LORD SANDS—I concur.

The LORD PRESIDENT did not hear the case.

The Court found in answer to the question of law that the Sheriff-Substitute as arbitrator was entitled to hold that the appellant was barred by the terms of the agreement referred to in the case from proceeding against the respondents by way of arbitration under the Workmen's Compensation Act 1906.

Counsel for the Appellant—Wark, K.C. —Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondents — Gentles, K.C.—W. A. Murray, Agents—Carmichael & Miller, W.S.

Friday, December 8.

SECOND DIVISION.

[Dean of Guild Court Glasgow.

PORTER *v.* CAMPBELL'S TRUSTEES AND OTHERS.

Property—Building Restriction—Superior and Vassal — Self-contained Lodging — Conversion into Four Separate Lodgings.

A feu-contract contained a clause binding the feuar to build, complete, and finish on the steading of ground feued "a self-contained lodging . . . and thereafter to maintain and uphold in good condition . . . and to rebuild . . . the same, if and when necessary, of the same height, elevation, and outward style of architecture . . . with the said lodging." These conditions and restrictions were declared to be real burdens upon the steading of ground.

The proprietor of a dwelling-house upon the steading, who derived his title from the feuar, obtained a lining from the Dean of Guild for alterations on the house, then in single occupation, which, while not in any way affecting its structure or elevation, would allow of its being occupied by four independent and separate occupiers but would not prevent it at at any time being again put into single occupation.

In an appeal at the instance of a co-feuar and also of the superior of the ground, both of whom objected to the proposed alterations, *held—aff.* the Dean of Guild, and following *Buchanan* v. *Marr*, (1883) 10 R. 936, 20 S.L.R. 635, and *Miller* v. *Carmichael*, (1888) 15 R. 991, 25 S.L.R. 712—that the proposed alterations did not involve a contravention of the restriction in the feu-contract.

Arthur Porter, 70 Cambridge Street, Glasgow, proprietor of the dwelling-house No. 11 Great Western Terrace, Kelvinside, Glasgow, presented a petition to the Dean of Guild Court of Glasgow for a warrant and decree of lining authorising him to make certain alterations in order to increase the occupancy of the house.

Robert V. D. Campbell and others, the marriage-contract trustees of Mr and Mrs Alexander Campbell, proprietors of the adjoining dwelling-house No. 10 Great Western Terrace, and James William Anderson and others, the testamentary trustees of James Whitelaw Anderson, the superiors of the subjects forming the said Great Western Terrace, lodged objections.

The *facts* as found by the Dean of Guild were as follows:—"(*First*) that the petitioner is proprietor of the subjects No. 11 Great Western Terrace, Kelvinside, Glasgow, which consists of a dwelling-house of four storeys and attics and basement hitherto occupied as a single house or establishment; (*Second*) that he proposes to make certain alterations thereon, all as shown on the plan, in order to increase the occupancy of these subjects; (*Third*) that the alterations proposed, and for which the petitioner now asks authority, are shown coloured red and blue on the said plan; (*Fourth*) that the alterations are entirely internal, and if carried out will not in any way alter or affect the structure or elevation of the existing building, and that the alterations proposed will allow of its being occupied by four independent and separate occupiers but will not prevent it at any time being again put into a single occupation; (*Fifth*) that the proposal of the petitioner is opposed by the superiors and the proprietor of No. 10 Great Western Terrace; (*Sixth*) that the objectors maintain that the proposed alterations are an infringement of the petitioner's title . . .; (*Eighth*) that the subjects belonging to the petitioner were feued under a feu-contract between James W. Anderson, manufacturer in Glasgow, on the one part, and Robert Young, merchant in Glasgow, on the other part, dated 1st and 5th August, and recorded G.R. (Barony and Regality of Glasgow) 16th December 1874 . . . (*Ninth*) that under the said feu-contract it is provided that the said Robert Young binds and obliges himself and his heirs and assignees 'to build, complete, and finish a self-contained lodging with a sunk area of 12 feet in breadth, with retaining walls of said sunk area and the carriageway and retaining walls thereof hereinafter referred to, all conform to the elevation and other plans showing the exterior workmanship prepared by Messrs Alexander and George Thomson, architects in Glasgow, and subscribed by the parties as relative hereto, and thereafter to maintain and uphold in good condition and repair in all time coming, and to rebuild and form the same upon the same foundation or site, if and when necessary, and of the same height, elevation, and outward style of architecture, and of the like class or quality of external material, and of the same style of workmanship with the said lodging: Declaring that in construing the preceding clause with reference to the erection or rebuilding of said lodging it shall be read so that the external architecture of said lodging shall correspond in all respects with the architecture of the rest of the terrace, and shall line with steading number one of said terrace, and shall be at

the west end of the terrace the counterpart in style, height, and frontage of the lodging at the east end of said terrace, and the buildings which may be erected between the said lodging and the meuse lane formed on the said boundary of said steading shall line with the said meuse lane and shall be used only for private stables or offices attached to the said houses, or for the residence of the coachman or other servants, and shall not exceed in height above the level of the said meuse lane 20 feet in the side walls nor 24 feet to the ridge of the roofs, and declaring that the houses, buildings, and walls to be erected on the said steading of ground shall be of stone, and the front wall and the west gable of the said lodging shall be of polished ashlar, except the sunk storey in the front wall which shall be dabbed ashlar, and the back wall shall be of coursed rubble or striped ashlar, or, in the option of the builder, of any superior style of workmanship; that the roofs of all buildings which may be erected on the said steading shall be covered with slates and shall not be covered with thatch or tiles; which conditions and restrictions before written as to the erection, maintenance, rebuilding, and occupancy of the buildings erected or to be erected on said steading shall operate as real liens, burdens, and servitudes upon the said steading of ground and the buildings to be erected thereon in favour not only of the first party and his successors in the superiority, but also of the other steadings of said Great Western Terrace, and each of them, and of the feuars and disponees therein;' (*Tenth*) that the said feu-contract contains further provisions as to building lines of the houses, iron railings, pavements, gas lamps, &c., and clauses prohibiting the carrying on of certain trades and from occupying any buildings erected on the ground as a shop, warehouse, or store, but does not contain any further clause expressly regulating or bearing upon the use or occupation of the lodging to be erected on the plot feued."

The objectors pleaded, *inter alia*—"2. The proposed alterations being an infringement of the petitioner's title the petition for lining should be dismissed. . . . 5. The alterations proposed by the petitioner being in contravention of the building restrictions in his own title and in the vassal-objector's title which were inserted in both as part of a common building scheme, and the vassal-objector having an interest to enforce the same as before narrated, the petition should be dismissed."

On 9th October 1922 the Dean of Guild found in fact *ut supra* and in law, *inter alia*, that on a sound construction of the petitioner's title the proposal of the petitioner would not be a contravention or infringement of, and was not prohibited by, the petitioner's title, and therefore repelled the objections and granted the lining craved.

The objectors appealed, and argued—The proposed alterations were a contravention of the obligation in the feu-contract to build and maintain a self-contained lodging—*Montgomerie-Fleming's Trustees* v. *Kennedy*, 1912 S.C. 1307, *per* Lord President (Dunedin) at p. 1314, 49 S.L.R. 925, at p. 929. The cases of *Buchanan* v. *Marr*, (1883) 10 R. 936, 20 S.L.R. 635, and *Miller* v. *Carmichael*, (1888) 15 R. 991, 25 S.L.R. 712, were distinguishable. Counsel also referred to *Colquhoun's Curator Bonis* v. *Glen's Trustee*, 1920 S.C. 737, 57 S.L.R. 623; *Mathieson* v. *Allan's Trustees*, 1914 S.C. 464, 51 S.L.R. 458; *Ewing* v. *Hastie*, (1878) 5 R. 439, 15 S.L.R. 263; *Ewing* v. *Campbells*, (1877) 5 R. 230, 15 S.L.R. 145; *Fraser* v. *Downie*, (1877) 4 R. 942.

Argued for the respondent—Restrictions on the right of property were not to be readily inferred—*Russell* v. *Cowpar*, (1882) 9 R. 660, 19 S.L.R. 443. The proposed alterations were not a contravention of the obligation in the feu-contract to build and maintain a self-contained lodging. The case was governed by *Buchanan* v. *Marr*; *Miller* v. *Carmichael*. Lord Dunedin's dictum in *Montgomerie-Fleming's Trustees* v. *Kennedy* had reference to occupation only. Counsel also referred to *Holroyd* v. *Edinburgh Magistrates*, 1921, 1 S.L.T. 259; *Anderson* v. *Dickie*, 1915 S.C. (H.L.) 79, 52 S.L.R. 563; *Walker's Trustees* v. *Haldane*, (1902) 4 F. 594, 39 S.L.R. 409; *Colville* v. *Carrick*, (1883) 10 R. 1241, 20 S.L.R. 839; *Banks & Company* v. *Walker*, (1874) 1 R. 981, 11 S.L.R. 566.

LORD JUSTICE-CLERK—This is a petition brought in the Dean of Guild Court for a lining by the proprietor of a house at No. 11 Great Western Terrace in Glasgow. Upon that house he desires to make certain alterations which are shown upon the plan which is produced before us. To these alterations objection is taken by a co-feuar and also by the superior of the ground. The objection which is taken by these persons is founded upon the title upon which the feuars of this property hold. The title contains an obligation upon the pursuers to build and maintain a self-contained lodging upon the ground, and it is maintained that the building shown on the plans is not of that character. The Dean of Guild has granted the lining sought, and the question which is put to us is whether he is right in arriving at this conclusion. That involves the question of whether the contract to which I have referred will be infringed if the work proposed is allowed to proceed. Now building restrictions in accordance with a long series of decisions must be strictly construed, and never more strictly, I think, than at the present time. But it is not really necessary to canvass many of the arguments which have been used on both sides of the bar, for the simple reason that a judgment in this case is in my opinion foreclosed by authority, and in particular by the cases of *Buchanan*, 10 R. 936, and *Miller*, 15 R. 991. The principle upon which these cases were decided applies in terms to the decision of this case, and indeed it was not seriously disputed by the objectors that that is so. Accordingly I think that the Dean of Guild was right in the conclusion at which he arrived, and I move your Lordships that the present appeal be dismissed.

LORD ORMIDALE—I think that there is disclosed in this case a delicate and difficult question. In a sense I regret that the matter is not still open for our decision. I would gladly myself have given more weight than I feel I am entitled to to the distinction which Mr Moncrieff sought to draw between this case and the case of *Buchanan*, 10 R. 936. But I cannot think that there is any such distinction, and I do not think we can regard the case of *Miller* (15 R. 991) as essentially different from the case of *Buchanan*. In the later case all the Judges, including Lord Rutherfurd Clark, who had dissented in the case of *Buchanan*, treated that case as an authority binding upon them. Accordingly I concur with your Lordship in holding that this matter is foreclosed by the decisions in the cases of *Buchanan* and of *Miller*, which are binding on us.

LORD HUNTER—I have come to be of the same view. Counsel for the appellants admitted that the restrictions in this case relate to structure and not to use. Even upon that assumption, had there been no previous decision, I should have felt that there was great force in the argument that what the respondent proposes to do, and what the Dean of Guild allows him to do, is to convert a single self-contained lodging into four separate lodgings, and that by so doing he is contravening the terms of the disposition in his favour. But I do not think it is open to us to take that view. It was the view which was taken by Lord Rutherfurd Clark in the case of *Buchanan* (10 R. 936), and a view which I think has very great force in it. But the majority of the Court took a different view and held that in very similar circumstances it could not be alleged that the restriction had been contravened by what was done. Lord Rutherfurd Clark, who had been in a minority in the case of *Buchanan*, accepted the decision in that case as binding in the subsequent case of *Miller* (15 R. 991), and precisely the same question there arose. Where there are two decisions one after the other pronounced in this Division of the Court, I do not think we can take a contrary view. I think that counsel for the respondents was able to distinguish the last case, the case in which Lord Dunedin's opinion occurs, viz., *Montgomerie-Fleming* (1912 S.C. 1307), for there the restriction was on use and not merely upon structure. In these circumstances I do not think that expression of opinion would be sufficient to justify us in taking the course suggested by the appellants, *i.e.*, sending the case to Seven Judges or the Whole Court.

LORD ANDERSON—I agree. I think that the point raised by the appellants in this appeal was decided more than forty years ago adversely to their contention in the case of *Buchanan* (10 R. 936) followed by that of *Miller* (15 R. 991). If I had thought either that these cases were of doubtful soundness or that anything decided subsequently to these cases—such as *Montgomerie-Fleming's* case (1912 S.C. 1307)—was inconsistent with these decisions or in conflict with them, I should have thought it my duty to consider whether a question of such great importance should not be sent to a full Bench. But I do not consider that they are wrongly decided, and I do not think that any decision subsequent to these cases is in conflict with them.

The Court pronounced this interlocutor—

"... Dismiss the appeal; affirm the interlocutor of the Dean of Guild appealed against dated 9th October 1922; and remit the cause back to him to proceed as accords. ..."

Counsel for Appellants (Objectors)—Moncrieff, K.C. — Dykes. Agents — Martin, Milligan, & Macdonald, W.S.

Counsel for Respondent (Petitioner) — Graham Robertson, K.C.—Burn Murdoch. Agents—Hagart & Burn Murdoch, W.S.

Saturday, December 9.

FIRST DIVISION.

[Lord Sands, Ordinary.

FOSTER *v.* FOSTER'S TRUSTEES.

Jurisdiction — Forum non conveniens — Trust Estate of Domiciled Englishman—Will Executed in England—Testamentary Writings Executed in Scotland Relating to Heritage in Scotland and Personal Estate in England—Proceedings Pending in Probate Division—Action in Scottish Court to Determine Validity of Writing Executed in Scotland.

While proceedings at the instance of the testamentary trustees and the executors of a domiciled Englishman, for the purpose of deciding as to the admission to probate of his will and certain holograph writings left by him, were pending in the Probate Division of the High Court in England, an action was commenced in the Scottish Courts to establish the validity as testamentary documents of certain of the holograph writings which related to heritage in Scotland and to part of his moveable estate in England. The trustees and executors having pleaded *forum non conveniens*, *held* (1) that as the Scottish Court alone could pronounce an effectual judgment upon a disputed right to Scottish heritage, the plea fell to be repelled so far as the heritage in Scotland was concerned, but (2) that *quoad* the moveable estate the action fell to be sisted.

Captain William Edward Foster of Stockeld, Yorkshire, *pursuer*, brought an action against Herbert Anderton Foster, Queensbury, Yorkshire, and Edward Hornby Foster, Shibden Head, near Halifax, Yorkshire, trustees and executors acting under the testamentary writings of his uncle the late Frederick Charles Foster of Faskally, and of Prospect House, Queensbury, Yorkshire, namely, his will dated 12th June 1914 and holograph testamentary writings made