applied in maritime cases obtains here. The vessel there that has freeboard is in fault if it does not make use of it, and the vessel that has not got freeboard at its disposal is not held to blame. Here the one man had only got a few feet of road between his near wheel and the left-hand margin, and the other had the whole breadth of an exceedingly broad road, and must have had at least forty-five feet, if not more, in which to turn.

I cannot imagine that anyone could look at the description of this accident and see the plan of the place and come to any but one conclusion, if he had any experience of practical driving at all. When I say that the man lost his head, that is negligence. Negligence in law does not necessarily mean that a person has done it on purpose. I do not suppose that this driver in any way did it on purpose, but when you lose your head to such an extent that you forget to turn your steering wheel in the direction that takes you away from danger—well, I have no hesitation in coming to the conclusion, and I think it is an exceedingly clear case, that this accident was caused by the bad driving of the chauffeur of the defender's car.

LORD KINNEAR—I concur.

LORD MACKENZIE—I am of the same opinion, because I think that the accident here was caused owing to the driver of the Albion car having lost his head at the critical moment. I come to this conclusion upon the footing that it is not proved that the Humber car was proceeding at an excessive rate, and therefore that the embarrassment of the driver of the Albion car was not caused by excessive speed on the part of the driver of the Humber. What may be excessive speed, as your Lordship has pointed out, depends entirely upon the road and the surrounding circumstances; but I think it right to say that in my opinion the driver of any car is under all circumstances, entitled, in driving or manœuvring his car, to rely upon the fact that any and every other car upon the road is proceeding at a rate not exceeding twenty miles an hour.

The Court pronounced this interlocutor—

"... [*After the findings in fact, ut supra*] ... Find in fact that the said collision was due to the negligence of the defender's chauffeur in attempting to cross the main road while the pursuer's car was approaching the crossing, and in failing to turn to the left, as he could easily have done and avoided the collision: Therefore find in law that the defender is liable to the pursuer in damages, and assess the same at £30," &c.

Counsel for Pursuer (Appellant)—Watt, K.C.—Ingram. Agent—R. Arthur Maitland, Solicitor.

Counsel for Defender (Respondent)—Blackburn, K.C.—A. Moncrieff. Agents—Bell, Bannerman, & Finlay, W.S.

Tuesday, November 10.

FIRST DIVISION.

[Dean of Guild Court at Edinburgh.

BRAID HILLS HOTEL COMPANY, LIMITED *v.* MANUELS.

Property—Building Restriction—Servitude—Real Burden—Jus Quæsitum—Disponees Tracing from Same Author—Restriction Imposed in Favour of Disponer's Successors in Certain Lands——Disponees of the Favoured Lands Having No Assignation of Right to Enforce Restriction—Title to Sue.

Disponees tracing from the same author may, like feuars, have a *jus quæsitum* in a building restriction imposed in the title of one of them sufficient to entitle them, without any assignation of right to enforce, to insist on the observance of the restriction.

The owner of a block of ground disponed a part thereof under this restriction—"That no buildings of any kind shall be erected thereon excepting an ornamental greenhouse or summer house or pavilion not exceeding 15 feet in height, and that the said area or piece of ground hereby disponed shall not be used otherwise than as a garden or pleasure ground, nor in such a way as may be offensive to or as may affect the amenity of the neighbourhood as a place of residence, which conditions and restrictions before written the said William Ritchie Rodger, by acceptance hereof, binds and obliges himself and his foresaids to implement and observe in all time coming, and the same are hereby declared a real burden and servitude upon and affecting the area or piece of ground hereby disponed in favour of me and my successors, proprietors of the ground on the east and west sides thereof, and as such shall be inserted or validly referred to in all future conveyances and investitures of or relating to the area or piece of ground hereby disponed, under pain of nullity."

Held that disponees of a portion of "the ground on the east and west sides thereof," having an interest, were entitled to insist on the observance of the restriction.

Question if the restriction could be treated as the known servitude *altius non tollendi? Per* Lord President—"I confess that for myself I should like to reserve my opinion as to whether you can put within the category of known servitude a servitude which, although it begins, so to speak, by being a known servitude, has imposed upon it a qualification or exception which takes it out of the ordinary class."

On 12th December 1907 the Braid Hills Hotel Company, Limited, presented a peti-

tion in the Dean of Guild Court, Edinburgh, for warrant, *inter alia*, to erect on part of their ground a two-stalled stable with motor garage. Miss Margaret Law Manuel and another, proprietors of 140 Braid Road, Edinburgh, compeared and objected.

The following narrative is taken from the opinion of the Lord President — "Colonel Trotter of Mortonhall feued a portion of ground to one Peter Mowat, a builder in Edinburgh. Mowat, on a portion of that ground, erected the Braid Hills Hotel, and of another portion of the ground, which had not been utilised for making the Braid Hills Hotel, he disponed ·215 of an acre to William Ritchie Rodger. In the disposition which he granted there was this clause—'That the said area or piece of ground hereby disponed is so disponed with and under the following conditions and restrictions, viz. . . .' [*quotes restriction, v. supra in rubric*] . . . The piece of ground disponed to Rodger has passed to the petitioners in the present case, the Braid Hills Hotel Company, but it is admitted that the restriction originally imposed upon Rodger was, in terms of the provisions to that effect, duly inserted in subsequent transmissions, and that consequently it is part of the infeftment and qualifies the infeftment of the present petitioners.

"The present petitioners wish to put up a stable and garage of twenty-five feet high upon the ground in question, and that is opposed by the proprietors of a piece of the ground which is 'the ground on the east and west sides' of the ground originally disponed, their title flowing also from Mowat. Now, it is not disputed that the building proposed to be erected does not, under any construction, fall within the description of 'ornamental greenhouse or summer house or pavilion not exceeding 15 feet in height,' and accordingly there is no question here upon the quality of the restriction. The only question that has been argued before the learned Dean of Guild and before us is the question of title, and that is whether the present objectors have a title to enforce this restriction, which is part of the petitioners' infeftment, and which, it is admitted, strikes at the proposed erection if there is a title in them to enforce it."

The respondents (objectors) pleaded, *inter alia* (Additional Pleas)—"(1) The real burden and servitude referred to in article 4 of the condescendence being a valid real burden and servitude affecting the area referred to belonging to the petitioners, and one which the compearing respondents have a title and interest to enforce, the petition, so far as relating to the buildings proposed to be erected on the said area, should be dismissed."

On 5th March 1908 the Dean of Guild pronounced the following interlocutor—"Sustains the first plea-in-law for respondents, and therefore refuses the prayer of the petition in so far as the petitioners crave warrant to erect on the piece of ground to the south of the said stable another two-stalled stable with motor garage."

In his note the Dean of Guild expressed the view that the respondents had a title, (1) because the restriction was imposed in favour of the disponer's successors in certain lands, which the respondents were; and (2) because they were owners of the dominant tenement in the negative servitude *altius non tollendi*.

The petitioners appealed, and argued—The clause in question was merely a building restriction, not a servitude, and as there was no special assignation in their disposition of the right to enforce it, the respondents had no title to do so — Ersk. Inst. ii, 7, 2; Stair's Inst. iii, 2, 1; *Maitland* v. *Horne*, February 21, 1842, 1 Bell's App. 1; *Breadalbane* v. *Sinclair*, August 14, 1846, 5 Bell's App. 353; *Hislop* v. *MacRitchie's Trustees*, June 23, 1881, 8 R. (H.L.) 95, at p. 104, 19 S.L.R. 571; *Mactaggart & Co.* v. *Harrower*, July 20, 1906, 8 F. 1101, 43 S.L.R. 815. The respondents had no *jus quæsitum*, for the clause was contained in a disposition granted by a vassal, and not in a charter granted by a superior. In short, the law as to "mutuality" of stipulations, as in a case of co-feuars, was altogether inapplicable. Further, the restriction was not within the servitudes known to the law, for it did not prevent the erection of buildings, or merely limit the height of buildings, but attempted to regulate the kind of building that might be put up. The law was jealous as to the extension of negative servitudes — Bell's Prin. 979; Rankine's Landownership, 373. It was incompetent for the owner of the dominant tenement to increase the burden on the servient tenement by dividing up his tenement among various owners.

Argued for respondents—The restriction was clearly enforceable, for (1) it was fully entered on the record, and (2) it was a servitude *non ædificandi* duly set forth in the title of the servient tenement. It was unnecessary to appeal to the law of *jus quæsitum tertio*, for here the creditor in the obligation was expressly mentioned. This case was *a fortiori* of *Finnie* v. *Glasgow and South-Western Railway Co.* (1857), 3 Macq. 75, at p. 89. A *jus quæsitum tertio*, however (if it were necessary to appeal to that doctrine), could arise equally well between disponees — *Hislop* v. *MacRitchie's Trustees* (*cit. sup.*), *vide* Lord Watson's opinion. For the constitution of a *jus quæsitum tertio* privity of feudal estate was not necessary — *Stevenson* v. *Steel Co. of Scotland, Limited*, July 24, 1899, 1 F. (H.L.) 91, *per* Lord Watson at p. 94, 36 S.L.R. 946. A special assignation of the right to enforce a servitude or even a building restriction was not required where, as here, the restriction was an inherent condition of the grant —*Duke of Montrose* v. *Stewart*, February 15, 1860, 22 D. 755, *affd.* March 27, 1863, 1 Macph. (H.L.) 25. The present case was analogous to that of *MTaggart* (*cit. sup.*) In that case Lord Kyllachy indicated that in his opinion no special assignation was necessary. The restriction had entered the infeftment, and that was enough to make it enforceable. The present case was

distinguishable from that of *Johnston* v. *MacRitchie*, March 15, 1893, 20 R. 539, 30 S.L.R. 518, for in that case the stipulations had not been made real burdens by entering the record. The fact that the number of creditors had been increased was immaterial in the case of a negative servitude, for enforcement by one was as effective as enforcement by all.

LORD PRESIDENT— . . . [*After the narrative quoted supra*] . . . It is said there is no title in the objectors, because in the title which they got from Mowat there was no special assignation of the right to enforce these conditions. The learned Dean of Guild has held that no such special assignation was necessary, and I agree with him. The question was mentioned, but not decided, in the case of *M'Taggart & Co.* v. *Harrower* (8 F. 1101). It is mentioned by Lord Kyllachy in such terms as, I think, indicate not obscurely that his view was that no special assignation in such a case was necessary, but one cannot quote that as an authority upon the point, because he expressly reserved his opinion. I think, however, the matter comes out perfectly clearly in Lord Watson's judgment in *Hislop* v. *MacRitchie*, 8 R. (H.L.) 95, at p. 104. The case of *Hislop* v. *MacRitchie* is very familiar to your Lordships, and has again and again been quoted. The point there was whether one of a set of co-feuars could enforce restrictions in the title of another feuar. Now Lord Watson begins his opinion by saying that everyone of a class of feuars deriving their title from a common superior may have a *jus quæsitum*. He points out that the title of the superior, where there is always a remaining privity of contract between every generation of the superiors and vassals, is not the same, but the title of one feuar against another must depend upon a *jus quæsitum*. Inasmuch as this *jus quæsitum* must necessarily be in the nature of a servitude, he says this— "It would be unreasonable and contrary to all principle to hold that a feuar was subject to such a servitude, except upon evidence warranting the inference that in accepting a title of his own feu he had it in contemplation, and tacitly agreed, that such a burden should be imposed upon him." And then he goes on to consider what kind or amount of evidence would show that, and lays it down in terms that have again and again been quoted, that mere identity of burden will not be enough, but that there must be something else as well to show that each feuar consented to be bound in a question with his co-feuar. All that must, I think quite obviously, be taken subject to the consideration that discussion of what is tacit agreement can never be necessary where you have expressed agreement. You do not need to look for a tacit agreement by a feuar that a burden should be imposed upon him, when you have got it expressly stated in his own title, and if this had been in a feu-contract instead of in a disposition I take it that it would absolutely fall within the actual words used in *Hislop* v. *MacRitchie's* case. Here you have no need to look for inference, because it is expressly stated that this burden is imposed in favour of, not only the disponer, but his "successors, proprietors of the ground on the east and west sides thereof."

Well, then, does the fact that it is in a disposition make any difference? I think clearly not. I think that that also is shown inferentially in the case of *Hislop* v. *MacRitchie's Trustees*, because one of the cases Lord Watson quotes in examining these matters is the case of *Robertson* v. *North British Railway Co.* (1 R. 1213), which was a case of a disposition, and not a feu at all. It is quite true that Lord Watson indicates that he has doubts whether *Robertson* v. *North British Railway Co.*, was rightly decided upon one point, but that does not touch the authority of the case as he uses it. He says—"Assume that that point was rightly decided, then I agree with the case," and it leads to the result I have indicated. I think Lord Watson also came to say the same thing subsequently in the House of Lords in the case of *Stevenson* v. *The Steel Company of Scotland* (1 F. (H.L.) 91, at p. 94), where he says in so many words, on p. 94 of the report—"As regards the second point, whilst it appears to me that there may be a *jus quæsitum* arising to disponees as well as to feuars, where there are reciprocal obligations between them, I am of opinion that there are no circumstances to be found in the present case from which such a right can be inferred." Accordingly I think that really ends the matter. You do not need to speculate here, because you find the right expressed, and the only point is whether the parties here are persons who are proprietors of the ground on the east and west. Well, that is conceded, and that I think ends the matter.

The learned Dean of Guild has put his judgment also upon a second ground, that this is a servitude, and that it is a known servitude. As to the general doctrine, I agree. If you find a known servitude in the titles of a servient tenement, I think, in order to show a title to sue, you have only really got to discover two things. You have first of all got to discover from the servitude itself that there is a proper dominant tenement. Nobody coming forward without something to which he can appeal as a proper dominant tenement would have a title to enforce this right. And then, secondly, over and above that, he must also of course show interest, or else he will fail on the well-known doctrines laid down in the case of *Gould* v. *M'Corquodale*, 8 Macph. 165, where it was held that the servitude was perfectly well constituted, but that if the pursuers could not show an interest their right to enforce it fell. But I do not wish to put this judgment, for myself, on that ground, because I think the learned Dean of Guild has not quite correctly read the servitude. I will not say he has not correctly read it, but he has assumed it to be something I do not think he has the right to assume. He has assumed that this is an ordinary servitude,

altius non tollendi, the limit of height being fifteen feet. Now it is not quite so expressed, and although I think it is quite arguable that the outcome of it is to that effect, yet I do not think you can assume *de plano* that it is so, because what is here the prohibition is not against erecting any building over 15 feet, but against erecting any building except an ornamental greenhouse or summerhouse or pavilion which is not to be greater than 15 feet. I confess that for myself I should like to reserve my opinion as to whether you can put within the category of known servitude a servitude which, although it begins, so to speak, by being a known servitude, has imposed upon it a qualification or exception which takes it out of the ordinary class. I do not think it is necessary to decide that, because I think there are ample grounds of judgment on the first point.

LORD M'LAREN—I am of the same opinion.

LORD KINNEAR—I agree with your Lordship.

LORD PEARSON—I also agree.

It having been pointed out to the Court that the Dean of Guild's interlocutor (quoted *supra*) should have contained the word "additional" before the words "plea-in-law," the Court pronounced this interlocutor—

> "Vary the interlocutor of the Dean of Guild, dated 5th March 1908, by inserting the word "additional" between the words "first" and "plea": Affirm said interlocutor with the variation: Refuse the appeal, and remit the cause to the Dean of Guild to proceed as accords. . . ."

Counsel for Petitioners (Appellants) — Hunter, K.C. — W. Thomson. Agents — Lindsay Cook & Dickson, Solicitors.

Counsel for Respondents — M'Lennan, K.C.—W. J. Robertson. Agents—Skene, Edwards, & Garson, W.S.

Tuesday, November 10.

SECOND DIVISION.

[Sheriff Court at Perth.

PERTH TOWN COUNCIL *v.* EARL OF KINNOULL.

Burgh—Road—Street—Public or Private —"Highway"—"Road Maintained by Statute Labour"—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, cap.* 33), *sec.* 103 (5) (6)—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 3.

"Public street" in the Burgh Police (Scotland) Act 1903, sec. 103 (5), includes any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the Town Council. Highway within the meaning of the Roads and Bridges (Scotland) Act 1878, sec. 3, includes all existing statute labour roads, which means roads "maintained by statute labour" or its equivalent. A road which was a statute labour road in 1790 ceased to be on the county lists of highways upheld by statute labour about 1827. No statute labour or equivalent money was expended on it subsequent to 1829. It was never formally closed, and continued to be used as a road for vehicles down to 1878. *Held* that the road was an "existing statute labour road," and therefore a highway within the meaning of the Roads and Bridges (Scotland) Act 1878, and consequently that that part of the road which was within the boundary of a burgh was a public street and not a private street within the meaning of the Burgh Police (Scotland) Act 1903, sec. 103 (5).

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 103, enacts—"(5) 'Public street' shall . . . mean . . . (*b*) any highway within the meaning of the Roads and Bridges (Scotland) Act 1878, vested in the Town Council. . . . . (6) 'Private street' shall . . . mean any street other than a public street."

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 3, enacts —" . . . 'Statute labour' shall include moneys raised as the conversion of statute labour, or in lieu thereof. . . . . 'Statute labour road' shall include all roads and bridges maintained by statute labour. 'Highway' shall mean and include all existing turnpike roads, all existing statute labour roads. . . ."

The Town Council of Perth passed a resolution under the Burgh Police (Scotland) Acts 1892 to 1903, and in particular the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 133, as amended by the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33) calling upon the Earl of Kinnoull to cause that part of Gannochy Road, extending from Pitcullen Terrace to the burgh boundary of Perth, to be freed from obstructions, and to be properly levelled, macadamised, and flagged and channelled, and completed with fences, posts, crossings, kerb-stones, gutters, and street gratings or gulleys, and drains for carrying off surface water, all in terms of certain plans, sections, and specifications.

The Earl of Kinnoull appealed to the Sheriff under the Burgh Police (Scotland) Act 1892, sec. 339, on the ground that the portion of the road in question was a public and not a private street within the meaning of the Burgh Police (Scotland) Act 1903, sec. 103 (5) (6), and that the resolution of the Town Council was therefore incompetent.

On 23rd July 1907 the Sheriff-Substitute (SYM) found in fact that the road in dispute was not a "private street," and in law that the appellant was not liable to perform the operations specified in the resolution, and sustained the appeal.

The Town Council appealed to the Sheriff (JOHNSTON), who on 15th October 1907