accident, and that the same happened through the shying of the horses and the inability of the driver to control them; find in law that the defender is not liable to the pursuer in damages, and assoilzie him from the conclusions of the action.

LORD KINNEAR—I concur.

LORD DUNDAS—I also concur. I observe that the Sheriff-Substitute does not in his interlocutor make any finding of fault on the part of the defender, but in his note he "concludes" that "the accident was occasioned by Mr R. L. Colam's breach of the statute." I am unable to see any relation of cause and effect between the breach of the statute (assuming there was a breach) and the accident to the pursuer's horses and waggonette.

LORD M'LAREN was not present.

The Court pronounced this interlocutor:—

"Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated March 12, 1907: Find in fact (1) that the leaving of the car in the position described did not constitute an obstruction to the highway; (2) that the leaving of the car for the time without a person in attendance had no relation to the accident; and (3) that the same happened through the shying of the horses and the inability of the driver to control them: Therefore find in law that the defender is not liable in damages to the pursuer: Assoilzie the defender from the conclusions of the action, and decern: Find the pursuer liable to the defender in expenses."

Counsel for the Defender (Appellant)—The Dean of Faculty (Campbell, K.C.)—W. Thomson. Agent—Peter Macnaughton, S.S.C.

Counsel for the Pursuer (Respondent)—Hunter, K.C.—Lyon Mackenzie. Agents—Fletcher & Baillie, W.S.

Thursday, October 31.

FIRST DIVISION.

[Dean of Guild, Edinburgh.

MACANDREW *v.* DODS.

Dean of Guild — Appeal — Jurisdiction— Disputed Question of Fact — Sist of Cause in order that Action may be Brought.

The proprietor of a piece of ground having presented a petition to the Dean of Guild Court for warrant to erect buildings on the same, answers were lodged by the proprietor of immediately adjacent ground objecting to the petition in respect that the proposed buildings were in contravention of certain building restrictions by which the petitioner was said to be bound. One of these restrictions was that no buildings beyond a certain height (which the proposed buildings would exceed) should be erected to the south of a point marked X on a certain plan, which was lost, and the parties were at issue whether the proposed buildings were or were not to the south of this point. The Dean of Guild Court having sisted the cause in order that the petitioner might establish his rights in the Court of Session, the Court, on appeal, *affirmed* this interlocutor, in respect that, in addition to questions as to the construction of the parties' titles, a question of fact which necessitated inquiry was raised, and that it was expedient, in the circumstances, that the question should be determined in an action at law.

Observed that if the question in the case had been merely as to the construction of a legal document, the Court would have decided it or sent it back to the Dean of Guild Court for decision.

Colin Macandrew, builder, Edinburgh, presented this petition to the Lord Dean of Guild of the City of Edinburgh and his Council, in which warrant was craved "to erect office building within the yard at his premises, No. 13 Lauriston Gardens, the building to consist of public and private offices, safe, and lavatory, the present stone wall fronting street having window and doorway slapped, and wallhead raised to higher level, the side, back, and internal walls to be of brickwork, floor and roof of timber with asphalte covering."

Answers to the petition were lodged by the respondent, John Dods.

The petitioner was the owner of a piece of ground at 13 Lauriston Gardens, conform to disposition in his favour by Mrs Beattie and others as trustees therein mentioned, dated 30th March and 1st and 3rd April 1889, and recorded in the Register of Sasines on 8th April 1889.

The respondent was the owner of property adjoining the petitioner's said ground, and produced as the foundation of his title a feu-contract dated 9th and 10th, and registered in the Register of Sasines 28th December 1863 between George Beattie and others, as trustees therein mentioned, of the first part, and William Gibson, draper in Edinburgh, of the second part. The ground both of the petitioner and of the respondent originally formed part of the lands of Lauriston Lodge, and their titles were derived from a common author.

The petitioner's ground extended to little more than half an acre, and was bounded, *inter alia*, on the north by the centre of the wall forming the boundary between the petitioner's said property and the ground feued to William Gibson, and now owned by the respondent, John Dods, and, on the east, by the street of Lauriston Gardens. The buildings for which warrant was craved were to be erected at the north-east corner of the said piece of ground, and the petitioner proposed to raise the wall, which formed the eastern boundary of the property and separ-

ated it from Lauriston Gardens, from its then height of 8 feet by about 5 feet so as to form the front wall of the new building abutting on Lauriston Gardens. Four windows and a doorway were to be slapped in the wall; the depth of the proposed building from east to west was to be 18 feet or thereby, and its frontage along Lauriston Gardens 44 feet or thereby.

The disposition in favour of the petitioner contained the following restriction:— "Declaring that the said Colin Macandrew and his foresaids shall be bound, as by acceptance hereof he binds and obliges himself and his foresaids, not to feu the piece of ground hereby disponed except for the building of villas, unless with the consent of the feuars in Lauriston Gardens, to whom we or our predecessors in office as trustees foresaid have undertaken the like obligation in the feu-rights granted by us or our foresaids, and also that in so far as we are or may be held to be under any obligation ourselves not to erect on the said piece of ground any other buildings than villas, unless with consent foresaid, the said Colin Macandrew and his foresaids shall be under the same obligation, it not being intended to impose on them any obligation against themselves erecting other buildings than villas unless such obligation already exists upon us, in which case the same obligation shall continue to exist and shall be binding on them, which burden, obligation, and declaration hereinbefore contained are hereby created and declared to be real servitudes and burdens upon and affecting the piece of ground before disponed, and as such are appointed to be recorded in the Register of Sasines as part of these presents, and inserted or validly referred to in any notarial instrument to follow hereon, and in all future transmissions and investitures of the said piece of ground or any part or portion thereof, under pain of nullity of the deed, writ, or instrument from which the same shall be omitted."

The feu-contract between William Gibson and George Beattie and others produced by the respondent referred to a feuing plan of the lands of Lauriston Lodge made out by James Lorimer, C.E., but declared that the plan was "referred to for no other purpose whatever than as showing the position of the ground hereby feued, the said parties of the first part reserving right to themselves and their successors to deviate therefrom as they shall think proper in regard to the unfeued ground, except that the said feuing ground shall only be feued for the erection of villas" [which unfeued ground, the petitioner admitted, included his piece of ground].

The said feu-contract also contained a clause "declaring that the house of Lauriston Lodge and grounds surrounding the same, as shown on said plan, which has now been feued, shall not be used for such purposes as shall be a nuisance to the said William Gibson and the other feuars; and declaring that no building shall be erected by the said parties of the first part (*i.e.*, the granters) or by their feuars on the grounds of Lauriston Lodge southward of the plot of ground marked A on the said feuing plan feued to Adam Beattie to the extent of the breadth of that plot on the south side thereof, and to the south boundary of the grounds of Lauriston Lodge, of greater height than the boundary wall of the back-ground of the houses, being 6 feet high, with the exception of summer houses, which may be erected of a greater height; and the said parties of the first part shall take the feuars from them bound to this effect, and to submit to them the plans of any contemplated summer houses to obtain the approval of the party of the second part (*i.e.*, the said William Gibson) or his foresaids before erection thereof."

The petitioner averred that no part of the proposed buildings would occupy ground southward of the plot marked A on the said plan. He also averred—"When the common authors of the petitioner and respondent conveyed to the petitioner the subjects upon which it is proposed to erect the said buildings they did not feu the same but disponed them absolutely. But in any case the petitioner does not propose to feu his ground for the purpose of the erection of buildings other than villas, or for any purpose whatsoever, nor to erect buildings thereon which his authors were under obligation to refrain from erecting. The proposed buildings do not contravene any restriction imposed upon the ground belonging to the petitioner by the title thereof or otherwise."

The respondent averred "that the reservation contained in the said feu-contract of the granter's right to deviate from the said feuing-plan was expressly qualified by the words 'except that said feuing-ground shall only be feued for the erection of villas.' The effect of the clauses contained in the said feu-contract is to lay upon the superiors themselves and their successors an obligation and restriction, enforceable by any of the feuars holding on similar title to the respondent, that no buildings other than villas shall be erected by themselves or their vassals on the said lands of Lauriston Lodge as shown on the said feuing-plan. By the said disposition, granted by the same parties in favour of the petitioner, the said obligation and restriction was imposed upon him and his heirs and successors, and was thereby created and declared to be a real burden affecting the said piece of ground disponed to him. It is believed and averred that a similar obligation and restriction was inserted in all the feu-rights granted by them over the whole or part of the said lands of Lauriston Lodge as shown on said plan. The operations and the erections proposed by the petitioner are in direct contravention of the obligations and restrictions as contained in, or imported into, his said title."

The petitioner pleaded, *inter alia*—"(2) As the erection of the proposed buildings involves no violation of any conditions in the petitioner's or respondent's title, warrant therefor should be granted. (5) The respondent having stated no relevant objection to the petitioner's proposals, his answers

ought to be repelled. (6) As the petition and answers raise no question of heritable title, the Dean of Guild Court has jurisdiction, and the respondent's second plea-in-law ought to be repelled."

The respondent pleaded, *inter alia*—"(2) The questions raised in this process being questions of heritable right are not competent for decision in the Dean of Guild Court, and the petition accordingly falls to be dismissed or sisted till such questions are competently determined. (3) The operations proposed by the petitioner being in direct violation and contravention of the conditions and restrictions contained in his title-deeds, he is not entitled to warrant as craved, and the same ought to be refused. (4) The respondent having right in virtue of the obligations in his favour contained in his title-deeds to object to the operations proposed, and the respondent having so objected, the warrant craved by the petitioner ought to be refused. (6) The same questions as are here agitated having been raised in this Court in 1899, and the then Dean of Guild having allowed the petitioner an opportunity of establishing his right in the Court of Session, of which he has not availed himself, he is barred from pursuing the present petition, or otherwise the same should be dismissed or sisted."

The Lord Dean of Guild on 8th August 1907 pronounced an interlocutor sisting the petition to enable the petitioner to establish his alleged rights in the Court of Session. He also issued a note in which he stated, *inter alia*—"In 1899 the petitioner made a similar application to this Court, and the respondent avers that that application was for warrant for a building on the same land as the petitioner now proposes to build on. The application in 1899 was opposed by the then owner of the respondent's feu. This Court sisted the petition in 1899 to enable the rights of parties to be established in the competent Court. The petitioner did not proceed after this Court's judgment in 1899 to establish his alleged rights. The Dean of Guild sees no reason for going back on the judgment of the Court in 1899, and therefore he again sists the petitioner's application, and for the reasons expressed in his opinion in 1899 he thinks that it lies on the petitioner to establish his rights."

The petitioner appealed to the Court of Session, and argued—This was a question, not of heritable right, but merely as to the construction and extent of the building restrictions, and it was therefore a proper question for decision in the Dean of Guild Court either with or without an inquiry. Accordingly that Court was in error in sisting the case, and the sist should be recalled and the question either decided in this Court or remitted for decision to the Dean of Guild Court. With reference (1) to the provisions in the feu-contract between Beattie and others and Gibson, these were not of the nature of a known and defined servitude; they were merely building restrictions, and such restrictions could not be binding on a singular successor unless they entered the Register of Sasines and appeared in the deeds forming the title of the party against whom they were sought to be enforced—*Liddall* v. *Duncan*, June 10, 1898, 25 R. 1119, 35 S.L.R. 801; *Murray's Trustees* v. *St Margaret's Convent*, July 19, 1906, 8 F. 1109, 43 S.L.R. 774. Here the restrictions were not contained in or imported into the petitioner's titles, and were therefore not enforceable against him. If the respondent sought to found on the provision against buildings higher than 6 feet being erected south of the point marked on the plan referred to, he must produce the plan, or otherwise he could not found upon that clause. But in any case this particular provision could not be treated as a servitude because it was of an anomalous kind; it referred merely to the height of the wall, and the terms of the provision could not be considered as sufficient to create a servitude —*Morier* v. *Brownlie & Watson*, November 1, 1895, 23 R. 67, 33 S.L.R. 47. (2) The restrictions contained in the petitioner's disposition must be read strictly, and so read they did not infer that the petitioner was to be restricted from erecting buildings other than villas — *Assets Co., Limited* v. *Lamb & Gibson*, March 6, 1896, 23 R. 569, 33 S.L.R. 407.

Argued for the respondent—As the question regarding the burdens on the petitioner's land was complicated, and as a proof was required, the decision in the Dean of Guild Court was right. These burdens were binding on and could be enforced against the petitioner. As to (1) the provisions in the feu-contract on which the respondent founded, these formed a well-known servitude, and might be effectually constituted against a party although they did not appear in his titles and did not enter the register—*Mearns* v. *Massie*, December 5, 1800, Hume, p. 736; Stair, note W on Servitudes, p. ccxxi; *Gray* v. *Ferguson*, January 31, 1792, M. 14,513; Ersk. ii, 9, 35. In particular, the provision that buildings higher than 6 feet should not be erected beyond the point marked on the plan was merely the servitude *altius non tollendi*, the height of the wall being taken as the standard of height. Hence this provision along with the others contained in the respondent's feu-contract was binding on the petitioner although not inserted in his titles. As to (2) the clause in the petitioner's disposition, on its fair construction this clause prohibited buildings other than villas on the petitioner's land. This provision bound the petitioner's author, and if so it also bound the petitioner and gave the respondent a *jus quæsitum* — *Sandeman's Trustees* v. *Brown*, December 15, 1892, 20 R. 210, 30 S.L.R. 217; *Assets Company, Limited* v. *Ogilvie*, December 8, 1896, 24 R. 400, 34 S.L.R. 195.

LORD PRESIDENT—This case is not one that comes under quite ordinary circumstances. The proprietor of ground in Edinburgh wished some years ago to put up certain buildings. He was then opposed upon grounds which depended upon rights as shown in the title both of the opponent and of himself, and at that time the Dean of Guild pronounced an interlocutor sisting

the case, because he considered that the matter had better be determined in an action at law, and not by pronouncing an interlocutor upon the merits of the case in the Dean of Guild Court. The proprietor at that time acquiesced in that view and did nothing. He gave up for the time his proposal to build, and he did not raise an action. He then comes back to the Dean of Guild Court, and he repeats his crave to have a decree of lining granted, and the Dean of Guild of the present time has repeated the interlocutor of his predecessor. An appeal has been taken against that interlocutor by the person who wants to build. His counsel has urged upon your Lordships that the Dean of Guild here has unduly withheld his own jurisdiction, and that the case ought to go back to him again with a behest from your Lordships that he should proceed to dispose of the merits of the case.

Now I am exceedingly far from laying down the proposition that it is not proper of the Dean of Guild to take up questions of legal restriction where there is no proper competition of heritable right and where the questions are merely whether the restriction applies or not, however hard and difficult these questions may be. The books are full of cases where the Dean of Guild in the first instance has had to decide difficult legal questions, and his decisions have come up for review at this Court. If this case had been one where the whole question turned upon the construction of a legal document, and upon construction alone, then I think your Lordships would have been probably inclined either to send it back to the Dean of Guild or, as has been urged by counsel, to have proceeded at once yourselves to a determination of the case. When the particular restrictions that we have to deal with here are brought before our notice, it is abundantly made clear to me that there is one of them at least that cannot be finally determined without settling a disputed question of fact, and accordingly there has got to be an inquiry.

Now I am certainly not going to start the idea that parties who want an inquiry into these matters are entitled to come to the Inner House, and to ask the Inner House to have an inquiry before themselves. Accordingly the only form of inquiry that should be allowed is either to send the case back to the Dean of Guild for inquiry or allow the matter to be raised at law. I do not say that if the Dean of Guild had chosen to take up an inquiry any objection would have been made. But he did not. It was a question of discretion, and it was a question of discretion in circumstances where he found that his predecessor had pronounced an interlocutor to that effect some years before, and that no opportunity had been taken to give effect to that interlocutor. That being so I do not think it is expedient, in the circumstances of this case, to disturb the discretion of the Dean of Guild. I think, therefore, that as there are difficult questions here of construction, and also one question resting upon the determination of fact, they had better be determined by an action at law — all the more that the question of fact seems to me to be question of fact which really will turn upon questions of evidence rather than upon questions of a practical character, such as the Dean of Guild is specially entitled to determine. We are told here that the plan upon which this matter turns is lost. It is, therefore, not a question of simply going to the ground with a plan—that is to say, it is not a surveyor's question, where the Dean of Guild certainly would be a very good person to determine it. It really comes to be a question of evidence. What sort of evidence I do not quite know, but I suppose it will either be whether certain adminicles will really do instead of the plan, or whether these adminicles have been so lost that, the plan also being lost, the restriction, such as it is, must be held *pro non scripto*. All these things depend upon legal and not upon surveying considerations. I therefore think that in the whole circumstances of the case, which I look upon as a peculiar one, the Dean of Guild was right, and your Lordships should affirm his interlocutor, the case, of course, being sisted in order that the petitioner may raise the question by appropriate action at law.

LORD KINNEAR—I agree with your Lordship.

LORD DUNDAS—I also agree.

The Court pronounced this interlocutor—

"Affirm the interlocutor of the Dean of Guild dated August 8th 1907, and remit the cause to him: Find the appellant liable to the respondent in the expenses of the appeal. . . ."

Counsel for the Petitioner—Chree—Macmillan. Agents—Menzies, Bruce Low, & Thomson, W.S.

Counsel for the Respondent—Hunter, K.C.—A. M. Mackay. Agents—Waugh & M'Lachlan, W.S.

Saturday, November 2.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Ardwall.)

M'DOUALL *v.* IRVINE.

Game — Process — Title to Sue — Common Informer—Taking Partridges in Close Time—Partridges Act 1799 (39 *Geo. III, c.* 34), *sec.* 3—*Game Act* 1761 (2 *Geo. III, c.* 19), *sec.* 4.

A common informer with concurrence of the procurator-fiscal has no title in Scotland to recover a penalty under the Partridges Act 1799, sec. 3.

Question whether the Sheriff has jurisdiction to entertain an action to recover such penalty.