a private character due by the parties assessed. The learned Sheriff-Substitute goes on to say that he does not think that bankruptcy or insolvency is necessary to bring that enactment into play, but that is simply a recurrence to his assumption that a rate is a *debitum fundi*. Insolvency is the necessary condition of the question arising at all. For there can be no preference of one creditor before another, when every creditor is to be paid in full. I agree therefore with the Lord President's observation that the question of preference cannot arise except on the distribution of an estate which is not sufficient to pay everybody twenty shillings in the pound. But a right to a preference in competition will not prevent a creditor, with whom nobody is competing, from taking payment if he can get it, or recovering his debt by diligence.

It was said by Mr Pitman that if the method of recovery adopted were ineffectual there was nothing else which the collector could do. I cannot assent to that, having regard to what your Lordship has said. But if the remedies given by the statute are ineffective it is immaterial to consider whether there are other remedies or not, for the argument is this that all the remedies given by law are ineffective. But if they are, that would not justify this Court in going beyond its jurisdiction and giving other remedies not conferred by Parliament, and which are altogether outside the statute.

LORD MACKENZIE—I am of the same opinion.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court recalled the interlocutors of the Sheriff and Sheriff-Substitute dated 9th March 1908 and 7th November 1907 respectively, and dismissed the action as incompetent.

Counsel for Pursuers (Respondents) — Blackburn, K.C.—Pitman. Agents—Pearson, Robertson, & Finlay, W.S.

Counsel for Defender (Appellant)—A. M. Anderson. Agents—Balfour & Manson, S.S.C.

Tuesday, November 3.

FIRST DIVISION.

[Sheriff Court at Edinburgh.

MACANDREW *v.* TILLARD.

Reparation—Negligence—Motor Car—Collision—Public Safety—Duty of Driver in Approaching Main Road.

The driver of a motor car, while attempting to cross a very frequented and main thoroughfare from a side road at right angles to it, collided with another car coming from his left along the main road.

Held, in the circumstances, that the collision was due to the fault of the driver of the first-mentioned car, in respect that (1) he had approached the main road without having his car, in such an operation, sufficiently under control, and (2) he had failed, on finding he could not cross, to turn at once to his left where there was ample room.

Observations (*per* the Lord President) as to the duties of drivers of motor cars in approaching main roads with an intention to cross.

On 25th October 1907 C. D. Macandrew, engineer, 22 London Street, Edinburgh, brought an action against C. H. Tillard, Cargilfield, Cramond Bridge, in which he claimed £39, 9s. 2d. as damages on account of injuries to, and temporary deprivation of, his motor car.

The *facts* as stated in the interlocutor of the First Division were as follows: — "The pursuer's Humber motor car was on 17th July 1907, about 2 p.m., being driven by Thomas Macdonald, motor engineer, at the request of the pursuer, along the road from Edinburgh to Queensferry. At the same time the defender's Albion motor car was being driven by George Cox, his chauffeur, along the road from Davidson's Mains intending to cross the Edinburgh and Queensferry Road and proceed into the road by Craigcrook to Murrayfield. Neither car was being driven at what under the circumstances was an excessive speed. The cars collided opposite the entrance to Craigcrook road."

The defender pleaded, *inter alia* — "(3) Decree of absolvitor should be pronounced in respect (*a*) that the accident resulted without fault on the part of the defender; and (*b*) that the accident was caused, or in any event was contributed to, by the fault of the pursuer or those for whom he is responsible."

The nature of the evidence sufficiently appears from the opinion (*infra*) of the Lord President.

On 2nd March 1908 the Sheriff-Substitute (GUY) sustained the second branch of the defender's third plea-in-law and assoilzied him, holding that both drivers were in fault.

The pursuer appealed, and argued—The evidence showed that the collision was due to the defender's driver losing his head. The pursuer was on the main road, and the defender therefore should have allowed him to pass. It was the duty of the defender to have turned to the left on entering Queensferry Road. The pursuer was not guilty of contributory negligence. If there was any negligence on his part it in no way contributed to the collision.

Argued for the respondent—The appellant was to blame for the accident. He so acted as to mislead the respondent, inducing him to cross in front of the appellant. Drivers on a main road were not entitled to delay the traffic on the side roads. In any event, the appellant was guilty of contributory negligence in not slackening speed.

At advising—

LORD PRESIDENT—I am bound to say that I never read a description of an accident which left me in less doubt as to how it happened and who was to blame. The pursuer's car was coming from Edinburgh and going in the direction of Queensferry. I think it is quite clearly proved that not only was he at the proper side of the road, but that he was well on his proper side of the road, indeed within about 9 feet, I think, of the ditch at the extreme left side. It is proved, and not contradicted, that, as he approached the crossing, which is opposite Davidson's Mains he sounded his horn—that is to say, that he gave notice to all concerned that there was a car approaching the crossing. I do not think that it is proved that he was going at an excessive speed. I am not for one instant disagreeing with the remark of the Sheriff, who says that he thinks it is the duty of people, even upon the main road, to approach crossings which go over the main road at a non-excessive speed. When I say "non-excessive" I am not really thinking of the legal limit of twenty miles an hour, which does not seem to me to have much bearing upon this class of question. The truth is that a safe speed to approach a crossing should be, and in many instances is, a great deal less than twenty miles an hour. You cannot lay down a regular rule about it, because there are crossings and crossings, and crossings so far as their dangerous elements are concerned depend upon various things. The angle of a crossing is one of these things, the breadth of the road which makes the crossing is another thing, and last but not least is the state of the hedges, or it may be the buildings which form the angle of the crossing. Take an extreme case where the angle of a crossing is formed by a building, and the crossing is at a re-entrant angle from the place from which you are coming, it is quite evident that you can see nothing of the crossing until you are on the crossing itself. One knows many crossings where from a practical point of view a speed of more than about two or three miles an hour is unsafe. If I should wish to give an instance I should give the road which comes from Longniddry Station and goes into Gosford—I mean the road going along the shore past Gosford. That is a place where anyone would be doing perfectly wrongly if he arrived at a speed of more than two or three miles an hour at the utmost. On the other hand, there are other places where the roads are wide and nothing to obscure the view where a much greater speed would be perfectly safe. Accordingly I do not think anyone can lay down general rules as to particular speed, but one can say that it is certainly the business of persons driving on the main road to approach a crossing on the main road with caution and without excessive speed.

I do not think it has been shown affirmatively that, looking to the conditions of this crossing, which is not a bad crossing, and where there are no obstructions, that the pursuer's car did approach it at an excessive speed. It may be difficult—I think it is impossible—to say the precise pace at which the car was going, but I see nothing to suppose that it was going at such a speed that would make manœuvres for those who drove it unusually difficult.

The other car was coming from the direction of Davidson's Mains, and had as its intention to cross over into the Craigcrook Road. In doing so the driver knew that he was going to cross at right angles to a very frequented and main thoroughfare, and if there is one rule more than another that it is necessary to lay down for the practical conduct of traffic it is that it is the business of those who are on the side road and going to cross the main road to look out when they enter the main road and to give way to all traffic which is coming along the main road. Of course there is a degree in everything. They have a right to cross the main road, and it does not mean that they are never to get across the main road until nobody else is in sight, but it does mean that where there is any possibility at all of collision it is the business of the person on the side road to give way to the person on the main road; and as the corollary to that, it means that you ought to approach into a main road from a side road at such a pace as to have your car entirely under control so as to be prepared for whatever you find is the state of affairs upon the main road.

The first fault which the car from Davidson's Mains seems to me to have made is that I think he came up without that attitude of expectiveness on to the main road. He seems to have made up his mind to cross at once, and then only at a somewhat late time to have become aware of the other car. But his fault did not stop there. When he saw the car he seemingly made a miscalculation and thought he could still get over; but when he was just at the edge of the main road he saw that he had made a miscalculation and changed his mind and applied his brakes. I say nothing against his applying his brakes, but why didn't he turn to the left. The thing is so simple to anyone who looks at the angles and knows anything about the behaviour of a motor car, that the only way you can account for the accident at all is to suppose, as one must, that the man lost his head for the moment, because the diagram put in by the defender himself is absolutely conclusive of the case. He went straight on his track and he never turned to the left at all. And turning to the left was really not worthy being called a manœuvre. It was a simple turning to where there was any amount of free road, and the slower he was going the easier it was for him to turn. If his own evidence is correct, that at the moment of collision his car was either at a standstill or so nearly at a standstill that it would have run perhaps only a yard farther, that made it all the easier for him to have turned it at even the last moment, and avoided the other car. And I venture to say that the doctrine which has often and often been

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-