Accordingly the appellant's counsel argued that the expression "immediately before" must be construed as equivalent to "last before," and that his client was entitled to the benefit of the presumption in respect that his last employment prior to the date of his disablement was employment as a miner in the service of the respondents. I cannot accept this ingenious suggestion as the true construction of sub-section (2). Accordingly I think that the arbitrator was right in holding that the burden of proof lay upon the appellant. It follows that the second question should be answered in the affirmative.

The third question in the Stated Case is whether "in the circumstances was the arbitrator right in refusing to award pursuer compensation?" The arbitrator decided that against the appellant upon the ground that the effect of the evidence was that the disease was contracted before 26th March 1913, and was not aggravated by the nature of his employment after that date. In other words, the disease was not contracted either wholly or partially within the twelve months previous to the date of the disablement. In so far as this finding is one of fact, I see no reason to doubt that the arbitrator had evidence before him which entitled him to make it. In so far as it involves a particular view as to the meaning of the statute the finding cannot be disturbed in this appeal, because the arbitrator was not asked, nor were we asked, to make any determination as to the meaning and effect of section 8. For my own part, however, I should like to hear argument on the question whether sub-section (1) of that section really makes it a condition of a workman's right to recover compensation in respect of disablement from an industrial disease that the disease should have been contracted either wholly or partially within the statutory period of twelve months. It is at least arguable that the section draws a distinction between a disease being "due to the nature of" a workman's employment with a particular employer and its having been "contracted" either wholly or partially while the workman was in that employment. In this view all that it was incumbent on the appellant to prove was (*a*) that he had worked as a miner within twelve months of his disablement, and (*b*) that the miner's nystagmus referred to in the certificate was not due to some accident or disease unconnected with mining, or to his having worked in some other industry the conditions of which might have caused the disease. I make the suggestion with hesitation, because the opposite construction of the section was assumed to be the correct one in the case of *Scullion* v. *Cadzow Coal Company*, and was adopted by the Court of Appeal in England in *Dean* v. *Rubian Art Pottery, Limited*. I still, however, feel the doubts which I expressed in my opinion in the case of *M'Gowan* v. *Merry & Cuninghame, Limited*, as to the true meaning of the section. Another reason for giving a liberal construction to sub-section (1) of section 8 is to be found in the terms of sub-section (10), which apparently confine the workman's remedy in respect of a scheduled disease to proceedings under the section, and do not permit him, as was done in the present case, to make a claim without reference to the section.

The Court answered the second and third questions of law in the affirmative, the first being of consent superseded, and dismissed the appeal.

Counsel for the Appellant — Moncrieff, K.C.—Fenton. Agents — Simpson & Marwick, W.S.

Counsel for the Respondents — Horne, K.C. — Carmont. Agents — W. & J. Burness, W.S.

Thursday, December 10.

SECOND DIVISION.

[Sheriff Court at Glasgow.

WALLACE *v.* BERGIUS.

Reparation—Road—Negligence—Contributory Negligence—Motor Car—Liability for Collision.

The driver of a motor car continued on the wrong side of the road until a collision with a motor car approaching from the opposite direction seemed imminent, when he swerved to his proper side. The driver of the approaching car, however, in the belief that he must do something to avoid the imminent collision, swerved also to the same side and the two cars collided. *Held* that the driver of the approaching car was not guilty of contributory negligence in swerving away from his proper side of the road.

Per Lord Justice-Clerk—"I think the driver of a motor car is in the same position as the master of a ship in this respect, that if at the last moment he reasonably judges that a collision is absolutely inevitable unless he does something, and if that something might avoid a collision, he acts perfectly reasonably in taking that course."

Observed per Lord Guthrie — "On a clear road with nothing in sight a driver is entitled to take any part of the road he likes."

J. H. Wallace, stockbroker, Kilmalcolm, *pursuer*, brought an action in the Sheriff Court at Glasgow against A. Norman Bergius, Glasgow, *defender*, for £400, 10s. 3d. damages in respect of loss sustained by the pursuer arising out of injuries caused to his motor car which were the result of a collision between it and a motor car belonging to the defender on 31st October 1912. The defender made a counter claim for £320 in respect of loss sustained by him arising out of injuries caused to his motor car in the collision.

The following *narrative* of the *facts* is taken from the opinion of the Sheriff (*infra*) —". . . Without going into the details, I think it is proved that shortly after five o'clock on the date in question the Bergius

car crossed the river at the Renfrew Ferry, and that at that point the chauffeur took advantage of the delay in crossing to light the lamps of the car. The car after crossing the river proceeded up towards Scotstounhill, where it met the Wallace car in the neighbourhood of a cottage called the Knightswood Cottage. The Wallace car was proceeding westwards from Glasgow, and I think it is proved clearly that after passing a bend on the road at which many cars going west swing over towards the north side of the road (the wrong side), he continued to travel on the north or his wrong side of the road until he came quite close to the Bergius car. Up to this point the two cars were proceeding end on, and if they had continued a collision was inevitable. When they were quite close the Bergius car, thinking that the other one did not intend to give way, deflected towards the south, and at the same moment or very shortly afterwards the Wallace car also deflected towards the south, with the result that the collision occurred. I think it is proved that at the time the Bergius car deflected the cars were in distance within a few yards of one another, and in time within a second or two of colliding. At the same time it is not proved that if the Bergius car had remained on its own side—that is to say, the north side of the road—and the Wallace car had deflected when it did a collision would have occurred."

On 10th February 1914, after a proof led, which by agreement was restricted to the question of blame, the Sheriff-Substitute (FYFE) found in fact that the accident was occasioned through the fault of the pursuer's servant who was in charge of the pursuer's car, and found in law that the pursuer was liable to the defender in reparation.

Note. — ". . . The present case is concerned only with the damage done to the cars. The pursuer makes a claim of £400 and the defender counter-claims for £320.

"As generally happens in collision cases the proof is contradictory, but I have come to the conclusion that the blame for the collision rested with the pursuer's servant, and that the only question requiring serious consideration is whether the defender's servant was guilty of contributory negligence. . . .

"In my opinion the pursuer's servant was to blame, not because he failed to see the defender's car, but because, seeing it, he failed in sufficient time to take the requisite action to keep out of its way.

"I heard a great deal at the proof (as one always does in these cases) about a vehicle keeping to what is loosely spoken of as its own side of the road. But so far as I know there is no legal obligation requiring any vehicle to keep either side of the road so long as that vehicle has the whole roadway to itself, and is neither overtaking nor meeting another vehicle. Perhaps it might be a good thing if the law did lay down rules of the road, but that has not yet been done.

"I am of course very far from saying anything to weaken in any way the popularly understood safety-practice of each vehicle keeping to its near or left side of a roadway, but I do not know of any law making that imperative, and I think that in collision cases witnesses generally—and especially so-called expert witnesses — have a tendency to confuse in their minds a thing which is prudent to do with a thing which there is a legal obligation to do. They probably have in their minds navigation rules, which in narrow channels and inland water require vessels to keep to the left in all circumstances. But these are statutory rules which do not apply on land.

"The only rule of the road of which the law takes cognisance is that when two vehicles are meeting each other each should in order to pass safely bear to its left.

"In the present case the two motor cars were meeting each other. The defender's car was coming towards Glasgow, and the pursuer's car was going out from Glasgow.

"I think it is a proved fact in the case that the defender's car was on its left-hand side of the roadway, and it is also a proved fact in the case that the pursuer's car was on its right-hand side—that is to say, both cars were on the same side of the roadway although they were coming in opposite directions. In these circumstances the defender's car had nothing to do but keep its course, the duty being upon pursuer's car to bear to the left. In my opinion the whole explanation of the casualty is that the pursuer's car carried on too long before proceeding to perform this duty.

"At this point comes in an element upon which I had some very remarkable evidence—viz., whether there was a duty upon either car to stop. Here again I think there is often in the minds of witnesses a good deal of confusion as to legal obligation. I do not know of any law which requires either of two approaching vehicles to stop merely because they happen to be approaching each other on the same side of the roadway. Each vehicle is entitled to assume that the other is under proper control, and will at the proper time be steered in the proper direction; and a motor car belongs to a class of vehicles whose course can be deflected so easily that it does not appear to me that any circumstances existed which required either car to stop. If it were necessary for one to stop, of course it was also necessary for the other car to stop, and traffic would become impossible if every motor car which has a vehicle in front of it on the same side of the road were required to stop. The cars would never get past each other at all.

"The next question raised is that of speed. On record each party accuses the other of reckless driving, but I do not think that the proof discloses that either car was going too fast, nor does the proof disclose any reason why both should not have been driven at a smart pace.

"Neither his own speed nor that of the other car was the explanation of the pursuer's driver failing to bear to the left and to pass the other car in safety. It was not furious driving but defective steering which was the cause of the casualty.

"There is nothing whatever in the proof to suggest that the machinery of pursuer's car had at the moment failed its driver, or that there was any reason for his not bearing to the left earlier than he did.

"In the whole circumstances I think there is no doubt that pursuer's servant was to blame for the casualty.

"The other question is whether the defender's servant was also to blame. It is not doubtful that just as a collision was imminent defender's car did bear to the right—that is to say, it left what in normal circumstances ought to have been a safe position and attempted to pass pursuer's car on the south side of the road. Simultaneously the pursuer's servant did what he should have done earlier—he bore to the left The result was that both cars were angled across the road, pointing in the same direction, and that they collided at an angle.

"It was faintly suggested in argument by the pursuer's agent that the explanation of defender's car leaving the north side of the road was that there was better going on the south side. But there is not, I think, any evidence at all to support this suggestion. The real explanation of the casualty is that pursuer's servant had carried on, on the north side of the road, so long as to induce a reasonable belief in the mind of the defender's servant that he intended to stick to the north side, and accordingly defender's servant, in the emergency which arose, endeavoured to give him the roadway on the north side.

"I am not required to decide whether it was a wise thing on the part of the defender's servant to endeavour to leave the north side of the road. It was perhaps an error of judgment on his part to do so, and possibly if he had kept where he was the pursuer's car might have passed him in safety, although it would have been a close passing. What I am alone concerned with is whether the action of defender's servant was on his part fault or negligence in the legal sense.

"It is a well-recognised doctrine as regards collisions at sea—and the principle is equally applicable on land—that where one party is primarily at fault and puts the other party into a situation of peril and forces him to act in an emergency, the party primarily in the wrong is precluded from pleading fault against the other party. The principle has been applied in many maritime cases, and was very aptly expressed by L. J. James in the case of "*Bywell Castle*," 1879, 4 Probate 223, where he said—'A ship has no right by its own misconduct to put another ship into a situation of extreme peril and then charge that other ship with misconduct. My opinion is that if in that moment of extreme peril and difficulty such other ship happens to do something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men.' If in this passage one reads 'motor car' for 'ship' I think the situation in the present case is expressed. The pursuer's car put the defender's car into a situation of peril, where the defender's servant had to act in a moment of emergency. If in the emergency defender's servant committed an error of judgment, that was not in the legal sense fault inferring liability for damage.

"In my view, therefore, the pursuer's claim should be refused and the defender's counter-claim sustained. . . ."

The pursuer appealed to the Sheriff (GARDINER MILLAR), who on 17th June 1914 adhered.

Note.—". . . [*After the narrative supra*] . . . So far as the practice of chauffeurs is concerned, it is the evidence of all the experts that the chauffeur of the Bergius car should have remained on the north side and not deflected to the south, no matter what the Wallace car did. On these facts the question of law seems to me to be a difficult one. There is no doubt that according to the Statute 1 and 2 Wm. IV, cap. 43, section 97, incorporated in the Roads and Bridges Act 1878 (41 and 42 Vict. cap. 51), section 123, the driver of the Bergius car was bound to keep to the left or near side of the road on meeting the Wallace car. There is further no doubt on the evidence that in the view of all the experts he did wrong in not keeping to the left and in deflecting to the south. Accordingly I must hold that the driver of the Bergius car was wrong when he deflected his car to the south side of the road.

"But then the agent for the defender relied upon the rule which is sometimes known as the "agony rule" at sea, and is referred to upon page 3 of Marsden on the Law of Collisions at Sea (6th ed.), where he says—'If a vessel by her own fault makes a collision so imminent that it cannot be avoided except by extraordinary skill, nerve, or exertion on the part of the other ship, and a collision occurs, it will be held to have been caused by the former, and she will be liable for the entire loss.' It is curious that in none of the cases to which I was referred has the Court held that the ship whose error caused the collision may be excused on this ground. In the case of the "*Bywell Castle*," L.R., 4 P.D. 219, the Court held that the error of the captain of the "*Bywell Castle*" did not cause the collision, and in the case of the "*Khedive*," L.R., 5 A.C. 876, the House of Lords held that the captain of the "*Khedive*" was not excused, because the statutes and regulations had not left the master of the "*Khedive*" a discretion in the matter, that he was bound to stop and reverse, and therefore he must be held to be in part responsible. But they so decided because the statute had made that imperative. On the other hand we have the expression of opinion in the case of the "*Bywell Castle*" that even if the error of its captain had caused the accident, yet, nevertheless, they would have held him excused on account of the emergency in which he was placed by the wrong conduct of the "*Princess Alice.*" In the case of the "*Khedive*" the Court of Appeal held that the master of the

"*Khedive*" was excused by the emergency caused by the wrong conduct of the "*Voorwaarts.*" The question therefore arises whether there was such an emergency in the present case. Both cars were within a very few yards of one another, and were proceeding at a rate of nearly twenty miles an hour. Apart from stopping his car the driver of the Bergius car could do nothing but deflect to the right to avoid the collision. The collision seemed to be imminent, and the driver had to consider not only his own life but the lives of the three ladies who were his passengers. In those circumstances I think a driver of ordinary skill, nerve, and presence of mind might be very well excused for proceeding to the right, even although the result of that manœuvre should be to bring about a collision.

"On the whole matter there is no doubt in my mind about the fault of the driver of the Wallace car, whose action was the real cause of the state of anxiety and embarrassment of the driver of the Bergius car which induced him to do the wrong act, and therefore I concur with the learned Sheriff-Substitute in thinking that the defender is entitled to succeed in his claim against the pursuer."

The pursuer appealed to the Second Division of the Court of Session, and argued—*Esto* that the appellant's driver was in fault, in respect that he was proceeding along the road on his right-hand side, the respondent's driver was guilty of contributory negligence. When the cars were approaching the appellant's driver steered his car to his own side of the road in sufficient time to avoid a collision, had not the respondent's driver also altered his course—a manœuvre which the respondent's driver ought not to have executed. According to the rule in the "*Test*," 1847 (5 Thornton's notes 276), a vessel ought not to deviate frem her course in anticipation that another vessel will not give way, and that rule applied to the circumstances of the present case. The "agony rule" at sea did not apply to collisions on land, because Admiralty rules were inapplicable to road transit. At sea there was no definite line of approach, and a vessel was an unwieldy vehicle which could not stop without altering its course, thus differing from a motor car. In the present case, which was that of a motor car collision, what the respondent's driver ought to have done was to slow down and blow his horn. In any event the "agony rule" only justified a ship in leaving its proper course if there was some sudden emergency—The "*Bywell Castle*," 1879 (4 P.D. 219, *per* James (L.J.) at 222); *Stoomvart Maatshappy Nederland* v. *Peninsular and Oriental Steam Navigation Company*, 1880, L.R., 5 A.C. 876, *per* Lord Blackburn at 890. In the present case there was no sudden emergency. The action of the respondent's driver was due to "an unreasonably alarmed mind," and was not such as a reasonable and prudent man would have adopted—*Jones* v. *Boyce*, 1816, 1 Starkie 493, *per* Lord Ellenborough at 495.

Argued for the respondent—The appellant's driver was in fault, and there was no contributory negligence on the part of the respondent's driver. The "agony rule" applied to collisions on land. The foundation of the rule was laid in *Jones* v. *Boyce* (*cit.*), *per* Lord Ellenborough at p. 494, and that was the case of a collision on land. By the "agony rule" the action of the respondent's driver was justified, inasmuch as a driver was entitled to leave his own proper course if he had a reasonable apprehension of a collision, and if by changing his course there seemed to be a possibility of avoiding it—*The "Bywell Castle"* (*cit.*); *Adams* v. *The Lancashire and Yorkshire Railway Company*, 1869, L.R., 4 C.P. 739, *per* Montagu Smith (J.) at 743; *Wilkinson* v. *Kinneil Cannel and Coking Coal Company, Limited*, July 1, 1897, 24 R. 1001, *per* Lord Justice-Clerk (Kingsburgh) at 1004, 34 S.L.R. 533, at 535; *Huie Brothers* v. *Clyde Trustees*, March 7, 1888, 15 R. 498, *per* Lord Young at 504, 25 S.L.R. 364, at 366. *J. & C. Murray* v. *Wallace, Marrs, & Company*, 1914 S.C. 114, 51 S.L.R. 95, was referred to on a point argued by the respondent as to the sufficiency of the appellant's averments with regard to his contention of contributory negligence.

LORD JUSTICE-CLERK—We have here a most extraordinary case, and I am not surprised that Mr Sandeman, exercising his discretion, should, despite the able speech of his junior, come to the conclusion that he could not maintain that the pursuer's driver was blameless. The only loophole of escape, therefore, for him was to show that there was contributory negligence on the part of the defender's driver. But on this point we have independent evidence which leads very distinctly to the conclusion that the driver of the defender's car was placed in a very difficult position indeed. The evidence of Miss Curran is here of very great importance, because she was not a party to the case at all. She was walking quietly along the road, and her account of the incident is that the pursuer's car passed close to her on the side of the road next to the curve, and that it was evident that the car was moving to that side. She also says that the two cars were deflected at the same time, which means, undoubtedly, that the defender's driver turned to get out of the way of the other car. Plainly both chauffeurs turned their cars towards the centre of the road in order to avoid a collision. The pursuer's driver, of course, was perfectly right in turning towards his proper side of the road; but the question is not whether he should have done so, but whether he did so in time. Miss Curran says that she was satisfied that there must be a collision, and the only difference between what she expected and what happened is that the collision took place on the south instead of on the north side of the road.

Now, as matters stood, was the defender's driver in this position, that he, as a man of ordinary nerve, felt bound to take some action in order to avoid a collision if the other driver kept straight on? Upon the evidence I am satisfied that that was his position. It is probably true that if he had followed the policy which is suggested

by Mr Rennie and others he might have escaped, but it is equally true that, according to Mr Rennie, the proper course was to hold on and meet the collision right in the face. I cannot give any assent to such a proposition as that. I think the driver of a motor car is in the same position as the master of a ship in this respect, that if at the last moment he reasonably judges that a collision is absolutely inevitable unless he does something, and if that something might avoid a collision, he acts perfectly reasonably in taking that course. I am quite satisfied that there is no ground whatever for imputing contributory negligence to the defender's driver. Whether he should not have swerved a little sooner may be a question, but if he had swerved a little sooner even that might not have averted the collision. He swerved at the time when he thought the danger was imminent, when he saw that nothing was being done by the person who was causing the danger, but it was then too late, and the cars curved in to meet in collision on the south side of the road.

There is one other criticism urged against him, namely, that he failed to blow his horn. Now one cannot help speaking from general knowledge on a matter of that kind, and it is new to me that if two motor cars are approaching one another in daylight from opposite directions, the cars being in sight of each other for a considerable distance, it is usual or necessary to sound a horn. The pursuer's driver never thought of sounding his horn, although he intended to stick to the wrong side of the road apparently up to the moment of danger.

In these circumstances I think the Sheriff was perfectly right, and that no other decision could reasonably be reached.

LORD DUNDAS—I am entirely of the same opinion. One would always be slow to disturb the concurrent judgments—carefully considered judgments—of two experienced Sheriffs on a question of fact unless one thought that they were clearly wrong. On this occasion I have no difficulty of that sort, because I entirely agree with the conclusion at which the Sheriffs have arrived.

The pursuer now admits that for some considerable distance before the accident his car was on the wrong side of the road—the north side—while the defender's car was on its proper side; and his averment on record that at the moment of impact his car was going about five miles an hour has not been at all justified. The pursuer therefore now admits that he must be held to have been in fault. But his contention at our bar is that the defender's car was also in fault, because the pursuer says that he would in due time have cleared the defender's car and all would have been well if the driver of that car had not suddenly cut across towards the south side of the road instead of holding on his proper course. I do not think that will do at all. I consider that the pursuer's driver, having chosen to hold on his course upon his wrong side until the cars were apparently bound to meet within a space of, at the most, a very few seconds, the defender's driver had reasonable grounds for concluding that for some cause or another the pursuer's driver was going to continue on his course; and that the defender's driver cannot reasonably be held in fault for endeavouring at the last moment to avoid a collision by leaving his own side of the road. I may say further that I entirely agree with your Lordship's observations upon the criticisms of the defender's chauffeur for not blowing his horn. I speak without personal experience as a motorist, but as a matter of good sense and evidence I have no hesitation in agreeing with what your Lordship said.

I would only add with reference to some observations of the pursuer's counsel that while I agree that there would be danger in rashly applying nautical cases to incidents of the road, I do not see any reason why, making all due allowance for the obvious differences between sea and land—ships and motor cars—the fundamental considerations of good sense and fairness that underlie the one class of cases may not be applicable, and applied, if the circumstances warrant it, to cases of the other category.

It seems to me on the whole matter that the Sheriffs are absolutely right, and that this appeal must fail.

LORD GUTHRIE—I agree with your Lordships. It is true that the defender here has to meet two very serious difficulties. In the first place, at the moment of collision his car was undoubtedly on the wrong side of the road, and, secondly, it is clear that if he had stuck to his proper side—the north side—there would have been no collision. He admits that he has to explain both these points, and I think he has satisfactorily done so.

As to the first point, it seems to me that on a clear road with nothing in sight or with no traffic in front or behind, except at a distance, a driver is entitled to take any part of the road he likes, and he will naturally select the part of the road which has the best surface for his vehicle. But this is subject to the obligation of keeping a sharper look-out in front and behind than if he chose to keep all the time on what is called his own side; but when he sees a vehicle approaching he is not entitled to stay beyond a certain time and a certain point on the part of the road appropriated to that other vehicle. He must go to his own side in good time. What is good time must always be a question of circumstances. In this case I am not going into seconds or yards. It is enough to say that Wallace's chauffeur was not entitled to keep on his wrong side to the very last moment, or, to use a popular expression, to run it fine, because, as here, he will inevitably confuse an approaching driver by making him uncertain whether he is going to persevere on the wrong side, or to swerve to what would then have become his own side. Such a doubt might not be unreasonable. The driver on the wrong side might be sleepy, or he might be a foreigner, or an American, who had for the moment forgotten that the rule of the road is different in the United Kingdom. But here it is proved that for a substantial

time before the pursuer's car swerved to the south side of the road it was on the wrong side of the road, that is, the side of the road which he should have previously left.

I agree with your Lordship that Miss Curran's evidence is extremely important. She was the only onlooker, the only person there apart from the ladies and the driver in the defender's car and the driver of the pursuer's car, and she is quite clear that at the time that the two cars swerved she thought that there was going to be an accident just because the pursuer's car had continued so long on the north side of the road and that it appeared as if he was going still to continue. In addition I should say that the occupants of the defender's car clearly took the same view, because they were very much alarmed and one of the ladies had, it is said, screamed.

Mr Sandeman did not attempt to maintain the point that was strenuously maintained by his junior, namely, that the duty of the defender's car was to keep to the south side whatever happened on the north side. His whole contention was that the proof showed that the defender's chauffeur, to use the expression of Lord Ellenborough in *Jones* v. *Boyce*, 1816, 1 Starkie, 493, was in an unreasonably alarmed state of mind. The defender was satisfied to put his case on this footing, that it was enough for him if his chauffeur had reason to think that a collision was imminent, even though he was wrong in the view that he took. That is in accordance with what your Lordship said in the case of *Wilkinson*, July 1, 1897, 24 R. 1001, 34 S.L.R. 533, that a person could not be said to be guilty of contributory negligence merely because when he saw the danger he did not take the wisest course, but in the agitation of the moment took an unwise course in endeavouring to escape from it. If necessary, which I do not think it is, I would go even further than the defender finds it necessary to go here, for it seems to me that his driver not only did a reasonable thing, but that he did the right thing.

LORD SALVESEN was absent, being engaged in the Valuation Appeal Court.

The Court dismissed the appeal.

Counsel for the Appellant (Pursuer)—Sandeman, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondent (Defender)—Dean of Faculty (Scott Dickson, K.C.—MacRobert. Agents—Macpherson & Mackay, S.S.C.

Tuesday, November 24.

SECOND DIVISION.

EDGAR'S TRUSTEES *v.* EDGEWARE.

Fee and Liferent — Trust — Superior and Vassal—Casualty, whether to be Paid out of Revenue or out of Capital — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 5.

Trustees held the residue of the trust estate for a liferentrix for her liferent use allenarly and the fee for others. The residue included a heritable property for which a casualty of composition became payable. *Held* that the composition was payable out of capital and not out of revenue.

Query — "Whether in strictness the liferentrix ought to be made liable even in the yearly interest upon the amount of the composition?"

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 5, enacts—". . . Where by the terms of the feu-rights of the lands a taxed composition is payable on the occasion of each sale or transfer of the property as well as on the occasion of the death of each vassal, and where an entry is implied in terms of this Act in favour of two or more parties having separate interests as liferenter and fiar respectively or as successive liferenters, a composition, or in the case of parties interested *pro indiviso* a rateable share of a composition, shall be due by and exigible from each of the parties who shall take or derive benefit under the implied entry in the order in which they shall severally take or derive benefit under such implied entry, with such interest, if any, as may be stipulated for in the feu-right during the not-payment of casualties."

Andrew Macdonald and others, the trustees acting under the trust-disposition and settlement and codicil of the late Miss Rebecca Edgar, *of the first part*, and Miss Maybel Jane Edgeware, the liferentrix of the residue of the trust estate, *of the second part*, brought a Special Case for the opinion and judgment of the Court. The point at issue was as to whether a casualty due from a property included in the residue fell to be paid out of capital or out of revenue.

The *trust-disposition, inter alia*, provided —"And (*Fifth*) I direct my trustees to hold the whole residue and remainder of my means and estate for behoof of Miss Maybel Jane Edgeware, sometime residing with me, presently residing at One hundred and sixty-six Boulevard Mont Parnasse, Paris, in liferent for her liferent use allenarly and her lawful children in such manner or way as she may direct by any writing under her hand, and failing appointment then equally among them and the survivors of them in fee: Declaring that in the event of any of her children predeceasing the period of payment leaving issue, such issue shall be entitled equally among them to the share which their parent would have taken if in