I am clearly of opinion, having regard to these authorities, that the letter of the British Hispano Line Company dated the 2nd July already quoted at length cannot be regarded as such a positive and unequivocal expression of their election to treat the agreement of the 13th March 1920 as a valid, subsisting, and effective agreement as to disentitle them to repudiate it on the 3rd and 7th of July 1920 as in fact they did.

When the contract was rescinded and thus got out of the way I think there was nothing to prevent the respondents from enforcing their rights against the appellants. I am of opinion therefore that the appeal fails and should be dismissed with costs.

LORD SHAW—I have given much consideration to this appeal, but I cannot see any object to be served by my writing a separate opinion upon it. My reason is that in the most careful judgment of the learned Lord President I find every statement in fact and proposition in law set out in a manner which I would not wish to alter in any particular. I respectfully venture to adopt that opinion as expressive of my own views.

I agree to the motion proposed.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellants — Sir John Simon, K.C.—C. H. Brown, K.C.—A. H. D. Gillies. Agents — Smith & Watt, W.S., Edinburgh—Botterell & Roche, Solicitors, London.

Counsel for the Respondents—A. T. Miller, K.C.—W. G. Normand. Agents—Webster, Will, & Company, W.S., Edinburgh — William A. Crump & Son, Solicitors, London.

Monday, July 23.

(Before Viscount Haldane, Lord Atkinson, Lord Shaw, and Lord Parmoor.)

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

(In the Court of Session, December 8, 1922, 1923 S.C. 206, 60 S.L.R. 153.)

Building Restriction—Superior and Vassal —Obligation to Build a "Self-contained Lodging" and thereafter to Maintain the Same — Proposal to Convert into Four Self-contained Flats.

A feu-contract relating to a piece of ground upon which one of the houses in a terrace was built contained a clause binding the feuar to build 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: . . . 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 . . . shall correspond in all respects with the architecture of the rest of the terrace and shall line with steading number one of the said terrace. . . ." These conditions and restrictions were declared to be real burdens upon the ground in question. The proprietor of a house upon the steading having proposed to make certain alterations on the house, then in single occupation, which while not in any way affecting its external structure or elevation, would allow of its being occupied by four separate families, objection was taken by the proprietor of the adjoining house and also by the superior. *Held* (*aff.* the judgment of the Second Division) that the proposed alterations, which affected merely the internal structure of the house, did not involve a contravention of the restriction in the feu-contract, and appeal *dismissed.*

The case is reported *ante ut supra.*

The objectors appealed to the House of Lords.

At the conclusion of the argument for the appellants, counsel for the respondent being present but not being called upon, their Lordships delivered judgment as follows:—

VISCOUNT HALDANE—This is an appeal from an interlocutor of the Second Division which refused to recal a finding by the Dean of Guild in Glasgow about a house known as No. 11 Great Western Terrace. The appellants are the trustees of a Mr Anderson, now dead, who are the feudal superiors of all the house properties in Great Western Terrace. There are joined with them the trustee to the marriage contract of a Mr and Mrs Alexander Campbell, who are proprietors of the adjoining house, No. 10 Great Western Terrace. The controversy which has arisen is this—It is proposed by the respondent to take this house and use it or apportion it for flats, making certain internal structural arrangements as regards the doors opening upon the staircase, which, as the house stands now, goes inside from the front door up to the top. There is also a basement, to which I will refer later.

Before going into details I will turn to the words in the feu-disposition to the respondent, or rather to the respondent's author, which are sought to be enforced as entitling the appellants to a prohibition of the structure which I will presently describe. They are contained in the disposition of 1874, which was a feu-contract made between James Whitelaw Anderson and Robert Young. The words which we have to construe are these—"The second party and his foresaids"—that is, the respondent's author—"shall be bound and obliged, as by acceptance hereof he binds and obliges himself and his foresaids, to build, complete, and finish a self-contained lodging with a sunk area of twelve 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"; and then it goes on—"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 No. 1 of the 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 so on. Then there are certain restrictions upon user with which we are not concerned here, because it is not alleged that mere user is proposed to be contravened unless it be as regards the self-contained lodging being necessarily a single one, but it is said that these conditions, which your Lordships will observe relate especially to the external structure, are contravened. They are conditions the benefit of which is passed to the second of the sets of appellants to whom I have referred, and of course they are competent to the superior.

Now what is proposed to be done? This house is at the end of Great Western Terrace, and it has a front door and two storeys above and the basement below. The basement has a back door, as a basement usually has, or a door at anyrate by which you have access to it, and it is proposed somewhat to alter that door and make it at the back instead of where it is at the present time—or I so gather from the description that was given to us, but I do not think anything turns upon it. However that may be, what is proposed to be done is to take the basement, the ground floor, the first floor, and the second floor and to turn them into self-contained flats which will accommodate a family, and which are to have all the provisions that a family would require—kitchens, store-rooms, bath-rooms, conveniences, and so on with an adequate number of bedrooms. There is no doubt that if it had not been for the purpose of dividing the house into flats there would have been no violation at all of the structural restrictions had that been carried out, because the structural restrictions are exterior structural restrictions, and really the only question in this case turns not upon these restrictions but upon this—that the structure is alleged to be one which only a single family could occupy, and it is therefore described as a "self-contained lodging." It is said that "self-contained lodging" used in the singular is something that has to remain a lodging for one family, and is not to be divided into separate lodgings for separate families. In that sense it is said to be a restriction upon user to this extent.

In these days, with the change of customs, it is more difficult than it used to be to say at first sight whether a house is a single house in the sense of containing only one family, or whether it consists of several homes inside containing different families. Families may go upon the different floors and without any front doors occupy them by arrangement without interfering with one another, or there may be made such alterations as shut off the families from the stair going through and enabling them to have access to them, or you may do that more elaborately and the common stair may be a common stair of such a character as obviously from the outside to look structurally different in its opening from the front door of a private house. On the other hand, a private house, even when it contains lodgings for several families, may have a front door which is not different from an ordinary front door of a single occupied dwelling-house. Again, there is no prohibition here of setting up a club in one of these houses and using the house for a club. The door of a club would look rather different from the ordinary front door of a house, but that would probably not turn out to be a structural alteration contravening the provision in the feu-disposition. In that condition of things what is it that is sought to be done? Simply, as I take it, to modify the structure of the internal staircase. That you could have done for the purpose of a single family if you had wished without the superior or the neighbours being entitled to raise any objection. Then if you have adapted your staircase and arranged by partitions the rooms on each side of it in the various flats so as to suit the purposes for which you are going to use them, that is a thing again against which there is no prohibition. What is proposed to be done is to put on each flat a door where the staircase passes it, so that there may be access to the staircase, and on the other hand privacy against the entry of unauthorised persons. The question is whether that is prohibited by this clause? The clause in the feu-disposition is a clause which, according to the accepted usage of the Courts, is construed strictly—that is to say, you do not, by conjecture as to the general purpose of the instrument, introduce a purpose which would extend the words beyond their natural and strict meaning. Accordingly you take this as it stands as a restriction on the user of the property, as to which there is no presumption that it is to be extended to cover any particular case, nor is there any particular case for it to cover here. The purpose was to regulate the external structure. There was to be a "self-contained lodging." Now that is an expression of a type which has been construed by a series of decisions in the Court of Session. We had references to the cases of *Buchanan* and *Miller*, and these are cases in which the Court refused to hold that there was any other test than this: Were the alterations in the user of the building as a building in the character of a single lodging such that the lodging could not readily and without any external change be put back again into condition fit for

occupation by a single family? It is obvious that this building is not precluded from being occupied by a single family large enough. It all depends on what the disposition of the new family would be — whether they liked it in its somewhat secluded condition as regards parts or whether they did not. Therefore the mere fact that there are doors opening on to the staircase which enable groups of persons in each flat to seclude themselves from the entry of other persons unauthorised, and front doors of a subordinate kind, does not, within the meaning of what was laid down in the case of *Buchanan* and in the case of *Miller*, prevent the house from being restored so readily as in the views of the learned judges, the majority of whom decided these cases, makes the house still to continue to be in the nature of a single lodging within the interpretation they put upon the matter.

These are decisions of considerable authority. It is true that Lord Rutherfurd Clark, a distinguished judge and a great feudalist, dissented in the first of those cases—the case of *Buchanan*, but in that case there was a judgment of another great feudalist and equally distinguished judge, Lord Kinnear, and that judgment was affirmed by Lord Young, Lord Craighill, and the Lord Justice-Clerk himself, Lord Moncreiff, who was sitting. Subsequently the decision was followed by a case in which Lord Rutherfurd Clark, who had himself dissented in the case of *Buchanan*, concurred in the case of *Miller* on the ground that the thing had been decided. Now of course that may be interpreted as Lord Rutherfurd Clark maintaining his opinion and not thinking it necessary to dissent formally, but it was open to the learned judges in that case if they had had any doubt about the matter to say—"This is a serious question, and it ought to go before the entire Inner House or before a Court of Seven." They did not take that course, and those decisions have not been quarrelled with since, nor is there anything in the recent case of *Montgomerie Fleming's Trustees* v. *Kennedy* (1912 S.C. 1307), in which Lord Dunedin expressed an opinion, in which that opinion goes to the point which is before us. Therefore I come to the conclusion that there is a substantially uniform line of authority in the Court of Session in favour of the construction which the respondent invites us to put on the feu-disposition in this case. I do not say that if we thought the construction clearly a wrong one it would not be possible for us to overrule those authorities, but we should do so even in that case with reluctance; and here, for the reasons I have indicated to your Lordships, I do not think the construction was a wrong one at all, but that we are only giving effect to the natural meaning of the words used in the feu-disposition by accepting the construction which the Second Division has put upon them.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD ATKINSON—I concur with the judgment which has just been delivered by my noble friend upon the Woolsack. I think it is entirely in harmony with the current of Scotch authorities to which the House has been referred.

LORD SHAW—I felt inclined to address your Lordships at some length upon this case, but after the exposition of the law made from the Woolsack I find it quite unnecessary.

In looking at the feu-disposition, the construction of which has been so minutely analysed by the learned counsel for the appellants, your Lordships will broadly distinguish between the two points of restriction which are there set out. The one is manifestly and most clearly the point of external structure. The building is to be placed upon a certain site, it is to be of certain materials, it is to be in line with the adjacent buildings as set forth in the plans, and the external arrangement and the exterior structure — which I think are phrases culled from the disposition — are made the point of express bargain. Now it is an admission in this case that upon that part of the charter there is no question between the parties. The respondent in his operations has not violated by one iota those restrictive provisions. Accordingly one turns to the other part of the charter with reference to the use to be made of the plot of ground and buildings. There is the usual grotesque enumeration of noxious and offensive businesses and trades which one finds in these old Scotch charters. Again, it is a matter of admission that the respondent, with regard to the whole of those clauses applicable to the use of the ground and buildings, has not offended in one single particular which is expressed, but the learned counsel for the appellants says there is an implication of use from the employment of the term "self-contained lodging."

There is one part of the judgment of the Court below which I dissent from, and that is the judgment of Lord Ormidale, where he treats the case as a difficult and delicate question. I do not think it is anything of the sort, and I say so because of the broad sense and sound law contained in the judgment of that great lawyer Lord Kinnear in the case of *Buchanan* v. *Marr*, in which he gives this useful definition; he says—"If the defender's house is in its structure of such a character as to satisfy the conditions of the feu-contract, I think it is very doubtful whether the contract contains any effectual restriction against its being occupied by several families or otherwise than as self-contained houses. The feuars are prohibited from occupying any buildings otherwise than as 'dwelling-houses and relative offices.' But the condition that the houses shall be 'self-contained' occurs in a part of the clause of restriction dealing not with use or occupation but with the structural character of the houses to be erected," and he proceeds to say, that that being so, although internal alterations had been made, these could at the will of the owner be undone, and the building to all intents

and purposes would remain a self-contained dwelling-house not only in its nature but capable of again being occupied by a single tenant. In the present case the Dean of Guild expressly certifies that the building could again, the proposed internal alterations having served their turn, be abandoned and the dwelling be made fit for a single family. But whether a single family or several families live in it, that is a matter not of structure but of use and occupation —the one building remains in structure and design as contracted for all the time.

The result is this—First, no breach of the restrictions with regard to the exterior and the architecture; secondly, no breach with regard to use in the terms of occupying the premises for noxious or offensive trades; and thirdly, on this decision, no breach with regard to what is said to be implied, namely, the necessity of keeping this as a self-contained dwelling-house.

The case of *Buchanan* to which I have referred was decided forty years ago. Thirty-five years ago it was followed by the case of *Miller*, and Lord Rutherfurd Clark then agreed that the settlement of this question upon the principle involved had been determined—and determined as part of the law of Scotland—in the case five years before of *Buchanan*. Who are we that we should propose to interfere with that judgment. I most heartily agree with what has been said from the Woolsack, that if there was anything manifestly contrary to elementary legal principle in any of the doctrines laid down in the Court below, this House would consider itself free to take a strong line even in face of a long-standing decision, but it would not lightly do so, and I do not find that I am so constituted that I have the slightest fault to find with the law laid down forty years ago, and I should hesitate long before I should condemn that law which to my knowledge, I might assert, has been followed during that long period, amounting to the long prescription period, in towns and villages in Scotland from one end of it to the other. To say that all that was done in the face of sound law instead of according to law is not a proposition which commends itself to my mind.

I desire to say that I think this a most unfortunate appeal. I think the challenge of this decision should not have been made, and this superior and neighbour should have stood well content to accept the law which has so long prevailed.

LORD PARMOOR—I concur. The question raised in this appeal depends upon the legality of certain proposed alterations to the structure of a house or lodging in Glasgow. It does not refer in any way to the construction of restrictive covenants regulating the use or occupation of that house.

In my opinion, if a house or lodging is so constructed as to be reasonably capable of being occupied as a self-contained house or lodging, it is within the terms of the feu contract a self-contained house or lodging. Then the question of fact arises whether this house if altered as proposed will be reasonably capable of being occupied as a self-contained house or lodging. This question is answered in the affirmative by the Dean of Guild, and I cannot see that any other finding is possible. In my opinion it is not inconsistent with the contract that the proposed alteration will allow of the occupation of the house by four individual or separate occupiers. This objection might arise under a covenant restricting the use or occupation of a house or lodging. It is not an objection on a covenant relating only to structure.

I agree with the judgment which has been proposed.

Their Lordships ordered that the interlocutor be affirmed and the appeal dismissed with costs.

Counsel for Appellants—Moncrieff, K.C. — Dykes. Agents — Martin, Milligan, & Macdonald, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for Respondent—Graham Robertson, K.C. — Burn Murdoch. Agents — Hagart & Burn Murdoch, W.S., Edinburgh —Trinder, Capron, Kekewich, & Company, London.

Monday, July 23.

(Before Viscount Haldane, Lord Atkinson, Lord Shaw, and Lord Parmoor.)

BARKEY *v.* A. G. MOORE & COMPANY.

(In the Court of Session, October 31, 1922, 1923 S.C. 46, 60 S.L.R. 40.)

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—*Accident Arising out of and in the Course of the Employment —Contravention of Statutory Rule by One of Two Miners both of whom were Killed by Explosion — Absence of Evidence of Breach—Onus of Proof—Presumption.*

Two miners while engaged in clearing gas from a pit were killed by an explosion. In an arbitration at the instance of the representatives of one of the men the arbitrator found that the explosion was due to an attempt to re-light a Glennie lamp in breach of the Coal Mines Act 1911 and refused compensation. There was no evidence that the deceased opened the lamp, which as a matter of fact belonged to the other man, or that he attempted to re-light it, nor was it proved that he was in possession of matches. *Held* (*aff.* the judgment of the Second Division) that as the deceased was doing his work when the accident took place he was *prima facie* within the statute; that the onus of showing that he had contributed to the contravention, or had acted outside the scope of his employment, lay on his employers; that in the circumstances they had failed to discharge it, and that accordingly compensation fell to be awarded.

The case is reported *ante ut supra.*

A. G. Moore & Company appealed to the House of Lords.