ancillary administrator are sufficient to pay all legitimate claims existing in the jurisdiction by which such administration is granted, the administrator's course, it is true, is plain. He is to pay such debts, under direction of the court to which he owes his authority; settle his accounts under the supervision of such court, and when such accounts are legally passed on and affirmed, transmit the residuum to the administrator in chief, *i.e.*, the administrator appointed by the court of the deceased's last domicile, to be distributed among heirs and legatees. But, in such cases, in view of the delicacy of the issues and complication of the trust, it is important that the ancillary administrator should make no payments except under decree of the court by which he is appointed. To such court he is exclusively bound to account. Nor are any assets to be transmitted to the administrator of the domicile when there are claimants within the jurisdiction of the ancillary administrator.'

"The case of *Preston* v. *Melville* (2 Robinson's Appeals, p. 88) has an important bearing on this subject. It was decided by the House of Lords upon an appeal from Scotland, and therefore if applicable to this case it is binding upon the Scottish Courts In that case there were Scotch trustees appointed to administer the estate of a domiciled Scotsman, who obtained possession of the whole of the personal and heritable estate in Scotland, but there was a different person who had obtained administration of the personal estate in England, and who refused to convey to those Scotch trustees the estate taken up under

her letters of administration, and in this refusal she was sustained by the judgment of the House of Lords. 'The personal estate in England,' said Lord Chancellor Cottenham, 'rests and must remain with the appellant. If, after such administration shall have been completed, any surplus should remain, and it shall appear that there are trusts to be performed in Scotland to which it was devoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers for the purpose of being applied in the performance of such trusts;' and it was determined that the English administrator must account to the English Court for the English assets, and satisfy all the creditors of the estate in England. 'The letters of administration,' said the Lord Chancellor, 'under which he acts, direct him so to do, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts, so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration. That such are the duties of an executor or administrator acting under a probate or letters of administration in this country is certain, although the testator or intestate may have been domiciled elsewhere. The domicile regulates the right of succession, but the administration must be *in the country in which possession is taken and held, under lawful authority, of the property of the deceased.*' This last sentence is the position taken up by the pursuers of the present action. The whole of the Scotch assets, the property of Mr Orr Ewing, were taken and held under lawful authority in Scotland, and therefore, according to this judgment, they must be administered there.

"It is, however, said that in this case there was no person appointed separate from the defenders—the executors nominated by the will—to ingather the rents and profits of the estate in England—in other words to collect the £25,000 that were there invested at Mr Ewing's death. But what does this come to, except to strengthen all the more the argument against the assumption by the Court of Chancery of a jurisdiction which international law denies to it? If there had been a separate executor appointed in England, with probate in his favour separate from the Scotch confirmation, there is reason for holding that there should be separate administration and accounting. But when the executors of the domicile and the executors who obtain probate in the foreign country are the same persons, and when these executors of the domicile have got possession of the whole goods and brought them to the country of the domicile, and when there is not a single debt to pay in the country of the ancillary administration, there is less reason than ever for holding that these executors should count and reckon in the country where the ancillary probate has been obtained.

"This very point occurred for decision in America, where it was decided that the courts of one State may compel an administrator or executor of an intestate, domiciled at his death in that State, to account for assets situate in a foreign State at the death of the intestate, but acquired by the same administrator by virtue of letters of administration issued to him in the foreign State; and it was held that the distribution must be according to the laws of the foreign State, so far as regards debts, and according to the laws of the domicile of the deceased so far as regards the residue. In regard to the distinction between administration by the executor of the domicile and ancillary administration, the learned Judge thus expressed himself—(*Cureton* v. *Mills*, 36 American Reports, 703)—'It is one of the necessary deductions from the general character ascribed to this administration, at the domicile of the decedent, by the authorities, that such administration is, in its nature, general and unlimited, while the ancillary administration is both special and limited. The nature of the administration had at the domicile of the decedent depends on the universally received doctrine, that personal property follows the person of its owner. . . . The ancillary administration, we have said, is special and limited. The sense in which these terms are used is the same as that just applied to the original administration. That administration is special, because it extends merely to such personal effects of the decedent as may be found at his death in the place of ancillary administration, while, as we have seen, the scope of the original administration is commensurate with the whole personal estate of the decedent wherever situated. The ancillary administration is limited in the sense that the objects to which that administration looks do not comprehend all that are appropriate to the original administration. The ancillary administrator is primarily concerned only with the debts of the decedent at the place of ancillary administration, and with the administration of the assets only to the extent requisite to pay such debts.'

"It is further said that the Court of Chancery exercises in this matter a very peculiar jurisdiction. It acts *in personam*, and compels persons within its jurisdiction to perform acts outwith its jurisdiction. Now, this is a power which is not peculiar to the Court of Chancery. It belongs to all courts of equity, and the Court of Session has exercised it in the same manner as the Court of Chancery with reference to cases in which it would be equitable to exercise the jurisdiction—M'Laren on Wills, vol. i., p. 49; *Leader* v. *Hodge*, Hume, 261.

"After what has been shown—according to international law—to be the limited character of the authority of the jurisdiction of the ancillary administration, it is not a little surprising to find that authority pushed to the extent of maintaining that the courts of the domicile (Scotland) cannot enforce payment of a legacy due by the executors of the domicile to a legatee of the domicile, but that payment must be applied for to the foreign court (England)—which has assumed the right to administer the estate because of the presence of assets of the deceased in England at the death. This was the case of *Brown* v *Stirling-Maxwell's Executors*, 17th July 1883, 20 S.L.R. 818. Sir William Stirling-Maxwell was a Scotsman, and his domicile was in that country, but he happened to have funds in England, and therefore his executors required probate in England. There was also an administration suit in Chancery in the same way as there is here, which was held to carry the estate of this Scotsman into Chancery in the same way as it is now sought to be done with the estate of Mr Orr Ewing. The executors of Sir William Stirling-

Maxwell did resist the competency of these proceedings, but were overruled (9 Ch. Div. 173, and 11 Ch. Div. 522), and the whole of the estate is now taken away from the country of the domicile and the country of the executors to England. A legatee under the will of Sir William Stirling-Maxwell sued the Scotch executors in the Court of Session for payment of a legacy, to which the executors replied that they could not pay it without the authority of some official in the Chancery Court, and that the Court of Session had no jurisdiction in the matter, and could not grant decree. A grave argument in favour of this contention was submitted to the Court. The debtor and the creditor were both within the jurisdiction, and the estate was within the jurisdiction. But the Court was informed that no payment whatever could be made without the authority of some official in the Chancery Court of England. This was a novel and hitherto unheard of assumption in favour of the powers of courts dealing with ancillary administration. There was no dictum of any jurist or of any court cited in support of it; merely the statement that such was the rule of the Court of Chancery. The Scottish courts have in almost all cases declined to call a foreign executor to a general accounting for his administration though he may be found in Scotland; while they have sustained action for a pecuniary legacy or a specific debt. The decision of the Court of Scotland in this case sustaining its jurisdiction was, in accordance with its practice, long settled —(M'Laren, vol. i., p. 49; *Morison* v. *Ker*, M. 4601; *Munro* v. *Graham*, 1 D. 1151; *Robson* v. *Walsham*, 6 Macph. 5; *Ferguson* v. *Douglas*, 3 Paton, 510, per Lord Loughborough); also it was in accordance with the judgment of the House of Lords (*Carron Company* v. *M'Laren*, 24 L.J., Chan. 620), and with the decisions of the American Courts (*Johnson* v. *Jackson*, 21 American Rep. 285).

"But although an executor found in Scotland may be compelled to pay a legacy or any specific debt, the courts of Scotland have abstained from insisting on enforcing their jurisdiction to any further extent. If the claim made involve an accounting for the whole of the executry estate, such as a claim made by a residuary legatee for the residue, and so involving a general accounting, the courts of Scotland decline to entertain such an action. They do so upon the plea of *forum non conveniens*. In the case of *Clements* v. *Macaulay*, 16th March 1866, 4 Macph. 592, the Lord Justice-Clerk Inglis explained the practice thus—'The cases in which the plea of inconvenient *forum* has been sustained are chiefly of two classes—1st, where foreign executors have been sought to be called to account in this country for the executry estate situated in a foreign country. In these cases the question always was, whether it was more for the true and legitimate interest of the executry estate and all the claimants that the distribution should take place where the executors have had administration. There is, of course, in most cases a strong presumption in favour of that consideration, and accordingly the plea is generally sustained in such cases. The law of the executry estate is the law of the country where administration is had; and there generally are the papers, the property, and the parties concerned.' See also *Young* v. *Ramage*, 16 S. 572; *Brown* v. *Palmer*, 9 S. 224; *Macmaster* v. *Macmaster*, 11 S. 685, and 12 S. 731.

"Even when the Scottish courts do entertain such an action, it is merely to enforce payment of a debt or legacy, and not in any way to administer or aid the executor in administering the estate. They only entertain the one specific claim which is brought before them by an action, and when that claim is satisfied the foreign executor is no further troubled. No doubt he is bound, if he have obtained confirmation in Scotland, to count and reckon for all the assets which he has collected there, so far as necessary to meet Scottish claims, whether of debt or of legacy; but beyond this the courts of Scotland, like those of France, will not sustain an action against him relative to the executry estate.

"It is true that there neither was nor is any action pending in the Scottish courts similar to the suit that is now before Chancery, and this because of the recognition by the Scottish courts of a more simple and economical mode of administration. An executor who is nominated by a testator, or who is appointed by the commissary, and has found security for the due discharge of his office, is allowed in Scotland to exercise his own judgment in reference to the debts and legacies he shall pay. Of course, if he pays a debt or a legacy that is not due he will be answerable for the funds thus thrown away. Any doubtful claim of debt he is entitled to have constituted by a decree of a court of law at the expense of a claimant, and in cases of difficulty as to the construction of wills, facilities are afforded to him of obtaining a judgment of a court by means of a special case or action of multiplepoinding. There is no continual recurrence to a clerk of court or other official for sanction to every step of administration; and if this were necessary in Scotland it is hardly necessary to say that it would be deemed so hard and intolerable that it would have a short tenure of existence Something of the kind did formerly exist, as stated by Erskine (iii. 9, 47):—'By our old custom it behoved executors who wanted to be discharged of their trust, and have their accounts settled, to apply for formal decrees of exoneration upon actions to be pursued by them before the commissaries against all interested in the executry, which decrees must have contained a particular inventory both of the funds and debts of the deceased, and an account how every part of the executry funds was applied; for general decrees of exoneration were accounted as covers to fraud and concealments, and therefore did not avail the executor. Stair, b. iii. t. 8, sec. 75; *Durie*, March 10, 1632; *L. Ludquhairn* (Dict. p. 3872). But now of a long time this action has been disused, and executors, when they are sued by creditors, are admitted to plead, by way of exception, that the inventory is exhausted by lawful articles of discharge.'

"The remedy of interdict which is here sought is one suitable to the circumstances, and according to the practice of the courts both of England and Scotland. In the case of *Hope* v. *Carnegie*, L.R., 1 Chancery Appeals, 320, it appeared that a British subject had property both in England and in the Netherlands, which he conveyed by will in trust for certain parties. The Court of

Chancery in a suit made a decree for carrying into execution the trusts of the will, and the usual accounts and inquiries as to real and personal estate were directed. One of the legatees after this commenced proceedings in the Netherlands for the administration of the real and personal estate of the testator situated in the Netherlands. Vice-Chancellor Stuart was asked to grant an injunction to restrain the proceedings in the Netherlands. His Honour, upon hearing the motion, considered it established upon the evidence that the testator was domiciled in England, and held therefore that no proceedings in the Netherlands could be allowed as to the personal estate. His Honour considered that as to the real estate the Court could not interfere; but that, inasmuch as the proceedings in the Netherlands related to personalty as well as to realty, they ought to be restrained altogether, and this judgment was affirmed upon appeal—Lord Justice Knight Bruce dissenting in so far as the injunction restrained from continuing the proceedings as far as regards realty in the Netherlands.

"In the Scotch Courts the remedy by interdict has also been sanctioned. Thus interdict was granted by the Court of Session against removing the title-deeds of a Scotch heritable estate which the trustees, by an order of the Master of the Rolls, had been required to deposit in the record office of the Court of Chancery—*Maclachlan* v. *Meiklam and Others*, 9th July 1857, 19 D. 960. See also *Young* v. *Barclay*, 8 D. 774.

"I am urged to dismiss this action because the House of Lords, the ultimate Court of Appeal from courts in Scotland, have upheld the order of the Court of Chancery, and that therefore as it is the same tribunal which must ultimately dispose of this case, it is idle now to pronounce a judgment in any sense contrary to what has been decided. This argument altogether overlooks what is the position of the House of Lords. It is no doubt the ultimate Court of Appeal appointed by the constitution of the country. It requires to administer the law according to the law of the country from which the appeal comes. In the case before it of Orr Ewing it had only to determine whether the Chancery Court had correctly decided as to the rule of Chancery practice. In the case that will now come before it—if this case be appealed to the House of Lords—it will have to determine, not any rule as to Chancery practice, but a question as to international law—that is, *quoad hoc*, the law of Scotland. The House of Lords cannot—or at all events ought not—to consider, in reference to the question brought before them by an appeal from this judgment, any other point than this, whether, according to the law of nations, this rule of the Chancery Court of England must be respected by a foreign court when the people of that foreign country in recognising it would be thereby subjected to grievous expense and many inconveniences, and when, moreover, the practice itself is contrary to all sound principles of international law.

"So far as I have been able to ascertain—and I have used endeavours to ascertain it—the practice of the Court of Chancery in this matter is without example in the courts of any of the other European states; as it certainly is so in America, even in those States of the Union where the English law is most closely followed. If the action of the Court of Chancery were sustained by the executive Government of this country, it might lead to embarrassing questions with foreign nations. A citizen of the French or American Republics, whose domicile is in his own country, may have investments in the British funds, and one of his executors—a Frenchman or American—may be resident in London. If the Court of Chancery, in an administration suit, committed that executor to prison for not bringing the whole assets of the deceased from France or America to be administered in London, it is not to be supposed that an act like this would be patiently submitted to by the foreign Government whose subject was imprisoned. And it is not at all clear that, however settled may be the practice of the Court of Chancery, the executive Government of this kingdom would sustain it—contrary as it is to the law of nations—at the hazard of disturbing peaceful relations with foreign powers. Nor can this practice of the Court of Chancery have been so very settled, seeing that so great a master of it as Lord Westbury in the year 1862 expressed himself as follows—'I hold it to be now put beyond all possibility of question that the administration of the personal estate of a deceased person belongs to the court of the country where the deceased was domiciled at his death. . . . The utmost confusion must arise, if, where a testator dies domiciled in one country, the courts of every other country in which he has personal property should assume the right, first, of declaring who is the personal representative, and next, of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman dying domiciled in London may have personal property in France, Spain, New York, Belgium, and Russia, and if the course pursued by the Court of Probate and the Court of Chancery in the present case were followed by the courts of those several countries, there might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there are countries in which he is possessed of personal property. It is unnecessary to dwell upon the evils which would result from this conflict of jurisdiction; it was to prevent them that the law of the domicile was introduced and adopted by civilised nations. I am therefore of opinion that the executors might have excepted to the jurisdiction of the Court of Chancery as a court of construction and administration. They might have insisted that it was the duty of the court to hand over to the executors the clear English personal estate, and to have remitted the next-of-kin to the court of the domicile of the testator. But the executors did not do so.'—*Enohin* v. *Wylie*, 31 L.J. Chan. 405.

"The Lord Chancellor (Earl of Selborne), in the case of *Ewing and Others* v. *Orr Ewing*, dissents from this opinion; but, at all events, this much can be said for it—that it was the opinion of Lord Westbury. And he stated an incontrovertible fact in saying that his opinion was in accordance with the views given effect to by the courts of civilised nations, and upheld by the jurists recognised as authorities on international law.

"Holding that the orders of the English court are contrary to international law, it is unnecessary

to do more than refer to another point which this case raises. I have already quoted the 19th article of the Treaty of Union, which declares that 'No causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other court in Westminster Hall.' Whether the case of *Ewing and Others* v. *Orr Ewing* be a 'cause' in the sense of this article, and whether the action of the Court of Chancery is in violation of the Treaty, are questions which do not call for a decision. If these questions were answered in the affirmative there would be another clear ground for refusing to recognise the validity of the Chancery order—an order in that case which, besides being obnoxious to international law, would be in direct violation of the Treaty which created the union between the two countries.

"Whether the new rule [order XI., rule 1 (d)] of 'The Rules of the Supreme Court 1883' has made any alteration on the Chancery procedure in administration suits I cannot tell. But whether it has or not, it can only apply to future cases, and does not relieve me from deciding this case without regard to it.

"The result of my consideration of this case is, that the orders of the Court of Chancery in England are inconsistent with the rules and practices between independent nations; and that therefore the Courts of the domicile are bound, in the protection of the interests of the estate within the domicile (and to this estate alone is my judgment confined), to grant interdict against compliance with these orders."

The defenders having been directed to do so by the Court of Chancery (Chitty, J.), reclaimed.

Before argument the pursuers added this additional plea-in-law:—"The action or cause in the Chancery Division of the High Court of Justice in England, in so far as the same relates to the estate of John Orr Ewing situated in Scotland at the time of his death, being in violation of the 19th article of the Treaty of Union, all the proceedings therein, so far as relates to said estate, are null and void; and the defenders ought to be interdicted from complying with any orders pronounced by said Court in such action so far as regards said estate."

During the course of the argument a joint-minute was lodged in which it was admitted "That the whole estate of the deceased John Orr Ewing which was situated in England at the date of his death, amounting to £25,235, 12s. 6d., had been realised and remitted to Scotland, £22,535 or thereby having been remitted prior to the issuing of the writ in the administration suit on 25th February 1880, and the balance, being £2700 or thereby, shortly thereafter."

The defenders argued—The principle of international law contended for is that there is an inherent want of jurisdiction in all courts, except those of the country in which the administration is being carried on, to call executors to account. But the law of Scotland does not come up to the proposition that the jurisdiction of the *forum* of administration is exclusive. The question is treated rather as one of discretion, and as depending on a consideration of the plea of *forum non conveniens*—*Longworth* v. *Hope*, July 1, 1865, 3 Macph. 1049, 1053; *Clements* v. *Macaulay*, March 16, 1866, 4 Macph. 592. The fact that this has been treated as a question of convenience implies the existence of a jurisdiction which mere convenience cannot give, and which mere inconvenience cannot take away. On principles of international law, the English Court has jurisdiction, for the following Scotch cases certainly go the length of establishing that the Scotch Courts have abstract jurisdiction over foreign executors, though the measure of liability is not discussed—*Morrison* v. *Ker*, M. 4601; *Ferguson* v. *Douglas, Heron, & Company*, November, 11, 1796, 3 Pat. 503, at p. 510; *Scott* v. *Elliot*, 1797, M. 4845; *Peters* v. *Martin*, June 21, 1825, 4 S. 107; *Young* v. *Ramage*, February 17, 1838, 16 S. 572; *Munro* v. *Graham*, July 4, 1839, 1 D. 1151; *M'Moime* v. *Cowie*, January 16, 1845, 7 D. 270. The concurrence of (1) personal presence of a trustee and (2) local situation of part of the estate in England gives the Chancery Court jurisdiction to make an administration order regarding the whole estate. The judgment of the House of Lords in the case of *Ewing and Others* v. *Ewing* is conclusive of the present question, because it involved a consideration of the question of jurisdiction—*Virtue* v. *Police Commissioners of Alloa*, December 12, 1873, 1 R. 285, 296. The object of the Confirmation and Probate Act of 1858 was merely to simplify the title of executors, and enable them to ingather the whole estate, not to make any difference in the legal results of having the seal of the English Probate Court put upon the deed—Williams on Executors, i. 368. There is nothing in the Act to lead to the conclusion that Scotch trustees are bound to account only in Scotland. The Lord Ordinary proceeds upon the principle that when the deceased had property in a foreign country, there must, in each country where such property is situated, be an ancillary administration—*Hastings* v. *Hastings*, February 12, 1852, 14 D. 489, *per* Lord Justice-Clerk (Hope). Story's Conflict of Laws, secs. 513, 524. But the local administration is entitled not merely to collect and remit to the home country, for the fund will be subject to the claim of creditors and legatees—Wharton's Private International Law (2d ed.), sec. 619. The Court must have power to work out its own jurisdiction—*Drummond* v. *Drummond*, L.R., 2 Ch. App. 32, overruling *Cookney* v. *Anderson*, 1 De J. & S. 365; *Foley* v. *Maillardet*, *ibid.* 389; *Samuel* v. *Rogers*, *ibid.* 396; and in the case of a share of residue this cannot be done without accounts being taken. It is within the discretion of the foreign court to determine when the proceeds should be transmitted to the home country—*Preston* v. *Melville*, 2 Rob. App. 88. There is no "cause" here sufficient the bring the matter under the 19th article of the Treaty of Union. The consideration of which suit has been instituted first must weigh in a question of interdict—*Dawson's Trustees* v. *Macleans*, February 4, 1860, 22 D. 685. The only cases in which the English courts have been asked to grant interdict in circumstances similar to the present are *Marquis of Breadalbane* v. *Chandos*, 2 S. & M'L. 402; *Carron Company* v. *Maclaren and Others*, 5 Clark (H. of L. Ca.) 416. Though interdict has been granted against a pursuer in a foreign court—*Young* v. *Barclay*, May 27, 1846, 8 D. 774—it has never been granted against defenders unwillingly appearing in such Court, except in *Hope* v. *Carnegie*, L.R., 1 Ch. App. 320.

The pursuers replied—It rests upon the de-

fenders to make good the proposition that this Court is to recognise and give effect to a decree which *ex concessis* will diminish the pursuers' share in the trust estate. This decree of the Court of Chancery, the form of which is never varied, involves the securing of the estate, *i.e.*, the supersession of the trustees, although it does not postulate default, but proceeds upon a *devastavit*, which only requires to be alleged, not proved. The theory of the jurisdiction is that it is sufficient to catch one trustee within the jurisdiction, and then act on his conscience. The operation is *in personam* without regard to the local situation of the property. In the present case the domicile of the trust is Scottish, for it is fixed as such by the finding in the confirmation. Of the six trustees at the date of service two were domiciled in England, one was personally served there, and the other three, resident in Scotland, were convened by the highly artificial method of service outside the jurisdiction. The trust settlement contains no purposes to be fulfilled in England or out of Scotland, so that there can be no question of *locus solutionis*. These circumstances bring the argument up to this, that if *Melville* v. *Preston*, February 8, 1838, 16 S. 472, *rev.* 2 Rob. App. 88—which is exactly the converse of the present case—be sound, it applies here in the sense of fixing that the place of administration is Scotland, for it is here that the estates of the deceased have been lawfully taken possession of. This order is inconsistent with the principle of international law that the *forum* of the domicile is the *forum* of administration—*Hastings* v. *Hastings*, 14 D. 489; Westlake's Private International Law, 109, 111; *Pipon* v. *Pipon*, Ambler's Rep. 25; *Enohin* v. *Wylie*, 10 Clark (H. of L. Ca.) 1; *Cookney* v. *Anderson*, *Foley* v. *Maillardet*, and *Samuel* v. *Rogers*, all *supra cit.*, at p. 434; *Eames* v. *Hacon*, L.R., 16 Ch. Div. 407, *per* Fry, J., *aff.* 18 Ch. Div. 347; Story's Conflict of Laws (8th Div.), sec. 513a; *Cureton* v. *Mills*, 36 Amer. Rep. 700; *Dawes* v. *Head*, 3 Pickering 128. The same principle has been recognised in Scotland—*Hutchison* v. *Aberdeen Bank*, June 9, 1837, 15 S. 1100; *Young* v. *Ramage*, February 16, 1838, 16 S. 572; *Maclachlan* v. *Meiklam and Others*, July 9, 1857, 19 D. 960; *Gibbon & Company* v. *Dunlop & Collett*, February 27, 1864, 2 Macph. 776; *Macmaster* v. *Macmaster*, June 7, 1833, 11 S. 685, June 17, 1834, 12 S. 731; *Brown* v. *Palmer*, December 17, 1830, 9 S. 224; *Morrison* v. *Ker*, M. 4601. This English order is plainly a contravention of the principles laid down in *Ferguson* v. *Majoribanks*, April 1, 1853, 15 D. 637; Lord Rutherfurd, p. 639. Under the provisions of the Confirmation and Probate Act of 1858 the only title which the executors have is derived from the Sheriff of Dumbarton, so that the ancillary is now fused with the general administration. By the Trust Act of 1867, sec. 5, it is provided that trustees shall not be subjected to the jurisdiction of the English courts in respect of certain investments. This order was a violation of the 19th Article of the Treaty of Union. The word "cause" there occurring does not mean that there must be an existing *lis*, but comprehends anything out of which an action may arise—Stair iv. 3, 19. The remedy should be interdict, or sequestration of the estate, either with or without removal of the trustees.

At the close of the argument the pursuers amended the summons by adding a conclusion that in the meantime, and until the estate should be vested in the judicial factor for whose appointment they concluded, interdict in terms of the conclusions for interdict ought to be granted.

At advising—

Lord President—This action of declarator is raised by four of the five persons who are equally interested in the residue of the estate of the deceased John Orr Ewing, merchant in Glasgow, against the trustees and executors appointed by his trust-disposition and settlement, dated 17th November 1876. According to the provisions of the deed the great bulk of the estate falls into residue. The only other person interested in the residue is Malcolm Hart Orr Ewing, who is in minority, and in whose name certain proceedings have been taken in the Chancery Division of the High Court of Justice in England, which are alleged to be productive of much embarrassment and expense in the administration of the trust committed to the defenders by the testator.

The action is brought under very exceptional circumstances, and the conclusions of the summons raise questions of great public interest.

Mr John Orr Ewing, the testator, died on the 15th of April 1878, domiciled in Scotland. His settlement was prepared and executed according to the forms of Scotch conveyancing. He was the owner of a landed estate in Dumbartonshire; and the great bulk of his personal or moveable estate was at his death locally situated in Scotland, the proportions being £435,314 (or fifteen-sixteenths) in Scotland, and £25,235 (one-sixteenth) in England. All the trustees are Scotchmen, and only two of them are resident in England, the others being resident in Scotland. The testator had no English creditors, and none of the purposes of the trust required to be performed in England or elsewhere than in Scotland.

The trustees proceeded to make up their title to the personal estate, by presenting an inventory in the Commissary Court of the county of Dumbarton, including the English as well as the Scottish moveables, and having obtained confirmation from the Commissary, in terms of section 9 of 21 and 22 Vict., c. 56, and had the confirmation stamped with the seal of the Probate Court in England, under section 12 of the same Act, they reduced the personal estate into possession. They were thus duly vested by a decree of the Judge of the Commissary Court of Dumbartonshire, pronounced under express statutory authority, with the whole personal estate of the deceased, and having brought the English assets to Scotland, they proceeded to administer the trust according to the usual practice in this country.

Such administration by the law of Scotland required no further legal proceedings, after the title of the trustees had been completed by confirmation as executors. The trustees would not have been entitled to throw the estate into Court, except upon an allegation, supported by evidence, that there were competitions of right under the trust-settlement between legatees and creditors, or between different persons claiming as beneficiaries under the trust, which the trustees could not undertake to determine without the authority

of the Court, or on the ground that there was so much difficulty and embarrassment in the distribution of the estate that the trustees would not be in safety to act on their own judgment. On the same grounds, any person interested in the succession of the deceased, who found that he could not obtain what he claimed, might have raised an action of multiplepoinding in name of the trustees for the purpose of having the existing disputes judicially determined. But if either the trustees or the individual took such a proceeding without establishing its necessity, the suit would be dismissed with costs. If the claim of a legatee or creditor is resisted by the trustees, on the ground that the trust-settlement gives no right to the so-called legatee, or that the truster was not, and the trust-estate is not, indebted to the so-called creditor, the legatee or creditor cannot by any proceeding throw the estate into the hands of the Court, but must sue the trustees by petitory action for payment. Even where there are competitions of right between different persons to a certain fund or to certain portions of the trust-estate, it is by no means necessary to throw the whole estate into Court. It is only the particular fund, or a part of the estate sufficient to meet the claim of the party who shall be successful in the competition, that requires to be placed *in manibus curiæ*. In such a case also there is the familiar and very inexpensive remedy of presenting a Special Case to the Court where the parties are agreed about the facts.

The great principle in the administration of Scotch testamentary trusts is to leave the administration where the testator himself has placed it, unless from fault or accident the trust has become unworkable; and even in that case the Court do not undertake the administration, but appoint new trustees or a judicial factor, who will occupy the same position, and possess the same powers of extra-judicial administration which the trustees named by the testator occupied and possessed.

After this explanation it may seem almost superfluous to say that an "administration suit" of the kind used and sanctioned in the English Courts of Chancery is altogether unknown to Scotch practice. I trust I do not exceed the true limits of a judicial utterance when I add that it is very fortunate for the people of Scotland that it is so.

The defenders as trustees and executors were in the course of administering the estate according to the directions of the testator when an "administration suit" was instituted in the Chancery Division of the High Court of Justice in England, and was afterwards carried on in the name of Mr Malcolm Hart Orr Ewing, already mentioned, and orders have been pronounced against the defenders in that suit, the effect of which would be to supersede the trustees in the performance of the duties entrusted to them by the testator, and to put the management and distribution of the estate entirely in the hands of the Chancery Division.

This suit was originally brought in name of two of the present pursuers, as well as in that of Mr M. Hart Ewing, as "infants, by George Wellesly Hope, their next friend." This appears from the proceedings to have been objected to by these two pursuers as done without any authority, and the suit was certified by the chief clerk to have been improperly instituted. With reference to this, the judgment of the late Master of the Rolls bears, "I think Mr Hope ought not to have been made a plaintiff at all. He had no direct interest in the estate which is sought to be administered. He is, in fact, a legatee under a residuary legatee's will, and of course should not have been a co-plaintiff, and therefore must be struck out. Why it was not done before I do not know. He could not maintain the suit." Mr Hope's name was accordingly struck out, as were those of the two pursuers which had been used by Mr Hope without any authority; and with reference to the further question, whether the action should be allowed to proceed with Mr Hope as next friend to the other plaintiff, the infant, Mr Hart Ewing, the judgment bears—"I quite agree with all that was said on the part of respondents that it is not the rule in the ordinary case to institute a suit in the name of the infants without communicating with the infants' father or the actual guardian. Therefore I think that Mr Hope was not justified in the step he took originally of making these infants plaintiffs, which was a step obviously not for the sake of the infants, but in his own interest for the sake of securing his own legacy.' Notwithstanding this, however, the suit was allowed to proceed, on a certificate or affidavit made on behalf of the infant's mother, who was separated from the father, to the effect that she wished the suit to proceed.

The pursuers aver that the effect of the orders pronounced by the Chancery Division will be to cause the making up of accounts which are altogether unnecessary, to transfer the personal estate in the defenders' hands from Scotland to England, together with the writs, evidents, and securities thereof, and so place them beyond the control of the defenders as trustees, and beyond the jurisdiction of the Courts of Scotland, and thereby defeat the diligence and process otherwise competent to the pursuers, and tend to lessen, if not destroy, the value of their interests in the estate. They further aver that these proceedings will cause great and unnecessary expense to the estate, and diminish the amount of the residue to which the pursuers are entitled. Lastly, they aver that the defenders, in obedience to the orders of the English Court, hold themselves not to be entitled to make any payment out of the estate without the special authority of the English Court, or some official thereof.

On these allegations, which are in all essential points admitted by the defenders, the pursuers conclude for declarator that the trust-estate of the deceased John Orr Ewing must, in accordance with his express desire, be administered in Scotland according to Scotch law, and subject to the jurisdiction and control, when necessary, of the Scotch Courts, and that the defenders are not entitled to remove the estate, or any part of it, or of the titles, writs, and securities thereof, beyond the jurisdiction of this Court, or to account for the same in any other Court. And on the footing of such declarator, the pursuers farther conclude alternatively for interdict against the defenders doing any of these things, or that the Court should sequestrate the estate and appoint a judicial factor to administer the same, either removing the trustees from office or

superseding their action in the meantime until they shall be relieved from the difficulties in which they are at present placed by the orders of the English Court.

It is evident that if we pronounce judgment in terms of all or any of these conclusions against the defenders, there will arise immediately a conflict of jurisdiction between this Court and the Chancery Division of the High Court of Justice in England. This is a very serious matter, and we must therefore deliberately consider (1) what are the relations of the two Courts, and (2) what are the grounds on which the jurisdiction of each Court to deal with this trust-estate is maintained.

I. As to the relations of the two Courts, I hold that in proper questions of jurisdiction such as the present *the judicatories of Scotland and England are as independent of each other, within their respective territories, as if they were the judicatories of two foreign states.* I am anxious to formulate this rule, which is the necessary result of the Treaty of Union, with as much accuracy and precision as possible, because a loose and illogical statement of so important a constitutional doctrine is both dangerous and misleading. I have been, however, so much accustomed to regard it as an incontrovertible proposition, that I was somewhat surprised to read in the Chancery proceedings which have been laid before us this passage in the judgment of so very learned and able a Judge as the late Master of the Rolls—"I caught during the argument an expression to which I do not assent. Scotland was called a foreign country—a foreign jurisdiction. All that in my opinion is quite erroneous. Ever since the union of the kingdom of Great Britain, Scotland has been an integral part of Great Britain; it it not a foreign country." I sympathise with the learned Judge so far, that Scotland and England cannot with strict propriety be spoken of as being in the relation of foreign countries. But as the proposition with which he was dealing was, as he says, only "caught during the argument," he was probably misled by inaccuracy of expression; and the proposition itself, if expressed more precisely, might have commanded his serious attention. I do not say it would probably have altered his judgment on the case before him, but it might have enabled him to avoid what follows in the statement of his opinion—"To talk of Scotland as a foreign country, and to say that the same rules apply, is, I think, a total error. It is not only an integral part of this kingdom, but *the judgment of this Court can be enforced in Scotland* in the same way that the judgment of a Scotch Court can be enforced in England. But there is more than that. In the case of a foreign country there is the difficulty of ascertaining the foreign law, and where questions of foreign law arise it is certainly very inconvenient to try them by the sworn and unsworn testimony of advocates and experts as to what the law is. It is much more convenient, of course, to obtain the decision of the judges of the country on the law of their own country. Well, now, what has the Legislature done? Recognising that the Legislature has empowered the English Courts, where a question of Scotch law arises in the course of English litigation, to take the opinion of the Scotch courts, which they are bound to give, and correlatively has empowered the Scotch courts to take the opinion of the English courts on a point of English law arising out of a Scotch litigation, there is therefore no difficulty at all in deciding a point of Scotch law in England, because they decide it not in England, but in Scotland, and so with regard to English law in Scotland, because that would be decided in England: all those difficulties are therefore purely imaginary."

Before I advert further to the reasons which seem to have led the learned Judge to the conclusion that in questions of jurisdiction Scotland and England do not stand in the relation of foreign kingdoms—or adopting the more correct formula that the judicatories of Scotland and England are not as independent of each other as if they were the judicatories of two foreign states—I wish to cite one very weighty authority, which is in terms contradictory of this proposition. In the appeal to the House of Lords from this Court regarding the guardianship of the present Marquis of Bute, Lord Campbell, as Chancellor, thus expressed himself—"I beg to begin by observing, that as to *judicial jurisdiction*, Scotland and England, although politically under the same Crown, and under the supreme sway of one united Legislature, are to be considered as independent foreign countries unconnected with each other. This case is of a judicial nature, although not between parties who are plaintiffs and defendants, and it is to be treated as if it had occurred in the reign of Queen Elizabeth. . . . The holder of the Great Seal of the United Kingdom is Lord Chancellor of Great Britain, and by statute he has important functions to exercise in Scotland, such as the appointment and dismissal of magistrates, and sealing writs for the election of Scotch peers and members for Scotland of the House of Commons. But as a Judge his jurisdiction is clearly limited to the realm of England. . . . As Judge he has no jurisdiction in Scotland whatever. In this respect there is an entire equality and reciprocity between the two divisions of this island, and a decree of the Court of Chancery is not entitled to more respect in Scotland than an interlocutor of the Court of Session in England." The Lord Chancellor was followed in that case by Lords Cranworth, Wensleydale, Chelmsford, and Kingsdown, no one of whom expressed the slightest dissent from his opinion, or even indicated that it was in any respect too unqualified.

The Master of the Rolls seems to have been misled into the opinion he expressed, in opposition to this high authority, by the supposed operation and effect of recent statutes providing for the enforcement of Scottish judgments in England and of English judgments in Scotland, and also for the more convenient ascertainment of the law of one part of the United Kingdom by a court in another part.

By what is known as "The Judgments Extention Act," 31 and 32 Vict. c. 54, a judgment of a court of common law in England for debt, damages, or expenses (*but not an order or decree of the Court of Chancery*) may be enforced in Scotland by the party holding the judgment producing to a registrar in Scotland a certificate of the judgment, and having it registered. And *e converso*, a judgment by this Court for debt, damages, or expenses (but not any other kind of order or decree) may by a corresponding proceeding be enforced in England. But this gives no jurisdiction to the Scotch court in the matter of the English

judgment, nor jurisdiction to the English court in the matter of the Scotch judgment; the one remains an English judgment throughout, though endorsed, so to speak, by a Scotch official under the authority of the statute, and the Scotch judgment also remains throughout a Scotch judgment, though endorsed by an English official under the like authority.

The 22d and 23d Vict. c. 63, "to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the courts of another part thereof," provides in effect that in any suit or proceeding, when the facts are ascertained, a case may be submitted by a court in Scotland to a court in England to ascertain the law of England applicable to such facts, or by a court in England to a court in Scotland to ascertain the law of Scotland applicable to such facts. But how the passing of such an Act can affect the jurisdiction of any of the courts in Scotland or England, or their relation to one another in the matter of jurisdiction, does not at all appear.

These very convenient reciprocal provisions for the enforcement of Scotch judgments in England and English judgments in Scotland, and for the more convenient ascertainment by any court of the law which that court does not judicially know or administer, are authorised by Acts of the Imperial Legislature of the United Kingdom. But the same reciprocal advantages and conveniences might be brought about in the case of English and French Courts, or of Scottish and Dutch Courts reciprocally, not indeed by an Act of the Parliament of the United Kingdom, but by treaty or convention; and it could hardly be contended that the effect of such treaty or convention would be to affect the relation of these courts to one another in a conflict of jurisdiction. Of this there could not be a more instructive or apposite illustration than is to be found in 24 and 25 Vict. c. 11, which is intended to extend the benefits of the 22 and 23 Vict. c. 63, to cases in which any of the courts of the United Kingdom require to ascertain the law of another nation, "with the Government of which Her Majesty may be pleased to enter into a convention for the purpose of mutually ascertaining the law of such foreign country or state, when pleaded in actions depending in any courts within Her Majesty's dominions, and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the courts of such foreign country or state."

It would, in my opinion, be a waste of time to say more as to the relations in which the Chancery Division of the High Court of Justice in England and this Court stand to one another, or in support of the general proposition that by virtue of the Treaty of Union the judicatories of England and Scotland are as independent of each other within their respective territories as if they were the judicatories of two foreign states. I therefore proceed, in the second place—

II. To inquire, what are the grounds on which the jurisdiction of each of the two Courts to deal with this trust-estate is maintained.

Prior to the passing of the Confirmation and Probate Act of 1858, to the effect of which I shall more particularly advert, the portion of Mr Orr Ewing's personal estate which was locally situated in England must have been taken up and administered by the defenders under English letters of probate, while the remainder (being the great bulk of the personal estate) would have fallen within the Scottish confirmation. To such a state of circumstances the law laid down by Lord Chancellor Cottenham in *Preston* v. *Melville* would have been clearly applicable. The personal estate in that case was situated partly in Scotland and partly in England, but the great bulk of it was in England. The trustees appointed by the testator having declined to act, the Court of Session appointed new trustees to act in their place; but that appointment did not confer on the new trustees the office of executors-nominate, which the testator had conferred on the original trustees. Therefore Lady Baird Preston, as the person chiefly interested in the succession, administered the whole personal estate as next-of-kin. Obtaining confirmation in Scotland and letters of administration in England, she handed over the whole of the Scotch personalty to the trustees for the purposes of the trust, but declined to part with the personalty in England until she and her sureties in the Prerogative Court should be discharged by that Court, or some other competent Court in England. The trustees, on the other hand, contended that her ladyship was bound to hand over to them absolutely and immediately, for the purposes of the trust, the whole assets belonging to the testator at the time of his death, wherever situated and by what title soever she held or had acquired them. Lord Cottenham decided in favour of Lady Baird Preston, on grounds which appear to me to be irresistible. The general rule which he enunciated, and which has often been quoted, is that "the domicile regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased." But the reason which his Lordship assigns for this rule is not less important than the rule itself. "By the law of England the person to whom administration is granted by the Ecclesiastical Court is by statute bound to administer the estate and to pay the debts of the deceased. The letters of administration under which he acts direct him to do so, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration." And it may be added that the Prerogative Court require the administrator further to find sureties (in the case of Lady Baird Preston to the amount of £360,000) for the full performance of these duties. To pay over the English funds to be administered by the Scotch trustees, his Lordlord holds would be "to act in violation of the oath she has taken, and in dereliction of the duties of the office with which she has been invested in this country." But when the English personal estate has met all its obligations in England, his Lordship does not doubt that the residue, if any, will be payable to the Scottish trustees.

Now, applying the rule established or declared in *Melville* v. *Preston* to the present case, where the personal estate with a small exception is situated in Scotland, and possession of it has been taken and held there by the defenders under

the lawful authority of the confirmation of the Commissary of Dumbarton, it follows that the administration must be in this country. They have given up a full and true inventory on oath of the whole effects of the deceased, and have undertaken that they will well and truly administer the estate, and pay the debts of the deceased, and render just count and reckoning for their intromissions.

Then how is this duty and obligation to administer the estate in Scotland affected by the circumstance that the deceased had also personal estate to a comparatively trifling amount in England? Prior to the Act of 1858, of course it would have been necessary for the defenders to obtain probate in the English Court to give them a legal title to uplift the English personalty; and this portion of the estate they would, on Lord Cottenham's principle, have been bound to administer in England. If there were any English debts they must be satisfied in the first instance. If there were any directions in the testator's settlement that required to be performed in England, these would next fall to be provided for. But after these debts had been discharged and these purposes fulfilled, the plain duty of the defenders would have been to combine the residue of the English with the Scottish part of the estate, and to administer the combined estate in Scotland as a whole, according to the directions of the testator.

The object of the ancillary administration in England would of course have been to obtain a legal title to the English funds; and this could not have been obtained by the defenders without an undertaking to administer and account in England. But as soon as they had satisfied all just claims in England out of the estate there situated, they owed no further duty to any party or to any Court in England.

All this is very clear on general principle; and it would have been still clearer in its application to the circumstances of the present case if the defenders had required to obtain and had obtained letters of probate from the English Court. For there were no English creditors of the deceased, and there were no purposes of his settlement which were to be carried into execution elsewhere than in Scotland. In such circumstances it appears to be the opinion of all jurists, as is successfully demonstrated by the Lord Ordinary, that even if the ancillary title of administration is in a different person from that of the principal administration, the simple duty of the ancillary administrator is to remit the funds which he has recovered to the principal administrator.

It is unnecessary to follow this theme further in the way either of argument or illustration, because it appears to me that in the present case the title of administration possessed by the defenders is by force of the statute 21 and 22 Vict. c. 56, a purely Scotch title, comprehending a title to administer the English funds, to the same effect as if they had been locally situated in Scotland.

The title and preamble of the statute plainly announce the purpose of the Legislature to be, to extend over the United Kingdom the effect of a confirmation in Scotland, and of grants of probate and administration in England and Ireland. The one condition required to make the statute applicable is, that the person whose estate is to be administered shall have died domiciled in that part of the United Kingdom in which the confirmation or grant of probate or administration is obtained. The object of the statute was to secure economy, and also simplicity and unity of administration, and, with this end in view, to do away with the necessity of ancillary administration as regards the three parts of the United Kingdom.

The 9th section enacts that "It shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland, or both, provided that the person applying for confirmation shall satisfy the Commissary, and that the Commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicile; provided also that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated within the United Kingdom."

Section 12 enacts that, "When any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the Commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate."

It cannot be disputed that this section of the Act gives to the Scottish confirmation extra-territorial operation and effect. But it has been argued that the words of this section giving to the confirmation, when sealed by an officer of the Probate Court, "the like force and effect in England as if a probate, &c., had been granted by the said Court," subject the confirmed executor to all the same liabilities, duties, and jurisdiction as if he had actually obtained a grant of probate in England. To this reading of the statute I cannot assent; and my reasons will be most readily understood by a reference to the proceedings in the present case, which it is not disputed are strictly in accordance with the provisions of the statute.

The defenders having in the Commissary Court of Dumbartonshire given up on oath an inventory of the whole of the deceased's personal estate, including the funds and effects situated in England, as well as those situated in Scotland, and having exhibited to the Commissary the trust-disposition and settlement of the deceased, the Commissary pronounced his deliverance, confirming the nomination of the defenders as executors, and giving them "full power to uplift, receive, administer, and dispose of the said per-

sonal estate and effects" (*i.e.*, the estate and effects contained in the inventory, both Scottish and English), "to grant discharges thereof, if needful to pursue therefor, and generally every other thing concerning the same to do that to the office of an executor-nominate is known to belong."

Now, this is the sole grant of right to administer the estate of the deceased which the defenders have obtained. They require no other. No doubt, to give it the effect of an active title to recover from English debtors, or to uplift English funds, the seal of the Probate Court of England is directed by the statute to be impressed upon it. But the official of the Probate Court cannot refuse to impress the seal. He has no discretion in the matter. His act is not judicial, but a mere statutory formality. The seal is impressed, not because the Probate Court or its official has seen the nomination of the executors, or the inventory of the estate, or the oath of the executors confirmed—not because the executors have taken any oath in the Probate Court, or undertaken any duties in that Court, or found there any security for their just and true administration—but simply and solely because the officer of the Probate Court has had presented to him what bears to be a confirmation sealed with the seal of the Commissary of Dumbartonshire, together with a certified copy of the interlocutor of the Commissary, pronounced in terms of the statute. He, as ordained by the statute, affixes the seal which gives the confirmation force and effect in England, solely because the Commissary of Dumbartonshire has given the executors the power and right to ingather that portion of the estate which is situated in England. And after the seal is impressed the statute requires that the confirmation shall be "returned to the person producing the same," so that neither the confirmation nor the sealing of it is required to be made matter of record in the Court of Probate. To hold that the Scotch confirmation when sealed, and because it is sealed by the officer of the Probate Court, becomes an English grant of probate in a question of jurisdiction, seems to be much the same thing as it would be to hold that a judgment of an English court registered in Scotland and put to execution there under the Judgments Extension Act becomes in a question of jurisdiction a judgment of a Scotch court.

I am of opinion that the effect of the Statute of 1858 and of a confirmation under the statute embracing English personal estate in the inventory given up on oath to the Scotch Commissary Court, is to enable the executors to administer the English estate along with, and as part of, the Scotch estate, and to exempt the executors from being subject to English jurisdiction by reason of a part of the executry estate having been locally situated in England at the death of the testator. And I am confirmed in that opinion by a provision in another later statute, 30 and 31 Vict. cap. 97, "To facilitate the Administration of Trusts in Scotland." The fifth section of that Act empowers trustees acting under any Scotch deed of trust to invest the trust-funds "in Government stocks, public funds, or securities of the United Kingdom, or stock of the Bank of England," but adds this proviso, "that the trustees shall not be held to be subject as defendants or respondents to the jurisdiction of any of Her Majesty's superior courts of law or equity in England or Ireland, as trustees or personally, by reason of their having invested or lent trust-funds as aforesaid." This proviso is a proper complement of the Confirmation Act of 1858 as I read it. But if the truster's possession at the period of his death of any personal estate in England would have the effect of subjecting the trustees and the whole or part of the trust-estate to the jurisdiction of English courts, it can hardly be supposed that this carefully worded proviso would have found a place in the statute.

Another argument of the defenders is founded on the circumstance that when the administration suit was commenced in the English court there was no corresponding suit, and no suit of any kind, depending in this Court affecting the trust-estate, and reference was made to the established rules respecting jurisdiction in bankruptcy where a trader has creditors in different parts of the United Kingdom.

I do not stop to point out the obvious distinction in principle between the administration of a bankrupt estate by a trustee or assignee in bankruptcy, and that of the estate of a solvent person deceased by trustees and executors appointed by himself. The analogy does not aid the defenders at all. If a bankrupt have only one trading domicile the distribution of his estate among his creditors must be in the court of that domicile. But when the bankrupt has two trading domiciles (and in that case only) the process of distribution of the estate may be instituted in either domicile; and when it has been instituted in one of the domiciles, and the estate has become vested in a trustee or assignee, the jurisdiction of the Bankruptcy Court of that domicile is exclusive of the other. This was settled by Lord Eldon in *Selkrig* v. *Davies and Salt*, 2 Dow, 230, and was given effect to in *Goetze* v. *Aders, Pryer, & Company*, 2 R. 150, and the *Phosphate Sewage Company* v. *Lawson's Trustee*, 5 R. 1125. But there is nothing here analogous to two trading domiciles. The domicile of the testator (so far as that affects the question) was in fact in Scotland, and was fixed as Scottish for confirmation purposes by the decree of the Commissary under the authority of the statute.

The defenders further say that there is no example of an interdict being granted by this Court to prevent persons subject to the jurisdiction of this Court obeying the order of the Chancery Court of England in a suit in which these persons are defendants. This is a mistake. There is a very clear and instructive example of it in the case of *M'Lachlan* v. *Meiklam and Others*, 19 D. 960. One cannot be surprised that such cases are of rare occurrence, because fortunately it is seldom that the courts of two parts of the United Kingdom come into conflict. When that does occur an adequate remedy will always be found.

Lastly, the defenders contend that the orders of the Chancery Division having been affirmed on appeal by the House of Lords this Court is bound by that judgment on appeal, because the House of Lords is the court of ultimate resort for every part of the United Kingdom. This would be a very formidable defence if it were not founded on a fallacy.

I recognise without hesitation the position of the House of Lords as the court of ultimate resort,

in the fullest sense, for the whole three parts of the United Kingdom, and I had occasion in the very remarkable case of *Virtue* v. *The Commissioners of Police of Allea*, 1 R. 285, differing from some of my brethren, to express myself in the following words—"I think it is an error in constitutional law to represent the House of Lords as sitting at one time as a Scotch court and at another time as an English court. That House, I apprehend, sits always in one character, as the House of Lords of the United Kingdom, and as such the Imperial Court of Appeal for the whole three parts of the United Kingdom. It has occasion to administer at one time the law of Scotland, at another the law of England, and at another the law of Ireland. But in appeals coming from all the three countries it has also to deal with principles of law that are common to the whole three." If this be sound, the corollary is manifest. This Court is bound by the judgments of the House of Lords in cases of the last description as authorities, even though the judgments may have been pronounced in English or Irish appeals, just as much as it would be by judgments pronounced in Scotch appeals. But it is otherwise when the House is administering a law different from or antagonistic to the principles of the law of Scotland. There the judgment on appeal is no more binding on this Court than the judgment of the Court of first instance from which the appeal comes.

In the present case the judgment of the House of Lords would not have been pronounced in the terms which are before us had it not been for the rules and precedents of the English Court of Chancery. A long practice in any of the Courts of the United Kingdom cannot be disregarded by the House of Lords without serious inconvenience. But such practice can have no influence whatever on the independent judicatories of another part of the United Kingdom, or on the House of Lords sitting in review of their judgments.

The pursuers by this action demand that the administration of the estate of the late Mr John Orr Ewing shall take place in Scotland, according to the provisions of his trust-disposition and settlement, and to this I think they are entitled *ex debito justitiæ*, because there are no rules or principles of international law or acts of the Imperial Parliament which require them to submit to have the administration in any other country.

If the defenders as trustees and executors had voluntarily proposed to remove the estate and its titles and securities out of Scotland, for the purpose of carrying on the administration elsewhere, it will hardly be disputed that the pursuers would have been entitled to interdict to prevent this being done. The defenders are not acting voluntarily, but they propose to do the very same thing in obedience to the orders of the Chancery Division in England. But this cannot alter or prejudice the rights of the pursuers, unless the orders of the Chancery Division are binding on the pursuers, which, for the reasons already given, I think they are not. One cannot but sympathise with the defenders in the very embarrassing position in which they are placed, from no fault of their own; but no considerations of this nature can be allowed to influence the Court in judging of the pursuers' right to the remedy they ask by the conclusions of their summons.

I propose to your Lordships that judgment should be given in terms of the declaratory conclusions, and as regards the other conclusions it appears to me that the most appropriate and effectual remedy is to sequestrate the trust-estate, and (without removing the trustees from office) to appoint a judicial factor, with all the powers conferred on the defenders by the trust-disposition and settlement, to hold and manage the estate and distribute the same according to the directions of the deceased truster. The effect of this will be to relieve the trustees, for the present, of all charge of the estate, and to suspend all action on their part as trustees and executors; but the sequestration need not be permanent, if the trustees shall hereafter find themselves in a position to resume their duties of administration without interference from the Chancery Division. The course which I propose is in accordance with the practice of the Court when testamentary trustees become from any accidental cause temporarily disqualified to administer the trust; and it is in my opinion at once the most effectual remedy in the pursuers' interest, and the most appropriate to the unfortunate position in which the defenders are placed.

Lord Deas—I have read and carefully considered the opinion proposed to be delivered in this case, and which has now been delivered by your Lordship, the Lord President, and I entirely concur in it.

In particular, I cannot entertain any doubt that under the Treaty of Union the judicatories of Scotland and of England are as independent of each other in their respective territories as if they were the judicatories of two foreign states.

Neither can I entertain any doubt that the effect of the affirmance by the House of Lords upon appeal of the orders issued by the Chancery Division in England cannot be to give them any higher force or effect in Scotland than as orders regularly issued in conformity with Chancery rules and practice in themselves possess. In this respect I regard the effect of that judgment of affirmance as *toto cœlo* different from the effect which the reversal by the House of Lords, under Lord Cottenham as Chancellor, had upon the judgment of the Court of Session in the action brought against my then client Lady Baird Preston at the instance of Sir Robert Preston's trustees. It is material, in order to see this, to trace the proceedings in the action which led to that appeal.

The Lady Baird Preston who was my special client in those days, and may be identified as the relict of General Sir David Baird, who overthrew Tippoo Sahib and took Seringapatam, was the eldest of three nieces of Sir Robert Preston of Valleyfield, who survived him. After his death, which occurred on 7th May 1834, she obtained confirmation as his next-of-kin and executrix in Scotland, and letters of administration from the Probate Court of Canterbury as his administratrix-at-law in England. In the latter capacity she took possession of the deceased's large personal estate in England, which she declined to make over to his trustees, surrendering however to them his comparatively small estate in Scotland.

Sir Robert's trustees thereupon brought against her in the Court of Session the action to which I have alluded, concluding, *inter alia*, that she

ought to be ordained to make over to them the whole personalty situated in England, to be administered by them in accordance with Sir Robert's trust-deed and settlement.

The Court of Session pronounced a judgment, which was, *inter alia*, substantially to the effect just stated, namely, that she should make over to the trustees the whole personal estate of Sir Robert situated in England.

Against this judgment an appeal was taken by Lady Baird Preston to the House of Lords.

I prepared the appeal case lodged for her Ladyship, which has been preserved with the Court of Session record and other relative papers in the Advocates' Library, from which, taken in connection with the judgment, it will be seen that there can be no doubt at all that all the matters involved in it of fact and of law were competently and finally adjudicated upon under that appeal by the clear and comprehensive judgment delivered by Lord Cottenham, then Lord Chancellor. When I say his judgment was final and conclusive, of course I mean only as between the parties then before the House.

At the same time, the judgment, while it took a form calculated to carry with it general authority, unquestionably formed a direct precedent of the greatest possible weight, which may safely be followed under circumstances so entirely analogous (*mutatis mutandis*) as those now before us, in which the great leading and important question is, whether we ought to allow the large funds of the deceased, which have been lawfully reduced into possession in Scotland, to be carried to England, or elsewhere, in order to be there dealt with by different rules and laws from our own.

I am, unfortunately, the only survivor of the counsel who in March 1841 appeared and pleaded along with me at the Bar of the House of Lords on behalf of Lady Baird Preston, but I have a perfect recollection of all that then took place, including the law laid down, and I can readily supplement from my memory whatever may be thought to be imperfectly reported or recorded in reference to the matters then in question.

I think that the precedent of that judgment, in the absence of all authority to the contrary, is of itself conclusive upon the question, which, as I have said, is really the leading and most important question in this case.

If I am right in this, it follows that we ought to take measures for preventing what ought not to be allowed to take place; and as to what these measures should be, I agree with what your Lordship has proposed to us towards the conclusion of your opinion.

I may add that it is within my personal knowledge that the soundness of that judgment was fully recognised by the able counsel of the English Bar who were then associated with me on the part of Lady Baird Preston, and when such of your Lordships as had a knowledge of the members of the English Bar of that day see from the report who those counsel were, you will at once be aware that there were none who stood higher in the estimation of the public and the profession. It is in these circumstances that I venture to say that although the judgment delivered by Lord Cottenham is only a precedent, a higher or more authoritative precedent for us to follow in the present case could not possibly be found.

Lord Mure.—I concur in the opinion which has been delivered by your Lordship, and in the grounds of that opinion. The main question here raised is certainly a serious and important one, inasmuch as it involves a conflict of jurisdiction between the courts of this country and the Chancery Division of the High Court of Justice in England, which courts, as your Lordship has shown upon the highest authority, stand toward each other in the relationship of courts of foreign countries in all matters of judicial jurisdiction. Such being the nature of the question, it has of course formed the subject of very anxious deliberation, and after carefully considering it in all its bearings, the conclusion I have come to is, that the pursuers are entitled to one or other of the remedies they ask under the conclusions of this action, in order to prevent the administration of this trust, in which they are deeply interested, from being removed from this country to England.

The pursuers' interest in the trust-estate amounts to four-fifths of about £450,000; and having regard to the allegations made by the pursuers on the record as to the change in the mode of administration and management of the trust contemplated by the defenders, and the probable removal of the estate out of the jurisdiction of the Scotch courts, which allegations are not seriously disputed by the defenders, it is clear that the pursuers have a very material title and interest to maintain that the administration of the estate should be continued to be carried on in Scotland.

But the pursuers have not only a clear title and interest to maintain the Scotch administration; they have, in the view I take of their position, a right by the law of Scotland to have that administration carried on in Scotland, without interference on the part of any foreign tribunal.

This trust is essentially a Scotch trust. It relates to the succession of a domiciled Scotsman. It must be administered in conformity with the provisions of a settlement framed according to the forms of Scotch conveyancing, and all disputes as to the terms of that settlement, or as to the distribution of the estate, must be ruled by the law of Scotland, as being the law of the domicile of the truster. The trustees, again, are all Scotch. The majority are permanently resident in Scotland, and they have been empowered to administer the estate in respect of a judgment or decree of the Judge of the Commissary Court of Dumbarton, pronounced under statutory authority, after due inquiry as to the domicile of the deceased, and whose jurisdiction in such matters is exclusive, and his judgment final. The estate, moreover, with the exception of a comparatively small amount, is locally situated in Scotland, and there are no debts due by the truster to anyone in England.

Such being the position and character of the trust, it is difficult to conceive any combination of circumstances less calculated to require the interference of a foreign court with the Scotch administration. There is truly nothing foreign about the estate and the trust. Even the infant plaintiff in the Chancery proceedings is the son of a Scotsman, one of the trustees; but he has for the present apparently become the unconscious instrument for originating an unfortunate family litigation, under the direction of what is called a "next friend," who seems to stand in the very peculiar position of having instituted proceedings

for bringing the Scotch trust into Chancery, in the first instance without authority from any of the infants whose names he used, and for his own interest alone—as explained by your Lordship in the passage you have read from the judgment of the late Master of Rolls.

Now, the main grounds in law on which it humbly appears to me that the pursuers are entitled to have this Scotch trust-estate protected from the contemplated change of administration are—1st, That the whole estate has been placed, by the proceedings taken before the Sheriff-Commissary, in terms of the Statute of 1858, and by the judgments pronounced by him on the question of domicile, under the exclusive administration of the defenders; and that this administration, which includes, by the law of Scotland, both collection and distribution, must be carried on in Scotland; and 2d, That even if a similar question had been raised before the date of the Act of 1858 relative to a Scotch trust, in a case where ancillary administration had been obtained in England relative to the estate there, and it had been proposed, as here, to call upon the Scotch executors to account to the Court of the ancillary administration for the administration of the estate in Scotland, in the way the defenders have been proceeded against, those Scotch executors would not, according to the well recognised rules of international law, have been entitled or bound to submit themselves to the jurisdiction of a foreign court.

(1) With reference to the first of these questions, I concur entirely in the very full and able exposition which has been given by your Lordship of the meaning and effect of the rules and regulations introduced by that statute for the amendment of the law relating to confirmation in Scotland, and for extending over the United Kingdom the effects of such confirmations, with reciprocal arrangements for England and Ireland. I feel it impossible to add anything to the weight of that exposition, and shall abstain from attempting to do so. But I think it right to say generally with reference to that statute, that I have always understood that one of its main objects was to remedy the inconveniences which were frequently experienced from the necessity of separate confirmation and letters of administration, as the case might be, in each portion of the United Kingdom in which a deceased party might happen to have property; and to have the whole moveable estate embraced in the inventory dealt with as a *universitas*, and placed under one administration, both for collection and distribution, in the hands of an administrator or administrators in the country of the ascertained domicile of deceased.

Some of the inconveniences which thus arose were alluded to in the opinion of the late Lord Justice-Clerk Hope in the case of the *Marquis of Hastings*, quoted in the opinion of the Lord Ordinary in this case, where his Lordship speaks of the advantages of having the estate of deceased parties managed as one *universitas* for collection and distribution, and of the inconveniences arising from having different administration in different countries, where he says "In principle it is clear that the party in whom the title of administration is vested should be the same in both countries, since in the foreign country it is only a title for collection and not for final distribution."

One effect, therefore, of the Act of 1858, as explained by your Lordship, was to introduce the principle of the rule referred to in the above extract into the working of Scotch confirmations, in the case of parties who died domiciled in Scotland, and to allow the whole estate included in the inventory to be administered as one *universitas* by the executors of the domicile, and within the courts of the domicile, by the law of which it fell to be distributed.

(2) But assuming that the question had required to be disposed of apart from the provisions of the Act of 1858 and under the ordinary rules of international law applicable to such questions before 1858, I am of opinion with the Lord Ordinary that the pursuers are entitled to the protection they ask. On that point I entirely concur in the exposition of the law which the Lord Ordinary has given us in his very learned opinion, and have therefore very little to add. It appears to me that the various authorities he has referred to are conclusive in favour of the soundness of the conclusion which his Lordship has arrived at; and it struck me as remarkable that in the course of the discussion before us there was no leading writer on international law referred to as laying down any different rules from those on which his judgment has proceeded.

The case of *Lady Baird Preston* seemed to be relied on in support of the defenders' contention. I am, however, unable to adopt that view, for it humbly appears to me to be a judgment directly adverse in principle to the defenders. The judgment in that case was expressly limited to "the property held by Sir Robert Preston in England." The ground of judgment, as explained in the opinion of Lord Cottenham, was that "administration must be in the country in which possession is taken and held under lawful authority of the property of the deceased;" and as Lady Baird Preston had obtained possession of that property under letters of administration in England, it was held that she could not be called upon to give it up to the Scotch trustees. Now, apply that rule to the circumstances of the present case. The defenders have taken possession under a valid confirmation of the whole moveable property in Scotland which belonged to the late Mr Ewing, and are still in possession of that property for purposes of administration and distribution in Scotland. Upon the principle of the rule laid down by Lord Cottenham, they are bound to continue its administration in Scotland, under the jurisdiction of the Scotch Courts, and are not entitled to take the property out of Scotland, or hand over its administration to a foreign court.

In the case of *Enohin* v. *Wylie*, to which the Lord Ordinary has referred for a statement of Lord Westbury's very distinct views of the law of nations, as quoted in his opinion, and which statement, although not expressly concurred in, is not dissented from either by Lord Cranworth or Lord Chelmsford, Lord Cranworth thus expresses himself:—"Personal property in this country belonging to a foreigner or to a British subject domiciled abroad can only be obtained in the event of his death through the medium of a representative in this country. If he has died intestate, administration will be granted here limited to the personal estate in this country."—10 House of Lords, p. 19.

It was thus the *situs* of the property which, in the opinion of Lord Cranworth as well as that of

Lord Cottenham, was held to regulate the right to administer that property; and the grant of administration was limited to the property situated in the country where administration was applied for; and when granted, it was not in the power of any foreign tribunal to interfere with the administration. That is, I think, clear from the opinion and decision of Lord Cottenham in *Lady Baird Preston's* case, which is a distinct authority in favour of what the pursuers here contend for.

If the defenders, as your Lordship has remarked, had proposed of their own accord to remove the administration from Scotland to England, there could have been no serious question as to the pursuers' right to have such a proceeding stopped; and the fact that the defenders have been called upon to take this step on an order issued by the Chancery Division, cannot, in my opinion, be held to deprive the pursuers of the redress they ask.

As regards the practice of Chancery, I agree with your Lordship that that cannot be held to rule or affect the present question. No case was referred to where such practice had in a question of international law been sanctioned or given effect to by the tribunals of any foreign country; and I am unable to see any good grounds on which, according to any sound rule of international law, extra-territorial effect could be given to it.

(3) There is, however, another objection taken by the pursuers to the Chancery proceedings, which, if well founded, is, I think, conclusive in the pursuers' favour, viz., the terms of the Treaty of Union. The Lord Ordinary has referred to certain clauses in the Articles of Union bearing upon this question; and since the case came before us the pursuers have asked and have been allowed to add a plea-in-law to the record founded on the 19th article of that Treaty, which provides "that no causes in Scotland be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other court in Westminster Hall; and that the said courts, or any other of the like nature, after the Union shall have no power to cognosce, review, or alter the acts or sentences of the judicatories within Scotland, or stop the execution of the same," and which the pursuers maintain is or would be violated by the proceedings they complain of.

In order to dispose of this plea it is necessary to keep clearly in view the precise position the defenders are placed in with regard to the trust-estate in question, which, as I have already explained, is essentially a Scotch trust-estate. The defenders have been authorised by the judgment pronounced by the Commissary Judge of Dumbarton, after due inquiry, in terms of the statute, into the facts necessary to enable him to decide the question of the domicile of the deceased, to "uplift, receive, administer and dispose of the personal estate and effects of the late Mr Ewing, and to grant discharges thereof." This judgment is final, and the defenders have been and are still administering the estate under its authority, and according to the recognised rules of administration in this country, and subject to the jurisdiction of the courts of Scotland. While so administering the estate in Scotland, proceedings are taken against them in the Chancery Division in name of a beneficiary and "next friend," in which a claim is made "that the personal estate of the testator, John Orr Ewing deceased, may be administered, and that the trusts of his will or testament, and codicils thereto, may be carried into execution by and under the direction of the Court," viz., the Chancery Division. And on the 29th November 1882 "the Court declares that the trusts of the will or testament, and codicils thereto, of the testator John Orr Ewing of Glasgow, North Britain, deceased, ought to be performed and carried into execution, and doth order and adjudge the same accordingly;" and a further and full inquiry and account is directed to be made in the Chancery Division with a view to a course of administration, as set out in the condescendence, and this order is served on the defenders in Scotland.

Here, therefore, there is a direct demand made by the plaintiffs upon the defenders to bring up a Scotch estate, which the defenders are in course of administering under the jurisdiction and authority of the courts in Scotland, for administration in the Court of Chancery; and in order that the whole affairs of the late Mr Ewing may be inquired into, or, in other words, "cognosced" in that Court, and the administration removed from Scotland to England. That this is against the spirit and policy of the 19th article of the Treaty of Union cannot, in my opinion, admit of doubt. But I am also disposed to think that it comes under the words of the prohibition.

The subject-matter in dispute is a Scotch estate which has been appointed to be administered in Scotland by Scotch trustees, and is being administered after the manner in which such administration is carried on in Scotland, as fully explained by your Lordship. In these circumstances the Court of Chancery calls upon these trustees to come and have the estate administered in Chancery according to the rules of that Court. This, in the view I take of it, is substantially an interference with a Scotch cause; and making allowance for the somewhat quaint phraseology of the time used in the 19th article, the proceeding appears to me to amount to an attempt to "cognosce" a Scotch cause in the Court of Chancery, and in doing so, to "review or alter the acts of a judicatory within Scotland and stop the execution of the same," that is, to stop the carrying out of the order for administration pronounced by the Sheriff Commissary of Dumbarton. On fair construction, therefore, I am of opinion that what is here sought to be prohibited is covered by the express words, in addition to being adverse to the spirit, of the 19th article of the Treaty of Union.

As regards the order which this Court should pronounce, I concur in thinking that, in the position in which this estate is now unfortunately placed, the remedy your Lordship has suggested is the proper remedy. A judicial factor is, I think, better suited to the position of this trust than the remedy which the Lord Ordinary has proposed, and it is the remedy now asked by the pursuers.

Lord Shand—I am also clearly of opinion that the pursuers are entitled to succeed in their demand for decree of declarator and interdict in terms of the conclusions of the summons, and that, in the very special circumstances of the case, the Court ought in the meantime, but I hope as a temporary measure only, to sequestrate the

trust-estate and appoint a judicial factor to execute the purposes of the trust exclusively in this country—the factor being liable, as an officer of this Court, to account directly to the Court for his administration.

I feel myself relieved from the necessity of entering at length and in detail into the legal grounds on which the judgment of the Court is rested. Indeed, any attempt to do so would simply involve a repetition of much that has been already said. I entirely adopt the views expressed in the learned and exhaustive opinion which your Lordship has delivered, and the Lord Ordinary has supported his judgment by powerful reasoning and a full citation of authorities in a careful and elaborate opinion, in which the various points maintained, excepting the special arguments founded on the terms of the Confirmation and Probate Act of 1858, are fully discussed. I shall content myself, in these circumstances, with some observations merely with the view of summarising my opinion on the leading points on which, as it seems to me, the judgment must rest:—

1. The pursuers have made out a clear interest as well as a valid title to insist in their demand, that this Scotch trust-estate should be administered in this country, which is at once the domicile of the deceased and the country within which to all intents and purposes the estate is situated, and where the trust purposes have to be executed. Fortunately for those who are interested in such estates, the management in Scotland, extrajudicial in its character, is most simple and economical, the trustees being permitted and bound to administer the trust without interference by the Court, although entitled to the assistance of a law-agent. It is not said that any legal questions have arisen in the management requiring an appeal to the Court, or that in the administration of the trust anything has occurred to cause either embarrassment or expense or delay. It is quite obvious, on the other hand, and indeed it is not disputed, that if the trust-estate is to be managed by the Court of Chancery in England, inconvenience, delay, and expense entirely unnecessary and unjustified by any exigency that has arisen will be the result. It is only necessary to read the Order of the Chancery Division of the High Court of Justice in England of 29th November last, directing detailed accounts and inquiries to be taken and made on the various matters therein enumerated in reference to the trust-estate in order to see that considerable expense must be caused by the administration in that Court. The appointment of a separate agent for the trust in England, in addition to their law-agent in this country, and the fact that no payments can be made by the trustees without a reference to the Court of Chancery for authority, must necessarily cause embarrassment, expense, and delay; and it would be difficult, if indeed possible, to specify a single benefit or advantage which would be gained as the counterpart of these advantages.

2. The defenders have maintained that this Court is bound to follow the decision of the House of Lords, which confirms the order of the Court of Chancery, directing that the administration of the trust-estate should be carried out in that Court as an authority deciding the whole questions in dispute, and if there be a decree in the House of Lords which finally settles the matters raised by the present action, there would, of course, be an end to all further argument in the case. I agree with your Lordships and the Lord Ordinary in holding that the judgment of the House of Lords is not of that nature. That House, as a Court of final resort, has at different times, in appeals coming before it, to determine questions of purely Scotch law, questions of purely English law, and questions common to the law of both countries. It is, only, however, in cases of this last class that it can be represented that the courts alike in England and Scotland must regard the decisions of the House of Lords as authoritatively binding on them. At one time the House of Lords may be dealing with a question of Scotch conveyancing, or of Scotch entail law, and it is obvious that decisions on these matters would be of authority only in this country. Again, a decision on a question arising under the statute of limitations in England, or dealing with a question in which the law of England has its own peculiar rules, as, for example, a question of servitude of light or the like, could not be regarded as settling any question of law in this country, while on many questions of mercantile law, or questions as to the interpretation of British statutes, the law announced in the House of Lords must receive effect throughout the whole United Kingdom. It seems to me to be obvious that in the decision founded on by which the House of Lords confirmed the order of the Court of Chancery their Lordships were dealing with a matter of purely English law and practice only. Their judgment related to the practice of the Court of Chancery, and proceeded to a great extent, if not entirely, on the peculiarities of that practice, and the length of time for which the practice had existed. I think that is practically stated in the opinions of Lord Blackburn and Lord Watson, and that in parts of the opinion of the Lord Chancellor the same view is presented. Should the decision in this case be appealed, the question to be determined will be, not a matter of mere practice either of this Court or of the Court of Chancery, but whether having regard to the special provisions of the Confirmation and Probate Act of 1858, or alternatively, according to sound and recognised principles of international law, the courts of this country are bound to give effect to the practice of a foreign court in violation of these principles, and under which it is sought to transfer the entire administration of a Scotch trust-estate duly administered by Scotch trustees to another country, thereby causing serious expense and inconvenience to the whole parties interested. On that question it appears to me that the House of Lords in affirming the order of the Court of Chancery has as yet pronounced no opinion.

3. In one sense it may be and would be inaccurate to speak of England as a foreign country, and the courts of England as foreign courts, for England and Scotland are parts of one kingdom, but there can, I think, be no doubt that so far as the judicatories of this country are concerned, the principle stated by your Lordship is undoubtedly sound, that these are as independent of each other within their respective territories as if they were judicatories of two foreign states. Nothing can more clearly support that view than the provisions of article 19 of the

Treaty of the Union, which not only provides for the maintenance and preservation of the courts of this country, with the full authority which they have always claimed and exercised, but expressly enacts that "no cause in Scotland shall be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other courts in Westminster Hall," and that "the said courts, or any others of the like nature, after the Union, shall have no power to cognise or alter the Acts or sentences of the judicatories within Scotland, or stop the execution of the same." The Judgments Extension Act (31 and 32 Victoria, chapter 54), only confirms the view that the courts of Scotland and England are as independent of each other as if they were judicatories of two foreign states. Before that Act was passed the decrees of English courts were examinable and examined in this country in the same way as the decrees of any foreign tribunal. Such decrees afforded only *prima facie* evidence of the truth and justice of a pursuer's claim—*Southgate* v. *Montgomerie*, 1837, 15 S. 507; *Whitehead* v. *Thomson*, 1861, 23 D. 772 — and the judgments of courts in this country were treated in the same way by the courts in England. The Imperial Legislature has by the statute now referred to made no change, so far as regards the Court of Chancery in England, for the provisions of the statute are limited, so far as England is concerned, to judgments of courts of common law in England for debt, damages, or expenses, and the order of the Court of Chancery is thus to all intents in the same position as the decree of a foreign court.

4. Assuming, then, that the order of the Court of Chancery is to be regarded as of the same authority as an order of the court of France or any other foreign country, the question arises, To what extent ought this Court to give effect to it? The answer to be given appears to me to be very clear. The laws of all civilised states recognise the existence of an ancillary administration of the estates of a deceased as extending over the property of the deceased situated within the foreign territory, while the principal administration belongs to the country of the domicile of the deceased according to the law of which all questions of succession must be determined. The Court of Chancery stands quite alone in its rule or practice, by which the principal administration is, I may say appropriated, although the estate and domicile of the deceased are situated in another country. It seems to me that this Court is bound to disregard any such practice, and when appealed to by parties whose interests are seriously prejudiced, ought not only to refuse its aid in the execution of an order such as is here complained of, but if necessary to grant a decree which will prevent that order from being carried into effect in this country. If one of the supreme courts in France or in the United States of America were to grant an order for the transference of the whole funds of a Scotch trust-estate to the territory of that court, even when the domicile and the estate of the deceased and the domicile of the trustees were all in this country—a supposition perhaps scarcely admissible, for in those countries it is clear that the principles of international law on this subject are carefully observed—I cannot doubt that this Court would decline to give effect to the order, and would by the necessary order or decree support the executors or trustees of the deceased in maintaining their right to administer the trust in this country, and I should be surprised to learn that the courts in England would act differently. I see no reason for holding that the order of the Court of Chancery is to receive any higher effect than the order of the foreign court in the case supposed. It appears to me, further, that apart from the stream of authorities on the principles of international law to which the Lord Ordinary has referred, and which are conclusive of the matter, the case of *Preston* v. *Melville*—a decision of the House of Lords in a question appealed from the Courts in Scotland—is a direct authority in favour of the pursuer's contention. In that case, possession of the deceased's personal estate in England, taken and held under the English probate, was held to give right to the administration in England, at least in the first instance. It was so held although the domicile of the deceased and the principal administration were in this country. Lord Cottenham, while holding that the administration of the estate must remain in the first instance in England, added, however, that, "If after such administration shall have been completed any surplus should remain, and it shall appear that there are trusts to be performed in Scotland to which it was devoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers" (the trustees acting under the deceased's settlement in Scotland, the country of the deceased's domicile), "for the purpose of being applied in the performance of such trusts." In a subsequent part of the judgment his Lordship refers to the right of the trustees to the funds in England as a right which will not emerge "until the administration shall have been completed in England and the surplus ascertained." In the end the funds which the deceased had directed to be applied in the purchase of lands to be entailed in Scotland were disentailed, in an application which was brought originally before myself as Lord Ordinary, and was ultimately disposed of by a Court of Seven Judges (see petition *Bruce*, March 6, 1874, 1 Ret. 740), and the money was ultimately directed to be paid over to the son Robert Preston Bruce, in whose favour the decree of disentail had been granted, by an order of Vice-Chancellor Malins, a copy of whose judgment to that effect is now before me, dated 20th June 1874. If the mere fact that the funds were situated in England, and that the title of administration was therefore taken out in that country, gave the right of administration there, it follows, *a fortiori*, in such a case as the present, where not only the funds or estate sought to be removed from Scotland and situated there are held under the Scotch title of confirmation, but where Scotland is the country of the deceased's domicile, and therefore the country of the principal administration in which, indeed, he directed his trust purposes to be fulfilled, that this Court, and, as it humbly appears to me, the House of Lords, following their decision in the case of *Preston*, must order that the estate of the deceased in Scotland ought to be administered by the defenders, by virtue of the decree of confirmation obtained by them from the Commissary Court. Indeed, the very words of the order of the House of Lords in the case of *Preston* might

safely and properly be adopted in this case, altering only the names of the parties, and substituting the term decree of confirmation for letters of administration.

5. But for the reason fully stated by your Lordship, I am further of opinion that even the principle of ancillary administration which applies in the case of foreign states, and which held good as between England and this country prior to 1858, has no longer application. The effect of the Confirmation and Probate Act of 1858 has been, I think, to do away entirely with the ancillary administration of trust-estates as between Scotland and England, so that the country or domicile of the deceased, in which either the confirmation or the letters of probate, as the case may be, are taken out, is now not only the principal but the sole place of administration of the estate. It seems to me to be the result of the provisions of that statute that creditors, legatees, heirs, or next-of-kin claiming an interest in a trust-estate must have recourse to the country of the deceased's domicile in which the estate is being administered under the title there taken out. It is to be observed that the terms of this statute with reference to the effect of the title of administration as distinguished from the decree fixing the domicile of the deceased, do not appear to have been the subject of argument in the House of Lords in the appeal from the order of the Court of Chancery, and were not specially adverted to before the Lord Ordinary. The provisions of the statute and the terms of the schedule containing the forms of decrees to be granted by commissaries seem to me to make it clear that the title to administer the whole estate of the deceased, in the case of a person who dies domiciled in England, is contained in the letters of probate, granted in England, while in the case of a person dying domiciled in Scotland, the title to administer is contained in the confirmation by the commissary. I refrain from a reference to the different sections of the Act of Parliament, for these have been already adverted to by your Lordship. I will only observe that the terms of the decree of confirmation seem to be conclusive, for the form of that decree is a narrative that the executor has "given up on oath an inventory of the personal estate and effects of the said E. F. at the time of his death situated in Scotland (*or situated in Scotland and England, or situated in Scotland, or situated in Scotland, England, and Ireland, as the case may be*), amounting in value to pounds, which inventory has likewise been recorded in my court books of date , and he has likewise found caution for his acts and intromissions as executor," and the effectual operative part of the decree gives full power to the executor "to uplift, receive, administer, and dispose of the said personal estate and effects, that is, the effects in all the three countries, and grant discharges thereof," &c., providing always "that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required,"—a clause which, it may be observed in passing, is analogous to the clause in letters of probate on which Lord Cottenham's observations in the case of *Preston* v. *Melville* were founded. The seal of the Court of Probate is an official formality only designed to give debtors the security of knowing that the decree of confirmation is genuine, and has been recorded as such in the Registry of Probates. It seems to be expedient and desirable, so far as regards the whole of the United Kingdom, that creditors, legatees, and others should be required to resort to that part of the kingdom in which the deceased had his domicile, as the place of administration, in place of having a principal and an ancillary administration in different parts of the kingdom, and this object has been, I think, effected by the statute.

6. It has been observed in argument that if there had been an administration suit in this country, or anything equivalent to it, before proceedings in the Court of Chancery were initiated, the decision of the Court of Chancery would probably have been different, and that respect would have been given to the fact that the estate was already the subject of legal proceedings in this country. I have no means of forming an opinion whether even in that case the Court of Chancery would not still have granted an order for the administration of the estate by that Court; but it must be observed that no such proceedings as an administration suit, such as is common in the Court of Chancery, is known in this country. An action of accounting, or, as it is frequently called, of count, reckoning, and payment, can only be maintained when there is really a refusal or failure on the part of the trustees to account, or a necessity for litigation to settle legal questions which have arisen. If, then, the absence of an administration suit in this country is a reason for the Court of Chancery in England undertaking the administration of Scotch trust-estates, it would appear to follow that, provided the trustees happen to be within the jurisdiction of the Court by temporary residence, or to be liable to serve under the rules of the Court of Chancery, there will be nothing to prevent the transference of the administration of proper Scotch trust-estates from this country to England at the suit of anyone who can substantiate an interest in the estate.

Again, it is said that the Court of Chancery acts *in personam*, and so will compel a defendant within its territory to fulfil his duties, or rather his legal obligations. I venture humbly to think that this is no peculiarity of the Court of Chancery. I apprehend that the courts of this country act in the same way, and on the same principle. In every action for the payment of money, or the performance of some act by a defendant, the Court acts *in personam*, and in order to compel the fulfilment of a legal duty or obligation. But to take the case on hand, the carrying out of that principle cannot dispense with the necessity for the Court having jurisdiction to grant the decree asked on recognised principles of international law; and at least this must be so where the decree is to receive effect in another country. If the duty and legal obligation of a defendant trustee and executor be that of administering a Scotch executory or trust-estate in Scotland, and he is not only ready and willing to perform that duty, but is in due course of doing so, the fact that the Court of Chancery proceeds *in personam* seems to afford no reason or principle for destroying the existing obligation to account to the proper courts in the proper country of administration, and creating a new obligation to remove the whole administration to another

country. This may, no doubt, be characterised as a proceeding *in personam*, because the order of the Court may be enforced by diligence against the person; but if the order itself be one in violation of sound principles of international law, the proceeeding *in personam* becomes one of might, and not of right, and the order is one which will be properly disregarded when it is sought to be enforced or carried into effect in another country. The courts in this country in such cases, though proceeding *in personam*, have been in use invariably to decline to undertake or to order administration in Scotland, and to require that resort shall be had to the country of the domicile of the deceased in which the executor's title had been completed, and where the administration is being properly carried on. The case of course would be different if executors or trustees were altogether evading the duty of administration and accounting even before the courts in the country of the domicile and estate of the deceased; but there is no case of that kind justifying and requiring, it may be, a special remedy now before the Court.

7. A special argument founded on the terms of article 19th of the Treaty of Union, which has been already quoted, was submitted by the pursuers. The case is, in my humble judgment, clear on the grounds already stated. But on this point I must add that I think the argument maintained by the pursuers is sound, and that I concur in the opinion of my brother Lord Mure. The proceeding of the Court of Chancery is certainly directly against the spirit of the clause of the Treaty which provides, as already noticed, that "No clause in Scotland shall be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other courts in Westminster Hall, and that the said courts, or any other of the like nature after the Union, shall have no power to cognise or alter the Acts or sentences of the judicatories within Scotland, or stop the execution of the same." The defenders say that no "cause" within the meaning of the Treaty is being cognosced by the Court of Chancery, because no litigated question the subject of a cause has arisen in this country when the administration order was pronounced. It appears to me that this is too narrow a view of the terms of the provision. The term "cause" in the provision of the Treaty includes, in my opinion, questions of legal right on which a dispute has arisen, although it may not actually be already the subject of an existing litigation in this country. If an administration suit such as exists in the Court of Chancery had been a known form of proceeding in this country, and had been instituted in the case of this trust before the proceedings in the Court of Chancery, it appears to me the words of the Treaty would have directly applied to the case, and that the Court of Chancery would in that case be attempting to take up and cognosce a cause in Scotland. The circumstance that the administration is happily carried on without such a judicial process or proceeding does not, in my opinion, make a difference in principle. The cause which the Court of Chancery seeks to cognosce is essentially a Scotch cause, or, in the words of the Treaty, "a cause in Scotland," and the order of the Court of Chancery is substantially in effect "to stop the execution" of the decree of confirmation of the Commissary of Dumbarton, which authorises the defender to administer and dispose of the executry estate in this country, subject to their acts and intromissions.

With these observations I concur in thinking that the decree proposed by your Lordship should now be pronounced.

The Court pronounced the following interlocutor:—

"The Lords having considered the cause and heard counsel for the parties in the reclaiming-note for the defenders against Lord Fraser's interlocutor, dated 15th December 1883, Recal the said interlocutor: Find, declare, and decern in terms of the declaratory conclusions of the summons: Sequestrate the whole estate and effects of the deceased John Orr Ewing contained in the inventory given up by the defenders in the Court of the Commissary of Dumbartonshire, and recorded in the Court Books of the said Commissariot on the 13th May 1878; Nominate and appoint George Auldjo Jamieson, chartered accountant in Edinburgh, to be judicial factor on the said estate and effects, with power to him to take full and complete possession of the said estate and effects, and to hold and administer the same till the further orders of the Court, with all usual powers, and the said judicial factor finding caution before extract, in common form: Suspend for the present, and till the further orders of the Court, all action on the part of the defenders in the administration or disposal of the estate: Interdict, prohibit, and discharge the defenders, until the said estate and effects are fully vested in and taken possession of by the said judicial factor, from removing the said estate or effects, or any part thereof, or of the titles, writs, and evidents of the same, beyond the jurisdiction of this Court, and from delivering, paying, or accounting therefor to any person or persons other than the said judicial factor, and decern, and allow interim extract: Dispense with the reading in the minute-book, and allow extract to be issued forthwith; reserving in the meantime all questions of expenses."

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