crime, and therefore it could not stand. (2) The minor proposition was alternative; it charged "fraudulently concealing, away putting, or disposing of" property "or otherwise" "making or causing to be made delivery or transfer of" property with intent to defraud creditors. The object of the framer of the libel was to charge alternatively the offence in A 3 and that in B 5. But the verdict was general, and the conviction was therefore bad.

Argued for respondent—(1) The statutory charge applied to Robert, for though not debtor or insolvent, he was rightly charged and convicted of being art and part in his brother's crime. A crime may always be committed by accession, the only and well-known exceptions being treason and concealment of pregnancy. The latter was an exception only because the disclosures necessary to accession elided the charge of concealing pregnancy during its whole course. The success of Robert Robertson's argument would lead to this, that where there had been such a conspiracy as this case disclosed the debtor and his accomplice must be tried on separate libels. (2) The second objection would only be good if the alternative was truly an alternative, but it was really not an alternative charge, but only a redundant and alternative way of stating the *modus*. The thing was the same, and it was no more a proper alternative than would be "six, or otherwise half-a-dozen."

At advising—

Lord Justice-General—The indictment before us contains three charges in the major proposition. The first is a common law charge of "wicked and fraudulent concealment and putting away or disposing of his property or effects by any person insolvent or on the eve or in contemplation of bankruptcy, for the purpose of defrauding his creditors;" the second is a charge under section 13 of the Debtors (Scotland) Act 1880, sub-section A, No 3; and the third is a charge under sub-section B (5) of the same section. The verdict against both parties is "guilty as libelled," and that means that both and each of the panels are guilty of all three offences charged.

As regards the statutory charge, the first provision with which we have to do is, that "the debtor in a process of sequestration or *cessio*" shall be deemed guilty of a crime and offence "if [A(3)] after the presentation of the petition for sequestration or *cessio*, or within four months next before such presentation, he conceals any part of his property." . . . The other (B 5) is that he shall be guilty of a crime and offence if, being insolvent, and with intent to defraud his creditors, or any of them, he makes or causes to be made any gift, delivery, or transfer of or any charge on or affecting his property.

It seems, then, that no one can commit the statutory offence who is not a "debtor" in the meaning of section 13—that is, in the case of A(3), a person who has been sequestrated or against whom a decree of *cessio* has been pronounced, and in the case of B (5) a person insolvent.

Now, Robert Robertson was not in the situation contemplated by either of these definitions. He was not made bankrupt, nor sequestrated, or under decree of *cessio*, nor was he insolvent; and that being so, it is plain that the conviction of Robert under the statutory charge is bad, and as the verdict cannot be split, that disposes of the whole case as against Robert. I give no opinion as to the relevancy of the statutory charge as it is here stated. Against it something appears capable of being said. As to Robert, then, decree of suspension and liberation ought to be granted.

The case of David is in a totally different position. He was bankrupt and a debtor in the sense of section 13, and may be convicted of the common law offence charged, and also under both statutory charges. The difficulty in his case is that there is introduced in the minor proposition of the indictment an alternative. If it is a proper alternative—that is, if the two things with which he is charged are properly inconsistent—the objection is good, because then we have an alternative charge and a general conviction, but I think that so far from being inconsistent then they are substantially the same. The part of the minor which precedes the words "or otherwise" consists of a statement that the accused removed from his own to his brother's farm a large part of the stock to conceal it from his creditors, and what follows "or otherwise" is just a narrative of the same thing in other words. Now, that *species facti*, thus doubly described, satisfies, as was admitted, both sub-section A (3) and sub-section B (5). I therefore am for holding that the conviction of David is good.

Lord Young—I concur in all respects.

Lord Adam—I also concur.

As regards the case of Robert Robertson the Court suspended the sentence complained of, and granted liberation, finding no expenses due. As regarded the case of David, the Court refused the bill of suspension and liberation.

Counsel for Suspenders—A. J. Young. Agent—D. Roberts, S.S.C.

Counsel for Procurator-Fiscal—Rankine, A.D. Agent—Crown Agent.

HOUSE OF LORDS.

Friday, July 24.

(Before Earl of Selborne, Lords Blackburn, Watson, and Fitzgerald.)

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

(*Ante*, vol. xxi, p. 423, 11 R. 600—29th February 1884).

Jurisdiction—Foreign—Executor—Trust—Trust Funds situated partly in England and partly in Scotland—Confirmation and Probate Act 1858 (21 *and* 22 *Vict. c.* 56), *sec.* 9 *and* 12—*Treaty of Union* 1706 (6 *Anne, c.* 11), *article* 19.

A domiciled Scotsman died leaving a trust-disposition and settlement executed in Scottish form disposing of his personal property, which was of great amount, and was situated in Scotland, except about one-sixteenth which was in England. He appointed six trustees and executors, all Scotsmen, and four of

whom were domiciled in Scotland and two in England. None of the purposes of the trust fell to be performed out of Scotland. The trustees gave up an inventory and obtained from the Commissary of the county in which the deceased died domiciled decree of confirmation under sec. 9 of the Confirmation and Probate Act 1858, and had this confirmation sealed with the seal of the English Court of Probate under section 12 of the same Act. After the English assets, except a very small part thereof, had been transmitted to Scotland, an administration suit was commenced in the Chancery Division of the High Court of Justice in England against the trustees (three of whom were cited in England and three in Scotland) at the instance of an infant residing in England who was one of the residuary legatees, suing by his next friend. The trustees appeared and objected to the estate being administered in England, but ultimately the High Court of Justice and the House of Lords on appeal decided that an administration order should be made, and that complete accounts and inquiries should be taken and made in England. Thereafter the Court of Session, in an action at the instance of the residuary legatees (other than the infant plaintiff) against the trustees, granted a decree of declarator that the trustees were bound to administer the estate according to the law of Scotland, and subject to the jurisdiction of the Scottish Courts alone, and were not entitled to place the funds in the hands of or render accounts to any Court furth of Scotland, and also sequestrated the estate and appointed a judicial factor suspending the action of the trustees in the meantime, and interdicted the trustees, until the estate should be fully vested in the judicial factor, removing the estate or any part thereof, or any writs belonging thereto, out of the jurisdiction of the Scottish Courts.

Held that the declaratory portion of the judgment ought to be *reversed*, because (1) the trust-disposition and settlement did not contemplate that the investment and administration of the estate must necessarily be in Scotland; (2) while the succession to the estate of a person deceased must be according to the law of his domicile, the *forum* in which the rights resulting therefrom must be vindicated is not necessarily the Court of that domicile (the *dictum* of Lord Westbury to that effect in *Enohin* v. *Wylie*, 10 Clark, House of Lords Cases, 1, being disapproved); (3) the decisions of the Scottish Courts show that the Courts of Scotland will when necessary sustain their jurisdiction over the parties administering a foreign will when they are resident within Scotland, or the estate they are administering is within Scotland, though the Courts of Scotland will only exercise that jurisdiction when an accounting cannot be obtained in the more convenient *forum*; (4) because the terms of Art. 19 of the Treaty of Union relied on in the Court of Session did not apply; (5) because the Confirmation and Probate Act 1858 relied on in the Court of Session has no bearing on a question of jurisdiction.

But (II.) *held* that the sequestration of the trust-estate and appointment of a judicial factor having been ordered by the Court of Session in the exercise of its own independent jurisdiction unaffected by the decision of the House of Lords in the English appeal, and in order that the administration of the estate should proceed in the proper and convenient *forum*, were right and ought to be supported.

This Case is reported *ante*, vol. xxi., p. 423, and 11 R. 600, 29th February 1883.

On 27th May 1884 a petition was presented in name of the trustees (defenders) to the First Division praying the Court to grant authority to petitioners to present a petition of appeal to the House of Lords in common form against the interlocutor of the Lord Ordinary and that of the First Division of 29th March 1884, and subsequent interlocutors, granting warrant to the judicial factor to take complete possession of the trust-estate and books and papers thereof, and granting warrant to messengers-at-arms to search for and recover the same, and if necessary to open shut and lockfast places.

It appeared and was admitted at the bar that the trustees in whose name the petition was presented were not themselves desirous to appeal, but that the appeal was to be brought and prosecuted in their name by the infant plaintiff in the English administration suit and his next friend. An extract from the judgment of a Judge of the Chancery Division giving the infant plaintiff's next friend liberty to prosecute the appeal in the trustees' names on a proper indemnity for costs was produced.

The Court postponed consideration of the petition *hoc statu*, to enable Malcolm Hart Orr Ewing (the infant plaintiff) and his next friend, if so advised, to sist themselves as defenders in the Scottish action, being of opinion that leave to appeal ought not be granted to a person not a party to an action merely on the ground that he had obtained permission of a party to the action to use his name (see 12 R. 343).

Malcolm Hart Orr Ewing and his next friend did not sist themselves, but appealed without leave.

At delivering judgment—

Earl of Selborne—My Lords, the appellants in this case are trustees under the will of John Orr Ewing, a testator who died on the 15th April 1878 domiciled in Scotland, and leaving a very large personal estate, estimated at more than £460,000, of which all but £25,000 was in Scotland. The respondents are four of the residuary legatees under the will. When the Scottish suit, out of which this appeal arises, and in which the respondents are pursuers and the appellants are defenders, was commenced (5th July 1883) another suit was already pending in England in which Malcolm Hart Orr Ewing, another of the residuary legatees (an infant suing by his next friend), was plaintiff and the appellants were defendants, and in which the respondents (though not defendants on the record) had for the protection of their own interests intervened. A decree had been made in that suit for a general administration of the testator's estate under the direction of the Chancery Division of the English High Court of Justice by the Court

of Appeal on 29th November 1882. The infant plaintiff was resident in England, and it had been found, upon inquiry by the English Court, that the prosecution of that suit would be for his benefit. Of the defendants, the trustees, two were permanently and one occasionally resident in England. These three were all served with the process of the English Court while personally within its jurisdiction. The other three ordinarily resided in Scotland, and were there served according to the rules of the procedure of the English Court. They appeared to, and joined in defending the suit without raising any question as to the propriety of that service.

From the English decree of 29th November 1882 there was an appeal by the defendants, the trustees (now also appellants here), to your Lordships' House. They submitted that the English Court had not jurisdiction in the case, and that if there was jurisdiction it ought not to have been exercised. Your Lordships were of a contrary opinion, and dismissed the appeal; and it cannot in my opinion admit of any doubt that your Lordships' adjudication on that appeal is now absolutely conclusive upon both the points so raised. Nor is it correct to represent the question of jurisdiction then determined as depending upon the mere procedure and practice of the English Court without reference to any general principles; though the other question, whether the jurisdiction had been rightly exercised, undoubtedly did so. I will not repeat what was then said, though to all that I myself said, after carefully reconsidering it, I adhere. That decision turned upon the doctrine of trusts and upon the authority of a Court of Equity to act *in personam* against trustees personally present within and subject to its jurisdiction, whatever may be the *situs* of the subject-matter of the trust or the domicile of any deceased person by whom (whether by deed *inter vivos* or by testamentary instrument) that trust might have been created.

A decision of this House in an English case ought to be conclusive in Scotland as well as in England as to the questions of English law and English jurisdiction which it determined. It cannot of course conclude any question of Scottish law or as to the jurisdiction of any Scottish Court in Scotland. So far as it may proceed upon principles of general jurisprudence, it ought to have weight in Scotland, as a similar judgment of this House on a Scottish appeal ought to have weight in England. If, however, it can be shown that by any positive law of Scotland, or according to authorities having the force of law in that country, a different view of the proper interpretation, extent, or application of those principles prevails there, the opinions on those subjects expressed by noble and learned Lords when giving judgment on an English appeal ought not to be held conclusive in Scotland. When a Scottish decision in apparent conflict with them is brought to the bar of this House, the first duty of your Lordships must, I conceive, be to ascertain whether there is any settled rule of Scottish law requiring or justifying that decision. If not, it may still be open to the House to reconsider the points raised in any new light which may be presented by the view of them taken in the Scottish Court.

It is now proper for me to state the effect of the principal interlocutor under appeal. The Inner House (recalling in form but only modifying in substance the interlocutor of the Lord Ordinary) has, in the first place, adopted and affirmed the declaratory conclusions of the summons, which I will read:—"It ought and should be found and declared, by decree of the Lords of our Council and Session, that by virtue of said trust-disposition and settlement and relative codicils, and of said testament-testamentar, the defenders are 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 foresaid 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: And further, it ought and should be found and declared, by decree foresaid, that the defenders, as trustees and executors foresaid, are 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 estates and effects beyond the control of the Scottish Court: And further, it ought and should be found and declared by decree foresaid that the defenders, as trustees and executors foresaid, are bound to render just count and reckoning for their intromissions with said estate and effects 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 said 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, or any of the Divisions thereof, or to any other 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 to deposit the same in the custody of any Court 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."

The Court has also granted an interdict which appears to me to depend partly, though not wholly, upon those conclusions. Beyond this it has exercised the unquestionable jurisdiction of the Court of Session over the parties and the subject of the suit by sequestrating the whole moveable estate of the testator (that part of it which was not in Scotland at the testator's death having been afterwards brought within their jurisdiction), and appointing a judicial factor to take possession of and administer it with all usual powers till the further orders of the Court, suspending also for the present, and till the further orders of the Court, all action on the part of the defenders, the trustees, in the administration and disposal of the estate.

The first question for consideration is, whether the decerniture in terms of the declaratory conclusions of the summons is or is not correct? That decerniture appears to me to be not only inconsistent with but contradictory to the

decision of your Lordships' House upon the former appeal from the English decree. It declares (in effect) that the trustees, the appellants, are to be treated by the Court of Session as wrongdoers in Scotland, and as violating their trust, if they submit to and obey in England the decree of the English Court which was affirmed by your Lordships' House.

If it were necessary to enter into the question whether there may not have been in this case some excess of its own jurisdiction on the part of the Court of Session, I should be disposed to say that although the Courts of any country may affirm their own competence, and may decline to give effect to the proceedings or orders of a foreign court, they have no authority to determine the extent or limits of the jurisdiction of that foreign court within its proper territory. They may be entitled to exercise all powers which they possess by way of injunction or interdict against a plaintiff or actor in a foreign suit when within their jurisdiction, so as to restrain him from further proceeding in the foreign *forum* (as was done by the Court of Session in *Young* v. *Barclay*, 8 D. 774), on the same principle on which English Courts of Equity were accustomed to restrain the prosecution of actions at common law. But there is neither principle nor precedent that I am aware of for restraining a defendant sued in a foreign court by a plaintiff not capable of being enjoined or interdicted, or not enjoined or interdicted in fact, from obeying, while within the foreign jurisdiction, the orders, lawful according to the *lex loci*, of that foreign court.

Without dwelling further on that point I propose to examine the reasons assigned for the declarator in the present case. The first declaration seems to assume that there is a something in the terms of the trust created by John Orr Ewing's will prohibitory of or repugnant to any administration of the trust-estate elsewhere than in Scotland, and the Lord President has treated the pursuer's demand as, for that reason, *ex debito justitiæ*, saying—"If the defenders, as trustees and executors, had voluntarily proposed to remove the estate out of Scotland for the purpose of carrying on the administration elsewhere, it will hardly be disputed that the pursuers would have been entitled by interdict to prevent this being done." For that view I am unable to discover any foundation in the terms of the trust-disposition and settlement. It is true that the trust is created by a Scotch deed, and is technically a Scotch trust. But there are no words requiring the administration of the funds belonging to the residuary estate, when realised by the trustees, to be in Scotland only; on the contrary, the trustees are authorised to invest the whole or any part of these funds in real securities (not restricted to Scotland), or in personal securities of certain specified kinds in any part of Great Britain or Ireland, or of the British colonies or dominions. If in the honest exercise of those powers they had invested these funds in English securities, they would have been acting in accordance with their trust, and I do not understand on what principle they could have been interdicted from so doing. The fact that they have not done so cannot alter the terms of the trust or justify a declaration not warranted thereby.

In support of the remaining declarations the Inner House seems to have mainly relied upon the reasons alleged in the opinion of the learned Lord Ordinary. These, and the Scottish and American authorities to which the Lord Ordinary referred, turned partly upon the doctrine of domicile and partly on that of principal and ancillary administrations.

So far as relates to domicile, it has always appeared to me to be clear that the domicile of a deceased testator or intestate cannot in principle furnish any governing or necessary rule, except for the purpose of determining the succession to moveable estate. For that purpose recourse must be had, not always and necessarily to the Court, but always and necessarily to the law of the domicile. The succession being once ascertained, the rights resulting therefrom belong to and follow the person of the living successor and not the dead predecessor. It has never been held that the *forum* in which such rights may be vindicated depends on the domicile (as distinguished from the place of residence for the time being, which is sometimes inaccurately so denominated) either of the plaintiff or of the defendant in any action or suit, and if the domicile of the living men whose rights and liabilities are in question is for that purpose immaterial, I am unable to understand how the place in which these rights are to be protected, or those liabilities enforced, can necessarily depend on the domicile of the deceased.

Lord Westbury did indeed in the English case of *Enohin* v. *Wylie* (10 House of Lords p. 1), express an opinion (unsupported, so far as I can see, by any other authority, and inconsistent, as I read them, with the general tenor, both of the English and of the Scottish, and even of the American authorities) to this effect, that "the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the assets of an intestate, are required to resort" (*ibid.*, p. 13). He said more to the same effect in other passages of his opinion, and he would have thought it right, but for the conduct of some of the parties, to send to Russia English assets in the hand of an English administrator of an Englishman who died domiciled in Russia, for distribution by the Russian Courts, although in that case all reasons of convenience, if proper to be regarded, appeared to be the other way. Lord Fraser and Lord Mure ascribe to this opinion greater weight apparently than to the late decision, also in an English case, of your Lordships' House. But as was there pointed out (*Ewing* v. *Orr Ewing*, L.R. 9 Appeal Cases, p. 39) the majority of the Lords who decided that appeal of *Enohin* v. *Wylie* (Lord Cranworth and Lord Chelmsford) dissented from Lord Westbury's opinion. Lord Mure indeed thinks that they did not dissent from it, which induces me to quote what they actually said. Lord Cranworth (10 House of Lords, p. 19) said that where there is a will of a person domiciled abroad, "and probate of it has been obtained here, the duty of the Court in administering the property, supposing a suit to be instituted for its administration, is to ascertain who by the law of the domicile are entitled under the will, and that being ascertained, to distribute the property accordingly. The duty of administration is to be discharged by the Courts of this country,

though in the performance of that duty they will be guided by the law of the domicile." Lord Chelmsford (*ibid.*, p. 24) after stating the circumstances said—"Why the property should be remitted to the *forum* of the domicile in order that it shall be sent back again to be distributed, and why the Court should be incompetent to act effectively and finally in the suit which has been instituted, by decreeing a distribution amongst the several persons entitled, and transmitting to Russia the shares of the next-of-kin resident there, I am unable to comprehend."

The other point, as to principal and ancillary administrations, seems to me to be not germane to the present case. The authorities upon it, both British and American, relate to the proper consequences and effects of the title and office of legal personal representative conferred by a grant of probate or letters of administration, or by confirmation in Scotland, which always have reference to the *situs* of the moveable property of the deceased person within the local jurisdiction of the Court making the grant. These questions usually arise when one person is principal and another "ancillary" executor or administrator. And here it may be convenient to observe that the word "administration" is capable of being, and is in fact, often used in three distinct senses, and that some confusion in certain parts of the reasoning of the learned Judges in the Court below appears to have arisen from want of a sufficient discrimination between those senses. The first and most technical sense is that of the official character of legal personal representative conferred by the act of a Court of probate or confirmation. The second is that of the management and distribution by an executor or administrator (and in this sense the word is not less applicable to management by a trustee) *extra curiam*. The third is that of a judicial administration of the estate, under the decree or order of a competent Court, for the purpose of taking the accounts and superintending the management and making a proper distribution among the persons entitled. It was in the first only of these three senses that Lord Cranworth used the word in the passage quoted by Lord Mure from *Enohin* v. *Wylie*—"Administration will be granted here, limited to the personal estate in this country"—from which the inference drawn by Lord Mure was that Lord Cranworth (and Lord Cottenham also in *Preston* v. *Melville*, to which case Lord Cranworth referred with approval) held "the *situs* of the property to regulate the right to administer that property." Doubtless in the first sense (that of the grant of probate or letters of administration by the *forum rei sitæ*), but in that sense only, that inference is correct; but though correct, it is for the present purpose irrelevant. I can hardly suppose Lord Mure to have understood either Lord Cranworth or Lord Cottenham as meaning to exclude (contrary to the general current of English authorities) the power of the Courts of the domicile at all events to make a general decree for the administration (in the third sense above explained) of the whole estate of any testator or intestate who might have died leaving assets in several states or countries, in respect of which several grants of probate or administration (whether principal or ancillary) might have been obtained—working out such a decree in the best way practicable as to assets not within the local jurisdiction.

In the case before your Lordships the fiduciary character is not divided. The same persons are legal personal representatives in both countries, and they are also trustees for the beneficiaries under the testator's will. The remedy (both in England and in Scotland) has been sought, not on the footing of those duties and liabilities which result from the official character of the legal personal representative, but on that of trust, under the trust-disposition and settlement. The distinction between a mere executor or administrator (whether acting under a principal or ancillary, a general or a limited grant) and a trustee under a trust-disposition is well understood in the Courts both of Scotland and England. It cannot make any difference as to the *forum* in such a case whether the trustees in whom the residuary estate is vested are or are not the same persons who as executors obtained probate or confirmation. The rights of the plaintiffs in both countries, and the remedies against the defendants, ought to be precisely the same so far as relates to the trust-estate, whether the defendants were original or afterwards assumed trustees, or were or were not executors as well as trustees.

Having examined the authorities, both Scottish and American, which were referred to in the opinions of the learned Judges of the Court of Session, and the arguments at your Lordships' bar, I will first refer to the Scottish authorities, which, as far as they go, must be of principal importance for the determination of this appeal.

There is a difference between the course of the Courts in England and Scotland respectively as to the grounds which are held sufficient for a general judicial administration at the instance either of fiduciaries or of beneficiaries. The Court of Session will not in either case interfere with the administration *extra curiam* except for some special cause shown. The English Court, on the other hand, regards the mere exoneration of fiduciaries from the risks and responsibilities of an administration *extra curiam*, and the better security for the interests of beneficiaries afforded by a judicial administration, as sufficient reasons generally for its intervention. Which may be the better practice cannot now or here be determined. In each country the rule to which its Judges and suitors are accustomed may probably be preferred. It appears also that the doctrine of *forum conveniens*, which in England seldom comes into consideration when jurisdiction exists apart from service of process abroad unless there is an actual competition of suits, is in Scotland carried further, and may prevent the exercise of jurisdiction when the Court is satisfied that the suit might have been brought and effectively prosecuted in a more convenient *forum*, although this may not actually have been done. These, however, are in my judgment differences affecting not the jurisdiction but the *lex fori* by which the Courts are to be governed in exercising or declining to exercise it.

That a Scottish Court may act *in personam* when the pursuer and the defender are within its jurisdiction, although the subject-matter of the suit may not be so, seems indisputable. *Johnston* v. *Johnston* (M. 4788) is an instance as old as 1579, where the subject-matter was real estate beyond the jurisdiction. If in the case of im-

moveables the *situs rei* does not exclude the jurisdiction, there is no intelligible principle on which it can be held to be excluded by the mere *situs* in the case of moveables.

Ferguson v. *Douglas* (3 Pat. Ap. Ca. 523) was a case which came to the House of Lords in 1796. The pursuers there claimed against the estate of Andrew Grant, who had died domiciled in England, and whose assets do not appear to have been wholly or even partly in Scotland, not as being directly creditors of Andrew Grant himself, but as creditors of Baron Grant, of whose personal estate Andrew had been the representative. Andrew's estate was represented by trustees, defenders in the suit, who resided chiefly in England, and had taken out letters of administration in the Prerogative Court of Canterbury, but who do not appear to have obtained confirmation in Scotland. There was a suit pending in England for the administration of Andrew Grant's estate, and as it was necessary that the liability, if any, of Andrew Grant for assets of his brother, received by him and not duly administered, should be established before the pursuers could in any way substantiate their claim, the House of Lords held that they ought to go in and take such proceedings as they might be advised under the English decree. But Lord Loughborough said—"I have no doubt as to the competency of the Court of Session in a case where either the persons of executors or effects of the deceased are within their jurisdiction. No matter where the will was made or proved, the Court has full jurisdiction, and could carry their judgment into effect, and this might be even where the will has reference to the law of England."

In *Morrison* v. *Kerr* (1790, M. 4601) it was held that an English administrator living in Scotland might be sued there by next-of-kin for their distributive shares of the estate, and the action was sustained against the representatives of such an English administrator although he offered to appear to any suit which might be brought in England.

In *Peters* v. *Martin* (1825, 4 Shaw, 108), Martin, sole surviving executor and trustee under an English will, the property being situate partly in England and partly in colonies governed by English law, and having come after the lapse of 20 years to reside in Scotland, was sued in the Court of Session by beneficiaries under the will for implement of the trusts, on an allegation (the truth of which was admitted) that he had in his hands a balance of £7800 not then invested as directed by the will. Martin objected to the jurisdiction on the ground that the action related solely to an English trust, and that the implement of the will could only be judged of in an English Court, in which also he could get a discharge.

The Lord Ordinary sustained the jurisdiction. Martin reclaimed, stating that he had filed a bill in the English Court of Chancery relative to the matter, and the Inner House, after suspending the case to see what might follow, and it appearing that no effectual procedure had followed, and that no orders of the Court of Chancery could be enforced against the defender while in Scotland, adhered. Their Lordships, while satisfied that the case ought, as a matter of expediency, to be settled in an English Court, held that they could not deprive the pursuers of their legal right to sue a party domiciled within their jurisdiction, and to obtain security for the balance in his hands. This case affords a good illustration of the difference between the doctrine of *forum competens* and that of *forum conveniens*.

In *Macmaster* v. *Stewart* (1834, 11 Shaw, 731) an action was brought in the Court of Session by residuary legatees under an English will against parties domiciled (that is, as I understand it, resident) in Scotland who had administered the will, which had specially directed "the English Court of Chancery to be the *forum* in the event of legal discussion," and "the administrators having, in obedience to an order of the Lord Ordinary, filed a bill in that Court, and it being ascertained by the opinion of counsel that they might be compelled to account, the Court sisted further procedure *hoc statu*." The Inner House adhered, holding that as the Lord Ordinary had "only sisted procedure *hoc statu*" he had "adopted the most expedient course." But the Lord President (Hope) said—"If any improper delay is allowed by the defenders to occur in their accounting in England it is open to the pursuers to go to the Lord Ordinary and crave his Lordship to proceed here;" and Lord Mackenzie said—"It may happen that circumstances may occur before the close of the accounting in England which will make it necessary to go on with the accounting here."

I readily accept the exposition of these and some other Scottish authorities which will be placed before your Lordships by my noble and learned friend Lord Watson, especially as to the manner in which the doctrine of *forum conveniens* is understood and acted on in the Court of Session. But for the declaratory part of the principal interlocutor now under appeal, which affirms, not the greater convenience under the circumstances of this case, but the exclusive competency of the Scottish jurisdiction, I can find no support in these authorities, but rather the reverse.

Unless the learned Judges in the Court below considered the decision of this house in *Preston* v. *Melville* (1841, 2 Robinson's Appeal Cases, p. 88) to be at variance with and partially to have overruled these authorities, I can hardly understand the reliance which all of them, and especially Lord Deas, appeared to have placed on that case. In the observations which I am about to make upon it I shall do little more than enlarge what was said in this House in the English appeal of *Ewing* v. *Orr Ewing*.

Preston v. *Melville* was a case of trust under the will of a Scottish testator domiciled in Scotland who left assets in England as well as in Scotland. The trustees were not executors. Lady Baird Preston, who had been confirmed executrix as next-of-kin in Scotland, and had also taken out letters of administration in England, was not a trustee. Two suits for the administration of the English assets had been instituted and were pending in the English Courts of Equity before the commencement of any proceedings in Scotland. In the first the trustees were plaintiffs, and the administratrix defendant, in the second the administratrix was plaintiff and the trustees were defendants. The trustees in this state of circumstances raised an action for declarator and payment in the Court of Session, by which (the moveables in Scotland having already been transferred

to them) they asked that it should be declared that the whole goods and effects of the deceased held by the administratrix under the English letters of administration belonged to and ought to be vested in and transferred to the pursuers for the purposes of their trust, and that the pursuers' receipts and discharges would be a valid and sufficient discharge and exoneration to the administratrix of her whole intromissions, concluding for payment accordingly. The Court of Session decerned in terms of the declaratory conclusions of the libel, superseding (that is, postponing) the consideration of the rest. The House of Lords reversed that decree, and declared that the property of the testator in England ought to be administered by the appellant (the administratrix) by virtue of the letters of administration granted to her by the Prerogative Court of Canterbury.

That reversal was plainly right, for it was beyond question that the administratrix would not be discharged or exonerated in England by any payment over by her to the trustees until all other claims to which she might be liable in her character of legal personal representative in England were satisfied, and that until she was so discharged and exonerated the English assets in her hands could not properly be treated as belonging to or vested in the trustees for the purposes of their trust. It was not less clear that the English *forum* in which the two administration suits between her and the trustees were pending had proper jurisdiction to take the accounts of the estate so as fully to discharge and exonerate her and ascertain the clear residue, if any, subject to the trusts of the will—a thing which could not be done in the Scottish suit. This is all that the House of Lords determined in *Preston* v. *Melville*, and it appears to me to be quite consistent with the earlier Scottish authorities and with the English decision in *Ewing* v. *Orr Ewing* and other similar cases. Some words used by Lord Cottenham in *Preston* v. *Melville*—"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"—seem to have been regarded by the Lord Ordinary as expressing "the position taken up by the pursuers in the present action." I cannot so regard them. The competition there was for possession of funds vested by the law of England in the administratrix (who claimed to retain them for the purposes of that administration for which she was accountable in England) by trustees who had nothing whatever to do with her duties, and could not exonerate her from her liabilities, and who claimed possession of them for the purposes of a trust distinct from the duty which the administratrix had to perform. The only proceedings for judicial administration were those then pending in England. Lord Cottenham's words refer, as their whole context shows (2 Robinson, p. 105-7), not to any question of forensic jurisdiction or judicial administration, but to the title and consequent duties and responsibilities in England of an English executor or administrator as such.

Some observations of the Lord Justice-Clerk Hope, in *Hastings* v. *Hastings*, 14 D. 489, were cited by the Lord Ordinary to which I must not omit to refer. That was a case of confirmation. The words of the learned Judge—"unless there are some peculiar specialties or clear convenience the administration is also to be that of the domicile"—were used as to the principles which in case of competition ought to be acted on by and to guide the judgment of a court of confirmation, and not as to any such question as that raised by the present case.

Some of the learned Judges in the Court of Session appear to have thought two statutes relevant to the present question—the Act of Union between England and Scotland, and the Confirmation and Probate Act of 1858. The Act of Union preserves to the Scottish Courts the same independence of the English Courts which they before possessed, and it leaves, *e converso*, the English Courts in full possession of their own independence also. In the present case the Scottish Court has acted (whether rightly or wrongly) in the exercise of its independent jurisdiction, and no English Court has interfered with anything which it has done. The English Court has done nothing which it might not have done if the two kingdoms had never been united, and what it did could not possibly have been upheld by this House upon appeal if it had been contrary to the Act of Union. A like argument from the Act of Union was advanced for a like purpose in *Johnstone* v. *Beattie*. Lord Brougham (who thought that the English Court had not properly exercised its jurisdiction in that case) expressed his opinion against it in strong terms, with the substance of which I agree, though I do not think it respectful to those from whom I differ to adopt that noble and learned Lord's language—(10 Clark and Finnelly, p. 152).

As to the Confirmation and Probate Act of 1858, I am unable to appreciate its bearing upon the present question. The argument which was urged in the English case of *Ewing* v. *Orr Ewing*, that the appellants by obtaining confirmation in Scotland had become officers of a Scottish Court in such a way as to make them for that reason accountable to Scottish Courts alone, was disposed of by your Lordships in that case, and it was not repeated at your Lordship's bar by the learned counsel for the present respondents, nor can I perceive that it was relied on by any of the learned Judges in the Court below. A similar argument as to an English administration was advanced and was rejected by the Court of Session in the case of *Morrison* v. *Ker*, M. 4601.

The statute of 1858 was passed for the double object of simplifying the procedure necessary in Scotland for confirmation, and in all parts of the United Kingdom for what it may be convenient to call ancillary administration, and of enabling in the latter class of cases a single stamp denoting the duty payable on the aggregate value of the whole personal estate within the United Kingdom to be placed upon the principal grant, whether of probate or administration, in England or Ireland, or for confirmation in Scotland, the latter object being purely fiscal. For the purposes of that Act, and for these purposes only, as is expressly provided by sec. 17, a statement of the domicile of the deceased person in Scotland, or in England or Ireland, on the face of any interlocutor of the commissary judge granting confirmation, or of any probate or letters of administration granted in England or Ireland, is made conclusive evidence, that is,

it is to determine conclusively which shall be deemed the principal grant on which the duty on the whole personal assets within the United Kingdom is to be paid, and which is to be followed in the rest of the United Kingdom by the procedure substituted by the Act for that previously in use. The substituted procedure is the sealing or endorsement of the instrument bearing the stamp on which the duty has been paid by the proper court in each of the other parts of the United Kingdom. It is clear that if in any case the domicile should happen to be erroneously stated on the face of the instrument so sealed or endorsed, all parties interested may assert their rights and pursue their remedies in any *forum* which would have been competent if that Act had never been made, nor is there anything to alter or take away any such rights or remedies when the domicile is correctly stated. The statute expressly says that the effect of a Scottish confirmation when sealed under its provisions in England or Ireland is to be the same as if a probate or letters of administration, as the case may be, had been granted by the Court of Probate in these countries respectively.

I find, therefore, nothing in these statutes or in the Scottish authorities to warrant the declaratory part of the interlocutors now under appeal.

The American authorities cited in the Lord Ordinary's opinion relate mainly, if not wholly, to the consequences of principal or "domestic" and ancillary administration in some of the United States of America.

In those States (sec. 543a, added by the editor of 1873, to chapter 9 of Story's Equity Jurisprudence) there is a divison of jurisdictions between their probate courts and courts of equity materially different from that which prevails in England. It is impossible, in my judgment, to collect any binding rules of private international law from these authorities or from the passages in certain French books, also referred to by the Lord Ordinary. The phrase "private international law" is liable to be misunderstood. It is a convenient expression for such rules as in the jurisprudence of most civilised nations are applied *ex comitate* to the solution of questions depending upon foreign *status*, foreign laws, or foreign contracts. But no law binding *proprio vigore* upon any independent state can be established by generalisation from the jurisprudence of other nations. All such rules must yield to the *lex loci* whenever it differs from them, and in point of fact few (if any) such rules are universally accepted without some modifications or variations making it necessary to distinguish between the general principle and the forms and conditions of its local application. Even if the uniform practice of the Courts of the United States of America had been in accordance with the view taken by the Lord Ordinary, it could be no law for the Courts of England or Scotland unless a similar practice was also found to prevail there. But I think it unnecessary to examine in detail the American authorities mentioned by the Lord Ordinary, because your Lordships need go no further than the opinion of Mr Justice Story to be satisfied that no such uniform practice does in fact prevail in the Courts of the United States.

Mr Justice Story had occasion to consider some questions connected with this subject judicially in 1818 in the case of *Harvey* v. *Richards* (1 Mason's Reports, p. 381), and his judgment, which well repays perusal, is in accordance with the conclusions stated by him in the 9th chapter of his work on Equity Jurisprudence. In the earlier sections of that chapter he recognises the doctrine of trusts as a generally sufficient foundation for the administration of assets by courts of equity. In sec. 588 he deals with the question how far the courts of a state granting an ancillary administration may properly exercise jurisdiction as to the distribution of the residue of the estate in the administrator's hands after payment of all debts, &c. In sec. 589 he states the general result which he collects from the authorities—courts of equity of the country where the ancillary administration is granted (and other courts exercising a like jurisdiction in cases of administration) are not incompetent to act upon such matter, and to decree a final distribution of the assets to and among the various claimants having equities or rights in the fund, whatever may be their domicile, whether it be that of the testator or intestate, or be in some other foreign country. The question whether the Court entertaining the suit for such a purpose ought to decree such a distribution or to remit the property to the *forum* of the domicile of the party deceased, is treated not so much as a matter of jurisdiction as of judicial discretion dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals for the purpose of enforcing the rights of all persons having a title to the fund, when such interference will not be productive of injustice or inconvenience or conflicting equities which may call upon such tribunals for abstinence in "the exercise of their jurisdiction."

It may be observed in passing that this eminent jurist, in *Harvey* v. *Richards* (1 Mason, 415, 416), commented upon the words "principal" and "ancillary" when used with respect to administrations as having no magic in them, and as not necessarily governed by domicile in their practical application. "I am yet to learn," he said, "what possible difference it can make in the rights of parties before the Court whether the administration be a principal or an ancillary administration. They must stand upon the authority of the law to administer or deny relief under all the circumstances of the case, and not upon a mere technical distinction of very recent origin." If the views of Mr Justice Story ought to be regarded, they seem to me to be consonant with the Scottish authorities and with the English laws also, so far at all events as the question of competency is concerned.

The conclusion at which I have arrived on this part of the case is that the declaratory part of the principal interlocutor of the Inner House cannot be supported, and ought to be reversed.

But the question whether your Lordships ought also to reverse that part of the interlocutor which sequesters the estate, appoints a judicial factor, and suspends till further orders the action of the appellants as trustees, appears to me to depend upon other considerations. As to this it cannot be maintained that the Court of Session

was bound to abstain from the exercise of its own independent and unquestionable jurisdiction over the persons of the trustees and the trust property, both being in Scotland, on the mere ground that a decree for administration had previously been made against the same trustees and as to the same property by an English Court. Their competency being undoubted, the question on this part of the case is, whether what they they have done was right according to that principle of *forum conveniens* which appears by the Scottish authorities generally (see *Ferguson* v. *Douglas*, *Peters* v. *Martin*, *M'Master* v. *Stewart*, already cited, and also *Clements* v. *Macaulay* 4 Macph. 592) to be recognised by the law of Scotland.

I think it convenient in the first instance to examine this question as if the Court of Session had been able, according to its usual practice, to make, and had actually made, a decree for administration in Scotland similar to and co-extensive with that made by the English Court.

That priority of suit would not alone be a sufficient reason in Scotland for leaving the parties to the English jurisdiction may, I think, be collected from the authorities. It is an element no doubt in the case, but I do not think it ought to prevail if in other respects your Lordships are unable to say that the Scottish criterion of greater convenience has not been reasonably applied.

The Scottish jurisdiction has been invoked by the pursuers, who constitute the majority in number and interest (though the original proportion of interests may have been in some degree altered by what has already been done in the administration of the trust) of the beneficiaries under the testator's will.

The trust is Scottish in form, the testator was a domiciled Scotsman. If any questions should arise under the terms of the trust Scottish law must be applied to their solution; the whole trust estate is *de facto* in Scotland, and neither the trustees nor the pursuers desire it to be removed from that country.

The views of the trustees who are appellants here in obedience to the English Court, and who are suspended from all present action in Scotland by the interlocutors under appeal, may not perhaps now be very material, but so long as they were at liberty to exercise their own judgment they objected to and resisted the English judicial administration. All these circumstances being taken into consideration, I am unable to say that there is not such a *prima facie* case of convenience in favour of a judicial administration in Scotland as to throw upon the appellants the burden of proving the contrary.

The strongest reasons to the contrary which have been or can be alleged appear to me to be these—(1) that the interlocutors are not equivalent to a decree for general administration, (2) that they are such as would not have been pronounced if the object had not been to displace the judicial administration in England, (3) that the pursuers are open to personal exception, having intervened in the English suit, (4) that the English plaintiff is not a party to the Scottish action, and that his interests will not be adequately protected if the sequestration and the order for a judicial factor are allowed to stand.

To the first of these objections it appears to me to be a sufficient answer that the appointment of a judicial factor (whose duties and responsibilities are substantially the same as those of a receiver in England) is in effect, so long as it continues, a judicial administration; that the factor has given security, and will have to render regular accounts of his intromissions; and that all the parties interested will be at liberty from time to time to apply to the Court of Session, as there may be occasion, as to any questions arising upon the factor's accounts, or otherwise relating to the sequestrated estate or to their respective interests in the funds realised therefrom. So far as relates to the accounts or other liabilities exigible from the trustees in respect of intromissions or default prior to the appointment of the judicial factor, the affirmance by your Lordships of this part of the interlocutor will not interfere with the substance of any rights or remedies of the English plaintiff against the trustees under the decree of the English suit.

The second objection is not in my opinion substantial. It may be true that it is not the course of the Court of Session to interfere with the administration of a trust estate *extra curiam* by trustees without special cause shown. But in the present case the administration *extra curiam* has been interfered with, and to a great extent superseded, by the English decree. The Court of Session, therefore, may consistently with its general rule treat this state of circumstances as an adequate cause for the appointment of a judicial factor when asked, as it is, by parties having sufficient interest to exercise its jurisdiction so as to retain the general administration in what it deems to be the more convenient *forum*. I may not be so convinced that this was clearly *ex debito justitiæ* as to have thought a different decision erroneous, but I am not prepared to overrule the judgment of the Court of Session on a point which I regard as one of practice more than of principle.

As to the third objection, the intervention of the pursuers for certain purposes in certain proceedings in the English suit cannot in my opinion be a bar in Scotland to their present action, or to any proper relief to which in that action they may be entitled.

Lastly, with respect to the position of the English plaintiff, the objection that he is not made a party to the action in Scotland has been, for all necessary purposes of justice, removed by the undertaking offered by the Solicitor-General at your Lordships' bar, that he by his present or any future next friend who may be recognised by the English Court as representing him for the purposes of the English suit, shall have notice of and be at liberty to attend to the taking of the judicial factor's accounts, and to apply and be heard on all matters relative to the sequestered trust estate or the funds arising thereupon for any purpose (claims for expenses included) which might be competent to the plaintiff if a party on the record. I propose that a declaration conformable to that undertaking should be embodied in the order to be now made by your Lordships.

I think that in this way the plaintiff's interest, so far as it may be affected by the sequestration and the judicial factor, will be adequately protected. In the English suit it will of course be open to the plaintiff or to the appellants to make

such application to the Court as they may be advised for the stay of any part of the proceedings under the directions contained in the decree the prosecution of which the sequestration and the appointment of the judicial factor in Scotland (so long as they remain in force) may render impracticable or inexpedient, and it cannot be doubted that on any such application the English Court will do what is right. Nothing in your Lordships' order, or in that part of the interlocutors now under appeal which will be thereby affirmed, can interfere in any way with the power of the English Court to continue the prosecution of such accounts, inquiries, and other proceedings under the English decree as may be for the infant plaintiff's benefit, and not inconsistent with the suspension of the ordinary powers of the trustees in Scotland during the continuance of the sequestration and the judicial factor, and also to give such directions as it may think fit as to any proceedings which it may deem proper to be taken in Scotland on behalf of the infant plaintiff under the respondent's undertaking or otherwise.

With respect to the interdict, as limited by the Inner House, I understand my noble and learned friend Lord Watson to think, that with one slight exception it may be understood in a sense not necessarily involving the principle of those declarations from which your Lordships dissent, and its practical operation is now spent and exhausted. I am ready to defer to my noble and learned friend's opinion, which, however, I do not understand to extend to the prohibition of "accounting (*i.e.*, for the trust-estate or any part of it) to any person or persons other than the judicial factor." As to this I cannot construe it otherwise than as prohibiting obedience even in England to the decree of the English Court affirmed by this House, and I think it would be dangerous for your Lordships to appear to give your sanction to this by leaving that part of the interdict unaltered, temporary though it was. I shall therefore propose to your Lordships to vary it in that respect only.

I have only to add that the results thus arrived at appear to me to be entirely consistent with your Lordships' judgment on the former appeal affirming the English decree. At the time when the English decree was made no suit concerning this trust had been commenced in Scotland, and it was then expressly said that "if there had been any proceedings pending in a Scottish Court equally beneficial to the infant plaintiff, in which his rights and interests could have been adequately protected, it would have been competent and probably right for the High Court in England to stay the further prosecution of that suit either before or after decree (9 Appeal Cases, p. 42).

The order which I propose to your Lordships to make is to reverse so much of the principal interlocutor appealed from as finds, declares, and decerns in terms of the declaratory conclusions of the summons, and also so much thereof as interdicts, prohibits, and discharges the appellants from accounting for the trust-estate or any part thereof to any person or persons other than the judicial factor, and to declare (the respondents by their counsel consenting thereto) that Malcolm Hart Orr Ewing, the infant plaintiff in the English suit by George Wellesley Hope, his present next friend in that suit, or by such other person as may from time to time be admitted by the High Court of Justice in England as the next friend of the said infant plaintiff, is to have notice of and to be at liberty to attend the taking of all accounts of the judicial factor from time to time in this action, and all proceedings thereon, and to make all such applications to the Court of Session on all matters relative to the sequestered trust-estate or the trust funds arising therefrom for any purpose, including claims for expenses, as might be competent to the said infant plaintiff or anyone on his behalf if he were a party on the record, and in other respects, subject to the aforesaid declaration, to affirm the interlocutors of the Inner House under appeal, and remit the cause to the Court below.

The interlocutor of the Lord Ordinary having been recalled by the Inner House (which recal will stand) does not require to be dealt with by your Lordships.

I think the costs of the appeal should be paid to the appellants out of the trust-estate.

LORD BLACKBURN—My Lords, the Lord President in his opinion says, I think quite truly—"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."

Had the interlocutor of the Lord Ordinary not been recalled, this conflict would have been raised in a very painful way, which it would have been difficult to justify, for if the Chancery Division order the trustees to do anything (it may be to render accounts to that Court), the trustees must obey the order or incur all the penalties of a contempt of the Court of Chancery Division. And if that interlocutor had not been recalled they would have incurred all the penalties of a breach of interdict of the Court of Session if they did obey the order of the Court of Chancery. The course taken by the interlocutor now under appeal relieves the trustees from this painful, and in the present case unnecessary, predicament, as they cannot be held responsible for what is done by the judicial factor. I do not, as at present advised, agree in thinking that the declaratory conclusions of the summons are such as to make it correct to decree in their terms, nor that (on the supposition that the sequestration and appointment of a judicial factor were right) it was either necessary or proper to couch the interdicts in the terms in which they are framed—but these are matters that can be amended.

Two important substantial questions remain—(1) Whether the Court of Session had jurisdiction to sequestrate the estate, which lay entirely in Scotland, and appoint a judicial factor? On this I have a distinct opinion that they had such a jurisdiction. And (2) Whether it was a proper exercise of the jurisdiction to exercise it when the only reason for removing the trustees from office or superseding them for a time was, that if not so removed or superseded they would obey the orders of the Chancery Division rather than enter into a personal conflict with that Court? On this I have felt and feel doubt and difficulty.

There are some matters which it is best to notice before entering upon the merits. I completely agree that unless where some legislation (by the independent Legislature of Scotland before the Union, or by the Legislature of the United Kingdom since) may have made a difference, the judicatures of Scotland and England are as independent of each other as if they were the judicatures of foreign states. I think the Lord President puts the grounds of this rather too low when he says it is the necessary result of the Treaty of Union. The two kingdoms were in all respects independent, foreign, and often hostile kingdoms, and there was a mass of border legislation in both countries founded on the supposition that the normal relation of the inhabitants of the two countries was that of hostility. Soon after the accession of James I. to the Crown of England this legislation was all repealed (see 4 James I. c. 1), and it was established that the nominal relations of the inhabitants of the two countries were so far from being hostile that the *post nati* were not aliens, but there is no pretence that there was any legislation affecting the independence of the judicature of either country. When the Treaty of Union was agreed on it would have been competent for the Legislature of Scotland to enact as part of the bargain that the judicature of Scotland should be subordinate to that of England. I need hardly say that they did not so enact, and as far as I know no one has ever suggested that they did so. In the absence of such an enactment the judicature remained independent as it was before, and though now that England and Scotland have not only a common Sovereign but also a common Legislature, it may not be an inaccurate use of language to call them foreign countries, and though no doubt many enactments have greatly reduced the practical differences between Scotland and England (which is all that I think Sir George Jessel meant to say), I think none of these enactments made the judicature of Scotland dependent on the judicature of England, any more than they have made the judicature of England dependent on that of Scotland.

There was a plea added, putting a construction on the 19th Article of the Treaty of Union, or rather I should say on the Act of Union which incorporates it. It is not made a ground of decision by any Judge, but the Lord Ordinary, Lord Mure, and to some extent Lord Shand, treat it so that it ought to be noticed.

Long before the Union the Superior Courts of England, when a defendant was properly served with process, entertained an action against him wherever the cause of action arose, of course subject to any and every plea to the jurisdiction. The technical rules of English common law pleading required that a venue should be laid to each material allegation, and the very technical way in which this was done is fully explained in note to *Mostyn* v. *Fabrigas* (1 Smith's Leading Cases, 689). However, without entering into that, it is certain that when a defendant appeared in the King's Bench, a declaration on a cause of action arising in foreign parts was good, though where for any reason the actual place was material it was necessary to lay a formal venue, and in an action on a deed of covenant, for instance, in case the variance should be fatal on oyer, to say that a bond made at Madras was made at Fort St George in the East Indies, to wit, at London in the Ward of Cheap. Is it contended that if two actions had been brought in the Court of King's Bench, the year after the Union, the one on a bond made at Paris in the kingdom of France, to wit, in London in the Ward of Cheap, and the other on a bond made at Glasgow in the kingdom of Scotland, to wit, in London in the Ward of Cheap, the first would have remained a good declaration, but the second would have been void as contrary to the 19th Article of the Treaty of Union? Yet unless we carry the construction of the article so far as to make the entertaining of such an action by the Court of King's Bench a breach of the Treaty of Union, I do not see how the suit entertained by the Chancery Division in this case could be one. It is extremely improbable that it should have been intended by the Treaty of Union to restrict the jurisdiction of the English Court, and I think the words used cannot bear that construction. There is no authority in either country in favour of such a construction of that Article, and there is such a uniform course of precedents in which the English Courts have since the Union exercised without objection the same jurisdiction *in personam* over persons within their jurisdiction that they did before the Union, and have exercised in all transitory actions, though in respect of matters happening in Scotland and over which the Scottish Courts have concurrent jurisdiction, the same jurisdiction which they exercised and still exercise over cases originating in all other countries out of England, that I do not think that I need do more at present than say that this construction of the Article of the Treaty is in my opinion utterly untenable.

I now come more to the merits. I think that the state of things was such before the date of the English suit on 25th February that the appellants held the whole property wherever situated as trustees, and no more as executors or administrators than if they had been fresh trustees who had never been executors to whom the original trustees and executors had assigned the property. And though I think that the judicature of Scotland had jurisdiction over the trustees (if properly brought before them) to make them do their duty as trustees, I do not think they had that jurisdiction either on the ground that the testator whose will created the trust was a domiciled Scotsman or on the ground that the trust funds were principally originally collected by a Scottish confirmation, still less that they had exclusive jurisdiction. And here I am afraid I do not take the same view as the Judges below. I cannot but think that the Judges below have put a mistaken construction on what was said in *Preston* v. *Melville*—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,"—from not remembering what kind of administration Lord Cottenham was speaking of when he used these words.

There has been a change in the law of England by the 20th and 21st Victoria, cap. 77 (the Probate Act of 1857), as to the Court which is to appoint the personal representative, whether executor or administrator, of deceased persons, and a further change in the special case when the deceased is a domiciled Scotsman by 21 and 22 Victoria, cap. 56 (the Probate Act of 1858), but

the general law remains as it was at the date of *Preston* v. *Melville*.

No person can, according either to the law of England or Scotland, by his will deprive his creditors of the right to enforce payment out of the property he leaves behind him of such obligations as survive. The personal representative, whether executor or administrator, might without suit safely pay such obligations, unless he had notice of some obligation of a higher degree. In England at least there is no distinction between English obligations and foreign obligations. The priority in which they are to be paid does not depend on the nationality of the creditor, but on the nature of the debt. The personal representative is liable so far as he has assets to pay. He might defend himself on the ground that he had already fully administered all such assets, but if he had misapplied the assets he might be made liable to make good the deficiency out of his own funds. It would obviously be unjust, as long as there were obligations of any sort for which the personal representative might be made liable out of his own property on a deficiency of assets, to make him hand over the assets to any persons who in the due course of administration would come after the holders of these obligations, even though they were those to whom the surplus was by the testator's will to come.

The pursuers in *Preston* v. *Melville* were such persons; they were the trustees duly appointed by the Court of Session to act in lieu of those named in the testator's will; they were the partners in Coutts' Banking House who had been appointed trustees and named as executors by Sir Robert Preston's will, just as the appellants were appointed and named by Mr Ewing. But the original trustees and executors in that case had, probably very prudently, declined to act.

The law of England, I think, is quite settled that when the personal representative has discharged all that in due course of administration (using the word in its more limited sense) he was bound to discharge, if there is any surplus he ought to deal with it according to whatever may be the directions in the testator's will. If he, without any sufficient reason refuses to do so, he may be compelled by the Court of Chancery to do so, but he is not required to obtain the sanction of a Court before doing this. It may sometimes be prudent to do so, it would often be vexatious to do so, and it is not necessary that there should be any formal transfer of the property. If Lady Preston, the administratrix, had been satisfied that all Sir Robert's debts were paid, and that the pursuers in that action were the trustees to whom the property by the will was devised in trust, she might have simply assented to their taking it, and that would have vested the property which was in her as administratrix in them as trustees. As to all this, and as to what is sufficient evidence of an assent, see 2 Williams on Executors, part 3, book 3, chapter 4, sec. 3.

It might have happened, though in this case it did not, that the testator had at the time of his death personal estate in many countries—in, for instance, some one or more of the United States, or in some one or more of the British Colonies—in each of those, in order to get possession of the estate, a personal representative would have had to be appointed. It probably would not have been convenient to make any of the executors themselves such a representative in a distant country, and it certainly would not have been necessary. And it might have happened, though it did not, that his debts would have been so great that his personal estate would not have been sufficient to pay 20s. in the £. Many difficult questions might in such a case, specially if the estate was insolvent, have arisen. I do not enter on these questions, for none of these things did happen, and the time when they could have happened was over as soon as the personal representatives were satisfied that all debts and obligations were discharged and that the administration, in the sense in which Lord Cottenham used the word, was completed, and remitted the foreign funds, if there were any, to the trustees. The trustees would have held them under the same obligation to dispose of them according to the trust, in whatever way those funds came to their hands, if they were received by them rightfully. The domicile of the testator might be all-important in ascertaining what the trusts were but not otherwise.

I cannot therefore think that it makes any difference whether the funds came to the hands of the trustees by means of administrators, whether themselves or others appointed under the Probate Act of 1857 or under the Probate Act of 1858, or (had the fact been so) by means of administrators who collected and remitted the funds from New York or Calcutta or Melbourne. I cannot therefore agree with the Lord President and Lord Shand that the Probate Act 1858 makes any difference in this case, or that it is at all necessary to examine its provisions.

The testator in this case was a Scotsman, the great bulk of his estate was in Scotland, though £25,235 was in England, a sum not by any means despicable, and much more than sufficient to discharge every liability of the testator's. He named four of his relatives, all Scotsmen like himself, two of whom resided in England and two in Scotland, and one of his partners, and Mr M'Grigor, a writer in Glasgow, and "such other person or persons as may hereafter be nominated by me or assumed into the trust hereby created, and the acceptor and acceptors, survivors and survivor, of them, the major part of them accepting and surviving and resident in Great Britain from time to time being a quorum," as trustees for the ends and purposes after mentioned. The six named trustees, who are the appellants, he named as his executors.

He further "empowered my trustees to appoint any one or more of their own number to be factor or factors under them, or to be law-agent or law-agents for the trust, and to allow such factor or factors, and such law-agent or law-agents, their professional charges, and to do everything which in their discretion they may conceive to be for the benefit of my estate." When the trustees had got possession of the trust-property they proceeded to work the trust in Scotland; nor do I suppose anyone can doubt that the testator expected them to act in that way, and I suppose the testator made Mr M'Grigor one of his trustees in order that he might be the factor and law-agent. At all events, the trustees did so work the trust, and no one says it was wrong to do so. But I fail to find anything in the trust-deed to require them to do so. There is no provision in the trust that I find which must be executed in Scotland. The only qualification on the trustees is that the

quorum shall consist of the majority resident in Britain.

If the majority of the trustees at any time came to reside in England, and *bona fide* thought it best for the interest of the estate that the whole funds should be vested in English securities and managed in England, there is nothing expressed in the deed to prevent their doing so. I cannot, notwithstanding what is said by the Lord President, think that there could have been any ground for an interdict to prevent them from doing so. They never proposed to do so, but continued to work the trust in Glasgow.

What they have done appears by the joint-minute of admissions:—"Burnet for the pursuers, and Smith for the defenders, concurred in stating—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." They further stated that "the defendants, in terms of an order of the Court of Chancery, dated 4th May 1883, pronounced in the administration suit at the instance of Malcolm Hart Orr Ewing, of which order a copy is hereto annexed, remitted to England, and on 20th June 1883 paid into the said Court of Chancery, the sum of £25,384, 2s. 11d. on account of capital, and a further sum of £8039, 2s. 11d. on account of income on behalf of the said Malcolm Hart Orr Ewing, in respect of his interest in the estate of the deceased John Orr Ewing, conform to the two official receipts by the Paymaster-General, of which copies are also hereto annexed."

No one has ever alleged that the trustees up to 25th February 1883 had in any way acted, or even given rise to a suspicion that they meant to act, contrary to their duty as trustees. If anyone having a proper interest had asserted that they had done or left undone something, and properly brought the trustees before the Court of Session, that Court would certainly have had jurisdiction to entertain the action and give or refuse relief.

In *Brown* v. *Stirling-Maxwell's Trustees*, July 17, 1883, 10 R. 1235, where the question was whether Brown was within a class of servants to whom Sir W. Stirling-Maxwell had left legacies, the pursuer sued in Scotland, and got relief, and no one could doubt the jurisdiction of the Court of Session. Had Brown issued a writ in England, and the trustees appeared to the writ, no one would have doubted the jurisdiction of the English Court to entertain the same question. All that I have before this said as to administering the assets as personal representative, and working the trust as trustees, is only important as leading to this, that in the latter case at least the Courts of Scotland and England have concurrent jurisdiction, the jurisdiction of the English Court not depending, as the Lord Ordinary seems to think, on the existence of funds in England, but on the trustees being brought in person within the jurisdiction.

The writ in this case was not issued for the purpose of obtaining relief for anything of this sort, but on behalf of an infant by his next friend, in order to have the personal estate of the testator administered, and the trusts of his will carried into execution, by and under the direction of the Court of Chancery. I do not now repeat anything as to the English law; that has been decided finally by the English Courts and in this House in the case of *Ewing* v. *Orr Ewing*, L.R., 9 App. Ca. 34. But the Lord President shows, what I had before only suspected, that such an "administration suit" is not known to the law of Scotland. It may be doubted, if all that is now known had been foreseen, whether the Chief-Clerk's certificate would have been reversed by the order of 21st March 1881. I thought that whilst that order was unreversed the decisions in the Court of Chancery bound me to say that it was *ex debito justitiæ*, and not a question of discretion, to grant such an administration. I wished it had been otherwise, and I wish it more now that the admissions show how very little of the estate (indeed I think at the time when the writ was issued no part of the estate) really was in England, and consequently how strong a case there would have been for refusing such a grant in this case if it had been a matter of discretion.

The declaratory conclusions of the summons go much further than is required in order to support the sequestration. It is one proposition to say that owing to the interference of the Court of Chancery, and the refusal of the trustees to enter into a personal conflict with that Court, the trust has become unworkable in the hands of the present trustees unless they substitute for their discretion that of the Court of Chancery, and that so to do is injurious to the interests of the pursuers, and therefore that the Court of Session may and should change the trustees, and it is quite another thing to deny that the trustees can under any circumstances act in England, or that an English Court has any jurisdiction at all, even to give relief.

The declaratory conclusions of the summons are as follows:—"That it ought and should be found and declared, by decree of the Lords of our Council and Session, that by virtue of said trust-disposition and settlement and relative codicils, and of said testament-testamentar, the defenders are 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: And further, it ought and should be found and declared by decree foresaid that the defenders, as trustees and creditors foresaid, are 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 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: And further, it ought and should be found and declared, by decree foresaid, that the defenders, as trustees and executors foresaid, are bound to render just count and reckoning for their intromissions with said estate and effects, 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 said defenders are not bound nor entitled to render any account of the said estate and effects to the said High Court of Justice in England or any of the Divisions thereof, or to any other tribunal furth of Scotland having no jurisdiction in Scotland, nor bound or entitled to part with the custody of any of the title-deeds, writs, or evidents of the said estate."

When the Lord President said, "The plain duty of the defendants 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," he had not, I think, any intention to assert that the directions of the testator were to work the trust in Scotland. If he did so mean, I think he made a mistake, for I can find no such directions. If he had said, "to combine the residue of the English with the Scottish part of the estate, and administer the combined estate as a whole, according to the directions of the testator, in Scotland so long as they in their discretion thought it the most convenient place to administer it," I think there would have been no difference of opinion. But I rather think that from not having before his mind the distinction between administering as an executor and managing as a trustee, or perhaps not taking the same view of that distinction which I do, he did mean that it must be done in Scotland, even though the trustees thought it best and most convenient to put the whole estate into English securities, and substituted new trustees who were all Englishmen.

The declaratory conclusions of the summons would lead to the conclusion that if an action for relief had been brought in an English Court, and the trustees had defended it but been defeated, and they under the compulsion of that judgment had paid, the trustees would have committed a breach of trust, and were liable for it, even though the payment was one which they ought to have made, and which the Court of Session if they had been applied to would have ordered. That could not have been meant. Nor can it have been meant to declare that it was a breach of trust to render accounts to the English Court, even though those accounts went no further than to inform that Court of what they had done in Scotland under the compulsion of the Court of Session.

For these reasons I think that, whatever may be the result as to the substance, the interlocutor appealed against must be varied, but I think the Court of Session had certainly jurisdiction to sequestrate the estate in Scotland, and change the trustees, although the effect was to baffle the action of the English Court; for I know of no principle of international law to prevent them from so doing, if the case was one to make it proper so to do. Whether they ought to do so, and whether this House as a Court of Appeal should alter what the Court below has done, though within its jurisdiction, on the ground that it was an injudicious use of its jurisdiction, depends on other grounds.

There is very little to be found as to the principles which should regulate the discretion of a Court in changing trustees; the only case which I know on the subject is *Letterstedt* v. *Broers* (9 Appeal Cases, 371). The part of the judgment which bears on this point begins at p. 385. The conclusion which the Judicial Committee of the Privy Council came to there, on principle (for they could find no authorities), was that the Court must be mainly guided by the welfare of the beneficiaries, and that "if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate" (p. 386). On that principle, I think that if the proportions of the Scottish funds to the English had been reversed, and the funds in England had been £400,000 to £20,000 in Scotland, it would not have been a proper exercise of the jurisdiction to remove the trustees.

I doubt a little whether the Judges below directed their minds sufficiently to the question whether in this particular case it might not have been better for the interests of all to allow the administration suit to go on, but I am inclined to think, on the whole, that with the undertaking which was given by the appellant's counsel it may be better to allow the removal.

I agree in the proposed form of order.

Lord Watson—My Lords, in regard to some of the points raised upon this appeal I have never entertained any serious doubt; but there are questions involved in it upon which I have felt much difficulty in forming an opinion satisfactory to my own mind. That difficulty has been owing in some measure to the circumstance that the record appears to have been framed with a view to the leading conclusion of the summons for declarator and interdict irrespective of the alternative conclusions to which effect has been given by the interlocutor of the First Division.

It is unncessary for me to refer to the circumstances in which this litigation had its origin, seeing that these have already been fully stated in the judgment delivered by my noble and learned friend Lord Blackburn. I shall content myself with saying that in my opinion the trust created by the *mortis causa* disposition and settlement of the late John Orr Ewing is a Scottish trust, and that *prima facie* his trustees are amenable in all questions touching the administration of the trust-estate to the jurisdiction of the Courts of Scotland. The truster appears to me to have contemplated that his estate should be administered in Scotland; he expressly declares that the trustees are to have the powers, privileges, and immunities conferred upon trustees by any Act of Parliament applicable to Scotland, and he authorises the recording of his settlement as a Scottish deed. In the case of a foreign trust—foreign in the same sense in which I have ventured to designate the late Mr Orr Ewing's trust as Scottish—the Court of Session would decline, even if the trust included landed estate in Scotland, to repair any lapse of administration occasioned by the failure or death of the trustees (*Brockie and Another* v. *Peters*, 2 R. 923).

I do not of course intend to suggest that domiciled Scotsmen acting in the execution of a Scottish trust, when temporarily resident in a

foreign country, may not, by reason of their personal presence, be subjected *qua* trustees to the jurisdiction of the tribunals of that country. And I think it may be safely asserted that in some cases it would be the plain duty of the Courts of Scotland to recognise and give effect to these foreign proceedings, and that in other cases it might be their duty as well as their right to disregard them. If a foreign creditor in such circumstances obtained a regular judgment by process in his own Courts against Scottish trustees for a debt incurred to him by the trustees, I do not think the Court of Session could or would examine the merits of that judgment or refuse to enforce it. On the other hand, if a single Scottish beneficiary followed the trustees abroad, and during their temporary residence there sued them and obtained decree against them for his share of the trust estate, I do not think that the Courts of Scotland, in any judicial distribution of the estate, would be precluded by that decree from considering and determining, according to the principles of Scottish law, the amount of the share to which each of the beneficiaries, excluding the holder of the decree, was entitled.

In the present case it is maintained for the infant Malcolm Hart Orr Ewing, and his next friend George Wellesley Hope, using the name of the late Mr Orr Ewing's trustees, that the First Division of the Court of Session had no jurisdiction to sequestrate the trust-estate and appoint a judicial factor in respect of the proceedings then pending at their instance before the High Court of Chancery in England. The power of the First Division to make the appointment contained in their interlocutor of 29th February 1884 was not in my opinion ousted by these proceedings. That is really the operative part of the judgment of the Inner House, but it also contains a finding and decerniture in terms of the declaratory conclusions, although it does not give effect to the conclusion for interdict which was affirmed by the Lord Ordinary. I have come without much difficulty to the conclusion that the declaratory decree cannot be sustained upon the reasons which have been assigned by the learned Judges in the Courts below, and I entertain serious doubts whether it would in any circumstances be either necessary or expedient to pronounce such a decree. I am at present disposed to think that whenever a real conflict of jurisdiction does arise between two independent tribunals, the better course for each to pursue is to exercise its own jurisdiction so far as it availably can, and not to issue judgment proclaiming the incompetency of its rival.

The 19th Article of the Treaty of Union, which is referred to in the opinions of the learned Judges, appears to me to have a very remote bearing upon the points raised in this appeal. It does establish what has not been controverted in the argument addressed to your Lordships, that the Court of Session is an independent national tribunal, as independent and of as high authority within Scottish territory as the Court of Chancery within the realm of England. I agree with Lord Deas that 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 (11 Session Cases, 4th Series, p. 637.) In *Maclachlan* v. *Meiklam and Others* (19 Session Cases, p. 960), which is referred to in the opinion of the Lord President, the Treaty of Union had a very direct bearing upon the question before the Court, because in that case the Master of the Rolls had ordered trustees to deposit in the Record and Writ Office certain title-deeds which were on the register in Scotland, whereas the 24th Article of the Treaty expressly declares that, notwithstanding the Union, all records, rolls, and registers whatever, public and private, shall "continue to be kept as they are within that part of the United Kingdom now called Scotland, and that they shall so remain in all time coming." In this case the terms of the Treaty of Union appear to me to throw very little light upon the question which the House has to decide.

In deference to the favour with which it was received by the learned Judges in both Courts, I have very carefully considered the argument which was pressed upon us for the respondents, founded upon 21 and 22 Victoria, cap. 56, which now regulates confirmations in Scotland, but I am unable to assent to it. The provisions of that Act do not appear to me to deal directly or indirectly with the subject of jurisdiction, or to indicate that the Legislature either intended to confer upon the Courts of Scotland any new jurisdiction, or to abridge any jurisdiction which, before it passed, might have been lawfully exercised by the Courts of England and Ireland. It is thereby enacted that the inventory lodged with a petition for confirmation in Scotland may, when the deceased had his principal domicile there, include his personal estate in England and Ireland, and that instead of taking out letters of administration in these countries the executor-nominate may obtain a good title to such personal estate by having his testament-testamentar duly sealed in the Courts of Probate in London and Dublin. But the effect of that proceeding as declared by 21 and 22 Victoria, cap. 56, secs. 13 and 14, is that the Scottish confirmation when sealed shall have the like force and effect in England and Ireland as if letters of administration have been granted by their respective Courts of Probate. Then according to the statutory form of a Scottish decree (21 and 22 Victoria, cap. 56, Schedules D and E) confirmation to the office is granted, subject to the *proviso* that the executor shall render just count and reckoning for his intromissions with the deceased's estate, not in the Courts of Scotland, but "when and where the same shall be lawfully required." I venture to think that the jurisdiction of the Scottish Courts, whether it be exclusive or not, in regard to the administration of the moveable estate of persons dying domiciled in Scotland, and there confirmed, must depend upon general principles of jurisprudence as accepted in the law of Scotland, and not upon the provisions of 21 and 22 Victoria, cap. 56, or of any other statute.

I am, moreover, of opinion that the gentlemen who at the commencement of this litigation were executing the trusts of Mr Orr Ewing's settlement must be regarded not as executors but as trustees. The deceased conveyed to them in their capacity of trustees the *universitas* of his estates, heritable and moveable, and his intention must have been that, after his moveable estate was ingathered and his debts paid, the

whole should be administered as one trust, and not that they should be trustees *quoad* his heritable and executors *quoad* his moveable estate. No doubt after conveying all his estate to his trustees he appoints them to be his executors, but that is merely an ancillary appointment made with the view of giving them an active title to recover, if necessary, his moveable estate in order to its being administered by them as his trustees. It would have been in entire accordance with the just construction of his disposition and deed of settlement had one of the trustees nominated been confirmed as executor, and after paying debts transferred the free executory funds to the whole body of trustees to be disposed of by them in conformity with the purposes of the trust. In the case of testate succession confirmation was never required by the law of Scotland in order to take moveable estate out of the *hereditas jacens* of the deceased. By that law the title of a testamentary executor to personalty of which he has obtained possession is complete without confirmation, which is, however, necessary in order to give him an active title against debtors to the estate who decline to pay without it. The provisions of 21 and 22 Vict. cap. 56, and of previous statutes regulating confirmation, in so far as these require that the inventory shall include the whole personal estate of the defunct, were enacted for fiscal purposes, and not for the purpose of vesting the executor with those assets to which he might have a perfect title independently of his confirmation.

That the Courts of Scotland will in certain circumstances sustain their own jurisdiction over the trustees of a foreign will who are resident in Scotland is a proposition which does not appear to me to admit of dispute. In *Ferguson and Others* v. *Douglas, Heron, & Company*, 3 Pat. App. Cas. 510, Lord Loughborough said that he had "no doubt as to the competency of the Court of Session in a case where either the persons of executors or effects of the deceased are within their jurisdiction." That was an action brought for recovery of debt by a banking firm in Scotland, and I cannot suppose that Lord Loughborough meant to lay down the law (for the point was not before him) to the effect that the Courts of Scotland either did exercise or were bound to exercise jurisdiction over foreign trustees in every case in which the persons of trustees or funds of the trust were to be found in Scotland. The principles which regulate the exercise or non-exercise of jurisdiction in such cases have now been settled by a long course of decisions. These decisions establish a broad distinction between claims of debt at the instance of Scottish creditors and claims by persons beneficially interested in the estate, which involve questions as to the due execution of their office by the trustees, or as to the rights and interests of other beneficiaries. Thus in *Campbell* v. *Rucker*, March 1809, Hume's Dec. 258, an action proceeding on arrestment *jurisdictionis fundandæ causa* was sustained at the instance of a Scottish creditor against the executors of a West Indian will, who had obtained letters of administration from the Prorogative Court of Canterbury. The Lord Ordinary repelled a preliminary defence of no jurisdiction, "in respect the present action is not brought for the purpose of bringing an English creditor to a general accounting, but that of operating payment of a particular debt out of a fund belonging to the defunct and attached by arrestment in Scotland for that purpose," and the Court adhered. But in *Brown's Trustees* v. *Palmer*, 9 Shaw, 224, a case similar in all respects to the preceding, with this single exception that this summons was not at the instance of a creditor of the defunct, and concluded for an account of the executor's intromissions and payment of the balance to the pursuers, the Second Division, affirming the judgment of the Lord Ordinary, dismissed the action. A like decision was given in the case of *Macmaster* v. *Macmaster*, 11 Shaw, 685.

It is no doubt true that the reason assigned by the Scottish Courts for declining to entertain actions against foreign trustees or executors when they come to Scotland, or when trust or executory estate is under arrestment there, is not that the Court of Session is an incompetent but an inconvenient *forum*. It necessarily follows that the plea of *forum non conveniens* must fail in cases where the trustees are not liable to suit, or are evading an accounting, in the proper *forum* of the trust which the law of Scotland regards as the only convenient *forum* so long as the pursuer can there obtain the redress which he seeks. In *Macmaster* v. *Macmaster*, 11 Shaw, 685, the Lord Justice-Clerk (Boyle) said — "The decisions go to this, that if the executor of a foreign will come here he may be called before this Court, because he could not in the foreign country." And the Lord President (Inglis), in *Clements* v. *Macaulay*, 4 Macph. 592, which was a case of partnership accounting, observed that "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 foreign executory estate situated in another country. In these cases the question always was, whether it was more for the true and legitimate interest of the executory 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." I have no fault to find with the explanation thus given by the present head of the Court of the *rationes* by which the *forum* in which administration has taken place has also been held by Scottish Courts to be the one convenient *forum* to the exclusion of their own jurisdiction. But it is equally accurate to say that the only reason which has induced the Courts in Scotland in such cases to uphold their own jurisdiction has been, as stated by Lord Justice-Clerk (Boyle), because the trustee or executor could not be called to account in the more convenient *forum*.

I am not aware of any authority in the law of Scotland for entertaining an action in the Court of Session against foreign trustees who can be called to account, and who are willing to account in the proper *forum*, though action has been sustained in cases where they were neither liable nor willing to answer in that *forum*. There is another and intermediate class of cases in which it is doubtful whether the courts of the *forum conveniens* may have it within their power to give the pursuer a full remedy, or to enforce their orders against the persons of the trustees

and the trust-estate. In such cases the Court of Session will not dismiss the suit, but will sist procedure, not with the view of superseding, but of aiding the action, and supplementing the powers of the foreign court in order that full justice may be done.

The case of *Peters* v. *Martin*, 4 Shaw, 138, illustrates the grounds upon which the Court of Session has, notwithstanding the plea of inconvenient *forum*, sustained its own jurisdiction against the trustee of a foreign will. Martin, the defender, was sole trustee under an English will, the estate being partly situated in England and partly in the Colonies. He had taken out letters of administration in England, but at the time when the action was raised he had returned to and was resident in Scotland, his native country. The action was at the instance of the trust beneficiaries, and concluded for implement of the will, and for investment, in terms of the trust, of a balance of £7500, which it was alleged he had wrongfully retained in his hands. The pursuers averred that they were unable to institute proceedings against him in England so long as he was resident in Scotland. Martin objected to the jurisdiction of the Court of Session, but the Lord Ordinary sustained the action. The Second Division, however, recalled his Lordship's interlocutor, and superseded the cause in consequence of an allegation by Martin that he was willing to submit to the jurisdiction of the Court of Chancery, and that he had actually filed a bill in that Court. It subsequently appeared that his allegation was untrue, and that no effectual proceedings had yet been taken by him in Chancery, and accordingly the Second Division allowed the action to proceed, reserving to him to be heard upon his allegation that he had put himself within the jurisdiction of the Court of Chancery. The report does not give the opinions of the Judges, but the ground of the decision was thus explained by the Lord Justice-Clerk (one of the Judges who took part in it) in the subsequent case of *Macmaster* v. *Macmaster*, 11 Shaw, at page 688 —"In the case of *Peters* the executor was here, and refused to appear in Chancery." To my mind it is obvious that if Martin had actually done that which he merely professed his willingness to do, and had submitted himself to the jurisdiction of the English Court of Chancery in respect of the matters embraced in the Scottish action, the Second Division would not have sustained it.

Macmaster v. *Stewart*, 12 Shaw, 731, furnishes an illustration of that class of cases in which the Court, whilst refusing to dismiss the action, yet stay all procedure in it unless and until it has been ascertained that the pursuers cannot obtain an effective remedy against the trustees in the proper *forum* of the trust administration. In that case Mrs Stewart, a domiciled Scotswoman, one of the residuary legatees under an English will, upon the refusal of the trustees to accept or act, took out letters of administration in England, and intromitted with the whole estate falling under the will, consisting of real as well as moveable estate in England. The testator had by his will directed that if any of his legatees harrassed the executors the latter should file a bill in the High Court of Chancery so that his will might be carried into execution under the direction of that Court. All debts and special legacies had been paid shortly after the death of the testator, which occurred in the year 1810, but there had been an undue delay in realising and dividing the residue, and in the year 1832 an action was raised against Mrs Stewart in the Court of Session by two of the residuary legatees, concluding for implement of the trusts of the will. The pursuers averred their inability to bring Mrs Stewart to an accounting before the Court of Chancery because she lived beyond its jurisdiction, and had removed great part of the proceeds of the trust-estate to Scotland. The Lord Ordinary (Corehouse) sisted process for fourteen days in order that the defenders (Mrs Stewart and her husband) might have an opportunity of filing a bill or adopting other proceedings for making themselves accountable in the Court of Chancery. Availing themselves of the opportunity thus afforded them the defenders did file a bill in the Court of Chancery, but the pursuers still insisted on their right to proceed with the Scottish action, alleging that the defenders could at any time abandon the proceedings instituted by them in England, and so evade a complete accounting. The Lord Ordinary thereupon directed a case and queries to be laid before English counsel, and being satisfied by the answers of counsel that the defenders could not defeat the English proceedings by withdrawing or abandoning the bill which they filed, his Lordship "sisted further procedure *in hoc statu*." In a note to his interlocutor his Lordship said—"On the grounds, therefore, both of expediency and the will of the testator, formerly referred to, it seems imperative that this process should be sisted until the accounting in Chancery is brought to a close. It is possible that the aid of this Court may be afterwards required to enforce the execution of the decree." On a reclaiming-note to the First Division their Lordships adhered to the interlocutor of the Lord Ordinary. The Lord President (Hope) said—"If any improper delay is allowed by the defenders to occur in their accounting in England it is open to the pursuers to go to the Lord Ordinary, and crave his Lordship to proceed here." To the same effect Lord Mackenzie observed—"It may happen that circumstances occur before that period (*i.e.*, the close of the accounting in England) which will make it necessary to go on with the accounting here." These observations appear to me to refer to the possibility of the defender Mrs Stewart (who, to say the least, had been very remiss in the performance of her duties as a trustee, and had not displayed much anxiety to render an account of her intromissions) evading the jurisdiction or disobeying the orders of the High Court of Chancery. The purpose of the learned Judges in making these observations was to make it clear that in the event of any such circumstances occurring the pursuers were not to be precluded from moving the Scottish Court by the terms of the Lord Ordinary's note.

I think it is worthy of observation, that, as shown by the authorities to which I have already referred, the Courts of Scotland in declining jurisdiction over foreign trustees do not rely upon the circumstances of there being no pending litigation in the proper *forum*. Although there be no *lis alibi pendens*, it is sufficient to oust their jurisdiction on the plea of *forum non conveniens*, either that the pursuer can obtain his

remedy by a suit in the proper *forum*, or that the trustee, called as a defender, expresses his willingness to institute, and accordingly does institute, proceedings, proceeding in that *forum* by means of which the pursuer can have the redress which he claims. There were no proceedings depending in the foreign *forum* when action was raised before the Court of Session in *Campbell* v. *Rucker* (Hume Dec. 258), *Macmaster* v. *Macmaster* (11 Shaw, 685), or in *Macmaster* v. *Stewart* (12 Shaw, 731). In *Peters* v. *Martin* (4 Shaw, 138) it was alleged by the defender that an effective proceeding at his instance was depending before the Court of Chancery, but after an opportunity was allowed him of substantiating his allegation their Lordships of the Second Division were satisfied that the statement was untrue, and they permitted the action to proceed on the ground that the defender refused to submit himself to the jurisdiction of the English Court.

There are two decisions which have sometimes been cited as showing that the Scottish Courts have gone further in sustaining their jurisdiction over English executors than the principles which I have stated would justify. I refer to *Morrison* v. *Ker* (Morison's Dict. 4601) and *Scott* v. *Elliott* (Morison's Dict. 4845). It was explained, however, that in neither of these cases was it sought to call an administrator to account for his intromissions with the trust or executory estate, and that explanation is in my opinion correct.

In *Morrison* v. *Ker* (Morison's Dict. 4601) the deceased, Alexander Ker, who was resident in England, left a will by which he bequeathed the liferent of his estate, which consisted of personalty, to his sister Janet, and the fee on her death to "his next lawful heir or heiress of blood." The liferentrix, who was a domiciled Scotswoman, took out letters of administration in the Prerogative Court of Canterbury, in virtue of which she uplifted the estate and transferred it to Scotland. Before her death she delivered the whole estate to James Ker, a domiciled Scotsman, believing that on her death he was entitled to it as next lawful heir of blood of the deceased. After her death an action was brought against James Ker by several persons resident in Scotland, who claimed a share of the estate as being along with the defender the next-of-kin of the deceased. It was pleaded for the defender that as an English executor he was only liable to answer in the Courts of England, and that the action ought to be dismissed, but the Court repelled the plea. The defender was not in point of fact an executor, and the title by which he held the deceased's estate was not derived from any English Court. He was in reality defending his own right as sole beneficiary against pursuers who alleged that they were also beneficiaries and that payment had been made to him under error by the executor then deceased. Then in *Scott* v. *Elliott* (Morison's Dict. 4845) the defender Maria Elliott, who had always lived in Scotland, administered to the personal estate of her father in England, where he was resident at the time of his death, not under any settlement, but as the *hæres in mobilibus* of the deceased. The defender's mother had obtained a decree of the commissaries divorcing her from the deceased and decerning him to pay to her an annual sum for the aliment of the defender, and the action was brought against the defender as her father's representative for payment of arrears due under that decree. The defender did not allege that the succession which she took from her father was insufficient for payment of his debts, but she contended that "from his long residence in England every claim against him, and consequently against his representatives, ought to be decided by its laws." That contention was plainly untenable as a plea ousting the jurisdiction of the Court. The claim made was for a debt due under a Scottish decree, and it involved no question either as to the due administration of the executory estate of the deceased, or as to the rights of parties having beneficial interests.

If I have rightly stated the principles upon which the Courts of Scotland exercise or decline jurisdiction over foreign trustees, it appears to me to be a necessary consequence that the Courts below have erred in giving decree in terms of the declaratory conclusions of the summons, because these conclusions affirm the absolute incompetency of the High Court of Chancery to entertain the suit which was brought before it. There is to my mind a broad distinction between a radical defect of jurisdiction, and jurisdiction to entertain, stay, or dismiss a suit according to the discretion of the Court. The latter is the kind of jurisdiction exercised by the Scottish Courts in the case of foreign trustees, and they are, in my opinion, bound *ex comitate* to allow a similar jurisdiction to foreign courts in the case of Scottish trustees. How far the Courts of Scotland are entitled or bound to criticise and control the discretion of a foreign court in sustaining its own jurisdiction when that discretion has been honestly exercised it is not necessary for the purposes of this appeal to consider, and it is not in my opinion expedient to determine such nice questions until they actually arise for decision. With reference to the English administration suit at the instance of the parties who are now prosecuting this appeal, I desire to make these observations. It is true that in the law of Scotland there is no form of process which is known by the name of an administration suit, and also that the Scottish Courts do not undertake to superintend generally the administration of trusts, and do not interfere with the management of the trustees appointed by a testator unless a relevant case is stated which calls for their interference. But the Courts are at all times ready to entertain a complaint at the instance of a beneficiary, if made in proper form, to the effect that the trustees are mismanaging or dilapidating the trust-estate, or that they have failed or unduly delayed to pay or to set aside and secure the provisions made in his favour by the settlement of the truster, and to give him such remedy as may seem just. And I entertain no doubt that the allegations made by the compearing appellants in their Chancery proceedings would have been relevant to sustain an action of count and reckoning in the Court of Session at their instance against the nominal appellants with appropriate conclusions for having their share of the late Mr Orr Ewing's estate either paid to them or set apart and secured for future payment. And it does not appear to me to admit of any doubt that if the circumstances of this case had been reversed, if the trust of the late Mr Orr Ewing had been English in the same sense in which I have described it as Scottish, the

Court of Session would have been bound by its own decisions at once to dismiss any such action brought before them by a beneficiary, whether in minority or of full age, and to leave the pursuer to seek his remedy in the Courts of England as the proper *forum* of the trust administration. It may be said that the determination of what shall constitute a *forum conveniens* or *non conveniens* is more or less a matter of discretion, but the principles upon which it has hitherto been held in cases of this kind that the Court of Session was *forum inconveniens* are in my opinion as binding upon its Judges as any rules of positive law.

I further desire to say that in the English appeal of *Ewing* v. *Orr Ewing* in this House (9 Appeal Cases 34) I did not think I was at liberty to consider the question arising for decision as an open question. It appeared to me that to disregard to any extent the long and consistent series of authorities by which the order appealed from was supported, would in effect have been to trench upon the functions of the Legislature. I participate very strongly in the doubt expressed by my noble and learned friend Lord Blackburn —"whether it is always for the benefit of all concerned to make such an order"—but at the same time I agree with his Lordship that it had "been too long the course of Chancery to treat this as a right which the plaintiff has *ex debito justitiæ*." In my opinion the true principle upon which jurisdiction in such cases should depend is, that every person beneficially interested ought to seek his remedy in that Court in which it is most for the benefit of the trust and of all concerned that the litigation should be carried on, and it does appear to me that our decision in *Ewing* v. *Orr Ewing* (9 Appeal Cases 34) may occasionally lead to a violation of that principle.

As I have already indicated, I do not think the declaratory conclusions of the summons in this case can be sustained—on the other hand, I am of opinion that the jurisdiction of the Court of Session to sequestrate the trust and appoint a judical factor cannot be held to have been ousted by the proceedings in Chancery, and although I did at one time entertain doubts upon the subject, I am of opinion that the appointment ought to be sustained. I am also of opinion that the First Division had power to grant, and rightly granted, the limited interdict contained in their interlocutor of 29th February 1884, with the exception of that part of it which relates to accounting, that interdict being in other respects in common form, and its sole object and effect being to enforce the sequestration and secure the immediate transfer of the whole trust estate then in Scotland to their own judicial officer.

Lord Fitzgerald—My Lords, the lucid and dispassionate judgment of the noble and learned Earl meets with my entire concurrence. That judgment and the judgments of the noble Lords who have preceded me have so exhausted the facts and the authorities that I can add but little, and will endeavour to avoid repetition of that which has been already said so well.

The Lord President in expressing his judicial opinion, which is the foundation of the interlocutor of the Inner House, says that "the action is brought under very exceptional circumstances, and the conclusions of the summons raise questions of great public interest." I agree in this, and will add for myself that the questions thus raised require the calmest judicial consideration, divested of even the least shade of bias or susceptibility. If my mind could possibly be affected by any inclination it would be in favour of the respondents.

The main question before your Lordships' House is, Whether so much of the interlocutor of the Inner House as "finds and declares and decrees in terms of the declaratory conclusions of the summons" is well founded in law? Those declaratory conclusions may be said to be the first three, which assert in substance and effect that by virtue of "the trust-disposition" and according to the law of Scotland the trustees are bound to carry out the purposes of the trust in Scotland, and under the authority and subject to the jurisdiction of the Scottish Courts alone, and are not bound to render any accounts of the estate to the High Court of Justice in England "or to any other foreign tribunal furth of Scotland." I interpret "foreign" and "furth" as meaning "outside the limits of Scotland," and not intended to convey that England is as to Scotland a foreign country just as China or Japan would be, or her tribunals alien tribunals.

My Lords, I am clearly of opinion that in decerning these declaratory conclusions the judgment of the Inner House was erroneous. No rule of Scottish law justifies the decerniture of those conclusions.

It seems to me that the interlocutor appealed from is so far in conflict with the decision of this House in the former appeal in the English action. Your Lordships were not then "administering a law different from or antagonistic to the principles of the law of Scotland," or giving effect merely to the rules and precedents of the English Court of Chancery. Your Lordships in that case determined a question then arising as to the jurisdiction of the latter Court in the sense of its inherent legal authority and the extent of its power.

If the question of the jurisdiction of the Court of Chancery in the English cause was now open to us on this appeal—if it could be called in question—I could have no hesitation in determining in favour of that jurisdiction to the full extent to which it had been exercised. The Court of Chancery was there acting *in personam* at suit of a competent plaintiff against trustees resident within the locality in which its authority was to be exercised, and their co-trustees, who on notice intervened and submitted to the jurisdiction.

My Lords, in coming to this conclusion I rest nothing on the circumstance of a portion of the personalty having been at the time of the testator's death locally situate in England, or of there being English administration to that part of the estate, or of the authority of the trustees to invest the trust funds, if they should think fit, in English securities, and, on the other hand, it seems to me that the nationality of the trustees does not affect the question. It is worthy of observation that the Scottish conveyancer who prepared the trust-disposition lays no stress on residence as a qualification of the trustees, save in one instance, where it is provided "that the major number of them accepting and surviving and resident in Great Britain from time to time being a quorum, as trustees and trustee for the ends, uses, and purposes after mentioned (the

said trustees and their foresaids and their quorum being hereafter referred to as my trustees)." The truster then, after a gift of his whole estate, heritable and moveable, to his trustees, appoints them also his executors, with a direction for the payment of his debts, sick-bed and funeral expenses, and thereafter through the numerous directions of the trust-disposition the appellation "executors" is dropped and each further provision commences thus—"I direct my trustees." The line of distinction between their acts as executors and their duties as trustees is thus sharply defined.

It is also observable, if it be a matter of importance, that the truster does not in the trust-disposition give any express direction that the trust should be carried out in Scotland, nor is such his express desire, although I think he may have so intended, for reasons which I will presently point out. The truster declares his intention of purchasing a landed estate, and that if he dies possessed of it his wife shall have certain rights in the mansion-house, gardens, &c.; but he does not indicate in any way that the estate is to be in Scotland, and it is obvious that, according to the express trusts of the deed, the whole or a large portion of the trust fund might have been and still may be invested in land or other securities in any part of the United Kingdom at the discretion of the trustees. But, my Lords, although the truster's express declaration (if there had been such declaration) that the trust-disposition should be carried out in Scotland, and under the supervision and direction of the Scottish Courts, could not affect the question of jurisdiction, yet it may form an important element to guide the exercise of judicial discretion.

My Lords, it seems to me that though the truster has not so expressed it, yet he did expect that the trusts of his disposition would be carried out in Scotland, and with the supervision and aid, if necessary, of the Scottish Courts acting in the administration of Scottish law and according to their well-known and established practices. The greater part, say five-sixths, of the trust-estate consisted of the truster's share and interest in the firm of John Orr Ewing & Co., in which he was a partner. The truster gives special directions as to how his share of the capital of that firm is to be withdrawn. The second codicil is applicable to a portion of the same capital to the extent of £100,000, and the assumption of two of his nephews, being also two of the residuary legatees, as partners of that firm, and it seems reasonable to assume that the truster had in view that the trusts of this portion of the trust fund should be carried into operation in Scotland by the trustees he had selected and according to Scottish practice *extra curiam*. The whole instrument too, it is obvious, is one couched all throughout in the language of Scottish conveyancing, and must be interpreted according to Scottish law. If difficult questions should arise as to the rights of the legatees (and it would be too sanguine to anticipate that such difficulties may not arise), such questions must be decided according to the law of Scotland.

There is a passage of the trust-disposition which somewhat illustrates the view I have expressed, and is as follows:—"And I do hereby nominate and appoint my trustees to be tutors and curators, or tutor and curator, to all persons taking benefit under these presents who may be in pupillarity or minority, and who may not have any tutors or curators *quoad* such benefit during their respective pupillarities and minorities, and without prejudice to the powers, privileges, and immunities conferred upon trustees by any Act of Parliament applicable to Scotland, or to which trustees may be entitled at common law, all of which, in so far as not inconsistent herewith, are hereby conferred upon the said trustees, executors, tutors, and curators, I hereby authorise my trustees, if they think fit, to wind up or carry on, or concur in winding up or carrying on, any business or adventure in which I may be engaged at my death, either by myself or in company with others, and to make such arrangements and settlements in connection therewith as they may think proper; to allow any share or interest which I may have in any business in which I may be concerned along with others, to remain in the hands of my surviving partners or partner for such period and on such terms, with or without security, as they may in their discretion deem advisable, and that notwithstanding the terms of any contract of a copartnership which may then be existing."

It will be observed that the truster here avails himself of the practice under the law of Scotland which enables the donor to appoint tutors and curators of his gift during the pupillarity and minority of the beneficiary, at the same time preserving for them or conferring on them the protection of "any Act of Parliament applicable to Scotland," and he also authorises his trustees to carry on any business or adventure in which he may be engaged. He does not appear to have been engaged in any business save in Scotland.

My Lords, I cannot help regretting that the certificate of the Chief-Clerk in the English action was disturbed. He certified on the 18th February 1881—"This action has not been properly instituted, and it is not fit and proper or for the benefit of the infant plaintiff that the same should be further prosecuted." That certificate was discharged by the Master of the Rolls on the ground that he considered that the action was for the benefit of the infant, but if it had been open to him as a matter of judicial discretion, it would seem to me to have been more expedient to have let that action stand dismissed, although it would still have been open to the father of the infant, if he thought fit, or to the mother acting through a next friend, to have instituted another and properly constituted suit for the protection of the interests of the infant, but subject to the consideration of *forum non conveniens*.

My Lords, it seems to me to be undesirable to canvass the merits or defects of the diverging lines of procedure in the respective Courts of the two countries, or to consider whether either is "fortunate," the one in the possession of the privilege of an "administration suit," or the other in the absence of that blessing, or whether the statement of the Lord President has not disclosed an infirmity in Scottish practice in not providing any adequate means for the protection of beneficiaries such as the residuary legatees in the present case. An action of multiple or double poinding would not seem to me to be sufficient

or applicable. On the question of comparative expense I can form no opinion. It may be that "the Chancery Division," viewed from a distance, and through an exaggerated medium, carries with it no small degree of apprehension both as to the duration and the costs of its procedure; but, on the other hand, we have no information as to the fees or commission or percentage of the judicial factor, or whether payable on the whole fund or on its income only, or on both, or of the probable expenses or costs of the several actions or proceedings which may from time to time be necessary in carrying into effect trusts which must extend over a long period of time before the day of final exoneration shall have been reached.

My Lords, I concur in the opinions expressed that the Courts of Scotland are as entirely independent of the High Court of Justice in England as the latter Court is independent of the Courts in Scotland. The judicatories of the two countries are as independent of each other as they were before the Act of Union, and there is nothing in that Act, or in the Imperial statutes since, to militate against that independence, although there has been some wholesome legislation which tends to make each to be ancillary to the other in the due administration of justice in cases coming within their proper jurisdictions. I do not find it necessary to go further, or to adopt the opinion of Lord Campbell that the two countries are for the purposes of judicial jurisdiction "to be considered as independent foreign countries unconnected with each other," or "as if they were the judicatories of two foreign states."

That proposition seems to me unnecessary for the decision of the present case, and was not necessary for the decision in the *Marquis of Bute's* case, and is so extensive as probably to involve consequences not now quite foreseen.

Thus, for instance, the Lord Ordinary in his very learned judgment, proceeding very much on this basis, says—"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." And again in commenting on the 19th article of the Treaty of Union he is represented to have added —"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 determines the rights of natives of foreign states which may be made the subject of action in her Courts." And again—"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."

My Lords, I think it to be necessary to follow in these particulars or to criticise the opinion of the Lord Ordinary, and I may pass from this part of the case by observing that in my opinion no question of international law arises. There is no real conflict of jurisdiction between the two judicatories. It presents a case of concurrent jurisdiction and no more. Though there is no conflict of jurisdiction there may arise what would more properly be called a collision between the practice of the Courts of separate divisions of the same United Kingdom, which would properly be settled by the judicatories of two countries acting in ancillary courtesy to each other, or by this House as the supreme and final Court of Appeal, or if it cannot be effected otherwise, by legislation of the Imperial Parliament.

My Lords, there remains only for me to consider whether the interlocutor of the Inner House can be maintained so far as it sequestrates the estate and pronounces an interdict against the trustees. There is no question as to the jurisdiction of the Court to decree a sequestration, but as to whether the authority to do so ought to have been exercised. On this question I entertain serious doubt. When a sequestration is decreed, it at least implies that the fund is in danger. No danger existed, and the interdicted trustees had committed no default, and, on the contrary, have been active and straightforward in the performance of their duties.

I understood, however, in the course of the argument that the appellant's counsel did not question the authority of the Court of Session to decree a sequestration in the due exercise of its judicial discretion, and on that it seemed to me that it only remained to settle the terms of capitulation.

As to the appointment of a judicial factor, which seems to be a necessary sequence of the sequestration, I shall only say that I doubt whether his appointment, liable as it may be to abuse, is an equivalent in protection to the fund being brought into Court and paid out to the legatees on the orders of the Court.

My Lords, on the whole I concur in the order proposed for your adoption by the noble and learned Earl.

Mr Lemon—May I be allowed to ask whether your Lordships give to the respondents their costs out of the estate, or whether you only give to the appellants the "costs of the appeal." I understood your Lordships to say "the costs of the appeal."

Earl of Selborne—My Lords, I think that it would be proper, if your Lordships think the same, that the costs of all parties should come out of the estate.

Mr Fellows—Will your Lordships direct the judicial factor to pay those costs as he has the assets in hand?

Earl of Selborne—Yes. Our order should be that the judicial factor be directed to pay those costs out of the estate.

So much of the interlocutor of the Inner House, bearing date the 29th of February 1884, as finds, declares, and decerns in terms of the declaratory conclusions of the summons, and also so much thereof as interdicts, prohibits, and discharges the appellants from accounting for the trust-estate, or any part thereof, to any per-

son or persons other than the judicial factor, reversed.

Declaration (the respondents by their counsel consenting thereto)—That Malcolm Hart Orr Ewing, the infant plaintiff in the English suit by George Wellesley Hope, his present next friend in that suit, or by such other person as may from time to time be admitted by the High Court of Justice in England as the next friend of the said infant plaintiff, is to have notice of and to be at liberty to attend the taking of all accounts of the judicial factor from time to time in this action, and all proceedings thereon, and to make all such applications to the Court of Session on all matters relative to the sequestrated trust-estate, or the trust-funds arising therefrom, for any purpose, including claims for expenses, as might be competent to the said infant plaintiff, or anyone on his behalf, if he were a party on the record.

In other respects, subject to the aforesaid declaration, interlocutors of the Inner House under appeal, affirmed: Cause remitted to the Court below: The costs of all parties to the appeal to be paid out of the testator's estate, and to be paid by the judicial factor.

Counsel for Pursuer (Respondent)—Sir F. Herschell, Q.C.—J. P. B. Robertson—Lemon. Agent—D. E. Chandler for F. J. Martin, W.S.

Counsel for Defenders (Appellants)—Rigby, Q.C.—Romer Q.C. —Fellowes— W. C. Smith. Agents — Lattey & Hart for J. A. Campbell & Lamond, C.S.

END OF VOLUME XXII.