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.

At the conclusion of the argument on behalf of 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 the Second Division of the Court of Session in which, differing from the Sheriff-Substitute who was arbitrator under the Workmen's Compensation Act, the Court held that compensation should be given. The circumstances of the accident out of which the claim to compensation arose were these—Barkey the deceased workman was an oncost worker in the appellants' employment and he went down the appellants' pit with one Gillespie the night-shift foreman to assist the latter in clearing away gas. The operation is one in which the men engaged always work in pairs, and Barkey was bound under the terms of his engagement to go down with Gillespie if called upon. He did go down, and he and Gillespie were employed in driving out the gas. There is no doubt that when the accident happened, to which I will refer in a moment, they were in the course of their employment, and as they were driving out gas there is no doubt at all in my opinion that they were also engaged in employment out of which the accident which I am going to describe happened.

Their business being to drive out the gas they had to find out whether the gas was there. That business appears to have devolved upon Gillespie. Barkey had an electric lamp which does not detect whether gas is present or not, but Gillespie had an oil lamp which I presume requires a certain amount of oxygen, and the oxygen would be impeded if various noxious gases were present in the atmosphere and so might go out. Well now that is all we know. The rest comes from conjecture. There is no doubt an explosion took place which killed both men, and the explosion must have taken place near the face, and apparently the men were running from it. Barkey's electric lamp was not put out and remained burning, but Gillespie's lamp was found unscrewed, and unscrewed in such a way as looked as if it must have been done by the person handling it and done for the purpose of re-lighting it. Probably—and I think it is quite a legitimate inference in the circumstances—it had gone out and he was trying to re-light it improperly. He ought to have taken it to the place where the lamps were allowed to be re-lit, which meant his going to the surface again, and possibly to save himself trouble he did not do so. Anyhow there was an explosion, presumably due to an attempt made on his part to light the lamp. There was evidence that Gillespie had left his pipe and matches behind when he went down the shaft, but miners sometimes carry loose matches about with them, and it may be that he had loose matches. Anyhow there is no evidence to show that Barkey took down any box of matches or any matches at all, and although there was a tin box of matches found the day after near the scene of the explosion there is no evidence to show when that box got there or how it got there, and there is the evidence of Barkey's son that his father never had such a box.

Now under these circumstances the Sheriff-Substitute has said—"There is no doubt that the accident arose in the course of the employment, but I think that Barkey's representatives are bound to prove that it arose out of his employment, and they have not discharged the onus, and therefore Barkey's representatives are not entitled to recover."

I think in saying so the learned Sheriff-Substitute made a mistake as to the onus of proof. As soon as it was shown, as it was shown, that Barkey was acting in the course of his employment and that the accident arose out of the employment in so far as he was actually doing his work when the accident took place, then *prima facie* he was within the statute, and he could only be taken outside the statute if it is proved that he himself added a peril or did something which took his action outside the scope of his employment.

Now there is no evidence of that at all. There may be evidence that Gillespie did something of the kind—that question is not before us—but there is absolutely no evidence as regards Barkey. Barkey may possibly have seen Gillespie trying to light the lamp and may have protested unavailingly and the accident happened. And there are half-a-dozen other possibilities and conjectures which one may put in the same way, each of which is as likely as the other—as likely as the other because there is not a particle of evidence by which we can tell what happened. You may have to go on circumstantial evidence in such cases; you may have to find a fact happened which it is reasonably probable did happen, but the reasonableness of the probability must be a reasonableness which the law recognises; and depend on facts and evidence of which the law takes cognisance. Of such facts and such evidence there is not a trace in the present case.

The learned Judges of the Second Division feeling this overruled the Sheriff-Substitute and held that there was not that onus upon the representatives of Barkey which the Sheriff-Substitute had held there was, and they decided that the onus really lay upon the appellants, and that the appellants had not succeeded in discharging it.

With that view I find myself in entire agreement, and I move your Lordships that this appeal be dismissed with costs.

LORD ATKINSON—I think the learned arbitrator in this case has misapplied the well-known principle of law which has been laid down again and again in your Lordships' House. It would appear to me to be quite obvious that this miner had been sent down to clear the gas and was employed by his employer to do that thing, and if an accident arose while he was doing that, *prima facie* it was an accident arising out of and in the course of his employment entitling him to compensation. Of course it was competent for the employer in his turn to say, "Oh, the

accident was not caused by a risk arising out of the employment; it was due to a risk which you voluntarily incurred yourself and which you were in no sense employed to incur." Well, there is not a particle of proof of anything of the kind. In fact the arbitrator himself finds—"It is impossible to say who opened the lamp and who attempted to re-light it. It was Gillespie who had control of the Glennie lamp, but the two men were working together." That is, they were on the same job, not that they were in intimate association generally.

Then he proceeds—"The onus was on the appellants to prove that so far as Barkey was concerned the accident arose out of his employment, and that they had failed to discharge this onus."

In my opinion that is entirely wrong. If the employer wants to show that the workman has incurred some added risk which does not arise out of his employment, and which he is not bound by his contract of service to encounter, then the employer must do that, and do that by satisfactory evidence. There is no evidence at all here to establish that in this case. It is quite as consistent—indeed it is more consistent—with Gillespie having uncovered this lamp than that Barkey did. Barkey is in no way brought into connection with it, and I think the learned arbitrator was entirely mistaken in the rule that he laid down, and that the judgment appealed from is absolutely right.

LORD SHAW—I agree with the views which have been delivered to the House by my noble and learned friend opposite.

LORD PARMOOR—I agree. I think that there is no evidence to connect the claimant with the breach of the statutory duty which caused the explosion, or to show that the claimant in any sense undertook a voluntary added peril outside the scope of his employment. In the absence of such evidence there is no room for such a presumption as that on which the learned arbitrator has acted.

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

Counsel for Appellants—Morton, K.C.—Russell. Agents—W. & J. Burness, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for Respondents—Wark, K.C.—Paton. Agents—R. D. C. M'Kechnie, Edinburgh—D. Graham Pole, S.S.C., London.

Wednesday, July 25.

(Before the Earl of Birkenhead, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

CANTIERE SAN ROCCO, S.A. (SHIPBUILDING COMPANY) v. CLYDE SHIPBUILDING AND ENGINEERING COMPANY, LIMITED.

(In the Court of Session, July 20, 1922, S.C. 723, 59 S.L.R. 520.)

Contract — Termination — Impossibility of Performance — Contract Abrogated by War—Instalment Paid before Outbreak of War—Failure of Consideration—Right to Repetition on Declaration of Peace of Instalment Paid.

Prior to the outbreak of war in 1914 an engineering firm in Scotland entered into a contract with an Austrian shipbuilding company to make and deliver a set of marine engines By the terms of the contract the price was to be paid in instalments, the first instalment being due on the signing of the contract and the remaining ones as the work progressed. All the instalments were to be merely payments on account of the supply of the completed engines, and were not allocated to any particular stage or the completion of any particular part of the work. After the first instalment had been paid war broke out and further performance of the contract became illegal, the foreign company having become an alien enemy. At that date no part of the engines had been constructed. After peace had been declared the shipbuilding company, which had become Italian, brought an action for repetition of the instalment paid. *Held* (*rev.* the judgment of the First Division, *diss.* Lord Mackenzie) that as delivery of the subject of the contract had become impossible in consequence of the outbreak of war the consideration in respect of which payment was made had failed, and that accordingly the pursuers were entitled to repayment of the instalment in question, and appeal *sustained.*

At delivering judgment—

EARL OF BIRKENHEAD—The appellants are appealing against an interlocutor of the First Division of the Court of Session in Scotland, dated 20th July 1922, reversing the interlocutor pronounced by Lord Hunter, the judge who tried the action brought by the appellants as pursuers against the respondents as defenders.

The action was brought for a decree that a contract between the parties dated 4th May 1914 had been abrogated by the outbreak of war and that the appellants were entitled to repayment of a sum of £2310 paid by them to the respondents under the terms of that contract. On 7th July 1921 Lord Hunter found in favour of the appellants, but on appeal the Lords of the First Division recalled his interlocutor and assoilzied the respondents from the conclusions