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.

The Partridges Act 1799 (39 Geo. III, cap. 34), sec. 3, enacts—". . . That from and after the passing of this Act no person or persons shall, on any pretence whatever, take, kill, destroy, carry, sell, buy, or have in his or her possession or use, any partridge within the Kingdom of Great Britain, between the first day of February and the first day of September, in any year, and if any person or persons shall transgress this Act in the case aforesaid, every such person shall be liable to the same penalty as by the said Act of the second year of the reign of his present Majesty is laid and imposed on any person or persons transgressing the same, such penalty to be imposed, inflicted, recovered, applied, and disposed of in such and the same manner, and under such and the same rules, regulations, and, restrictions, as in and by the said Act is provided and directed with respect to the penalty thereby imposed on persons transgressing the said Act."

The Game Act 1761 (2 Geo. III, c. 19), which set forth a close time for different species of game, enacts, sec. 3—"Provided also that nothing in this Act contained shall extend or be construed to extend to that part of Great Britain called Scotland." Sec. 4—"And be it further enacted by the authority aforesaid, that if any person or persons shall transgress this Act in any of the aforesaid cases, and shall be lawfully convicted thereof by the oath of one or more credible witness or witnesses, every such person shall for every partridge, pheasant, heath fowl, or grouse so taken, killed, destroyed, carried, sold, bought, or found in his, her, or their possession or use, contrary to the true intent and meaning of this Act, forfeit and pay the sum of £5 to the person or persons who shall inform or sue for the same, and it shall and may be lawful to and for any person or persons to sue and prosecute for, and recover, the said penalty of £5, with full costs of suit, by action of debt, bill, plaint, or information, in any of his Majestie's Courts of Record at Westminster. . . ."

The Game Act 1831 (1 and 2 Will. IV, c. 32) provides, sec. 1—"Whereas it is expedient to repeal the following statutes in that part of the United Kingdom called England relative to game, and to substitute other provisions in lieu thereof, Be it therefore enacted . . . that . . . an Act passed in the second year of the reign of King George III entitled an Act for the better preservation of game in that part of Great Britain called England. . . . shall be and continue in force until and throughout the thirty first day of October in the present year, and shall from and after that day, as to that part of the United Kingdom called England, be repealed. . . ." Sec. 48—"And be it enacted that nothing in this Act contained shall extend to Scotland or Ireland."

Archibald Irvine, labourer, Church Street, Drummore, was charged in the Sheriff Court of Dumfries and Galloway held at Stranraer on 27th June 1907, at the instance of Andrew Kenneth M'Douall, Esquire of Logan, with the concurrence of John Marquis Ranken, solicitor, Procurator-Fiscal of Court for the public interest, on a complaint which set forth that he "did on 22nd May 1907, on the public road leading from Stranraer to Drummore, and at a part thereof in the parish of Kirkmaiden, distant about 90 yards in a northerly direction from the dwelling-house in Shore Street, Drummore, occupied by Helen Stevenson, spinster, and on the seashore *ex adverso* of said part of said road, kill and take a partridge in close time, *that is to say*, between 1st February and 1st September, both in the year 1907, contrary to the Partridges Act 1799, section 3, whereby the respondent is liable to a penalty not exceeding £5."

After the complaint had been read over the law agent for the accused stated, *inter alia*, the following objections:—"(1) No jurisdiction. (2) No title or interest on the part of the complainer, Andrew Kenneth M'Douall, to sue."

The Sheriff-Substitute (WATSON) sustained the second objection for the accused and dismissed the complaint, whereupon the complainer appealed to the Court of Session by way of stated case.

The question for the opinion of the Court was:—"Has the appellant, with concurrence of the Procurator-Fiscal, sufficient title to prosecute the present complaint?"

Argued for the appellant—Read together, the Statutes 39 Geo. III, cap. 34, and 2 Geo. III, cap. 19, sec. 4, conferred a title to sue here. It was true that, in terms, 2 Geo. III, cap. 19, only applied to England, but by construction it must be held to apply also to Scotland, as it was referred to by 39 Geo. III, cap. 34, on that assumption, and, further, it was repealed as regards England alone by 1 and 2 Will. IV, cap. 32, sec. 1. The Court at Westminster, as provided in the Act, having admittedly no jurisdiction here, the offence constituted by the statutes must be prosecuted in whatever Court had jurisdiction in the circumstances of the particular case dealt with.

Argued for the respondent—Section 4 of 2 Geo. III, cap. 19, was part of an Act which, as it only applied to England, had been wholly repealed by 1 and 2 Will. IV, cap. 32, sec. 1. The view that no penalty could be recovered in Scotland for this offence was not new—Hutchison's Office of Justice of the Peace, vol. ii, p. 566, note (*c*); Ness's Game Laws of Scotland (1818), p. 123. Even if not repealed, 2 Geo. III, cap. 19, only authorised private prosecution before an English Court; therefore there was no right of private prosecution here, and the concurrence of the Procurator-Fiscal did not cure the defect in the instance—*Duke of Bedford* v. *Kerr*, May 22, 1893, 20 R. (J.C.) 65, 30 S.L.R. 642. 13 Geo. III, cap. 54, was the ruling Act as regards the close time for game generally, but as regards partridges that Act was repealed by 36 Geo. III, cap. 54, which in turn was repealed by the Partridges Act 1799, 39 Geo. III, cap. 34, the Act here in question, and the only subsisting statute providing a close

time for partridges. The Partridges Act 1799 created a statutory offence without providing effective machinery for private prosecution, but there was by inference a right of public prosecution which was the appropriate method.

At advising—

LORD M'LAREN—In this case my opinion may be stated in a few words. The complaint charges the defender with taking partridges in close time contrary to the Partridges Act 1799, section 3, and claims for a penalty not exceeding £5. Now, on referring to this statute we find that it prohibits the taking of partridges within a close time there defined, and prescribes that the penalty may be recovered under the powers of an earlier statute—2 Geo. III, cap. 19.

The Partridges Act 1799 applies to Scotland, but the Act of 2 Geo. III, cap. 19, makes no provision for the recovery of penalties in the courts of Scotland, but only provides for the recovery of penalties in the King's Courts at Westminster. The reference to 2 Geo. III, cap. 19, is therefore ineffective so far as Scotland is concerned, at all events while the penalty is sued for by a private prosecutor, and in my opinion the Sheriff-Substitute has rightly dismissed the complaint.

The ground of judgment is want of title to sue, and in the stated case this is the only point brought under review. If the Sheriff-Substitute had found that he had no jurisdiction I should have been disposed to affirm the judgment. But I think the preferable ground of decision is want of title, because it may be that without any special statutory title the Lord Advocate or the procurator-fiscal has a title to prosecute wherever an illegal act is penalised and no provision is made for recovery of the penalty. By sustaining the plea of want of title on the part of a private prosecutor we keep this question open. I, of course, give no opinion as to whether taking partridges in close time may be the subject of a prosecution or complaint under any statute other than the Partridges Act 1799.

LORD PEARSON—I agree that this prosecution must fail, and I desire to explain very briefly the grounds of my opinion. The complainer is in the position of a common informer who has obtained the concurrence of the procurator-fiscal. The complaint is laid upon what is now styled the Partridges Act 1799 (39 Geo. III, c. 34). That Act had for its main purpose to introduce a uniform close time for partridges in Great Britain, namely, from 1st February to 1st September. Unfortunately, in the matter of imposing and recovering the penalty, the Act referred to a statute of 1761 (2 Geo. III, c. 19), which was a purely English statute providing for the recovery of the penalty "in any of His Majesty's Courts of Record at Westminster," by any person who might inform or sue for the same. That procedure, or whatever its modern equivalent may be, would obviously be futile at the instance of a common informer complaining of a contravention of the Act within Scotland; and I have not heard any suggestion as to the source from which a private informer in Scotland can derive a title to prosecute in any Scotch Court without express statutory authority. It is otherwise with the public prosecutor, who as a general rule can prosecute before the Sheriff Court for penalties which a statute has imposed without expressly enacting how the penalty is to be recovered.

I would not, however, be held as expressing any opinion as to whether a prosecution in the present case, under the Act 1799, would have been competent in the Sheriff Court at the instance of the procurator-fiscal himself. It may be that the express reference back to the Act of 1761 in the matter of imposing and recovering the fine excludes any implied authority to the procurator-fiscal to take proceedings, under the Act of 1799, in a Scottish Court. In determining that question, which is not now before us, it would be pertinent to consider whether there is any other remedy open; and in particular, whether the Act of 1773 (13 Geo. III, c. 54) does not apply, notwithstanding its partial repeal in 1796 by an Act which was itself repealed without any saving clause in 1799 (36 Geo. III, c. 54; 39 Geo. III, c. 34).

LORD ARDWALL—I agree with both your Lordships. The complaint which initiated the proceedings appealed against in the present case is founded solely upon the Partridges Act 1799 (39 Geo. III, c. 34), section 3. *Inter alia*, the objection was taken that the complainer had no title or interest to sue, and this objection has been sustained by the Sheriff-Substitute and he dismissed the complaint.

I am of opinion that the Sheriff-Substitute's decision is right.

The leading Scotch Act relating to close time for game is 13 Geo. III, c. 54, and under this statute the close time for partridges was fixed to be from 1st February till 1st September. Under that Act (section 8) it was provided that all offences under it might be tried before two or more justices of the peace or the Sheriff or Sheriff-Substitute of the county, and that the prosecutions might proceed either at the instance of the fiscal of the court at which the prosecution might be brought or by any other person who should inform or complain.

With respect to partridges, the period of close time formerly regulated by the above statute was altered by 36 Geo. III, c. 54, which made it unlawful to kill partridges between the 1st day of February and the 14th day of September in any year, and it provided that any person doing so in Scotland should incur the same penalties and forfeitures as by the Act of 13 Geo. III, c. 54, and under the same rules.

Matters remained in this situation until the year 1799, when the Act 36 Geo. III, c. 54, was repealed by the Act 39 Geo. III, c. 34. The commencement of the season for killing partridges was then altered from

the 14th to the 1st day of September, and this was declared to apply to the whole of the kingdom of Great Britain, and then the third section of the Partridges Act 1799 proceeds to say that any person transgressing the Act should be liable to the same penalty and to be recovered in the same way as is provided by the Act of 2 Geo. III, c. 19.

Referring now to the Act of 2 Geo. III, c. 19, it does not appear that the penalty there prescribed is recoverable in any of the courts in Scotland but only in any of the courts of Record at Westminster. This view derives support from the observations of Mr Hutchison in his work upon Justices of the Peace, vol. ii, p. 550, note C, and a case was tried in the Sheriff Court of Dumfriesshire referred to in a Treatise on the Game Laws by John William Ness, 1818, p. 123, in which it was held that the statutory penalty of £5 could not be recovered in the Sheriff Court. It will be noticed that by the Act 2 Geo. III, c. 19, it is declared that "nothing therein contained shall be construed to extend to that part of Great Britain called Scotland." I think it follows from these provisions of 2 Geo. III, c. 19, that the provision to the effect that an informer may prosecute for a penalty under the Act cannot be held to apply to Scotland, because such informer is only authorised to prosecute for a penalty in the Courts of Westminster. Now, without statutory authority a private informer is not in Scotland entitled to prosecute for penalties or fines, and if this is so the concurrence of the procurator-fiscal cannot supply the defect in the instance of a complaint brought by a private informer—*Duke of Bedford*, 20 R. (J.) 65. In the present case the complainer prosecutes merely in the character of an informer, because it is not maintained that he had any other interest in the matter, the offence having been committed not on land belonging to the complainer but on the seashore.

I am accordingly of opinion that under the Act of 1799, which is the only Act we have to deal with in this case, the complainer had no title to prosecute the complaint in question, that the concurrence of the Procurator-Fiscal did not supply the defect in the instance, and that accordingly we should answer the question put in the stated case in the negative.

The Court answered the question in the negative and dismissed the appeal.

Counsel for the Appellant—Chree—W. T. Watson. Agents—E. A. & F. Hunter & Company, W.S.

Counsel for the Respondent—Moncrieff. Agents—Simpson & Marwick, W.S.

Saturday, November 2.

FIRST DIVISION.

GOVAN PARISH COUNCIL *v.* GLASSARY PARISH COUNCIL.

Poor—Settlement—Residential Settlement—Capacity to Acquire Residential Settlement — Forisfamiliation — Education (Scotland) Act 1901 (1 *Edw. VII, cap.* 9), *sec.* 2—*Age at which Residential Settlement may be Acquired.*

The Education (Scotland) Act 1901, section 2, enacts—"It shall not be lawful for any person to take into his employment any child . . . (2) who, being of the age of twelve years and not more than fourteen years, has not obtained exemption from the obligation to attend school from the school board of the district. . . ."

Held that this enactment, having no reference to the poor law, did not affect the capacity to acquire a residential settlement, and consequently that, in spite of it, a female orphan could begin to acquire a settlement by residence on her attaining puberty, at the age of twelve.

The Parish Council of the Parish of Govan (*first parties*), and the Parish Council of the Parish of Glassary (*second parties*), presented a special case dealing with the settlement of Joanna Margaret Robertson Mackenzie, a pauper lunatic.

The pauper was born at Lochgilphead in the parish of Glassary on 19th December 1885, and was the lawful daughter of John Mackenzie, architect's draughtsman, who died on 18th February 1894 at Slockvullin, in the parish of Kilmartin. He had no residential settlement, and the settlement of his birth was Glassary. The mother, Joanna M'Corquodale or Mackenzie, died at Shettleston, in the parish of Glasgow, on 26th September 1901.

The case stated—"(4) From 3rd July 1894, when she was between eight and nine years of age, until 15th April 1902, when she was aged sixteen years and four months, the pauper resided continuously in the Orphan Homes, Whiteinch, in the parish of Govan. During her residence in these homes up to the age of fifteen the pauper was sent out each day to a public school for her education. . . . (6) If the pauper became capable of acquiring an independent settlement when she attained the age of twelve years, in December 1897, then, by her continued residence in the said Orphan Homes thereafter until April 1902, the pauper acquired a residential settlement in the parish of Govan, which settlement she had not lost at the date of her becoming chargeable as a pauper. The parish of Govan would accordingly, in that event, be the parish liable for the pauper's maintenance."

The questions for the opinion and judgment of the Court were—"(1) Did the said Joanna Margaret Robertson Mackenzie, the pauper, become capable of acquiring an