The defenders reclaimed, and argued—The plea of *forum non conveniens* ought to be sustained. By the proceedings in England the estate had been put in Chancery. The executors had no power to pay away one penny of the estate without its authority—*Stirling Maxwell* v. *Cartwright*, April 7, 1879, L.R., 11 Ch. Div. 522; *Preston* v. *Viscount Melville*, March 29, 1841, 8 Clark & Findlay, 1; *Martin* v. *Stopford Blair's Executors*, December 4, 1879, 7 R. 329; *Clements* v. *Macaulay*, March 16, 1860, 4 Macph. 583. The plea was always sustained where in an action against an executor he could show that he was going to administer the estate in another county or in another Court.—*M'Master* v. *Stewart*, June 17, 1838, 12 S. 731.

Lord Justice-Clerk—In this case I do not think it necessary to call for a reply. The action is brought in this Court by a person alleging himself to be a legatee under the will of Sir Wm. Stirling Maxwell, and the defenders are the executors under that will. It is a Scotch will—the will of a domiciled Scotsman—and as far as I can see the trustees are resident in Scotland.

It is objected by the executors, apparently somewhat reluctantly, that this is not the proper Court to determine questions as to the administration of a Scotch estate administered by Scotch executors, and they say the will ought to be administered and these questions determined by the Court of Chancery because an administration suit had been raised, not by the executor of the will but under the application of Mr Stirling Crawford, to the Court of Chancery. It does appear that the Court of Chancery acted upon that application and sustained the administration suit. What the effect of this may be it is not in my opinion necessary to inquire. The Court of Chancery will explicate its own jurisdiction in its own way, but in the meantime I am satisfied as to the jurisdiction of this Court. Beyond all question I think this Court is the competent *forum* to decide these questions.

There are other matters into which we might enter, but I think that it is undesirable that we should do so, for I am satisfied that there is nothing here to justify us in stopping these proceedings. I am for adhering to the Lord Ordinary's interlocutor.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court adhered.

Counsel for Reclaimers—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—Campbell Smith—Rhind. Agents—M'Caskie & Hutton, S.S.C.

Tuesday, July 17.

SECOND DIVISION.

[Magistrates of Burgh of Hillhead.

MURISON *v.* WHARRIE AND OTHERS.

Property—Feu-Contract—Building Restriction—Billiard-Room—Offices.

The titles of houses in a street within burgh contained a stipulation (which duly entered the record) that the houses should in all time coming be used solely as dwelling-houses, and that the proprietors of each should be entitled to erect upon the ground at the back of his house "such offices" (not exceeding a specified height) "as may be necessary for additional convenience," and that such offices should not be occupied as dwelling-houses, but be used "allenarly as a stable, washing-houses, or other offices." One of the proprietors proposed to erect upon the back ground, for the greater comfort of his dwelling-house, a billiard room, lavatory, sitting-room, and store rooms. *Held* that the erection of this proposed addition was not in contravention of the title.

The houses forming Buckingham Terrace, Hillhead, Glasgow, were built in 1852, and the proprietor of the ground, Andrew Gibson Corbett, disponed the several steadings on which the houses were built to the various purchasers by contracts of ground-annual, imposing on them all a similar set of restrictions. The conditions as to maintaining the front tenements and as to occupying the back-ground behind each of the steadings in the terrace were thus set forth in one of the contracts of ground annual by which three of the steadings were conveyed—"That the said tenements shall in all time coming be used and occupied solely as self-contained dwelling-houses, and for no other use or purpose whatever, and if at any time any of the said houses shall require to be rebuilt, it shall be so rebuilt of the same plan and elevation, external materials, and style of workmanship, and upon the same foundation as at present, as a component part of the said terrace, that the walls enclosing the back-ground of each of the said several steadings shall not exceed 10 feet; but it shall be competent to the said second party [disponee] and his foresaids to erect on said back-ground such offices as may be necessary for additional convenience, but such offices shall not on any account be more than 16 feet in height over the side walls, and shall not be occupied as dwelling-houses, but be used allenarly as a stable, washing-house, or other offices, by the proprietors or tenants for the time being of said respective tenements." These conditions and restrictions were declared to be real liens and burdens on the several steadings respectively in favour of the disponer and his successors as proprietors of the remaining steadings in the said terrace, and the said remaining steadings themselves; and further, the disponer undertook that when he should come to sell or dispose of the remaining lots or steadings in the terrace he should convey each of them subject to the same conditions, and the conditions were further created real burdens on

the remaining steadings in favour of the steadings disponed by said contract of ground-annual.

This was a petition for lining presented to the Magistrates of the burgh of Hillhead. The petitioner Mrs Murison, who was proprietor of one of the three steadings just mentioned, craved leave to erect on the ground behind her house a building consisting of a billiard-room, a lavatory, a room communicating with the billiard-room, designated in the plan by the name of a "snuggery," and three other rooms, two of which were described as stores.

The petition was opposed by the proprietors of the other two steadings, and by other proprietors in Buckingham Terrace. They averred—"The petitioner proposes to cover over almost the entire area of the back area or vacant ground forming a washing-green behind her house. The proposed buildings are shown on the plans to be 22 feet in height, measuring from the level of the lane, which is some 5 or 6 feet higher in level than the natural level of the ground at the back walls of the tenement. The proposed buildings on the back area are not of the class contemplated in the title, and any others are prohibited which are not included in the terms 'such offices as may be necessary for additional convenience,' or the terms, 'a stable, washing-house, or other offices.' The conditions as to buildings and the use of the back-ground are declared real liens and burdens on the ground in favour of the original proprietor and his successors, as proprietors of the respective steadings. If the petitioner erected the proposed billiard-room, and what she is pleased to call a 'snuggery,' the light and ventilation of the properties immediately adjacent would be affected, and a violation of the conditions of the title on the part of one would entitle all the proprietors to cover over their back areas with buildings, which would be injurious to the amenity and health of the houses and their inmates."

They pleaded that the proposed buildings not being of the nature of offices such as were allowed by the conditions of the title, decree ought to be refused.

The Magistrates pronounced this interlocutor—"(*First*) That the respondents have a sufficient title to enforce the restrictions regarding the height and character of the buildings to be erected on the petitioner's property contained in the title-deeds to the same; and (*second*) That the said restrictions forbid the erection of buildings of the description shown in the petition and relative plans—Therefore refuse the prayer of the petition.

"*Note.*—[*After stating the facts*]—As regards the title of the respondents to oppose, it appears to the Magistrates that the terms of the contract of ground-annual above quoted are sufficient to confer such a title on them. Besides the obvious interest which the proprietors of neighbouring houses have in the preservation of free spaces immediately adjoining their houses, the contracts of ground-annual expressly provide that the restrictions are imposed not merely in favour of the proprietor of the whole ground, but of the remaining steadings and the successive proprietors thereof, thus meeting the requirements laid down by the House of Lords in the case of *Hislop* v. *Macritchie's Trustees*, 8 R. 95. The question of whether the restrictions in the title-deeds prevent the erection of the buildings for which authority is craved is one of greater difficulty, and it is not without some hesitation that the Magistrates have arrived at the result they have come to.

"The hesitation has not arisen from doubt as to the meaning of the framers of the contract of ground-annual, but from a doubt as to whether they have been sufficiently accurate in the language which they have used to express their meaning, so as to satisfy the conditions of the law which require that clauses imposing restrictions should be strictly construed. It may with some apparent force be urged that the clause above quoted simply grants permission to erect on the back-ground buildings of a certain limited description, and that though it may have been intended that these should be the only kind of buildings permitted, yet the disponer of the ground has not been sufficiently careful to express his meaning by a clear prohibition of buildings of other descriptions. While, however, fully considering this view of the matter, the Magistrates have come to the conclusion that reading the contracts of ground-annual as a whole, the restrictions intended have been validly imposed. There is in the first place an obligation to build according to a common plan; then an absolute prohibition against walls enclosing the back-ground of a greater height than ten feet. The original plans of the houses have not been put in process, but the description of the ground in the title-deeds sufficiently indicates the authorised depth of the houses and of the back-ground, as being on the west boundary of the petitioner's feu 124 feet, and 56 feet 6½ inches respectively, and the measurements of the back-ground thus given substantially agree with the plans produced by the petitioner. These restrictive clauses are followed by an exception in favour of offices which may be erected on the back-ground of a height of 16 feet to the top of the walls, and which are not to be used as dwelling-houses, but 'allenarly as a stable, washing-house, or other offices.' The building in question cannot be held to be included in any of the descriptions of buildings given in the words quoted, but is really an extension of the dwelling-house, so as to cover the whole area of the back-ground, and having the effect of making the enclosing walls of the back-ground more than ten feet high. The fact of the largest room in the addition being destined for a billiard-room does not appear to affect the case. Such a room is very commonly part of a dwelling-house of the size of the petitioner's, and were it permitted, there does not seem to be any principle on which apartments for sitting, dining, or sleeping might not equally be sanctioned. In the opinion of the Magistrates, the terms of the title-deeds tie the petitioner down to the usual outside offices, the character of which is indicated by the words above quoted."

The petitioner appealed, and argued that the proposed building was "an office" of the house, and not of such a nature as to constitute a violation of the feu-contract; the respondents had no interest to object. The petitioner did not propose to make the building of greater height than 16 feet over the side walls, and would come under any condition to that effect.

At advising—

Lord Justice-Clerk—I think in this case that assuming the prohibitions in the feu-rights are binding on the feuars, which is, indeed, not disputed, it does not appear that the complainers have suffered any injury, or has any interest, but more especially that there has been no violation whatever of the stipulations contained in the feu-right. What is provided is—"That the walls enclosing the back-ground of each of the said several steadings should not exceed 10 feet high, but it should be competent to the said second party and his foresaids to erect on said back-ground such offices as may be necessary for additional convenience, but such offices shall not on any account be more than 16 feet in height over the side walls." That gives right to the proprietors of the tenements to erect buildings over the back-ground on condition they shall not extend more than 16 feet over the side walls. That condition has been substantially complied with, and, so far as the petitioner is concerned, she is willing to come under any restriction which may appear reasonable. The feu-right then provides—"These buildings shall not be occupied as dwelling-houses, but be used allenarly as a stable, washing-house, or other offices by the proprietors or tenants for the time being of said respective tenements." That means, and the rest of the clause makes it quite clear, that the building shall not be occupied as a separate dwelling-house. Now, if the structure is in accordance with the conditions contained in that clause, it does not affect the use except that the building is not to be used except as offices by the proprietors of the tenements. But then it is said that the structure is going to be used as a billiard-room. I think that the out-building is only for the convenience of the house. It might be used as a clerk's room, or for a hundred other purposes accessory to the principal use falling within the meaning of the clause.

I am of opinion that the Magistrates have construed erroneously the nature of the restrictions imposed. Of course we proceed on the assumption that the condition as to height will be complied with.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Find that by the terms of the feu-right the petitioner is entitled to build on the back-ground such offices as may be necessary for additional convenience, but that such building may not exceed in height 16 feet over the side walls: Find that the building proposed to be erected is not in violation of the provisions of the feu-right in respect of the use to which it is intended to be applied: Therefore recal the judgment appealed against; remit the case to the Magistrates to see the said buildings completed in terms of these findings: Find the petitioner entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Petitioner—Mackintosh—Low. Agent—Donald Mackenzie, W.S.

Counsel for Respondents—J. P. B. Robertson—Wallace. Agents—Frasers, Stodart, & Ballingall, W.S.

HIGH COURT OF JUSTICIARY.

Monday, July 16.

(Before Lord Justice-Clerk.)

HER MAJESTY'S ADVOCATE *v.* SIMPSON.

Justiciary Cases — Fraudulent Bankruptcy — Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 13.

Held (1) that in order to there being a relevant charge of contravention of sub-section 1 of section 13 of the Debtors (Scotland) Act 1880, there must be set out (1) the true statement with regard to his affairs which it is to be proved the accused ought to have made; (2) that the accused knew that to be the truth as to his affairs; and (3) that he did not disclose it. *Held* (2) that it was irrelevant to charge a person under section 13 with having not delivered up to his trustee in bankruptcy the books and papers belonging to his estate without alleging that such books and papers existed.

Observations (*per* Lord Justice-Clerk) on the terms of an indictment charging the accused with a contravention of the thirteenth section of the statute.

The Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34), provides by section 13—"The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary, or before the Sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury for any time not exceeding sixty days, with or without hard labour, in each of the cases following, unless he proves to the satisfaction of the Court that he had no interest to defraud—that is to say (1) If he does not to the best of his knowledge and belief fully and truly disclose the state of his affairs in terms of the Bankruptcy (Scotland) Act 1856 or the Cessio Act, as the case may be; (2) if he does not deliver up to the trustee all his property, and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the directions of the trustee."

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79) enacts (sec. 81) that "the bankrupt shall make up and, at the meeting appointed for the election of a trustee, deliver to the clerk of such meeting a state of his affairs, specifying his whole property wherever situated, the property in expectancy, or to which he may have an eventual right, the names and designations of his creditors and debtors, and the debts due to and by him, and a rental of his heritable property, which state and rental shall be subscribed by the bankrupt, and shall then be delivered to the trustee, and the same shall be engrossed in a sederunt-book to be kept by the trustee, and the bankrupt shall at all times give every information and assistance necessary to enable the trustee to execute his duty." . . .

William Simpson, farmer at Carrington, was charged before the High Court of Justiciary with the crime and offence set forth in the first of the