THE HISTORY OF THE ORR EWING CASE: WITH VERBATIM REPORT OF THE OPINIONS OF THE FIRST DIVISION JUDGES

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WALTER COOK SPENS

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Trieste

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ORR EWING CASE;

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VERBATIM REPORT OF THE OPINIONS OF
THE FIRST DIVISION JUDGES,

NOTES

ON

THE CONFLICT BETWEEN ENGLISH AND
SCOTCH JURISDICTION,

AND

THE REMEDY.

BY

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PREFATORY NOTE.

THIS pamphlet professes to be little more than a compilation. The history of the Orr Ewing case is, of course, simply a report of the different stages of the English and Scotch cases, which I have endeavoured to make as concise as possible consistently with enabling the conflicting views of the Judges to be distinctly understood; with this exception, however, that although a considerable portion of the opinions of the Judges of the First Division of the Court of Session is concerned with facts previously detailed, I still thought it would add to the interest of these pages to print them *in extenso*. For the verbatim report I am indebted to Mr. Beith, W.S. The main object of the pamphlet is to present in a concise and portable form at the same time the Orr Ewing case, in connection with the conflict of jurisdiction, and the position of Scotland with regard to the assumed jurisdiction of the English Courts in the issuing of writs against Scotchmen. It is in this view that I hope the pamphlet may be of use to Members of Parliament, the Legal Profession, and the General Public,—inclusive of, and more especially, the Mercantile Community. I am indebted to various memorials and memoranda prepared by legal bodies throughout the country, which are referred to in this Essay; and also, for information and assistance, to Sheriff Guthrie; Mr. David Lang, advocate; and Messrs. T. C. Young, jun., Borland, and Spens of the Glasgow Faculty of Procurators.

W. C. S.

5th March, 1884.

THE HISTORY

OF

THE ORR EWING CASE.

THE Orr Ewing case has succeeded in obtaining the dubious distinction to the parties interested of being a *cause célèbre* among *causes célèbres*. There is a direct conflict between English and Scotch jurisdiction with reference to the administration of an estate of which, at the date of the testator's death, admittedly only one-eighteenth was situated in England. Although there has been very general interest excited by the case, and the latest extra-Parliamentary utterances of Scotch Members of Parliament have all had reference to the subject, it is not, I think, perfectly understood how the question arose, and the details of the different aspects of this many-phased case are not familiar to the public. It will be of general interest to give a history of the case from the beginning, quoting the more interesting and pregnant passages in the opinions of the Judges who have had the case before them. It will be my object to present the case, so far as possible, in a purely narrative form, free of legal technicalities, and carefully to abstain from argument in the matter, the question being still one *sub judice*, because no doubt the trustees will be compelled under threat of imprisonment to appeal the case to the House of Lords.

John Orr Ewing died on the 15th day of April, 1878, leaving a trust-disposition and settlement dated 17th November, 1876, with codicils of date 16th November, 1877, and 15th January, 1878. In this deed the testator assigned and disposed his whole estate to and in favour of his brothers, William Ewing, merchant in London; Archibald Orr Ewing of Ballikinrain, merchant in Glasgow, and

Member of Parliament for the county of Dumbarton ; and James Ewing, merchant in London, and presently residing there ; and to William Ewing Gilmour, his nephew, and Henry Brock, partners of the firm of Messrs. John Orr Ewing & Co., turkey-red dyers and manufacturers, Glasgow ; and Alexander B. M'Grigor, writer in Glasgow, as trustees for the purpose of the trust-settlement. By this settlement he, *inter alia*, left to the children of his brother James (1) a special legacy of £60,000 ; (2) the whole residue of his estate equally among them.

An inventory was given up in the Commissariot of Dumbartonshire, and Sheriff Gloag, on the 18th of May, 1878, confirmed the nomination of executors contained in the said disposition and settlement. The whole estate in the United Kingdom, as given up in that inventory, amounted to £460,549, 10s. 4d., of which there was situated in England £24,830, and in Scotland some £435,000.

At the date of the death of the deceased, James Ewing, the testator's brother, one of the trustees, had six sons alive—namely, William Ewing, the younger ; Archibald Orr Ewing, the younger ; John Orr Ewing and Hugh Moody Robertson Ewing (who had all attained the age of twenty-one years on the 9th of April, 1881, when the statement of claim was presented to the Court of Chancery), James Robert Ewing, and Malcolm Hart Orr Ewing—the last named of whom, the youngest, is now seventeen or eighteen years of age. William Ewing, the younger, died in India on the 26th December, 1878. By the terms of the testator's will he had power to test on the share of the estate falling to him. He bequeathed the sum of £30,000 to his stepmother, Sarah Jane Ewing, to be paid out of his share under the will of the deceased John Orr Ewing ; the sum of £10,000 to his friend, Mr. George Wellesley Hope ; and the remainder of his share under the will to be divided among his brothers. He also appointed his uncles, Messrs. Archibald Orr Ewing and William Ewing, the executors of his will, they being two of the trustees also under John Orr Ewing's settlement.

The first step taken in the litigation was the issue of a summons on 25th February, 1880, by the Court of Chancery, nominally at the instance of Hugh Moody Robertson Ewing, James Robert Ewing, and Malcolm Hart Orr Ewing, infants, by George Wellesley Hope, their next friend, and the said George Wellesley Hope also for himself, craving to have "an account taken of the personal estate of the testator, *and to have the same administered.*" Appearance was entered by all the trustees, and the Master of the Rolls was moved on 11th June, 1880, on behalf of the trustee "to inquire whether this action has been properly instituted, and whether it will be fit and proper and for the benefit of the above-named infants that this action should be further prosecuted; and if this honourable Court should be of opinion that the action should be further prosecuted, then whether the said George Wellesley Hope is a proper person to be the next friend of the infant plaintiffs; and if he is not, that some proper person may be appointed as such next friend in his stead." Accordingly on that day the order to make such inquiry was made—I suppose as a matter of course—the remit being to the Chief Clerk. He reported on 20th January, 1881, that "this action has not been properly instituted, and it is not fit and proper and for the benefit of the infant plaintiffs that the same should be further prosecuted." This report of the Chief Clerk was brought before the Master of the Rolls, Sir George Jessel, who gave judgment on 21st March, 1881. He thought the action was one for the benefit of the last-named infant, Malcolm Hart Orr Ewing. As regarded Mr. Hope's personal claim, and all the other plaintiffs', who had themselves appeared and objected to the suit, he said:—

"In the first place I think the suit is badly framed. I think Mr. Hope ought not to have been made a plaintiff at all. He has no direct interest in the estate which is sought to be administered. He is, in fact, a legatee under a residuary legatee's will, and of course should not have been a co-plaintiff, and therefore must be struck out. Why it was not done before I do not know. He could not maintain the suit. There is another reason why he