which puts him out of the entail, and therefore out of the field. I entirely concur in the judgment of the Lord Ordinary and in it being affirmed as proposed by your Lordships.

The LORD JUSTICE-CLERK and LORD ORMIDALE were absent.

The Court adhered, and remitted the cause to the Lord Ordinary to proceed further therein.

Counsel for Reclaimers—Keir—Kirkpatrick. Agents—Dalgleish & Bell, W.S.

Counsel for Respondents—Mackintosh. Agents—T. & R. B. Ranken, W.S.

Wednesday, July 14.

FIRST DIVISION.

GUTHRIE AND OTHERS, PETITIONERS.

Process—Case Remitted by Court in England—Order of English Court—22 and 23 Vict. c. 63, sec. 1.

The Act 22 and 23 Vict. c. 63, sec. 1, enacted that "If in any action depending in any Court within Her Majesty's dominions, it shall be the opinion of such Court that it is necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law of such other part of Her Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts, . . . and upon such case being approved of by such Court or a Judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act." An order pronounced by Mr Justice Fry in a cause depending before him in the Chancery Division of the High Court of Justice in England was in these terms:—"And it is ordered that a case be settled before the Judge in Chambers for the opinion of the Court of Session in Scotland as to whether the heritable bond for £19,000, of which it is admitted that the testator was possessed at his death, was included in and passed by the deed-poll dated the 1st May 1872, in the bill referred to, or whether the said sum of £19,000 when paid off formed part of the testator's personal estate." The case as settled was authenticated by the chief-clerk of the English Court, but there was no order by Mr Justice Fry remitting the case to the Court of Session and desiring the opinion of that Court. *Held* that until such an order was pronounced the Court of Session could not consider the case.

Counsel for Petitioners—Jameson. Agents—Cowan & Dalmahoy, W.S.

Thursday, July 15.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

MOIR'S TRUSTEES *v.* M'EWAN.

Property—Feu-Contract—Alterations in Buildings—Use.

The superiors in a feu-contract took the vassal bound to erect on the ground feued out to him, and thereafter to maintain, two detached villas of a certain size and value, according to plans to be submitted for their approval. Soon after the defender removed the interior stair and built an outside stair at the back of the house to form a communication to the dwelling-house above, thus converting the structure into two flats for the accommodation of two separate families. In an action raised against him to have the house restored to its original condition—*held* (*rev.* Lord Ordinary) that under the feu-contract the structure was unobjectionable, and that the use proposed to be made of it was no violation of any restriction in the feu-contract.

The pursuers in this action were the accepting and acting trustees of the deceased John M'Arthur Moir, Esquire of Milton, Argyll, under a trust-disposition and deed of settlement executed by him dated the 31st January 1872. The defender was John M'Ewan, stevedore, Broomielaw, Glasgow.

By feu-charter dated 31st March 1877, and duly recorded in the General Register of Sasines, the pursuers feued to the defender a certain piece of ground on the Gallowhill, Dunoon, being part of the lands and estate of Milton belonging to the pursuers. The defender was taken bound to pay the superiors £13, 17s. 8d. of yearly feu-duty, and his entry was declared to be at the term of Whitsunday 1877. The defender held and possessed these subjects under the reservations, restrictions, conditions, provisions, and declarations of the feu-charter, and, *inter alia*, it was thereby provided—"First, that the said disponee and his foresaids shall be bound and obliged, within twelve months from the date of these presents, to erect, and thereafter uphold and maintain, upon the piece of ground hereby disponed, two detached dwelling-houses or villas, fronting Royal Crescent, with suitable offices, of stone and lime, and covered with blue slates, and which shall for the actual erection cost at least the sum of one thousand two hundred pounds sterling each, and forthwith to enclose the said ground with suitable and sufficient fences, and to uphold and maintain the said dwelling-houses and offices and fences in good and complete repair in all time coming; which dwelling-houses or villas shall be built at least sixty feet back from the line of Royal Crescent, and at least five feet

distant from each other, and shall be kept in a uniform line with the other houses in that crescent or street, and which dwelling-houses or villas, offices, and enclosing fences shall be erected according to plans which shall be previously submitted to and approved of in writing by the said trustees or by some one acting in their behalf."

It was further provided that it should not be lawful for the disponee to build on the said piece of ground any buildings such as a distillery, tanwork, &c., which might injure the amenity of the neighbourhood for private residences; and further, that the houses and offices to be erected on the said piece of ground should be only used as private dwelling-houses and offices, and should not be converted into or used as a hotel or shop.

Soon after obtaining possession of these subjects the defender caused plans of the buildings which he proposed to erect to be submitted to the pursuers for approval. This having been obtained, he erected two detached self-contained dwelling-houses in conformity with the plans which were approved of. These contained dining-room, drawing-room, and bedrooms, with modern conveniences suitable to the neighbourhood, and the only outside building to the back was a scullery with a bath-room over it.

In January 1880 the defender, without any communication with the pursuers, proceeded to make certain alterations and additions to the dwelling-house—(1) he removed the interior stair and closed the access from the lower to the upper floor of the house; (2) he built an outside stair at the back of the house, to form a communication to the dwelling-house above, through the staircase window. The staircase was enclosed by brick walls, but the defender offered to make it of stone if desired by the pursuers. In this way the dwelling-house was converted into two flats.

On hearing of this alteration the pursuers wrote to the defender complaining that the alteration was not in terms of the feu-charter, nor in conformity with the plans originally submitted for their approval. They further complained that the alterations would affect the value and amenity of the other houses and of the adjoining feuing-ground. As the defender refused to restore the house in question to the state in which it was originally built, they raised the present action against him, craving that he should be ordained to replace the communication between the ground and upper floor, to remove the outside stair, and restore the house to its previous condition, or, in the event of his failing to do this, that his right and interest under the feu-charter should be declared void.

The pursuers pleaded—"(2) The conversion of the detached dwelling-house into two flats or dwelling-houses, and the alterations and additions specified, being in violation of the terms of the feu-charter, the pursuers are entitled to have the dwelling-house restored to its original condition, as concluded for. (3) The defender having violated the conditions of the feu-charter under which he possesses the subjects in question, the pursuers are entitled to obtain decree against him in terms of the leading conclusions of the summons; and failing implement, to obtain decree in terms of the alternative conclusions of the summons."

The defender pleaded—"(3) The alterations complained of not being in any respect in violation of the defender's feu-charter, the defender is entitled to absolvitor."

The Lord Ordinary (Rutherfurd-Clark) decerned against the defender in terms of the declaratory conclusions of the summons, ordained the defender immediately to replace or open up the communication between the ground and upper floor of the eastmost detached dwelling-house or villa mentioned in the summons, and to remove the outside stair at the back of the said dwelling-house, and otherwise to restore the house to the same state and condition in which it was originally built, and in which it was prior to its being converted or altered by him.

The defender reclaimed, and argued—The restrictions in the feu-contract were to be construed in favour of the builder and vassal—*The Governors of Heriot's Hospital* v. *Ferguson*, March 2, 1774, 3 Paton's App. 674; *Fraser* v. *Downie*, June 22, 1877, 4 R. 942.

The pursuers quoted in support of their argument *Magistrates of Edinburgh* v. *Macfarlane*, Dec. 2, 1857, 20 D. 156.

At advising—

Lord Young—This is a question as to a restriction upon a right of property under a title on which the right of property is held. The defender became proprietor of a piece of building ground in the neighbourhood of Dunoon on a feu-charter whereby he was bound to erect, and thereafter to uphold and maintain, two detached dwelling-houses or villas, which were to be built of stone and lime, and to cost not less than £1200 sterling, and these dwelling-houses or villas were to be erected according to plans which had previously been submitted to and approved of by the superior. The plans were submitted to and approved of by a person authorised by the superior. Those plans did not show an outside stair, the only outside building to the back being a scullery with a bath-room over it. It is not contended that the plans submitted to and approved of by the superior were conclusive except to this extent and effect, that the building according to these would be certainly unobjectionable. If a plan was submitted, as I suggested in the course of the argument, without these outside buildings—the scullery and bath-room—it would have been altogether objectionable, but being approved of would certainly not have prejudiced the rights of the proprietor subsequently to erect the scullery as being a building quite according to his title. The plans, I have said, did not exhibit the stair beyond the outer back wall, but the plans were not conclusive against the right of the proprietor to erect a stair outside the outer back wall, any more than it would have been conclusive against his right to build the scullery and the bath-room if these had not been upon the plan. His right to make that outside stair would have depended upon his title, and upon the right of the superior to object to its erection. He now says he wishes to have such a stair. Now, I do not refer at this moment to the use to be made of it. Some proprietors desire such a stair for the service of the house—a second staircase for the use of servants or for the use of the family—and a staircase being simply a sloping passage, it is an additional passage for the accommodation of the house. And if the proprietor for the time being desire to make such

a stair or additional passage, it does not appear to me—the plans sanctioned not being conclusive against it merely because it was not exhibited there—that there is anything in the title itself to restrain the proprietor from so building, or that the superior, under the provision in the charter about the necessity of the plans being approved of by him, would be entitled to veto it. I therefore conclude—that is my opinion—that as a structure, the staircase here, enclosed by brick or stone—it does not signify which; it is brick in the meantime, but the party offers to make it stone if desired—is unobjectionable as a building; that there is nothing in the title making it objectionable as a building. The use to be made of it is another matter, for the use proposed may be objectionable though the structure itself is not so. It is said, and no doubt truly, that the kind of use contemplated is the service of the upper floor or flat of the dwelling-house to be used as a separate tenement,—that is, a dwelling-house for a separate family—and the case of the superior, the pursuer of the present action, is chiefly put upon what was represented to be the objectionable character of that use. It was said that the ground having been acquired for the erection thereon of two dwelling-houses, each of these dwelling-houses must be occupied by one householder or family, and could not be occupied by two without contravening the condition of the proprietory or feu-right, entitling the superior to complain. Now, I have not seen in any feu-charter an express restriction of the power of letting, confining it to one tenant—to one householder or head of a family—at a time. I have not seen any such restriction expressed in words. I put the question more than once, whether there was any such restriction expressed? and the answer I got was quite decided, that there was no such restriction here expressed. But it is said that it is implied in the language used, though not expressed. We have not to consider, therefore, whether such a restriction if expressed would be valid as at present advised. I greatly doubt it. I think that to insert in a proprietory title—a feu-charter conferring a right of property in fee-simple—a prohibition against letting altogether would be bad from repugnancy, just as a prohibition against selling would be bad from repugnancy. You cannot make a man proprietor and yet prohibit him from exercising the rights of proprietorship. There are certain restrictions which may be imposed. These are generally of a well-known character and illustrated by well-known decisions, but a restriction against alienation, or a restriction against letting—that is, alienating for a term—would, I think, as at present advised, be bad from repugnancy. I have the same impression, though it is not necessary to decide that matter, that a declaration in a proprietor's title that he should not be entitled to let the property to more than one tenant at a time would be bad. But there is no such restriction here expressed, and I do not think it is to be implied from the words, and I would be very slow to imply such a restriction, which is not only of an unfamiliar, but, so far as I know, of an unprecedented character. And joining those two things together—first, that the structure referred to is a structure unobjectionable under the feu-charter, and that the use proposed to be made of it, viz., to accommodate a tenant inhabiting the upper part of the house only, is not a violation of any restriction in the feu-charter—I am of opinion that this action is bad, and that the defender is entitled to be assoilzied and with expenses.

Lord Adam—The obligation of the vassal in this case is to erect, and thereafter to uphold and maintain, upon the piece of ground disponed, two detached villas or dwelling-houses of a certain size and value. It was maintained that the meaning of that was, that it was an obligation to erect, uphold, and maintain two detached villas or dwelling-houses in this sense, that there were to be two, and only two, dwelling-houses upon the property, meaning; as I understand it, two separate physical dwelling-houses, though the one might be superimposed upon the other. It was maintained to us that that was the meaning and the only meaning of this charter, and that plans were accordingly submitted and approved of showing that that was the meaning of the parties. Now, on the other hand, it is the fact, and I should think there is no doubt about it, that there is no prohibition here expressed or existing in law to prevent the proprietor from letting out the houses in flats or in rooms, or in any portions of the tenement as he pleases. There is not upon the face of this contract any limitation of the vassal's power in that respect. If the tenants enter in by the one front door, the house may be divided internally, so that one tenant may occupy the top flat, and another the lower flat, and so on. That, I think, is what was maintained to us. I think it is not immaterial to observe here that this feu-contract was not entered into with reference to any feuing plan already in existence. It was entered into with reference to an obligation to build houses of a certain size and value, and they were to be built according to plans submitted previous to their being built, but not previous to the entering into the feu-contract. Now, that puts us in the position that we are entitled to examine the plans and see what they are. The question would have been the same if the vassal had entered into this contract and had submitted plans showing an outside stair, and the superior had said, "I will prohibit you from putting up such an erection." If, on the other hand, the vassal could show to the satisfaction of the Court that that was an unreasonable complaint, and could have said—"That is not the meaning of the contract. All you are entitled to look at in the contract is that the houses shall be sufficient, according to the plan, to meet the conditions specified in the contract. Everything beyond that is immaterial, and it is unreasonable in you to object." Then if the Court take the view, which I am inclined to take, of the rights of the parties here, that there was no restriction whatever imposed upon the number of tenants there might be in the house, and if, as I think, upon looking at the plans, there is nothing structurally objectionable in the outside stair to which the superior had a right to object, I think the question is reduced to this, that the only objection on the part of the superior is, that he wants to enforce what he has no right to enforce, viz., that this house shall be occupied by one family, and one family only, for that is literally what he wants to do. I am disposed to say that this proposed erection is one which the vassal is entitled to build, and it cannot be

legitimately objected to by the superior. On these grounds I am disposed to think that the interlocutor should be recalled, and I concur in the opinion expressed by Lord Young.

Lord Gifford—I have come to the same conclusion. I think this case attempts to push the rights of a superior under a feu-contract further than has been done in any previous case. There are two elements which are embraced in these restrictions, and it is always important to keep them separately in view—the structure of the houses to be built upon the feu, and the use or occupation of these houses — I think it is very expedient always to keep these points distinct. Now, take first the structure apart from the occupation. Suppose the back-stair was designed as the only stair of the building, and no internal staircase shown at all, I do not think it would have been an objection, looking to the other feus and to the properties around and in the neighbourhood, to have projected buildings behind the villas which are put up; and accordingly on the question of structure, apart altogether from use, supposing this back erection which is occupied by a stair had been occupied by closets or a conservatory or anything else, I do not think the superior could have prohibited it. And that brings us to the other point—the use or occupation to which the vassal proposes to dedicate the house so altered. Now, I agree with Lord Young that a stipulation that a house built structurally according to the conditions of the contract shall only be occupied by one tenant would be a very extraordinary stipulation. But we have not that question to decide here. We have not that stipulation in the feu-contract, and we cannot spell out of the feu-contract, except in a very indirect way, that the superior intended to prevent the vassal from ever having more than one tenant or more than one householder in the villa when erected. I am therefore of opinion that neither structurally nor as matter of occupation or use has the vassal here contravened the provisions of the feu-contract. Suppose this question had arisen before the villas had been erected at all, and that the vassal had submitted a plan with an outside stair, but declined to say how he proposed to arrange the use of the house internally, I doubt extremely whether the superior could have interfered, for I think the only meaning of his stipulations was to secure external amenity in the character of the buildings, and that he did not stipulate, and did not intend to stipulate, anything with reference to occupation, except in the clause specifying that the property was not to be used for hotels or shops. The complaint therefore fails on both grounds. There is not a contravention of the feu-charter as to structure, and as to the fact that the vassal intends to put two families into the house, which is admitted, that is not a thing prohibited, or which could be very easily prohibited, to a vassal under a feu-contract. Having come to these conclusions, I think that the defender should be assoilzied, sustaining the third plea-in-law, that the alterations complained of not being in any respect a violation of the defender's feu-contract, the defender is entitled to absolvitor with expenses.

The Court recalled the interlocutor reclaimed against, sustained the defender's third plea-in-law, and assoilzied him from the conclusions of the summons.

The Lord Justice-Clerk and Lord Ormidale were absent.

Counsel for Defender (Reclaimer)—Mackintosh—Wallace. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Pursuers (Respondents)—Trayner—Pearson. Agent—Alexander Morison, S.S.C.

Friday, July 16.

FIRST DIVISION.

[Exchequer Cause.

INLAND REVENUE *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Revenue—Inhabited-House-Duty—Act (57 *Geo. III. cap.* 25), *sec.* 1—*Act* 5 *Geo. IV. cap.* 44, *sec.* 4.

Held that the above enactments did not exempt from inhabited-house-duty the lower floors of a tenement which were used solely as the general offices of a railway company, and were not inhabited at night, the upper floors being used as part of a station hotel belonging to and in the occupation of the company, and communicating internally with those below.

In this case the Glasgow and South-Western Railway Company appealed to the Commissioners for the City of Glasgow against an additional assessment for the year 1879-80 of £62, 1s. 3d. as inhabited-house-duty at the rate of 9d. per £ on £1655, the annual value of certain premises in St Enoch Station, Glasgow. From the case settled by the commissioners it appeared that "the premises in question are part of a tenement or building, consisting of six floors, situated at St Enoch Station aforesaid. The first four floors from the ground or street floor inclusive are solely and exclusively occupied by the appellants as general and other offices in connection with and for the purpose of carrying on the business of the railway company. The remaining two uppermost floors of said tenement or building are solely and exclusively occupied as a part of and in connection with St Enoch Station Hotel, also situated at St Enoch Station aforesaid. The said hotel comprises, in addition to the said two uppermost floors of the foresaid tenement or building, another tenement or building attached to the former, and forming the main body of the hotel, but the said two tenements or buildings are distinct and independent, being under distinct and separate roofs. The entire hotel, inclusive of the said two uppermost floors of the tenement or building of which the premises the subject of the assessment in question are part, is also in the occupation of the appellants, by whom the business of the hotel is carried on, and the appellants have been assessed and have paid the sum of £163, 15s. for inhabited-house-duty for the same year (1879-80) on the annual value of the said hotel, inclusive as aforesaid of the said two uppermost floors. There is internal communication between the first four floors of said tenement