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-

yond the statutory limits within which alone the appellants' steamers are authorised by the statute to sail is not implied in, nor is in any sense incidental to, a power to sail within limits so defined.

I therefore pass to the second question. This is not simply whether the respondents as mere rival traders are entitled to bring the appellants into Court, for the Act of 1911 gives the respondents an interest of a special kind. From the preamble of that Act it is apparent that Parliament contemplated such a re-incorporation of the Harbour Trustees as would make them more fully representative of the persons interested in the harbour and commerce of Dundee. The harbour undertaking and also the Tay Ferries were transferred to them with this in view. By section 9 the trustees are incorporated. Section 10 provides for their being thirty-three in number, including four appointed by the shipowners and six by the harbour ratepayers. By section 19 the electing shipowners are to be British subjects carrying on business in the United Kingdom, and appearing in the books of the Custom-House of Dundee as owners to the extent of 100 tons of a vessel registered at that port, or else persons owning vessels in the United Kingdom and having paid rates under the Dundee Harbour Acts amounting to at least £25. The Act goes on to place persons resident within the burgh of Dundee who have paid rates, eligible under the Harbour Acts, in the same position. Persons coming within these categories may be registered as electors, and may vote at the election of trustees and be themselves elected.

Reading the sections together, I think that the effect of the statute is to establish a trust comprising a fund made up of rates, ferry dues, and other sources of income as well as of sums authorised to be borrowed. I think that the whole undertaking is vested in the corporation created by the statute. By section 186 and the following sections this undertaking is made to include the Tay Ferries. It appears to me that the respondents have an interest as beneficiaries in the fund so constituted and in the undertaking. They have not only contributed as harbour ratepayers, but they have been given certain statutory rights of taking part in the management and control as electors and possible trustees. Their rights are defined and limited by the statute itself, and their interest as beneficiaries under the Trust is an interest which belongs to them as members of a class.

But I see no reason in point of principle to doubt that this beneficial interest in the trust funds and undertaking which are vested in the appellants as a corporation with limited powers is sufficient to enable the respondents individually to claim to restrain dealings which are *ultra vires* with the trust funds and undertaking. Of the powers which the Harbour Trustees possess they appear to me to be trustees for those who are interested in their execution and who have contributed to the funds which they administer. The Harbour Trustees being a statutory corporation, can only execute their powers in the fashion prescribed by the statute incorporating them, and if they exceed the limits which the statute prescribes I think that any of their beneficiaries may invoke the assistance of the Courts.

In England it may well be that it would be in accordance with the usual and proper practice to invoke in a case such as this the assistance of the Attorney-General, who, as representative of the Sovereign, the *parens patriæ*, has the capacity to interfere. But even without invoking the Attorney-General, I think it probable that in a case such as the present a harbour ratepayer in the position of the respondents, whose interest in the undertaking and funds is apparent, ought to be treated as within the analogy of the principle which enables a single shareholder to sue in his own name to restrain an *ultra vires* act.

It is not, however, necessary to decide this question of English law, and the judgment in the present case will leave it open, yet I have thought it right to say what I have in order to show that I do not overlook the analogy. But whatever would be the position in England, the case for recognition of the individual title to sue of a person in the situation of the respondents is materially stronger in Scotland, inasmuch as the Lord Advocate does not, under the law and practice which obtain there, usually intervene as representing the *parens patriæ* excepting when some statute casts on him a duty to do so. I have come to the conclusion that the respondents had a good title to maintain these proceedings.

I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Dunedin, in which he examines this question from the point of view both of principle and of authority, and I concur in the conclusions at which he has arrived. I do not think that the respondents could have made their claim successfully on the mere foundation of injury to their interest as rival traders. It appears to me that their real case is that they are beneficially and individually interested in the administration of property and the execution of powers to be carried out in strict accordance with the terms and limits prescribed by the Act of Parliament under which the incorporated trustees derive their capacity and the respondents their beneficial rights.

For these reasons I move that the appeal be dismissed with costs.

LORD DUNEDIN—The appellants act under the powers of the Dundee Harbour and Tay Ferries Consolidation Act 1911, and by section 9 of that Act are incorporated under the name of the Trustees of the Harbour of Dundee. Part of their powers and duties consists in the owning and management of the ferries known as the Tay Ferries, being the ferries between Dundee on the north of the river Tay, and Newport and Woodham on the south of the Tay.

In order to work said ferries (or, in fact, the one to Newport, the other being disused) they are empowered and bound to

keep vessels, &c., and obligation is laid upon them of providing for a certain number of crossings per day. In accordance with their rights and duty the appellants have provided themselves with three steamers, On several occasions they have used one or other of these steamers which were not actually employed in the exigencies of the ferry traffic for the purpose of conveying excursion parties for pleasure trips on the Tay, such trips extending beyond the limits both of the ferry and of the harbour. The present note of suspension and interdict was presented by the respondents, who are shipowners, against the appellants, and sought to have them interdicted from so employing the steamers belonging to them.

Interdict, as so craved, was granted by the Lord Ordinary before whom the case came to depend upon being passed into the Court of Session, and on appeal to the Inner House his Lordship's interlocutor was affirmed by Lords Salvesen and Guthrie, *dissentiente* Lord Dewar. The ground upon which interdict was granted was that the proceedings complained of were *ultra vires* of the appellants.

The appellants in the pleadings raised two points. They denied that the proceedings in question were *ultra vires*, and they also objected to the respondents' title to sue.

As regards the question of *ultra vires*, the opinion of the learned Judges in the Courts below was in favour of the respondents, with the exception of that of Lord Dewar. With the finding of the majority I agree, and I do not think it necessary to say more than a few words. The law as to statutory corporations, whether created by a general statute which allows persons acting in accordance with the rules there laid down to procure incorporation for a company, or by a special statute providing by its own provisions for the special incorporation, was authoritatively settled by the case of *Ashby Railway Carriage Company* v. *Riche* in this House (L.R., 7 E. and I. A. 653). The appellants do not dispute that. They concede that a statutory corporation must show that its incorporating document authorises the acts it purposes to do; but they appeal to the dictum of the Lord Chancellor in *Attorney-General* v. *Great Eastern Railway Company* (1880 L.R., 5 A.C. 473, at 478), "that whatever may fairly be regarded as incidental to or consequential upon" the things authorised, are not to be held prohibited by implication. Applying that dictum to the facts of this case they say the use of the steamers for excursion purposes is incidental to the main purpose of the ferry.

This can only be so if incidental has such a wide interpretation as this—that any use of plant which brings in money, and so assists the main undertaking, is a use incidental to that undertaking. I cannot so hold. The appellants admit that if they went in for a regular business of excursion contractors that would be *ultra vires*. Incidental in my view means incidental to the main purposes of the main business, and making excursions with the ferry boats beyond the limits of the ferry—a proceeding necessarily subjecting the boats to new and different risks from those to which they are subjected in the ordinary ferry business—can never be, in my view, a proceeding incidental to the business of the ferry, just because the money so earned goes into what I may call the ferry coffers.

I turn now to the question of title. The respondents maintained their title on a twofold ground. They said (1) that they were rival traders, and that the competition of the appellants was injurious to them, as the appellants were enabled to undercut them in prices, and (2) that they were shipowners and "harbour ratepayers" in the sense of the term as used in sections 8 and 10 of the appellants' Act.

On this matter there was in the Courts below some difference of judicial opinion. The Lord Ordinary held that there was a good title under heading (1) but not under heading (2). In the Inner House Lords Salvesen and Guthrie held that the title was good, Lord Dewar that it was bad, under both heads.

In the arguments before your Lordships' House the respondents' counsel abandoned his contention under head (1). I think he was right in doing so. I agree with the judgment of Lord Low on this point in the *Clyde Steam Packet* case (*Clyde Steam Packet Company, Limited* v. *Glasgow and South-Western Railway Company*, 4 S.L.T. 327), which is in accordance with the principle given effect to in the *Stockport* case in England (*Stockport District Waterworks Company* v. *Mayor of Manchester*, 4 Jur. (N.S.) 266). In the phraseology of Scottish law, when a complainer can only say that he is a rival trader and nothing more, he qualifies an interest but not a title.

By the law of Scotland a litigant, and in particular a pursuer, must always qualify title and interest. Though the phrase "title to sue" has been a heading under which cases have been collected from at least the time of Morrison's Dictionary and Brown's Synopsis, I am not aware that anyone of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but I think it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies.

The simplest case of all is where a person is the owner of something. That legal relation of ownership gives him the right to sue all actions which deal with the vindication or defence of his property. Next in simplicity comes contract, where the relation of contract gives the one party a right to insist on the fulfilment of the contract by the other. Generally speaking, persons who are not parties to the contract cannot sue upon it, but this rule suffers exception when there has been created what is known as a *jus quæsitum tertio*. A well-known instance of this will be found in the right of feuars to enforce building stipula-

tions contained in the titles of other feuars, the law as to which was authoritatively explained by Lord Watson in the well-known case of *Hislop* v. *MacRitchie's Trustees*, 8 R. (H.L.) 95, 19 S.L.R. 571.

This class of case also affords excellent examples of how there may be title without interest—*Gould* v. *M'Corquodale*, 8 Macph. 165, 7 S.L.R. 108—and of the way in which interest will be judged of—*Earl of Zetland*, 9 R. (H.L.) 40, 19 S.L.R. 680, and *Mactaggart* v. *Roemmele*, 1907 S.C. 1318, 44 S.L.R. 907.

It would be useless, even if it were possible, to go on to enumerate in detail the various cases in which a title to sue may be found, so I pass at once to the class of cases which are analogous to the present. If any persons are in such a relation as to constitute them trustees, or if, without being technically trustees, they have a fiduciary duty to others, those persons to whom they owe a fiduciary duty will have a title to sue to prevent the infringement of that duty. Infringement of duty may consist in wrong dealing with property. These propositions are equally true whether the trustees or quasi-trustees are individuals or voluntary associations or corporations.

Instances of such title to sue having been given effect to are to be found in numberless cases.

Thus, for instance, in *Bow* v. *Patrons of Cowan's Hospital*, 4 S. 280, a guild brother was allowed to sue the trustees for reduction of an improper sale of property, his title being rested on the fact that under the trust a charity was to be maintained for decayed guild brethren, and although he had an appointment as one of a committee appointed by all the guild brethren, his title as an individual was affirmed by both Lord Alloway and Lord Justice-Clerk Boyle.

In *Rodgers* v. *Incorporation of Tailors of Edinburgh*, 5 D. 295, a widow was allowed to raise the question of the appropriation of funds which would prevent her having the chance of her annuity being increased—a judgment which was practically repeated in *Morrison* v. *Fleshers of Edinburgh*, 16 D. 86.

In *Baird* v. *Magistrates of Dundee*, 4 Macph. 69, two burgesses were allowed to call to account the magistrates in their capacity as administrators of a mortification fund established for, *inter alia*, the educating the sons of poor burgesses.

In *Bruce* v. *Aiton*, 13 R. 358, a fisherman who used a harbour was allowed to sue the proprietor of the harbour who levied dues thereon under an Act of Parliament for declarator that the proprietor was bound to keep the harbour lighted.

These cases I have quoted are not at all an exhaustive list, but are to be regarded merely as samples of the various relations in which title to sue has been maintained.

The only difficulty—and in truth the whole argument of the appellants depended upon this—arises out of the decision of this House in Lord Cottenham's time of the case of *Ewing* v. *Glasgow Police Commissioners*, MacL. and Robinson, 857, and consists not so much in a misunderstanding of the case as in the attempt to make it support a principle which it will not bear. Some preliminary explanation is necessary.

From the time of their creation the royal burghs in Scotland had possessed lands and other property which were designated by the name of the Common Good. The royal burghs are corporations by royal charter—it is not material save for accuracy's sake to note that in some cases there were subsequent Acts of Parliament—and the provost and magistrates of these burghs held the Common Good for the benefit of the inhabitants. The magistrates, however, were left as judges of what was for the good of the inhabitants, and sometimes from necessity and sometimes from less cogent motives as time went on much of the Common Good of the burghs of Scotland was alienated. Indeed, if the state of affairs to-day is taken it will be found that in the case of most of the royal burghs in Scotland by far the greater part of the Common Good has been dissipated.

Now it was to be expected that such transactions would be objected to by burgesses who had no part in them, and a good many cases are to be found in the books of attempts to call the magistrates to account. The decisions were conflicting, of which a somewhat naive account may be found in the note in Brown's Synopsis as to the decision in *Lang and Burgesses of Selkirk* v. *The Magistrates* in 1748—"A very elaborate argument tending to show that private burgesses have neither title nor interest to pursue their magistrates for misapplication of the burgh revenues is to be found in this case. The Court pronounced opposite judgments, but before a final decision the suit was compromised." At last, however, when the time came that the old hearings *in præsentid*, with the power of presenting unlimited reclaiming petitions, were brought to an end, and the Court divided into two Divisions, consisting of an Outer and an Inner House, and the decisions of the Divisions made final, save as appealable to the House of Lords, the controversy was finally settled by the case of *Burgesses of Inverurie* v. *Magistrates*, December 14, 1820, F.C., which settled that an individual burgess has no title to call on the magistrates for a general accounting as to the Common Good.

Then in 1837 came the case of *Ewing* v. *Glasgow Commissioners of Police*. Glasgow had by this time obtained a Police Act, which imposed certain duties on the Commissioners established, and under it gave powers of assessment. These Commissioners opposed a water bill promoted by certain water companies in Parliament, and paid the expenses of the opposition out of the funds in their hands. Ewing, a resident in Glasgow, and as such liable to assessment, raised a suspension against the Commissioners, seeking in general terms to have them interdicted from thus applying money raised by assessment. At the same time they raised an action of reduction of the resolutions by which the Commissioners had authorised the payment of the money

with petitory conclusions attached, ordering them personally to pay back the moneys into the funds of the police establishment.

It is worthy of notice that in the discussions which followed the bill of suspension seems to have got overshadowed by the action of reduction and payment, and got lost sight of. The Court of Session treated the matter somewhat strictly upon the conclusions in the reduction action; and the ground of judgment, which sustained a plea of no title to sue, is thus put by Lord Medwyn—"They (the pursuers) do not seek repetition to themselves but into the fund. . . . This is not a question of levying but of misapplying funds levied for another purpose, and the levy for next year is not objected to." With deference to Lord Medwyn, though this might be said of the conclusions of the reduction it could not, I think, be properly said of the crave of the bill of suspension.

The case then came to this House, and was disposed of by Lord Cottenham. The cases cited were entirely the Common Good cases and none else. The judgment was affirmed, stress being laid on the decision of *Magistrates of Inverurie* above-mentioned.

Now the underlying view of the Common Good cases was undoubtedly this, that looking to the origin of the Common Good, and the wide range of discretion given to the magistrates in its management and application, the Crown, as represented by the Exchequer, could alone institute what one might now call an audit, and that no private burgess could be allowed to do so.

Seeing that no such origin could be attributed to funds raised by assessment under a Police Act, and seeing that the Exchequer had never had, or proposed to have, any inquisitorial position as to said funds (in the Act itself powers of objection were given to specific bodies and persons, and the Court of Exchequer was indicated as the Court before which certain of these objections should be brought), it is not altogether to be wondered at that doubts have been expressed as to the expediency of the judgment thus pronounced—See Lord Kyllachy in *Conn* v. *Magistrates of Renfrew*, 8 F. 905, and Lord Johnston in *Stirling County Council* v. *Falkirk Magistrates*, 1912 S.C. 1281.

But the decision is a decision of this House of old standing, and cannot as a decision be interfered with. There is, however, no reason to take it as deciding any more than it necessarily decided, *i.e.*, in view of the particular conclusions contained in that action.

The appellants, however, wish to extract from that judgment the general proposition that if it is a corporation which commits an act of *ultra vires* no one can complain except the Crown, unless the act complained of has a direct injurious effect on some patrimonial interest of the complaining party.

I think no such proposition can be taken from it, and the strongest argument against it is that the decision has never been so understood by the learned Judges of the Court of Session. The case of *Rodgers* already cited was decided within three years of the decision in *Ewing*. Now the interest of the widow in that case was not a direct interest, it was only contingent. In *Baird* v. *Magistrates of Dundee*, also cited, the interest was still less direct—it was the case of allowing individual burgesses to compel the magistrates to act up to their fiduciary duties.

Nor were these cases left to stand alone. In *Sanderson* v. *Lees*, 22 D. 24, an individual burgess vindicated the right of the golfers of Musselburgh, he being after all only a potential golfer himself; and lastly, in *Grahame* v. *Magistrates of Kirkcaldy*, 8 R. (H.L.) 91, an individual burgess vindicated the right of recreation and bleaching, and Lord Watson in this House upheld his title, while pointing out that in the matter of a general accounting for the Common Good the *Magistrates of Inverurie* case was still law.

Finally, in the case of *Leith Dock Commissioners* v. *Magistrates of Leith*, 25 R. 126, the Leith Dock Commissioners in their capacity as ratepayers presented a suspension against the proposed charging against the public health assessments in Leith of the expenses of unsuccessful parliamentary opposition to a Bill promoted by Edinburgh. Interdict was granted by the Court of Session, and on appeal to this House the appeal was dismissed, 1 F. (H.L.) 65.

It is worth noticing that the suspension in this case is practically indistinguishable from the neglected suspension in *Ewing's* case. The report does not show it, but I have looked up the pleadings, and I find that no title and no interest were both pleaded by the defenders, and Lord Watson delivered the leading judgment. It is not likely that he had forgotten what he said in *Grahame's* case as to *Magistrates of Inverurie*.

The reason for this attitude, I think, is not far to seek. At the time of *Ewing's* case the doctrine of *ultra vires* had not been developed as it came afterwards to be, and the point was looked at from the point of view of a title to call to a general accounting. But a somewhat prophetic view may be found in the opinion of Lord Glenlee in the case of *Aitchison* v. *Magistrates of Dunbar*, 14 S. 421, decided three years before *Ewing*.

The action was brought by burgesses and town councillors against the magistrates to test the legality of an alienation of the burgh property. Lord Glenlee said—"I do not rest on the circumstance that they are members of the town council, but that they complain as burgesses of the illegality of an alienation of the town's property. As the illegality of the act is asserted here I am not disposed to carry too far the distinction between burgesses and town councillors. I am inclined to think that at common law a burgess has an interest and title to look after matters of this sort."

This case was disposed of by Lord Cottenham in *Ewing's* case by remarking that there was a title in a minority of the town council to challenge an act of the magis-

trates and council, and that the Lord Justice-Clerk put his opinion on that ground. But while that is true, it does not notice the distinction between a calling to account and an objection to a specific act, and while I consider we cannot go back on the judgment in *Magistrates of Inverurie*, I think it is clear from the later cases that even if it was a matter of the Common Good there might be room for distinction between objection to one specific *ultra vires* act and the general complaint of maladministration. A trace of such a distinction may be found in the old case of *Burgesses of Irvine* (Elchies Burgh Royal, No. 31), mentioned in the argument in *Inverurie*, but for the reason I have given it was not at that time sufficiently appreciated.

The decision in *Magistrates of Leith* was followed in the recent cases of *Stirling County Council* v. *Falkirk Magistrates* and *Farquhar & Gill* v. *Aberdeen Magistrates*, 1912 S.C. 1281 and 1294, in which cases the case of *Ewing* was disinterred and sought to be overpled as here.

I have taken no notice of the English authorities on which the appellants found. The question of title to sue in England bristles with difficulties having their origin in the rigid rules of common law actions, with the subsequent modifications of the results of these rules either by statute or by the concomitant working of the equity jurisdiction. This fact makes these authorities of no assistance in Scottish procedure. And further, the Attorney-General, so far as his powers and duties are concerned, has no nearer relation to the Lord Advocate than is contained in the fact that the two officials are dubbed with the common nomenclature of law officers of the Crown. No case in practice has been cited where the Lord Advocate has ever pursued an action of this sort.

I now turn to the circumstances of this case. As I said at the outset, I do not think any general pronouncement can be made as to when there is title and when there is not. But when I find that the respondents in the capacity of harbour ratepayers are members of the constituency erected by the Act of Parliament to elect the trustees, and as such are also persons for whose benefit the harbour is kept up, I cannot doubt that they have a title to prevent an *ultra vires* act of the appellants, which *ultra vires* act directly affects the property under their care. It is not only that loss of that property through improper acting may have the effect of imposing heavier rates on the respondents in the future, but, in the words of Lord Johnston in the *Stirling County Council* case, as they have contributed to the funds which bought the property, "they have an interest in the administration of the fund to which they have contributed," and a title flowing from that position and interest.

For these reasons I concur with the motion proposed by the Lord Chancellor.

LORD ATKINSON—I have had the pleasure and advantage of reading carefully the judgment which has just been read by my noble and learned friend Lord Dunedin. I concur in it, and have nothing to add.

LORD PARMOOR—The appellants in this case raised two points. First, that the acts complained of were not *ultra vires*, and secondly, that the respondents were not competent parties to proceed against them.

I propose to limit my opinion to the first point. The appellants are the trustees of the harbour of Dundee and derive their authority from the Dundee Harbour and Tay Ferry Consolidated Act 1911. This Act vests the Tay ferries and certain other ferries and their rights in the trustees, and gives them power to work the ferries and to keep a sufficient number of vessels for that purpose, with an obligation to provide not less than a minimum number of trips between Dundee and the ferry harbour of Newport. The trustees are working the ferries themselves and keep three vessels, which are sufficient for the service of the ferries, but are not all required to be in use at the same time. During 1912 the appellants occasionally let out one of the ferry steamers for excursion parties to points outwith the limits of the harbour and of the ferries as defined by the Act. It is in respect of this occasional letting out of one of the ferry steamers that the appellants are charged with acting *ultra vires*.

It is settled law that a body such as the appellants, constituted by statute, have no authority except such as Parliament has conferred upon them, and that they must find a sanction for any powers which they claim to have in their incorporating statute or statutes. These powers may be expressly authorised or implied as fairly incidental to what is expressly authorised. It is within this border line that the difficulty of definition usually arises. There is no question in the present case of express authority. The appellants are only empowered to use the ferry vessels within geographical limits, and the excursion trips to which exception has been taken are outwith these limits. I think further that the limitation of the powers within geographical limits is in itself sufficient to negative any implication that there is authority to let out their steamers outwith the specified area.

Mr Younger in attempting to bring the acts complained of within the statutory authority of the appellants as fairly incidental to their express powers, relied on two arguments, neither of which can, in my opinion, be maintained. He says that the letting of the ferry steamer for excursion purposes outside the statutory area is fairly incidental to the powers expressly conferred on the appellants, in that it enables them to make a profitable use of surplus plant, not in actual use for ferry purposes at the time, but necessary to keep as a stand-by, to ensure that the appellants can fulfil their statutory duties. Unless the convenient or profitable use of surplus plant in itself is sufficient to justify the letting out of the steamers for excursion purposes, such a use of them is in no sense fairly incidental to the exercise of

the powers expressly given to work a ferry within a defined area.

I think that the principle that a corporation of limited authority, if it has surplus plant, can use that plant in any way it thinks profitable so long as such use is not in contravention of its statutory duties, is quite untenable. It makes no difference whether the letting out of the steamers is occasional or such as to constitute a regular business, since in neither case is there statutory authority, and such authority is the only source from which the right claimed can be derived.

The case of *Forrest* v. *The Manchester, &c., Railway Company*, 30 Beavan, 40, was quoted in favour of the appellants, but the decision in that case has not been followed, and it cannot be accepted as an authority.

The second argument on which Mr Younger relied was based on a suggested analogy between surplus plant and surplus land, when such land had been acquired for statutory purposes but was not being wholly used for such purpose. I regard with suspicion any argument founded on analogy; but the answer is that the possession of surplus land does not, any more than the possession of surplus plant, extend the ambit of the powers conferred on a company by statute, and that no company could on such land set up a business, or do any act, which the incorporating statutes had not sanctioned either expressly or by implication.

The case relied upon was *Foster* v. *London, Chatham, and Dover Railway*, 1895, 1 Q.B.D. In this case the Railway Company had let the land under the arches, over which the railway was carried on a viaduct, upon short tenancies for shops or business purposes. There was no express statutory sanction or limitation, but it was held that by fair implication the company was authorised to use the land which it had acquired under its statutory powers for any purpose which did not infringe the rights of others, and which were not inconsistent with the purposes for which the company was incorporated. The right of railway companies, as owners of land acquired under statutory powers, to use such land subject to the above limitations gives no support to the proposition that surplus plant when not in actual use for statutory purposes may be used for any profitable purpose which the corporation may think fit, irrespective of either the rights conferred or the limitations imposed by the incorporating statute or statutes.

On the second point, which is a question of Scotch procedure, I concur in the opinion expressed by my noble and learned friend Lord Dunedin. The position of the Attorney-General in England differs so materially from that of the Lord Advocate in Scotland that it is difficult to apply the English precedents to the conditions which prevail in Scotland. Should a similar case arise in England I reserve my opinion. In my opinion the appeal should be dismissed with costs.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants — Younger, K.C.—Sandeman, K.C.—Ingram. Agents —J. K. & W. P. Lindsay, W.S., Edinburgh —Beveridge, Greig, & Company, Westminster.

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COURT OF SESSION.

Thursday, December 10.

FIRST DIVISION.

[Lord Cullen, Ordinary.

GRAY *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Title to Sue—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 6—*A Father Suing Damages for Death of Son from One not the Son's Master when Son has Received Compensation from Master—Competency.*

A workman sustained injury by accident arising out of and in the course of his employment, and was paid compensation by his employers in respect thereof for three years, when he died. His father thereafter, averring that the death was the result of the injury, brought an action of damages for the loss caused to himself by the death of his son against a person other than the employer, by whose fault, he alleged, the accident had been caused. *Held* that the action was incompetent.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 6, enacts—'Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2) if the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act.'

Robert Gray, *pursuer*, raised an action against the North British Railway Company, *defenders*, to recover damages in respect of the death of his son.

The defenders, *inter alia*, pleaded—"The pursuer's son Thomas Gray having claimed and been paid compensation under the