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

by him on 11th August 1921, *defenders*, concluding, *inter alia*, for declarator that the holograph writings written in pencil on 11th August 1921 by the said deceased Frederick Charles Foster upon a typewritten epitome of his will dated 12th June 1914 constituted valid and effectual bequests to the pursuer of (first) one-fourth of the said deceased Frederick Charles Foster's holding in John Foster & Son, Limited; (second) the Faskally and Ballyoukan estates in the county of Perth owned by the deceased Frederick Charles Foster at the date of his death; and (third) the sum of One hundred thousand pounds sterling.

At the time of his death the deceased Frederick Charles Foster, who was a domiciled Englishman, was possessed of considerable estate in England, including the moveable estate to which the conclusions of the action related, the estate of Faskally and Ballyoukan being his only property in Scotland. The defenders, who were his brothers were domiciled in England. When the action was raised proceedings at their instance were already pending in the Probate Division of the English High Court for the purpose of deciding as to the admission to probate of the deceased's will and other writings of a testamentary nature left by him, including the pencilled writings in question. In these proceedings the pursuer had been cited as a defendant, as being interested in these pencilled writings.

The defenders pleaded, *inter alia*—"1. No jurisdiction. 2. *Forum non conveniens.* 3. *Lis alibi pendens.* 4. All parties not called."

On 31st May 1922 the Lord Ordinary (SANDS) repelled the first, second, and third *pleas-in-law* for the defenders,

Opinion.—"In this case there is a plea to the jurisdiction, but it was not insisted in.

"The plea of *forum non conveniens* was, however, keenly argued. The question is raised in the case as to whether the estate of Faskally in Perthshire is validly bequeathed by certain writings executed in Scotland. In my view that is a question appropriate to the Scottish Courts, and a question upon which the Scottish Courts alone can pronounce effective judgment.

"The question might have presented a different aspect if the disputed writings had dealt with personalty alone. As regards the alleged bequests of personalty there are three questions—(1) whether the writings are executed according to the requirements of Scottish law; (2) whether the writings are part of the testament of the deceased; and (3) what is the meaning of the writings. If the first had been the only question, the Scottish Courts, notwithstanding the statutory facilities for invoking their assistance indirectly, would probably have been the appropriate tribunal for the direct determination of the matter. But there is some force in the contention that as regards the other questions the appropriate tribunal is the Court of Probate of the testator's domicile. No suggestion was made that I should deal with this plea distributively as between heritage and moveables, and the directions are so entertwined that this would probably not be a convenient course.

"I shall accordingly repel the plea of *forum non conveniens.*

"The plea of *lis alibi pendens* is admittedly not maintainable as a substantive plea.

"The defenders also plead (4) 'All parties are not called.' As regards the pecuniary legatees, they are none of them, with one trifling exception, subject to the jurisdiction of the Scottish Courts. They have no interest which is not protected by the attitude which the defenders have adopted. The defenders have it in their power to certiorate them of the dependence of these proceedings if they deem it their duty to do so. The case of the relative to whom the properties are bequeathed under the original will is perhaps more doubtful. He is convened as a trustee, and counsel stated at the bar that they were watching the case on his behalf. The point is therefore a technical one. But though the difficulty may be technical it may be for consideration whether it should not be obviated. Meantime I do not dispose of this plea as it was not fully argued.

"I shall accordingly repel the first, second, and third of the defenders' pleas-in-law and continue the cause."

The defenders reclaimed, and argued—The plea of *forum non conveniens* should be sustained. All the factors of convenience were in favour of the English Courts. It was an English trust, the bulk of the estate was in England, all the beneficiaries except one were English, and the proceedings in the English Courts, which would deal with the questions raised here, were commenced prior to this action. The fact that part of the heritage was in Scotland was no ground for upholding exclusive jurisdiction of the Scottish Court. There was concurrent jurisdiction, and the English Courts could deal with the *universitas* of a trust estate and apply Scots law where that law was appropriate — M'Laren, Wills and Succession, vol. i, pp. 56 and 57: *Allan's Trustees*, 1896, 24 R. 238, 34 S.L.R. 166; *Orr Ewing's Trustees* v. *Orr Ewing*, 1885, 13 R. (H.L.), 1, *per* Lord Chancellor at p. 14, Lord Watson at pp. 23 and 24, 22 S.L.R. 911; *Ewing* v. *Orr Ewing*, 9 A.C. 34, *per* Lord Chancellor at p. 40; *Ferguson* v. *Buchanan's Trustees*, 1890, 18 R. 119, 28 S.L.R. 516; *Morley* v. *Jackson*, 1888, 16 R. 78, 26 S.L.R. 52. The Court was not bound to entertain the action when another Court had also jurisdiction, and if it did so here its decision might be contrary to the decision in the Probate Division. The action should therefore be dismissed or sisted until it appeared what the English Court was going to do. [Counsel also referred to the Wills Act 1861 (24 and 25 Vict., cap. 114).]

Argued for the respondents—The plea of *forum non conveniens* did not depend on the balance of consideration. If the Court had jurisdiction it was bound to entertain the action unless satisfied by the party objecting that to do so was against the interests of justice—*Clements* v. *Macaulay*, 1866, 4 Macph. 583, *per* the Lord Justice-Clerk at p. 593, 1 S.L.R. 90; *Longworth* v.

Hope, 1865, 3 Macph. 1049, *per* Lord Deas at p. 1058; *Sim* v. *Robinow*, 1892, 19 R. 665, *per* Lord Kinnear at p. 668, 29 S.L.R. 585. Priority of proceedings was not of importance. It might even be the duty of the Scotch Court to disregard what was done in the English Court—*Orr Ewing's Trustees* v. *Orr Ewing*, 1885, 13 R. (H L.), 1, *per* Lord Chancellor at p. 14 and Lord Watson at p. 25; *Huntly* v. *Brooks' Trustees*, 1901, 8 S.L.T. 399. The question here was purely one of Scots law and was therefore appropriate to the Scottish Courts. In any event there was not here a proper case of priority. The question was one which in England would fall to be dealt with in the Court of Chancery, and no proceedings had as yet been raised in that Court. On the other hand the question could be completely disposed of in the present action. Further, application of the plea of *forum non conveniens* was usually limited to cases of trust accounting or partnership, and was not extended to such cases as the present,

After the case had been argued, the pursuers, on the suggestion of the Court, moved for leave to amend the summons by calling Herbert Anderton Foster as an individual. The motion was granted and the summons was served upon Herbert Anderton Foster, who lodged defences. There was no further argument.

At advising—

LORD PRESIDENT—The late owner of Faskally died a domiciled Englishman. Besides Faskally he possessed real property in England and had a large moveable estate. He left a will executed in England, which appears from the printed documents to satisfy the formal requirements of the law of Scotland, and contains, *inter alia*, a gift of Faskally in favour of one of his brothers. There were also found in his repositories two other writings whose testamentary character and effect are in dispute, of which it is only necessary here to refer to one. It consists of a typewritten epitome of the English will, with certain pencilled markings and *notanda* upon it, together with a signature and a date (subsequent to the date of the will), said to have been written thereon by the testator during residence at Faskally. It is alleged by the pursuer (who is a nephew of the testator) to be a valid testamentary instrument according to the law of Scotland—that being the place of its execution—and to have the effect of revoking the will so far as to bequeath to him (1) one fourth of the deceased's holding in John Foster & Son, Ltd., (2) the estate of Faskally, and (3) the sum of £100,000. The pursuer raised the present action against the trustees and executors under the will; and they stated in defence pleas of "all parties not called" and "*forum non conveniens*." They also stated pleas of "no jurisdiction" and "*lis alibi pendens*," but these were departed from in the Outer House.

It will thus be seen that the pursuer and his uncle are direct competitors for the deceased's Scottish heritable estate. The will does not purport to convey Faskally to the trustees and executors, but to bequeath it immediately to the pursuer's uncle. He is one of the trustees and executors under the will, and was called as a defender to the action in that capacity. But as the case reached us on reclaiming note, he had not been made a defender personally as donee (under the will) of Faskally, or in respect of any individual interest. It is, no doubt, possible that the trustees and executors might have completed a title to Faskally under section 46 of the Conveyancing (Scotland) Act 1874, but whether they did so or not the defenders' plea of "all parties not called" had to be met by calling the uncle as a defender in respect of his individual interest in Faskally (under the will) before the rights of parties in that estate could be decided in this Court. This has now been done, and the pursuer's uncle has lodged defences to the action on its merits. It remains to dispose of the plea of *forum non conveniens*, stated on behalf of the trustees and executors.

The trustees and executors, who are both domiciled Englishmen, commenced proceedings in the Probate Division of the English High Court on 18th November 1921 for probate of the deceased's will, and the writ was issued against the pursuer in the present action, which was raised on 26th January 1922, as being interested under the pencilled writing referred to above. Their counsel maintained that all the questions submitted to the Court in this action would be more conveniently tried in the English Courts. The question raised by the plea of *forum non conveniens* is whether it is more proper for the ends of justice that the pursuer should seek his remedy in the *forum* of the English Courts —*Longworth* v. *Hope*, 3 Macph. 1049, *per* Lord President M'Neill at p. 1053, but the decision of this question in the present case is complicated by the circumstance that the conclusions of the summons, while restricted to the bequests alleged to be contained in the pencilled writing, are concerned partly with the moveable estate of a deceased Englishman committed to the administration of an English trust, and partly with heritable estate in Scotland directly bequeathed.

I agree with the Lord Ordinary in thinking that the Scottish Court alone can pronounce an effectual judgment upon a disputed question of right to Scottish heritage as between two direct claimants. Both the principle and the reasons which support it are stated in Erskine's Institutes, i, 2, 17 and 18. It is therefore vain to plead *forum non conveniens* so far as the Scottish heritage is concerned. The case of *Hewit's Trustees* v. *Lawson* (1891, 18 R. 793) is the converse of the present case. It is, I think, no more than *debitum justitiæ* to use our undoubted jurisdiction in determining the pursuer's claim to the estate of Faskally, and the action must proceed to that end. The validity and effect of the alleged codicil as a bequest of heritage will of course have to be considered in this Court independently of any decision in the English Probate Court.

But the matter is not so clear with regard to the conclusions of the summons which affect the deceased's moveable estate. The question whether the pencilled writing is or is not well executed as a testamentary instrument is of course one purely of Scots law. But section 2 of the Wills Act 1861 (24 and 25 Vict. cap. 114) makes it admissible to probate in England as regards personal estate if it be found to be executed according to the forms required by the law of Scotland. The Probate Court accordingly can, and no doubt will, ascertain and apply that law in granting or refusing probate of the pencilled writing. Counsel for the trustees and executors informed us that the trustees are willing and intend to account for the deceased's whole moveable estate in the proper *forum* in England, and to take whatever proceedings in the Chancery or other English Courts may be necessary for that purpose.

If I look in the first instance at the conclusions affecting the moveable estate by themselves, they appear to me to present a case which falls within the class defined by Lord Watson in *Orr Ewing's Trustees* v. *Orr Ewing* (1885, 13 R. (H.L.) 1, at pp. 27-29, 10 App. Cas. 453, at pp. 537-540), as that in which the Scottish Court holds the *forum* of the English Court to be more convenient for the ends of justice than its own, and either sists procedure in the action depending before it or dismisses such action according as it does or does not promise to be of possible service to the parties in facilitating a solution by the English Court of the controversy between them. There is, no doubt, a certain inconvenience in declining jurisdiction upon the validity and effect of the alleged codicil as a whole, while exercising jurisdiction in relation to the heritable estate affected by it, all the more because in considering the validity and effect of the codicil in relation to the heritable estate it will be impossible to exclude any considerations arising from the document regarded as a whole. But in view of the facilities provided to the English Court by section 2 of the Wills Act 1861, I am not inclined to regard this inconvenience as sufficient to justify an exception from the ordinary practice of the Scottish Court in administering the law of *forum conveniens* (as formulated by Lord Watson) so far as the conclusions affecting the moveable estate are concerned. It is common ground that the accountability of the trustees and executors for by far the greater part of the moveable estate should be determined in the *forum* in which the trust is domiciled, and the parties have already joined issue there.

It remains to determine whether the action should be dismissed as regards the moveable estate or sisted. As it is possible that the present action may yet afford the means of solving, or assisting in the solution of, the questions which are involved, it appears to be the better course not to sustain the plea of *forum non conveniens* and to dismiss the action *quoad* the moveable estate, but to sist it so far as concerns that estate.

LORD SKERRINGTON—I concur.

LORD CULLEN—The deceased Frederick Charles Foster was domiciled in England. His executors and trustees are domiciled and resident in England. So far as regards the moveable or personal succession of the deceased the *forum* of the executry and trust administration is in England. Proceedings before the Probate Court have been instituted for the purpose of determining what the will of the deceased consists of, and, in particular, whether the documents put in issue in the present action form part of that will. These proceedings we are informed have so far advanced that judgment has been given by the Judge of first instance.

In the above circumstances it appears to me to be not doubtful that the English Court is the convenient *forum* for the decision of the questions raised under the present action of declarator so far as these relate to the moveable or personal succession.

There remains the matter of the heritage in Scotland. The question raised in this connection is whether a certain holograph writing founded on by the pursuer is according to the law of Scotland the *lex loci rei sitæ* habile to bequeath the heritage to the pursuer and to displace and supersede the bequest of it under the principal will in favour of the defender Herbert Anderton Foster. It appears to me to be clear that the Scottish Courts are the proper *forum* for determining this question relating to the ownership of Scottish land, and involving consideration of the requisites of transfer of it *mortis causa* according to the law of Scotland.

I therefore concur in the judgment which your Lordship proposes.

The Court recalled the interlocutor of the Lord Ordinary, of new repelled the first and third pleas-in-law for the original defenders, and also repelled their fourth plea-in-law, and repelled the plea of *forum non conveniens* so far as applicable to the second head of the conclusion of the summons, and sisted process *hoc statu* as regards the first and third heads thereof, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer and Respondent —Robertson, K.C.—Cooper. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders and Reclaimers —Brown, K.C.—J. R. Dickson. Agents—Waddell, M'Intosh, & Peddie, W.S.

Counsel Watching for the Trustees as Individuals—Moncrieff, K.C.—Cullen. Agents —Waddell, M'Intosh, & Peddie, W.S.