riority as superior. The plain object of that is, that after the passing of this Act fictitious superiorities shall be at an end, and fictitious vassalages shall come to an end, and the man who is the true owner of the beneficial estate in the land shall hold directly of the first superior he can reach backwards who has a real and beneficial estate of superiority in him.

That is to be the relation, and there is to be no other relation of superior and vassal. And what according to the statute is to be the effect of that? Sub-section 2 goes on thus—"to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." Now then, Mr Brownlie as purchaser of this estate is to be the vassal of the pursuers from the moment that he takes infeftment, and he is not to be at any time after infeftment—and he could not be before—the vassal of the seller—of the party from whom he purchased. He shall by the operation of this statute become the entered vassal of the true superior, and he shall do so to the same effect as if that superior had granted him a charter of confirmation. Now what would have been the effect of the superior granting him a charter of confirmation? It would have been to entitle the superior to a composition. Of that there cannot be the smallest doubt. He would not have got his charter of confirmation without a composition, and if he is to get his charter of confirmation by implication, we must hold, as my brother Lord Deas very properly said, that that is to be followed by all the pecuniary consequences just as if the charter of confirmation had actually been granted.

If indeed it had been the purpose of this statute to perpetuate that *quasi* right of a purchaser to bring forward an heir to be entered in place of him to the superior, it would have been very easy to do so by a very few words in this enactment. It would have been saved by merely saying that the superior shall not be entitled to a casualty as upon the entry of a singular successor if there be in existence the heir of the vassal last entered with the superior. But there is no such saving of the vassal's right. There is not the smallest appearance on the face of any of the sub-sections of section 4 of this statute of any intention to operate such a result as that. And I am not at all surprised that it should be so, because when the statute was abolishing all those useless estates of mid-superiority as far as possible, I think it was not at all unnatural that it should seek to abolish also every other fiction which complicated the relation of superior and vassal; and with all due deference to those who differ from me upon this point, I must say that I think the practice which prevailed before the passing of the Act, of bringing forward an heir nominally to take the position of vassal in place of the true proprietor of the subject—the purchaser of the *dominium utile*—was nothing but a device to get the better of the superior's right. For what did it come to? The original vassal sold to a singular successor with a double manner of holding, the purchaser was infeft, and the immediate effect of his infeftment feudally was to create the relation of superior and vassal between the seller and purchaser. The purchaser held base of the seller. Well, the seller dies, being the vassal last entered, and then the superior demands an entry; and the purchaser says, Well, no doubt the fee is empty, and you are entitled to have a vassal, but although I am the person who has the sole property and interest in this estate, and am in all true substance and effect the owner of that *dominium utile* which holds of you as superior, I will not enter with you, because I can find a man who upon strict feudal principles can complete a title as heir to the mid-superiority which stands between me and you, and he shall be your vassal. I think that is nothing but a device. It is a device perfectly consistent with feudal principles; I admit that, but it is not a bit the less a device in order to substitute a duplicand of the feu-duty for a year's rent. That is the whole affair.

Now, if it was the purpose of this statute to abolish fictitious titles, I cannot but think that it is entirely consistent with it to abolish a right to create such a fictitious superiority for a mere pecuniary purpose. The hardship of a singular successor paying a composition of one year's rent I cannot think enters into the consideration of this question at all. If it is a hardship such as ought not to exist, by all means let the Legislature put an end to it. But it is a statutory hardship. It is a hardship depending upon the statute of 20 Geo. II. cap. 50, which secures it to the superior as a compensation for what the superior then gave up; and until the superior is deprived of that right I do not see why he should be more unfairly dealt with in the exercise of his right than anybody else who has a right to such a statutory composition.

Therefore I confess I come to the conclusion—certainly not without much consideration, but also in the end, I am bound to say, without any difficulty—that the effect of a purchaser taking infeftment subsequent to the passing of the Act of 1874 is to enter him as a singular successor with the superior, and of course to subject him to all the conditions of such an entry as it stood before the statute, and among other things to the payment of a composition.

I am therefore, on the whole matter, of the same mind with the rest of your Lordships, and I am for adhering to the Lord Ordinary's interlocutor, which I think may be the form of our judgment, although we have had occasion to consider a plea which was not before his Lordship, because he not only decerns in the reduction, but he also decerns in the declaratory conclusions and for payment of the composition.

The Court adhered.

Counsel for Pursuer—Kinnear—Rutherfurd. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Defenders—M'Laren—Jameson. Agent—John Martin, W.S.

Friday, November 23.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CRUM EWING *v.* BOUVERIE CAMPBELL.

Superior and Vassal—Feu-Contract—Where Vassal barred from Erecting anything but "Dwelling-houses"—Does "Public-house" include "Hotel?"

A feu-charter imposed, *inter alia*, the following restrictions:—(1) That "no buildings of

any kind whatever, except dwelling-houses and the necessary offices connected therewith," should be built upon the feu; and (2) that the vassal should allow no "public-house or tavern" to be kept upon it.—*Held* (*diss.* Lord Shand) (1) that the terms of each prohibition struck at an inn or hotel or a hydropathic establishment, whether licensed for the sale of exciseable liquors or not.

Opinion (*per* the Lord President)—(1) that as a hotel was a place of business, the term "dwelling-house" was inapplicable to it; and (2) that the term "public-house" meant not merely a place for the sale of exciseable liquors, but was applicable to all houses to which the public were invited to resort.

Opinions contra per Lord Shand.

Observations on the meaning of the term "hotel" as affected by the Licensing Statutes 16 and 17 Vict. cap. 67, and 25 and 26 Vict. cap. 35.

Superior and Vassal—Feu-Contract—whether Restrictions waived on one part of Feu can be insisted on in another.

Where a superior had agreed that on part of a feu the restrictions imposed in the feu-charter should be temporarily waived upon certain conditions—*held* (*diss.* Lord Shand)—distinguishing the case from that of *Campbell* v. *Clydesdale Banking Coy.*, June 19, 1868, 6 Macph. 943—that the superior was not thereby debarred from insisting on the restrictions as regarded other parts of the feu.

By feu-charter dated December 21, 1870, Mrs Bouverie Campbell, of Dunoon, an heiress of entail, granted a feu-charter under the powers of the Act 31 and 32 Vict. cap. 84, to H. E. Crum Ewing of Strathleven, of certain pieces of land in Dunoon, being part of the entailed estate. The feu-charter contained certain restrictions, which were thus expressed in the deed—"*Firstly*, But it is hereby specially provided and declared that these presents are granted with and under the whole conditions, provisions, declarations, limitations, and restrictions specified or referred to in the foresaid statute; and without prejudice to the said generality, it is hereby declared that no buildings of any kind whatever, except dwelling-houses and the necessary offices connected therewith, shall be built upon the lands hereby feued. . . . *Secondly*, And further providing and declaring that the said Humphrey Ewing Crum Ewing and his foresaids shall not allow to be kept upon the said feu any public-house or tavern, or carry on any kind of work or manufactory thereon which may be considered by me or the proprietor of the said estate for the time, or the adjacent feuars, to be a nuisance or injurious to the amenity, health, or comfort of the neighbourhood."

The ground feued was in four separate plots. At Whitsunday 1875 Mr Crum Ewing sold two of the plots, on one of which there was a large dwelling-house, to a Mr Lamberton, who resold the subjects, with entry at Martinmas 1875, to a Mr M'Coll. After the sale had been effected, Mrs Bouverie Campbell, the superior, consented to the house being converted by the purchaser into a family hotel, and agreed that the restriction in the feu-charter should be allowed to remain in abeyance for twenty years on an annual payment of £10. When Mr Crum Ewing learned that this had been done, he wrote to the superior requesting the withdrawal of the restriction, so far as to remove any doubt which might exist as to his (Mr Ewing's) power to dispose of the remaining part of the ground for hotel purposes. This request the superior refused, and Mr Crum Ewing then brought this action against Mrs Bouverie Campbell, as heiress of entail of Dunoon, and her husband Colonel Bouverie Campbell for himself and as administrator-in-law for his wife.

The conclusion of the summons was, that the pursuer "has right to erect upon the said pieces of ground or any part thereof a hydropathic establishment, or an inn or hotel containing sleeping apartments set apart for the accommodation of travellers, and that the defenders have no right or title to interfere with the pursuer in making use of his property by erecting thereon such inn or hotel or hydropathic establishment."

It was averred by the pursuer, with reference to the prohibition against "any public-house or tavern"—"The said provision was not intended to prohibit, and does not prohibit, the erection of inns or hotels containing sleeping apartments for the accommodation of travellers."

It was further stated that it was not intended to take out a licence for the hydropathic establishment which it was proposed to put up.

In reference to the above-mentioned removal of restriction as regarded part of the feu, the defenders stated—"In October 1875 Mr M'Coll opened negotiations with the defenders, with a view to his being permitted to use the house upon the feu as a private hotel, and after some correspondence it was ultimately, in December 1875, agreed that the conditions in the feu-charter applicable to that matter should be allowed to remain in abeyance for a period of twenty years, and that Mr M'Coll should in consideration thereof make the defenders an annual payment of £10. The arrangement made was embodied in a bond and disposition in security, herewith produced, granted by Mr M'Coll in favour of the defenders, which proceeds on the narrative of the said arrangement."

The pursuer pleaded—"(1) On a sound construction of the said feu-charter in favour of the pursuer, it contains no prohibition against the erection of a hydropathic establishment, or of an inn or hotel containing sleeping apartments for the use of travellers, and the pursuer is therefore entitled to decree in terms of the conclusions of the summons. (2) Assuming the restriction to be applicable to inns or hotels, or to a hydropathic establishment, the defenders are barred from insisting in the same to the effect of preventing the pursuer from erecting buildings for these purposes upon his property, in respect of their having consented to the conversion of the said dwelling-house into a hotel."

The defenders, *inter alia*, pleaded—"(2) Upon a sound construction of the said feu-charter the pursuer is not at liberty to erect upon the ground thereby feued a hydropathic establishment or an inn or hotel."

The Lord Ordinary assoilzied the defenders, adding the following note:—

"*Note.*—The feu-charter contains a prohibition against the erection of any buildings other than dwelling-houses. But it also provides that the

vassal shall not allow to be kept on the feu any public-house or tavern, or carry on any kind of work, &c. The latter condition does not, in the opinion of the Lord Ordinary, limit the prohibition, but only restrains the vassal in the use of such houses as may be legitimately built.

"The Lord Ordinary is of opinion that neither a hydropathic establishment nor an inn or hotel is a dwelling-house within the meaning of the feu-charter. He has therefore assoilzied the defenders.

"The second plea-in-law stated for the pursuer was not maintained."

The pursuer reclaimed, and argued—The first restriction was intended solely to guard against places of business, such as shops, banks, &c., being erected on the feu. A hotel or hydropathic establishment was properly classed under the head of dwelling-houses. As regarded the prohibition against the erection of "any public-house or tavern," a public-house was a place solely for the purpose of selling exciseable liquors, and not for human habitation. In a hotel habitation was not the primary object. Neither, in the ordinary sense of the word, could a hotel be called a public-house, nor in the statutory sense—Act 16 and 17 Vict. cap. 67, sec. 17. So too with the case of an unlicensed hydropathic establishment. Even supposing the restriction to be applicable to inns or hotels or to a hydropathic establishment, the defenders were barred from insisting on the restrictions in this case in respect of their having consented to the conversion of a dwelling-house on the feu into a hotel in the case of Mr M'Coll.

Authorities—*Frame* v. *Cameron*, Dec. 21, 1864, 3 Macph. 290; *Inglis* v. *Boswall*, 6 Bell's App. 427; *Campbell* v. *Clydesdale Bank*, Jan. 19, 1868, 6 Macph. 943.

Answered for the defenders—A dwelling-house was not a place to which the public were invited to resort. It was certainly not a public-house, and a hotel was called a public-house in the Forbes Mackenzie Act (16 and 17 Vict. cap. 67). The primary use of a hotel was not the residence there of the hotel keeper, while the residence of the owner was the primary object of a dwelling-house. There could be no distinction drawn between a hydropathic establishment and a hotel, as they were both places to which the public were invited to resort, and into which the public were entitled to demand entrance if there were room for them in the house. As to the defenders being barred from insisting on the restriction on the ground of previous acquiescence, the case of M'Coll was a very slight departure from the conditions of the feu-charter, if it was one at all. It was quite different from that of *Campbell* v. *The Clydesdale Bank*, where the superior had allowed infringements of the restrictions in the charter to go on for a long time, and in the case of every feuar who chose to infringe them.

Authorities—*Kemp* v. *Sober*, May 13, 1851, 20 L. J. (Chan.) 602; *Doe* v. *Keeley*, Jan. 29, 1813, 1 Maule and Selden, 95; *Duke of Bedford* v. *British Museum*, July 6, 1822, 2 L. J. (Chan.) 129, and in 2 Milne and Keen, 552.

At advising—

Lord President—The question which arises for our decision in this case is, Are the buildings in question of the nature of dwelling-houses, or are they something different? It was argued that the clause only applies to the original construction of the buildings, and that it is satisfied if dwelling-houses are erected, to whatever use they may be put after they are built. Now, I cannot entertain that contention. I think that although restrictions of this kind are not to receive a loose construction, they must receive a fair one, and when parties agree that nothing but dwelling-houses must be erected, the words must be taken in their fair and honest sense. I cannot, then, think that the clause is satisfied if a house is built as a dwelling-house and then changed into something else.

Thus the question is raised whether a hotel or a hydropathic establishment is a dwelling-house? Now, I do not see that there is any material difference between a hotel and a hydropathic establishment as far as the meaning of this clause is concerned. Both are, I think, places of business, and not dwelling-houses. A man who keeps a hotel and resides there, carries on a business as his main object, and does not use the house primarily as a dwelling-house. The main object in view at its erection is to carry out a trade in it, and a trade in the strictest sense of the term. It is not the same thing as taking in lodgers, and I do not stay to inquire how that would be affected by the restrictions in the charter, as the question is not raised. In like manner, a man who sets up a hydropathic establishment is only a hotel-keeper in a different way. He provides medical treatment in addition, but that does not prevent his establishment being a hotel. As in the ordinary hotel, he invites all the world to eat and sleep there, and the fact of medical treatment being combined does not make the house any less a place of business. It is said that the establishment is not to be licensed, but that again does not make it any the less a place of business. A hotel does not cease to be a hotel for want of a licence; temperance hotels are now very common over the country, and they are hotels in the proper sense of the word. The keeper of a temperance hotel is quite as much under the edict of *Nautæ Caupones* as any ordinary hotel-keeper, and the one is as much bound as the other to receive a man into his house if there is room for him, and if there is no good reason for refusing so to receive him. He is a servant of the public. This applies just as much to the hotel-keeper who is licensed to sell wine and spirits as to him who is not. The man makes money in the unlicensed hotel or the hydropathic establishment every day, and I think the term "dwelling-house" is inapplicable either to the licensed or the unlicensed hotel.

But then there is another clause founded on by the defenders, and it is a very important one. It raises the question whether the words "public-house or tavern" include hotel or such a house as the hydropathic establishment is, and I think there can be no doubt on this point. I think that "public-house" in its ordinary sense means a house to which the public are invited to resort, and to which they do resort. It makes no difference whether exciseable liquors are sold there or not. I should say that a temperance hotel is as much a public-house as any other. But it is contended that a hotel is not a public-house, that a public-house means a place for the sale of exciseable liquors, and where there is no sleeping accom-

modation. I was, I confess, startled at this suggestion, and wished to know if there were any authority for the statement. The Lord Advocate went to Johnson's Dictionary, but what we find there is that a hotel is "a lodging-house; particularly a public-house furnished with beds." There is there nothing but the statement that it is a public-house because the public resort to it. Therefore, according to the English language—by that I mean the popular use of it—we have Johnson's authority that a hotel is a public-house. But it may be said that in popular use in Scotland the word has a different meaning. I was anxious also for authority on that point. I find that the late Sir James Sinclair of Ulbster, who was well acquainted with the social economy and language of Scotland, defines a public-house as "an inn, a tavern, a hotel." Jamieson, in his Scottish Dictionary, has precisely the same definition. I should like to hear whether there is any authority in opposition to this. If we ask, Is "public-house" a *nomen juris?* I can only say that its meaning is distinctly fixed by several statutes relating to public-houses. There every hotel is dealt with as a public-house; therefore it is impossible to say that a hotel is not a public-house. The question as to the sale of exciseable liquors we have seen is quite clear. What constitutes a hotel a public-house is, that when the keeper has hoisted his signboard, and invited the public to come in, he is under an obligation to the public, and he cannot refuse to take them in; if he does, an action of damages can be brought against him. Nothing stamps the character more plainly than the right the public have to gain admittance. I am, then, very clearly of opinion that the pursuer's proposals should be prohibited.

There is a further question as to whether the defenders are barred from making this objection by what they have allowed to be done on that part of the original feu which Mr Crum Ewing has sold? The pursuer alleges that the defenders have given liberty to the owner of the original feu to violate the conditions of the charter; and the *species facti* is that in 1875 Mr M'Coll, of Dunoon, bought those parts of the feu which Mr Crum Ewing had sold, and, as is averred, "in October 1875 Mr M'Coll opened negotiations with the defenders with a view to his being permitted to use the house upon the feu as a private hotel, and after some correspondence it was ultimately, in December 1875, agreed that the conditions in the feu-charter applicable to that matter should be allowed to remain in abeyance for a period of twenty years, and that Mr M'Coll should, in consideration thereof, make the defenders an annual payment of £10. The arrangement made was embodied in a bond and disposition in security, herewith produced, granted by Mr M'Coll in favour of the defenders, which proceeds on the narrative of the said arrangement." Now, I confess I should like to have had a little more information as to what is meant by a "private hotel." If what is meant is a house of which the proprietor selects his own guests, I do not know but that that would constitute a difference. To raise this in my mind to a violation of the conditions of the feu-charter it would be necessary to have more information of the exact nature of the house; but putting that out of view, this statement seems to me to afford no answer to the objection to allowing Mr Crum Ewing to build. And here there are two points which suggest themselves.

Firstly, if this were a violation of the conditions, the superior had no right to grant leave to make the violation, as she only had the right to feu on certain conditions settled by the Sheriff. The feu-charter embodies the clauses of restriction, and the enforcement of those conditions is a condition of the right to feu. The superior cannot waive those conditions, and therefore it was beyond her power to allow a violation in any case. It would never do to say that because an illegal thing had been done by the heir of entail that that had the effect of liberating all her vassals from a restriction which she had once allowed to be broken.

But, secondly, even if the superior were not an heir of entail, but a possessor in fee-simple, I should still hold that the case of Mr M'Coll was irrelevant. It is said that this case is the same as that of *Campbell of Blythswood* v. *The Clydesdale Bank*, June 19, 1868, 6 Macph. 943. But it seems to me that there is no resemblance between the two. In that case the superiors had permitted continual departures from a condition of the feu, and it was held that afterwards he was not entitled to come down on one particular vassal and to challenge him. That judgment was well founded. But here it is a case of a very limited relaxation, and the effect of that one relaxation is, it is said, to cancel the obligation in the case of all the other vassals under the feu-charter; it is not only to relax the obligation, but utterly to wipe it out. This would appear to be a very violent result to follow on such a slight departure from the obligations of the feu-charter. I should say that if Mr Crum Ewing were desirous to avail himself of a right he has mistaken his remedy; he should challenge Mr M'Coll's act. If he has a right he should challenge what has been done illegally. But in the case of *Campbell* everybody had been allowed to go on with the act until it had almost become a law. That case does not support the contention of the pursuer at all. I, in the circumstances, entirely agree with the Lord Ordinary, and hold that his interlocutor should be affirmed.

LORDS DEAS and MURE concurred.

LORD SHAND—The decision of this case involves principles of very general application and importance. The view I take of it differs from that of the Lord Ordinary and of your Lordships.

I had occasion, in the recent case of *Fraser* v. *Downie*, 4 Rettie 942, to consider the effect of a provision in a feu-contract that houses to be built on ground feued should all be "single or self-contained lodgings," and I refer to my opinion in that case for the general view which I hold in regard to such clauses of prohibition which relate only to the erection of buildings, and do not expressly deal with the use or occupation to which the buildings or property may be put, and also for the principle of construction to be adopted with reference to such provisions.

A proprietor who acquires the property is entitled to the free use of it, unless in so far as expressly restrained. I agree with your Lordship in the chair that clauses imposing restraint must receive a fair and not a malignant construction; but, on the other hand, I take it to be clear that

restrictions are not to be readily or lightly inferred—that restrictions are not to be imposed unless they are distinctly expressed, or are matter of necessary and direct inference from the terms used.

In the deed with which we have to deal in the present case there are two distinct sets of clauses of the nature of prohibitions. One set of these refers to the class of buildings to be put upon the ground, the other to the uses to which buildings once erected, or the property itself, may be applied; and I think in order to reach a sound judgment on the present question that these two sets of clauses must be considered separately.

The feuar is taken bound to erect buildings of the annual value of at least £61, being double the stipulated feu-duty, and the first provision imposing restrictions is thus expressed—[*reads clause as above*]. There is not a word as to the use or occupation of the buildings when erected. The clause relates exclusively to the character of the buildings to be put up, limiting them to dwelling-houses and offices. The superior further guards against these buildings being of an inferior style or plan by providing "that no building shall hereafter be erected upon the said feu until the elevation plan thereof shall have been approved of" by her—a provision which of course must be construed reasonably, not as giving a power which could be exercised capriciously to prevent the proprietor having the fair use of the ground, but which could be used to prevent him from erecting any house of an unsightly nature, or even it may be of an architectural design obviously unsuitable to the ground or its neighbourhood. These are the only clauses that relate to the character of the buildings to be erected. The subsequent provision as to the use and occupation of buildings I shall consider separately.

I observe, in the first place, that the clause in describing the buildings which may be erected is very general in its terms, providing merely that the buildings shall be of the general class of dwelling-houses and the necessary offices. There is no limitation to any particular class of dwelling-houses, as "self-contained" houses or houses suitable for private residence or for a single family or the like, and no restriction to any plan even of a general nature. In the absence of any clause of limitation of the mode of use or occupation, and the description of the buildings allowed being the general one of dwelling-houses, I take it to be clear that the proprietor is not limited to the erection of single villas or houses, but may erect houses of any class, for example, houses in flats, or workmen's houses in rows or blocks, and that he may use or occupy the buildings at least in any way in which dwelling-houses are commonly used.

It appears to me that the restriction receives its full force by holding that the houses to be erected are to be for human habitation—houses to be dwelt in—and not of the nature of manufactories, works, or stores, or the like, which cannot be represented as dwelling-houses, because they are not designed or suitable for habitation. I see no good reason for saying that the term "dwelling-house" in the deed either limits the kind of dwelling-house or carries with it a prohibition against carrying on any kind of business in the dwelling-house after it has been erected. Take the case of a house built on the ground for the purpose of being occupied as a lodging or boarding-house. Is there anything to prevent that? The house is erected as a dwelling-house in strict compliance with the terms of the charter, and is so occupied by the proprietor or tenant and his or her servants. I apprehend there is no ground—certainly none from the mere use of the term dwelling-house—which can prevent the proprietor or occupant from having lodgers or boarders, or from using the dwelling-house as a boarding-school.

The same observation, in my opinion, applies to a hotel, and also to a hydropathic institution. A building erected for use either as a hotel or hydropathic institution is a dwelling-house—a house built for human habitation. In the former the proprietor or tenant occupies the dwelling-house by himself, his family, and servants, and by receiving and entertaining guests, and even the persons who come as guests occupy the building also as a dwelling-house for the time. The same observation occurs as to a hydropathic establishment, with this difference only, that in addition to the ordinary accommodation the dwelling-house is fitted up with baths and other appliances for hydropathic treatment, and during the residence of such persons as come temporarily only they are subjected to hydropathic treatment in the house if they desire it.

The summons concludes for decree that the pursuer is entitled to erect on the ground a hydropathic establishment or an inn or hotel. I think that conclusion would have been more accurately expressed so as to adopt the very language of the charter in these terms—That the pursuer has right to erect upon the ground "a dwelling-house or dwelling-houses" to be occupied as a hydropathic establishment or an inn or hotel; for I think that is the substance of the claim. The conclusion so expressed would in terms describe the proposed buildings as dwelling-houses, which I think they are within the ordinary meaning of the words and within the meaning of the charter. With deference to the view expressed by your Lordships and the Lord Ordinary, I think there is no ground for taking the word "dwelling-house" in the charter in the narrow sense to which the judgment has given effect, for I see no good reason for attaching a meaning to that word which excludes any class of houses which are built for the purpose of being dwelt in or inhabited in the ordinary sense of that term.

Your Lordships have stated a reason for the judgment which I do not find in the note by the Lord Ordinary—I mean in attributing to the prohibition of all buildings "except dwelling-houses" the force of a prohibition of all buildings which are erected for use and occupation in any kind of business. I am unable to see any good reason for holding that the expression used should have the effect of so serious and important a restriction on the rights of the proprietor. If that view be sound, it would come to this, that after a dwelling-house had been erected it could not be occupied by a doctor for the purpose of his business, or by an attorney or solicitor who might wish to use part of his house for business purposes; and the same observation may be made as to the other illustrations I have already given. Such an interpretation of the clause appears to me not only against the rule of construction as I have stated it, but to be giving a most liberal interpretation of the clause in favour of the re-

striction and against the liberty of the proprietor in the exercise of his rights. The prohibition is certainly not in express terms to that effect. In my opinion such a prohibition is not either a necessary or even a legitimate inference from the words used.

Your Lordships' general view is open to another objection, which I am humbly of opinion is sufficient to show that the construction adopted is not sound. It is said that the effect of the clause now under consideration is directly to prohibit the carrying on of any kind of business. But in the same deed, in a subsequent clause, there is an express prohibition of particular kinds of business, and of these only. The subsequent clause, which deals with the use to which the ground may be put, prohibits any kind of work or manufactory which may be a nuisance, and also any public-house or tavern. If the clause which prohibits any buildings except dwelling-houses is to be construed as inferring a prohibition against the erection or use of buildings for any kind of business, what is the meaning or object of the subsequent clause, of much more limited effect, expressly prohibiting a public-house or tavern, or a work or manufactory causing a nuisance? This last and limited prohibition in the deed is to receive effect. It supplies the measure of the prohibitions or limitations in the charter as to the use and occupation of the property or buildings erected on it, and is, in my opinion, sufficient to show that the earlier clause could not, according to the intention of the parties, have the extensive effect which your Lordships attribute to it. It will, I think, lead to very serious results in restraint of the use of property if it should be held that a prohibition against the erection of any houses except dwelling-houses, without any clause limiting the mode of use or occupation, can prevent the use of houses built on the property for any purpose of business. In the case of *Fraser* v. *Downie*, referring to the opinion of Lord Cottenham in the case of *Inglis* v. *Boswell*, 6 Bell's App. 427, I made the observation—"As I read the deed, the superior was content to have self-contained buildings erected in the knowledge that from the nature and situation of the property it would be the feuar's interest so to use it, but that he left the feuar free to change that use if after the lapse of time he saw fit to make a change." Dealing with the first clause of this deed, taken alone, I make the same observation here, with the additional remark, that the term dwelling-house is used in this deed in the most general sense, for, as already noticed, it is not qualified even by such expressions as "private" or "self-contained," or any restrictive term. I agree in thinking that the clause prohibits the erection of any building not coming within the meaning of the term "dwelling-house" in the fair acceptation of that word. But I think that if a superior in feuing a property means to restrict the use of a house once erected, the restriction must be imposed in unequivocal terms which relate to the use or occupation, and impose the particular restrictions which he requires, and which the feuar then accepts as binding him, as appearing on the face of his title to the property.

The second set of clauses to which I have referred deal specially with the subject of use and occupation, and prohibit—[*reads clause as above*]. I am of opinion that a house occupied as a hydropathic institution does not fall within this prohibition. It is plainly not a work or manufactory, and I think it is equally clear that it is not a public-house or tavern, for I take it to be obvious that these words refer to the use of premises for the sale of exciseable liquors.

Again, as regards a hotel, after the strong expression of opinion by your Lordship in the chair, concurred in by Lord Deas and Lord Mure, I speak with deference, but I am bound to say that I do not think that a restriction against the use of premises for a public-house or tavern is a restriction against a hotel. According to the ordinary and familiar use of modern language—and that use is the standard by which the terms must be considered in this deed—a public-house or tavern is a place to which the public resort for drinking exciseable liquors, while a hotel is a house in which no doubt exciseable liquors are provided and sold, but which is used for the accommodation of visitors and travellers who reside in the house for a longer or shorter time, and are entertained at bed and board. A person living at a hotel or going to a hotel would not describe it as a public-house or tavern. It is true that a hotel may in one sense be included by the generic term public-house, in the same way as any house of public amusement may be; but looking to the alternative words used in this deed "public-house or tavern,"—which I think refer to houses *ejusdem generis*—it appears to me that the true meaning of the prohibition is that no building on the property shall be used for the purpose of a drinking place, which often brings a low class of company about, and that if it had been intended to prohibit the use of the house as a hotel for the entertainment of visitors, this should have been expressed. I do not think that such a use is prohibited either expressly or by necessary implication, although I may say that I think that the landlord or tenant of a hotel would not be entitled to open a taproom, which I think would fall within the prohibition of a public-house or tavern.

In regard to the light to be obtained as to the use of the terms "public-house or tavern" from the Licensing Statutes of 1858 and 1862 (16 and 17 Vict. cap. 67, and 25 and 26 Vict. cap. 35), I must observe that I do not think the provisions of these statutes give any material aid in determining the meaning of the terms used in the feu-charter. In the first of these (section 17, the interpretation clause) the term public-house, for the purposes of the Act, no doubt includes an inn or hotel, but I think this only shows that without that enactment the term public-house would not have had so comprehensive a meaning; and the forms of certificate appended to the Act bring out the difference between hotels and ordinary public-houses. The later statute appears to me throughout its whole provisions to recognise the distinction on which my opinion proceeds, and I refer particularly to the 2d, 8th, 22d, and 37th sections, and to the terms of the certificates appended to the Act, containing as they do various different provisions giving privileges to inns and hotels as distinguished from public-houses.

On the remaining point of the case I also differ in opinion from your Lordships. The pursuer pleads by his second plea-in-law—[*reads*]. I am of opinion that this plea is well founded. The facts on

which it rests must be shortly stated. By the original feu-charter of 1870, which is produced, the defenders feued out four plots of ground, extending in all to about 3 acres imperial. But although there were nominally four plots, practically there were two only, as appears by a reference to the plan endorsed on the feu-contract, for plot 2 is a small piece of shore ground forming a mere adjunct or pertinent of plot 1, while plot 4 is a similar adjunct of plot 3. By this deed the superior, avowedly for the purpose of preserving the amenity of the neighbourhood and of the ground feued, imposed the restrictions already referred to, one of these being (in the view that the present judgment is well founded) a prohibition against using any house on either of the plots as a hotel. The property of plots 3 and 4 having changed hands, the defenders in 1876, by a formal agreement, have waived the condition or prohibition against the use of a hotel on these plots, and in return for an annual payment of £10, secured heritably by a conveyance over the property, they have authorised the use of a dwelling-house as a hotel for a period of twenty years. The bond and disposition in security of this payment is produced. There is no limitation, as your Lordships seem to have supposed, of the use of the ground for a "private" hotel, although if there had been such a restriction I do not think it would have made any difference. Accordingly the proprietor of plots 3 and 4, with the sanction of the defenders, now uses the house on his property as a hotel.

It is settled by a series of decisions, both in this country and in England, that conditions in a feu-contract intended for the preservation of the amenity of the ground affected by them, and the immediate neighbourhood, are to be regarded as inserted in the interest of the feuars as against each other, as well as in the interest of the superior, and I agree with your Lordships in thinking that the present pursuer (on the assumption that the prohibition bears the construction maintained by the defenders) could have enforced the prohibition against his neighbour Mr M'Coll, the proprietor of plots 3 and 4, He has, however, acquiesced in the defender's act, by which he waived the prohibition and consented to the proposed use of the property. The result, however, obviously is, that the locality is materially changed, and the amenity of the pursuer's property, which closely adjoins the plots 3 and 4, is directly affected. If it was of consequence to each property and the immediate neighbourhood that there should be no hotel on either of these plots, or in the immediate vicinity, the erection of a hotel on the property adjoining that of the pursuer must alter and affect the character of both. Can the defenders then enforce the restriction against one property while they have released it on the property adjoining, and thus materially altered the character of the immediate neighbourhood? Would the defenders be entitled to take £10 a-year from several feuars along the shore and keep the restriction up as against others? I apprehend this would be against the faith of the contract between the parties, and against the authority of a series of cases, of which the case of *Campbell* v. *The Clydesdale Bank* 6 Macph. 943, and *Fraser* v. *Downie*, 4 Rettie, and the English cases of *Roper* v. *Williams* and *Peck* v. *Matthews*, are examples, for the object for which the prohibition was inserted and agreed to would be frustrated by the act of the superior himself. It is said these cases are to be distinguished from the present, because there the superior had allowed or acquiesced in deviations in a number of instances. It is true that was so, but in these cases there had been a great many feus. In the present case the plots or feus extended to 3 acres only, and on nearly a half of the whole the superior has abandoned the restrictions, to the injury of the remainder. The object of the restriction is at an end. The principle of the cases referred to seems to me directly to apply, and to apply with peculiar force in a case in which the subject is a small property almost contiguous, and on which the conditions have been waived with reference to about one-half of the whole.

I have only to add, that I think no difficulty arises in this question from the circumstance that the defender Mrs Campbell is an heiress of entail. Whether other heirs of entail could object to what the pursuer proposes is not the question. The plea as stated is one of personal bar, and I am of opinion that the defenders are personally barred from insisting on the enforcement of the prohibition in question in respect they have waived these conditions in favour of the adjoining feuar, with the effect of altering the character of the immediate neighbourhood, and defeating the object of the restriction.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Lord Advocate (Watson)—Kinnear. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders (Respondents)—Asher—Mackintosh. Agents—J. & A. Campbell & Lamond, C.S.

Friday, November 23.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COWAN *v.* DALZIELS AND MORE.

Reparation—Injury by Dog—Previous Knowledge of Ferocity—Liability where it had been Lent.

A dog was lent by its owner to protect certain premises, and there was kept chained. It had previously, when taken off the chain, bitten a man—a fact known both to the owner and the custodiers. Six weeks after it had been lent, the latter took it out for a walk, when it again, without provocation, bit a passer-by. In an action of damages at his instance against both owner and custodiers, the Court *held* the latter liable in the circumstances, and assoilzied the owner.

Expenses—Relief.

Held, in an action for damages for injury by the bite of a dog, brought against the owner and parties to whom it had been lent, where the former was assoilzied and the latter found liable, that the owner of the dog was entitled to his expenses in the Court of Session (though not in the lower Court, he having at first denied the ownership), and that the pursuer was entitled to relief against the custodiers.