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

life: In the event of the said Miss Maybel Jane Edgeware dying without leaving lawful issue, then I direct my trustees to make payment of the following legacies free of legacy duty, viz. . . . And with regard to the whole residue and remainder of my means and estate I direct my trustees to divide the same among such of the other benevolent, charitable, and religious institutions in Glasgow and Greenock as they in their sole discretion may think proper."

The Case stated—"The late Miss Edgar was proprietrix of Shaws Water Chemical Works, Greenock, which formed part of the estate liferented by the second party. Her trustees completed title thereto by a notarial instrument recorded on 3rd November 1903. By the terms of the feu-contract of, *inter alia*, these subjects, dated 25th September 1845 and 10th and 17th January 1846, a taxed composition of £112, 1s. becomes due from singular successors on each sale and transmission of the feu. The casualty of £112, 1s. was paid by the trustees on 17th May 1894, and accordingly, in terms of section 5 of the Conveyancing (Scotland) Act 1874, a further casualty of the same amount became due by them in May 1909, and this casualty has been paid to the superior and debited against revenue in the trust accounts. A question has arisen between the first parties and the second party as to which of them is liable for payment of this casualty, which fell due in May 1909. The first parties *maintain* that the casualty should be paid out of revenue. The second party maintains that the casualty should be paid out of capital."

The *questions of law* were—"1. Is the casualty referred to payable out of the capital of the trust estate of the late Miss Edgar? 2. Is the casualty referred to payable out of revenue, and to be borne by the liferentrix?"

Argued for the first parties—The casualty in question was essentially an additional feu-duty. Accordingly it ought to be paid by the liferentrix, since she was bound to pay the feu-duties and other burdens attending the subject liferented—Ersk. ii, 9, 61. The usual rule was that a liferenter enjoyed an estate *salva rei substantia*. The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 5, treated the burden as one appropriate to a liferenter, for it provided, at anyrate in the case of a direct gift of liferent and fee, that where an entry was implied in terms of the Act a liferenter should pay a share of a taxed composition. *Macdougall's Factor* v. *Watson*, 1909 S.C. 215, 46 S.L.R. 172; *Dunlop's Trustees* v. *Dunlop*, October 23, 1903, 6 F. 12, 41 S.L.R. 8; *Gibson* v. *Caddall's Trustees*, July 11, 1895, 22 R. 889, 32 S.L.R. 668; and *Lamont Campbell* v. *Carter Campbell*, January 19, 1895, 22 R. 260, 32 S.L.R. 203, were referred to.

Argued for the second party—Prior to 1874 it was the practice for trustees to name a life on which the casualty would be paid, and it was they, the persons who selected the life, on whom the burden of the casualty fell. Section 5 of the Act of 1874 only applied to the case where there had been a direct gift of liferent and fee, and accordingly where trustees had been interposed the question as to who should bear the burden of the casualty should be determined by the same considerations as were applicable prior to the passing of the Act. The "yearly payments" referred to in Ersk. ii, 9, 61, did not apply to casualties. The cases cited by the first party were different, because these were cases where numerous casualties formed part of the income of a trust estate. The present case was one where a trust estate was liable in payment of a casualty on a single property.

At advising—

The LORD JUSTICE-CLERK read the following opinion of Lord Dundas and stated that it was the opinion of the Court:—

LORD DUNDAS—. . . We are not informed of the total amount of Miss Edgar's residue, but it must have been considerable. It included a heritable subject of which she was proprietrix. By the feu-contract under which this property was held, a taxed composition of £112, 1s., probably a duplicand of the feu-duty, becomes due from singular successors on each sale or transmission of the feu. A composition was paid in May 1894 by the trustees, and another composition became due after the lapse of fifteen years, in accordance with the terms of section 5 of the Conveyancing (Scotland) Act 1874, in May 1909. The trustees paid this composition to the superior, and debited it against revenue in the trust accounts. The question we have to decide is whether the composition was payable out of the capital of the trust estate or out of revenue. There appears to be no direct authority upon the point, and I have found it to be attended with difficulty, but the conclusion I have arrived at is that the composition was payable out of capital and not out of revenue.

One may, perhaps, best begin by considering how the law stood prior to the passing of the Conveyancing Act of 1874. Before that Act, in the case of an ordinary feudal estate of liferent and fee without the interposition of a trust, I think it clear that the fiar and not the liferenter would have had to pay composition. The payment of a composition would enfranchise the property during the fiar's lifetime, and on his death, or on a transfer of the fee by him, another composition would become payable by his successor in the fee and not by the liferenter. The time or times at which a composition would become payable would depend solely on the title to the fee quite irrespective of the liferent right. I think the law is correctly stated by Professor Rankine, Landownership (4th ed.) p. 742, when he says that "in the ordinary case, since liferents are regarded feudally as mere burdens on the fee, casualties are due by and for the entry of the fiar." Conversely, where the superiority was held in liferent and fee, the casualties falling in during the liferent would be payable to the fiar, as he alone is able to give an entry. *See Dunlop's Trustees*, (1903) 6 F. 12, 41 S.L.R. 8, *per* Lord M'Laren at 6 F. 15, 41 S.L.R. 10; *Ewing*, (1872) 10 Macph. 678, 9

S.L.R. 416, *per* Lord Benholme at p. 680. In the case of a disposition of heritage in trust for behoof of liferenter and fiar respectively, the superior prior to 1874 was not bound to give an entry to a body of trustees and the survivor of them. It was usual in practice to name a life during which the fee should be held to be full. The trustees had the option of selecting the life—M. Bell's Lect. Conv. (3rd ed.) p. 1146—and would probably name the fiar, or a person approved by him, on the expiry of whose life, if there had been no previous transfer, the next casualty would become payable. If the fiar's own life was selected, he and his successors would thus be placed in the same position as regards liability for composition as if the liferent and fee had been feudally constituted, and I think that prior to 1874 all compositions falling due during the subsistence of the trust would have fallen on the fiar and not on the liferenter.

The Act of 1874, however, introduced a change in the law. It provided (section 5 *sub finem*) that where, as in the case before us, "a taxed composition is payable on the occasion of each sale or transfer . . . 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 . . . 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 the implied entry. . . ." The phrase "benefit under the implied entry" seems a curious one as applied to a liferenter who before the Act was a mere incumbrancer upon the title of the fee and was not bound to enter nor liable for payment of any casualty. But the intention and effect of the enactment appear to be clear enough in the case where the liferent and fee are feudally constituted, and seem in that case to impose on the liferenter, or successive liferenters, a new liability for composition, each for himself, and to relieve the fiar or successive fiars of all liability for composition until the expiry of the liferent. One does not know and need not speculate as to the reasons which induced the Legislature to make this change in the liability for composition as between liferenter and fiar in the ordinary case where that relation of parties was feudally constituted. What we are here concerned to consider is whether, or how far, the Act of 1874 introduced a change in the law as to liability for composition as between liferenter and fiar, in the case where (as here) a trust is created. The Act made a change as to the date at which the next composition shall become payable where there is a trust, for instead of leaving the trustees to name a life or fix a date by agreement with the superior, it provides (section 5) a period of twenty-five years, or in a case like the present where compositions are payable on every transfer, fifteen years, as the regular intervals at which payment of a composition shall fall due during the subsistence of the trust; and it is owing to this provision that the present question arises. Prior to the Act, I take it, as already said, that the composition or recurring compositions would have fallen on the fiar or successive fiars, and the recurring payments at intervals of fifteen years appear to be the statutory substitutes for the payments at irregular and arbitrarily fixed periods which obtained under the old law and practice. But the question remains whether or not the language of the concluding portion of section 5 of the Act above quoted has introduced a change in the law as to the liability for composition of liferenter and fiar respectively, where the land is held in trust, as it seems undoubtedly to have done in the case where there is no trust. I do not think the question is easy, but my opinion is in the negative. As already observed, I am not aware of the reasons which caused the Legislature to alter the law in the former class of cases, but if the alteration is to be held as extending also to the latter, I think one must find clear words in the statute to that effect and I am unable to find them. The enactment is limited in terms to the case "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." One may doubt what is meant by an entry implied "in favour of" two or more parties, but I think the words must mean an entry "of" the parties themselves with the superior, and that it would be forcing the language to read it so as to mean and include the implied entry of trustees under the statute in the sense that it is an entry "in favour of" the liferenter and fiar respectively, under which they may be said to "take or derive benefit." I come, therefore, to the conclusion, upon a construction of section 5 of the Act of 1874, that the Legislature did not intend, or at all events has omitted, to alter the old law in the case of a trust for liferenter and fiar. The composition now in question is not, therefore, in my judgment, payable by the liferenter, but must be charged to the capital of the estate funds. No question is raised in the case as to whether in strictness the liferenter ought to be made liable even in the yearly interest upon the amount of the composition, and I have therefore formed, and express, no opinion on the point. I think we should answer the first question put to us in the affirmative, and the second in the negative.

A number of cases, most of them familiar ones, were cited to us during the discussion, but I do not think they afford much aid to the decision of the question, and I do not base my conclusion upon decided authority. The cases are mostly of the class where a testator who owns a feuing estate bequeaths a liferent of his free annual income, or the like, and the question is raised as to the inclusion in that bequest of casualties of superiority or periodical duplications. The decisions show that the Court will have regard to the character of the testator's estate, and where it is a proper feuing estate with numerous casualties of sorts

coming in year by year, these will generally be regarded as income. But I do not think these decisions afford any direct guidance in a case like the present where the testatrix was not a superior but a vassal, and where she possessed not a variety of heritable properties but a single property forming an item in the general residue of her estate. The decisions may, however, throw some light on the matter in hand by way of analogy or of contrast. It is easy to figure a case where there might be a general residue including only two heritable items —(*a*) the *dominium directum* of a piece of land, and (*b*) the *dominium utile* of another. It seems clear (*e.g.*, *Gibson* (1895) 22 R. 889, 32 S.L.R. 668) that a casualty falling due to the estate from (*a*) would not be included in a liferent right to the free annual income of the residue, and it would appear anomalous and unjust if the liferenters should, notwithstanding, be held liable in payment of a casualty falling due by the estate from (*b*).

The Court answered the first question in the affirmative and the second question in the negative.

Counsel for the First Parties—A. O. M. Mackenzie, K.C. — Macdonald. Agent — Campbell Faill, S.S.C.

Counsel for the Second Party—Carmont. Agents—Carment, Wedderburn, & Watson, W.S.

HOUSE OF LORDS.

Thursday, December 10.

(Before the Lord Chancellor (Haldane), Lord Dunedin, Lord Atkinson, and Lord Parmoor.)

D. & J. NICOL *v.* DUNDEE HARBOUR COMMISSIONERS.

(In the Court of Session, February 20, 1914, 51 S.L.R. 329, and 1914 S.C. 374.)

Title to Sue—Trust—Ultra vires—Title of Harbour Ratepayers to Sue Interdict against Statutory Harbour Trust, Including Steam Ferries, Using the Ferry Boats for Other Purposes.

Harbour ratepayers, being members of the constituency erected by Act of Parliament to elect the harbour trustees, and being persons for whose benefit the harbour is kept up, have a title to prevent the harbour trustees committing an *ultra vires* act which directly affects the trust property.

Harbour—Trust—Ultra vires—Use by Harbour Trustees, Vested by Statute in a Ferry, of the Ferry Steamers for Excursions beyond Ferry Limits—"Incidental to or Consequent upon" the Statutory Purposes.

Harbour trustees, who were vested by statute in a ferry within certain limits, hired out occasionally for excursions beyond the ferry limits their steamers when not required for ferry purposes, without having any power so to do expressed in their statute. *Held* that their action was not "incidental to or consequential upon" the things authorised by statute, and was therefore *ultra vires*, and interdict *granted*.

Ashbury Railway Carriage and Iron Company v. *Riche*, (1875) 7 E. and I. A. 653, *applied*.

This case is reported *ante ut supra*.

The Dundee Harbour Trustees appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR — [*Read by Lord Dunedin*]—In order to support the decision of the Court of Session the respondents have to establish that two separate questions must be answered in the affirmative. The first of these questions is whether the action complained of, the carrying of passengers by means of the Tay Ferries steamers beyond the boundaries of the ferries, as defined by the Statute of 1911, was *ultra vires* of the appellants. The second is whether, if this be so, the respondents have title and interest such that they are entitled to an interdict. I have arrived at the conclusion that the respondents are entitled to succeed on both of these questions.

As to the first of them I can express my opinion very shortly. It is now clear that in the case of a corporate body the test is not what was thought by Blackburn, J., when in *Riche* v. *The Ashbury Carriage Company* (L.R., 9 Ex. 224) he laid down as law that a general power of contracting is an incident to a corporation which it requires an indication of intention in the Legislature to take away. It is now well settled by the judgment of this House in the appeal in that case (L.R., 7 E. and I. A. 653) and by subsequent decisions which this House has given, that the answer to the question whether a corporation created by a statute has a particular power depends exclusively on whether that power has been expressly given to it by the statute regulating it or can be implied from the language used. The question is simply one of construction of language and not of presumption.

If this be so, I am unable to find such power conferred by the statute under consideration in the case before us. It is argued that it is reasonable that the appellants should be entitled to employ their spare steamers in a fashion which might save wastage and earn money. The answer is that the limits of the ferries, for the service of which the appellants have authority from Parliament to maintain and use these steamers, exclude the region within which they are now claiming to use them. They have therefore no power to sail their steamers, as they claim the right to do, in the upper reaches of the Tay.

The circumstance that one of these steamers is normally in reserve, and that it is economically desirable to use it when the business of the ferries does not require it, cannot make what is proposed *intra vires*. For a power to send excursion steamers be-