been realised of £7000 in the course of a single year by its disposal, a case would have arisen very much more favourable to the respondent. This is how he proposes to treat the transaction, although it is plain from its nature that the seller would not have sold the stock separately from the less realisable heritable subjects with all their contingent liabilities. As the case stands, however, it is impossible to affirm that the sum placed to the reserve fund by the appellants at the very commencement of their existence represents actual profits of the first period of their trading. I am accordingly of opinion that the Commissioners were wrong in allowing this figure to enter the account for income tax purposes; and that this so-called reserve fund, which was virtually a suspense account to meet non-ascertained liabilities, is not assessable for income tax.

LORD MACKENZIE—I concur.

LORD GUTHRIE—I am of the same opinion. The argument of the Inland Revenue was based on two assumptions—First, that of the £25,000 paid by the appellants in 1907 for the acquisition of the business of coal-masters and fireclay manufacturers at Kilmarnock previously carried on under the same name, £5625 was the true proportion paid by the appellants for the stock taken over by them; and second, that there was no consideration for their acquisition other than the £25,000, disregarding in particular the liability for mineral damages of substantial although indefinite extent undertaken by them. The appellants have shown both these assumptions to be unfounded, but it would not necessarily have followed that the appellants' valuation of £12,798 must be accepted. The Commissioners, however, do not dispute that if the figure of £5625 relied on by them is rejected as empirical, the proper sum to be taken as the value of the stock is £12,798, the sum arrived at by a valuation the fairness of which is not challenged.

In my opinion the appellants are entitled to prevail on the merits of the question, there being no reasonable ground on which the finding of the Commissioners can be supported. I also think that the argument based on the appellants' books is unfounded. The course taken by the appellants in splitting up the £12,798 under stock account and stock suspense account was not only justifiable, it was the proper course in the circumstances. It does not follow either that £5000 was a correct proportion to take of the £25,000, or that £7173 (corrected to £6635) was a correct valuation of the liabilities undertaken in addition to payment of the sum of £25,000. Mr Clyde, as I understood, admitted that questions may arise between the appellants and the Inland Revenue if it ultimately turns out that the amount of the unascertained liability for mineral damages does not exhaust the suspense account fund. But no such questions arise under the case presented for our decision.

LORD SKERRINGTON—I concur.

The Court pronounced this interlocutor—

"The Lords . . . in conformity with the opinions of the whole Seven Judges, sustain the appeal, reverse the determination of the Commissioners, and remit to them to fix the profits on which the appellant company is to be assessed according to the principle laid down in said opinions, and decern."

Counsel for Appellants—Clyde, K.C.—Hunter. Agents—Laing & Motherwell, W.S.

Counsel for Respondent—Sol.-Gen. Morison, K.C.—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Friday, February 20.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

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

Title to Sue—Trust—Ultra vires—Statutory Harbour Trust including Steam Ferries—Illegal Use of Ferry Boat—Action by Rival Trader—Action by Ratepayer.

A statutory harbour trust, part of whose undertaking consisted in running ferry steamers, and which had power to meet any loss on its ferry traffic by means of increased dues on, *inter alia*, shipowners using the harbour, employed one of its ferry steamers occasionally for excursion traffic outwith the limits of its statutory area. In an action of interdict at the instance of a firm of shipowners, part of whose business consisted in running excursion steamers from the harbour, and who averred that their business was injured by the competition of the harbour trust, *held* (1) (*diss.* Lord Dewar) that as rival traders averring patrimonial loss the complainers had a title to sue, and (2) (*diss.* Lord Dewar and *rev.* judgment of Lord Skerrington, Ordinary) that as ratepayers paying harbour dues the complainers had also a title to sue.

Opinions (*per* Lords Salvesen and Guthrie) that the Lord Advocate would have no title to sue such an action.

Corporation—Ultra vires—Trust—Harbour Trust Authorised to Run Ferry Steamers within Certain Limits—Hire of Ferry Steamer for Excursion Traffic beyond Limits—Dundee Harbour and Tay Ferries Consolidation Act 1911 (1 *and* 2 *Geo. V, cap. lxxx*).

A statutory harbour trust, having power under its incorporating Act to charge certain rates per day under the heading of "ferries rates" for the hire of its steamboats, hired out one of these steamboats for occasional excursion traffic beyond the ferry limits. *Held* (*diss.* Lord Dewar) that such use was *ultra vires*.

The Dundee Harbour and Tay Ferries Consolidation Act 1911 (1 and 2 Geo. V, cap. lxxx), section 194, enacts—"It shall be lawful for the Trustees to levy or to order or direct to be levied at the ferries of Dundee, Newport, or Woodhaven respectively, and at the piers and ferry harbours vested in the Trustees for or in respect of the conveyance of passengers, animals, and goods by the ferry vessels from Dundee to Newport or Woodhaven, or from Newport or Woodhaven to Dundee, and also along the whole line of coast on both sides of the Tay over which the right of ferry vested in the Trustees extends, the rates specified in the Schedule J to this Act annexed." Schedule J—"Tay Ferries Rates—Hire of a steamboat . . . each £15 per day. Hire of a steamboat . . . each £10 per half day. . . ."

The Act imposes harbour rates on shipowners using the harbour (section 146 and Schedule B), and provides in certain contingencies for a deficiency in the ferry accounts being met out of the harbour rates and revenues (sections 208, 214, and 215).

D. & J. Nicol, shipowners and shipbrokers and agents, 59 Dock Street, Dundee, and David Nicol and James Urquhart Nicol, the individual partners thereof, *complainers*, presented a note of suspension and interdict against the trustees of the harbour of Dundee, *respondents*, in which they craved the Court to interdict the respondents "(1) from engaging in passenger steamer traffic from and to ports and places on the Tay outwith the boundaries of the Tay ferries as defined and limited by the Dundee Harbour and Tay Ferries Consolidation Act 1911, or at all events outwith the boundaries of the harbour of Dundee as defined and limited by said Act; (2) from employing their steamers or other vessels in excursion or other traffic from and to the harbour of Dundee not in connection with the Tay ferries; (3) from hiring out or tendering or offering for hire their steamers or other vessels or any one of them, either gratuitously or for lump sums or otherwise, to excursion parties or others for excursions or cruises, or for other purposes not connected with the said Tay ferries."

The complainers pleaded—"(1) The respondents having no power to engage in or to employ their steamers for passenger traffic as libelled, either generally or for excursions, or to lend or hire out their steamers or other vessels for such traffic, complainers are entitled to have them restrained from doing so, and interdict should be granted as craved. (2) The hiring out by the respondents of their said steamers to the employees of the Dundee Gas Commission or to other persons being *ultra vires* of the powers conferred on them by said Dundee Harbour and Tay Ferries Consolidation Act 1911, the complainers are entitled to interdict as craved. (3) The actings of the respondents complained of being illegal and *ultra vires*, the complainers are entitled to interdict as craved."

The respondents pleaded—"(1) The averments of the complainers being irrelevant, the note should be dismissed. (2) The complainers having no title to sue, and, *separatim*, no interest to insist in these proceedings, the same should be dismissed. (4) The respondents being entitled to hire their steamboats, the prayer of the note, so far as it seeks to interdict them from doing this, should be dismissed."

The *facts* of the case and the import of the proof appear from the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who, after having passed the note and allowed a proof before answer, on 8th January 1913, repelled the second plea-in-law for the respondents, and interdicted, prohibited, and discharged them, their servants, and all others acting with their authority, from carrying passengers by means of the Tay ferries steamers from and to places outwith the boundaries of the ferries as defined by the Dundee Harbour and Tay Ferries Consolidation Act 1911, and decerned; *quoad ultra* found it unnecessary to deal with the prayer of the note of suspension and interdict.

Opinion.—"The complainers are shipowners and shipbrokers and agents in Dundee. Part of their business consists in owning and working excursion steamers for passengers. In the present action they complain of and seek to restrain what they allege to be unfair and illegal competition on the part of the respondents, the Trustees of the Harbour of Dundee, as owners of the Tay Ferries. The respondents were incorporated on 18th August 1911 in succession to the then existing trustees by the Act 1 and 2 Geo. V, cap. lxxx. The Tay Ferries have been vested in and managed by the Harbour Trustees since the year 1873, and they form part of the respondents' undertaking. These ferries consist of the ferry from Dundee to Newport and of a disused ferry from Dundee to Woodhaven. The area over which the respondents' right of ferry exists is defined by section 186 of their Act. It extends along both sides of the estuary of the Tay from Balmerino on the west to Tayport on the east, exclusive, however, of the ferries at Balmerino and Tayport. the latter of which belongs to the North British Railway Company. The limits of the Harbour of Dundee, as defined in section 81, include the ferry limits as above described, and extend eastward to the sea.

"The complainers aver that the respondents' predecessors recently acquired a new steamboat, ostensibly for the purpose of replacing one of the ferry boats, but really for use as an excursion steamer; that the 'Newport,' which was the steamer referred to, was never employed on ferry traffic, and that large sums were expended upon special repairs which were necessitated by reason of her use in excursion traffic. All these averments have been disproved. The 'Newport' was built by the then existing Harbour Trustees at a cost of £10,000, because they required a new steamer for the purposes of their ferry, in addition to the two steamers which they already possessed, one of which was more than fifty years and the other more than thirty years old. Since September 1910 the 'Newport' has been regularly used for ferry purposes, except when she was under repair or being overhauled. By section 189 of their Act

the respondents are constituted the judges as to the number of vessels which they think it expedient to maintain for the purposes of the ferry, and they have fixed the number at three for the present. Normally only one steamboat is used for the ferry, but on Saturday afternoons and on holidays a second steamboat is used at the same time. The respondents maintain two complete crews, one of which works from 5 a.m. until 2 p.m., when the second crew comes on duty and works the ferry until midnight. When two ferry boats are running simultaneously one crew has to be paid for overtime. As regards the use of the ferry boats for excursions, it appears that during the period from 1st June 1910 till 10th September 1912 there have been nineteen excursions, for which £155 in all was received. These figures include the period since the respondents' incorporation in August 1911, during which there have been seven trips, for which £70 was received. The respondents' predecessors occasionally gave the use of a steamer for an excursion gratuitously, but the respondents have adopted the policy of making a regular charge on each occasion of £15 for a whole day or £10 for a half day. Two out of the seven trips for which the respondents are responsible took place on Saturday afternoons, when the two regular crews were engaged on the ferries, and when it was therefore necessary to engage a scratch crew from among the men employed on the harbour. In the ordinary case a ferry steamer, when used for an excursion, is manned by the spare crew, who are paid overtime, and who have the help of a pilot taken from one of the harbour tugs. After deducting wages, coal, and oil, one-half of the £10 charged for an afternoon's excursion is profit; but this calculation allows nothing for insurance, repairs, and general oncost. Private owners could not afford to let their steamers for excursions at £15 per day or £10 per half day. The respondents' boats have a crew of seven hands all told. The complainers' boats are smaller, but have crews twice as numerous. On every occasion the agreement to provide an excursion steamer was conditional on the boat not being required for ferry purposes. The respondents and their predecessors have been careful to subordinate their excursion traffic to that of the ferry, and there is no reason to fear that they will act otherwise in the future. There is, however, one possibility which must be kept in view in considering whether the respondents have or have not power to run excursion steamers. So far their excursions have been up the river towards Perth, because none of their steamboats has a Board of Trade Certificate which entitles her to go to sea. It is possible in the future that the respondents may be advised to acquire a new steamer of a different type, and this steamer may receive a full certificate from the Board of Trade. If the respondents have implied power under their statute to run excursion steamers 20 miles westwards towards Perth, there is no reason why they should not run a similar distance in the direction of the Bell Rock Lighthouse, or of Arbroath, or of St Andrews. I assume that the respondents would never send a steamer to such a distance that she would not be readily available if required for the purposes of the ferry.

"It is, I think, clear that the respondents have no express statutory power to carry passengers to any point outwith the limits of the ferry, Section 194 of their Act entitled them to levy the rates specified in Schedule J 'in respect of the conveyance of passengers, animals, and goods by the ferry vessels from Dundee to Newport or Woodhaven, or from Newport or Woodhaven to Dundee, and also along the whole line of coast on both sides of the Tay over which the right of the ferry vested in the Trustees extends.' Schedule J is headed 'Tay Ferries Rates.' The first two items are—

'Hire of a steamboat - each £15 per day
'Hire of a steamboat, each £10 per half day.'

The respondents are entitled to found upon these rates as a guide to what they ought to charge when they hire out a steamboat for excursion purposes; but the schedule refers to the hire of a steamboat for ferry purposes only. I was not referred by counsel on either side to any sections of the statute as throwing light upon the question whether excursion traffic was or was not within the implied powers of the respondents. Accordingly the question is a general one, viz., whether a duty and power to work a ferry within certain limits implies as an incident and consequence a right and a power to use the steamers when not required for the ferry in order to carry excursionists for hire to places outside the limits? It seems to me plain that this question must be answered in the negative. In certain circumstances it might be advantageous that a ferry authority should have such a power, but that is a question not for a court of law but for Parliament. If the respondents had stated in their preamble that they proposed to run excursion steamers to places beyond the limits of the ferry, they would have had to satisfy the Committee of both Houses that it was advantageous to the Harbour Trust to expose their vessels to unnecessary risks in order to gain an occasional £5. They would also have had to explain to the Committees how it came about that they worked their vessels with a much smaller crew than is thought necessary for the public safety by the owners of excursion steamers. The only explanation that occurs to me is that a ferry from a large seaport is conducted under essentially different conditions from excursion traffic, in which latter case the vessel must rely entirely upon her own resources in case of emergency. Lastly, they would have had to satisfy the Committees that it was fair to use vessels built with public money in order to compete with private traders. It seems to me out of the question for a court to decide all these points in favour of the respondents by implication from the mere grant of a right to work a ferry. The only difficulty which I feel is created by the judgment of Sir John Romilly, M.R., in the

case of *Forrest* v. *The Manchester, Sheffield, and Lincolnshire Railway Company*, 1861, 30 Beavan, p. 40, *aff.* 4 De G. F. & J. 126. It is, however, noticeable that Lord Westbury affirmed the judgment upon entirely different grounds, and that he pointedly refrained from endorsing Sir John Romilly's views. I respectfully dissent from the view that because a company in the performance of their statutory duties have to keep steamers which sometimes are not required for the statutory purpose the company have implied power to use their steamers 'as they think fit for the profit of the company, and either to let them out to private parties for excursions or to carry excursion parties themselves.' This doctrine seems to me to be as unsound as it is far reaching and dangerous. If the respondents have not implied power to run excursion steamers to points outside the ferry limits, their statute impliedly forbids them to do so. In *Attorney-General* v. *Great Eastern Railway Company*, 1880, 5 A.C. 486, Lord Watson stated the principle as follows, namely, 'When a railway company has been created for public purposes the Legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication.' Accordingly the respondents lie under a statutory duty to refrain from carrying on business of the kind objected to by the complainers. Of course I say nothing which can touch the respondents' right to alienate either permanently or temporarily by a lease ships or other plant for which they have no immediate use. They may also be entitled to demise one of their ships together with a crew to a person who proposes to engage in excursion traffic. But they have, according to my judgment, no power to use a ship for excursion traffic while they retain the possession of it and the control of the crew. The respondents' superintendent deponed that he always retained the control of any steamers which he let out for excursions. The respondents' counsel cited an American case, *Brown* v. *Winnisimmit Company*, 11 Allen 326, where it was decided that a ferry company had power to lease its surplus boats to other parties. The case is fully reported in Lawson's Rights, Remedies, and Practice, vol. i, sec. 391, note (6). While I have no quarrel with the decision, I think that some of the opinions of the Court and of the learned commentator are not reconcilable with the law of *ultra vires* as laid down by the House of Lords.

"The next question is, whether the complainers have a sufficient title and interest to prevent the respondents from contravening their statute. A person cannot sue in respect of the breach of a statutory obligation conceived in favour of some other person or for some purpose to which he himself is a stranger—*Monklands Railway Company* v. *Waddell*, 1861, 23 D. 1167; *Gorris* v. *Scott*, 1874, L.R., 9 Exch. 125. Nor can he sue in respect of the breach of a public statutory duty when the only remedy which Parliament had in view was a prosecution for a penalty—*Institute of Patent Agents* v. *Lockwood*, 1894, 21 R. (H.L.) 61; *Atkinson* v. *Newcastle and Gateshead Waterworks Company*, 1877, 2 Exch. Div. 441. Contrast *Watkins* v. *Naval Colliery Company*, 1912 A.C. 693. But a member of the public can sue for the protection of his own patrimonial interests, when these will be directly prejudiced by the breach of a public statutory duty—*Stirling County Council* v. *Falkirk Magistrates*, 1912 S.C. 1281; *Farquhar & Gill* v. *Aberdeen Magistrates*, *ibid.*, p. 1294. The complainers are interested in the prosperity of the harbour of Dundee as persons who pay large sums annually for dock dues, dues on goods, &c., in respect of their own ships and of ships consigned to them. The partners of the complainers' firm are qualified both as harbour ratepayers and also as municipal electors to vote for and to be elected as harbour trustees. But their patrimonial interest as harbour ratepayers is of a remote and indirect character. The Tay ferries being a part of the harbour undertaking, it is suggested that the harbour rates might have to be raised in the event of one of the ferry steamers being lost while upon an excursion. Also that in the case supposed claims might be made against the Trustees for damages and *solatium*. There could, however, be no liability upon the part of the Harbour Trustees as a corporation in respect of the *ultra vires* acts of the individual trustees, and the latter would be personally bound to provide the Trust with a new steamer to replace the one which had been lost while carrying on an unauthorised trade. I cannot consistently with the authorities sustain the complainers' title to sue as harbour ratepayers. But the complainers are also interested as rival traders in seeing that the respondents do not exceed their statutory powers. If it were not for the authorities I should have had no doubt that the complainers had a title and interest to enforce a restriction which, although imposed for the benefit of the public in general, directly affected the special and patrimonial interests of the complainers as persons carrying on a particular kind of trade in a particular place. It was, however, decided by Lord Westbury in the Court of Chancery so long ago as 1863 that a waterworks company had no title to restrain another similar company from making an *ultra vires* invasion of the former's territory. He said—'The Constitution of the country has wisely entrusted the privilege with a public officer (the Attorney-General), and has not allowed it to be usurped by a private individual'—*Stockport District Water-Works Company* v. *Mayor of Manchester*, 9 Jur. (N.S.) 266, 7 L.T. (N.S.) 545. This decision was reluctantly followed by Vice-Chancellor Malins in *Pudsey Coal Gas Company* v. *Corporation of Bradford*, 1873, L.R., 15 Eq. 167. There is a judgment to the same effect by Lord Low in the Outer House—*Clyde Steam Packet Company* v. *Glasgow and South-Western Railway Company*, 1897, 4 S.L.T. 327. The report is a short one, but it cites the *Stockport* case, and states that by running steamers the Railway Company did not invade any public or private right belonging to the complainers. If a public or private right which

exists antecedently to and independently of the incorporating statute is infringed by a corporation, the injured party has an undoubted title to sue unless the right has been excluded by the statute, but that consideration does not seem to have any bearing upon the question whether a rival trader has a sufficient title and interest to restrain by interdict trading which is expressly or impliedly forbidden to a corporation by its statute. So far as appears from the report, it was not pointed out to Lord Low that Lord Westbury's judgment proceeded upon the ground that according to English practice there was a recognised form of action of which the plaintiffs ought to have availed themselves, viz., an action in name of the Attorney-General suing on the relation of the rival trader. Such actions seem not to be conducted by Crown counsel. In a recent case it was argued that the Attorney-General ought not to have lent his name to an action which was brought in the interest of rival omnibus proprietors who sought to restrain the London County Council from doing something which, according to Rigby, L.J., might be 'very reasonable, very proper, and very beneficial to the public if only it is within their power under the statutes.' The House of Lords laid it down that the jurisdiction of the Attorney-General to decide in what cases it is proper for him to sue on behalf of relators is absolute—*Attorney-General* v. *London County Council*, 1901, 1 Ch. 781. *aff.* 1902 A.C. 165. Lord Halsbury indicated that as a matter of discretion the Attorney-General might refuse 'to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter.' The whole subject of the duty and functions of the Attorney-General in such cases seems to me to be a technical one, and there was a difference of opinion in regard to it in the Court of Appeal in *Attorney-General* v. *Great Eastern Railway Company*, 1879, 11 Ch. D. 449, 5 A.C., p. 447, *note*. In *Attorney-General* v. *Mersey Railway*, 1907, A.C. 415, the relators were not rival traders but a municipal corporation. There is no similar practice in Scotland, but I do not doubt that the Lord Advocate could and would bring a civil action of interdict in any case where he considered the public interest to be involved. On principle it seems to me that the Lord Advocate has as little title to sue in the private interest of the complainers as the latter have to sue in the public interest. Accordingly I agree with the respondents' counsel that the complainers could not, according to the practice of our civil courts, institute and prosecute an action of interdict in name of the Lord Advocate, even if they were expressly authorised by him to do so. It follows, in my opinion, that the complainers are entitled to protect themselves in the ordinary way, and by an action in their own names, against an abuse of statutory power which is directly injurious to their individual and patrimonial interests by exposing them to artificial and illegal competition. See *Haining* v. *Dumfries Commissioners*, 1861, 23 D. 755. The validity of the complainers' title to sue is emphasised and illustrated by the English practice which has made it necessary to invoke what looks like a legal fiction rather than to tolerate a manifest injustice. Upon the evidence I am satisfied that the running of excursion steamers by the respondents is calculated seriously to prejudice the complainers in their business. I shall therefore interdict the respondents from carrying passengers by means of the Tay Ferries' steamers from and to places outwith the boundaries of the ferries as defined in their Act."

The respondents reclaimed, and argued—(1) The pursuers had no title to sue either as private traders or as ratepayers. As private traders they had no title unless some right of theirs had been infringed. Apart from such infringement, an Act of Parliament incorporating a public corporation could not be enforced against that corporation except by the Crown acting in the public interest, or by a person who was creditor in a restriction imposed by the statute, and the complainers were not such creditors in the present case—*Monklands Railway Company* v. *Waddell*, June 21, 1861, 23 D. 1167; *Gorris* v. *Scott*, 1874, L.R., 9 Ex. 125; *Clyde Steam Packet Company, Limited* v. *Glasgow and South-Western Railway Company*, March 4, 1897, 4 S.L.T. 327; *Stockport District Waterworks Company* v. *Mayor of Manchester*, 1862, 9 Jur. (N.S.) 266, 7 L.T. (N.S.) 545; *Pudsey Coal Gas Company* v. *Corporation of Bradford*, 1873, L.R., 15 Eq. 167. The respondents held their power from the Crown, and the Crown alone, through the Lord Advocate acting in the public interest, had a right to restrain them in the exercise of those powers. Injury caused by *ultra vires* competition could not *per se* give the complainers a title—Bell's Prin., secs. 2177, 2178; *Stockport District Water-works Company* v. *Mayor of Manchester* (*cit. sup.*); *Alexander* v. *Officers of State*, March 30, 1868, 6 Macph. (H.L.) 54, *per* Lord Westbury at p. 67; *Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H.L.) 91, 19 S.L.R. 893; *Kesson* v. *Aberdeen Wrights and Coopers' Incorporation*, November 2, 1898, 1 F. 36, *per* Lord Kyllachy at p. 42, 36 S.L.R. 38; *Conn* v. *Corporation of Renfrew*, June 7, 1906, 8 F. 905, 43 S.L.R. 664; *Burgesses of Inverurie* v. *The Magistrates*, December 14, 1820, F.C. The complainers' claim was equivalent to the *actio popularis* in Roman law, which had not been accepted in Scots law—Mackay's Practice, i, 296; Ersk., iv, 1, 17; *Ewing* v. *Glasgow Police Commissioners*, M'L. & R. 847, *per* Lord Cottenham at 860; *Alexander* v. *Officers of State* (*cit. sup.*), *per* Lord Westbury at p. 67. *Grahame* v. *Magistrates of Kirkcaldy* (*cit. sup.*) showed that the sole point to be considered in such cases was the public interest. The case of *Haining* v. *Commissioners of Police for Dumfries*, March 16, 1861, 23 D. 755, cited by the Lord Ordinary, was not in point. The only apparent exceptions to a private individual suing such actions were in the case of rights-of-way and ferry—*Macfie* v. *Scottish Rights-of-Way and Recreation Society, Limited*, July 14, 1884, 11 R. 1094, 21 S.L.R. 742; *Magistrates of Edinburgh* v. *Blackie*, February 18,

1886, 13 R. (H.L.) 78, 23 S.L.R. 501, *affg.* 11 R. 783, 21 S.L.R. 352; *Adamson* v. *Edinburgh Street Tramways Company*, March 5, 1872, 10 Macph. 533, 9 S.L.R. 369. Further, as ratepayers the complainers had no title to sue. They paid dues to the harbour and not to the ferries, which were run quite separately without assistance from the harbour rates—Dundee Harbour and Tay Ferries Consolidation Act 1911 (1 and 2 Geo. V, cap. lxxx), sec. 215—and they could not therefore show that the acts complained of involved them in any patrimonial loss—*Ewing* v. *Glasgow Commissioners of Police* (*cit. sup.*), *per* Lord Westbury at p. 860; *Grahame* v. *Magistrates of Kirkcaldy* (*cit. sup.*); *Stirling County Council* v. *Magistrates of Falkirk*, 1912 S.C. 1281, 49 S.L.R. 969. In any event there was no evidence that the harbour had had to pay for any losses on the ferry, or that any increase in the rates had been caused by running the ferry-boat as an excursion steamer. But even if as ratepayers the complainers had an interest, they could not move in the matter till the illegal assessment had been made—*Stirling County Council* v. *Magistrates of Falkirk* (*cit. sup.*). (2) In any event the acts of the respondents were not *ultra vires*. They were not prohibited either expressly or impliedly. The respondents had power under their incorporating statute to hire boats out—Dundee Harbour and Tay Ferries Consolidation Act 1911, sec. 194, and Schedule J—but there was no real distinction between such demise and retaining control. The hire of a steamboat included the hire of a fully equipped boat with a supply of men. If the respondents had no express power, they had at any rate implied power at common law, such power being incidental to the right of every corporation to use its plant to the best advantage, and to employ it for subsidiary purposes when it was not required for the primary purpose of the business in place of keeping it lying idle—*Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 1861, 30 Beav. 40, *per* Romilly, M.R., at p. 47, *affd.* 4 De G. F. & J. 126; *Simpson* v. *Westminster Palace Hotel Company, Limited*, 1860, 2 De G. F. & J. 141, *affd.* 4 H.L. Cas. 712; *Brown* v. *Winnisimmit Company*, 11 Allen 326 (American), also reported in Lawson's Rights, Remedies, and Practice, vol. 1, sec. 391, note 6; *Attorney-General* v. *Great Eastern Railway Company*, 1880, 5 A.C. 473, *per* Lord Chancellor (Lord Selborne) at p. 478; Brice on Ultra Vires (3d ed.), p. 135. A corporation was not to be tied strictly to its statute, but was entitled to do anything that came under fair implication as being in its power—*Simpson* v. *Westminster Palace Hotel Company, Limited* (*cit. sup.*).

Argued for the complainers—(1) The complainers had a title to sue. In the case of a private partnership or limited company only parties to the contract could complain of a breach of it, but in the case of a statutory body of trustees such as the present, created for public purposes with no beneficiaries, any member of the public who could qualify an interest, however slight, was entitled to sue. The Act of Parliament which incorporated the Harbour Trustees constituted a contract between them and the public, and any member of the public who was injuriously affected by the illegal acts of the Trustees was entitled to found on the Act. That Act granted a monopoly, and it could not be maintained that the Trustees were to be free to go outside the limits imposed by the monopoly. If there had been a special stipulation in the Act in favour of the respondents, or if they had opposed a clause to run excursion steamers and had got the clause struck out, their title to sue would have been clear. Parliament in granting its powers to the respondents had impliedly prohibited trading outside their area, and the wrong done to the complainers was the interference with their goodwill done by such illegal trading—*North British Railway Company* v. *Magistrates of Perth*, 1885, 13 R. (H.L.) 37, 22 S.L.R. 593, *affg.* 11 R. 827, 21 S.L.R. 553; *Adamson* v. *Edinburgh Street Tramways Company* (*cit. sup.*); *Guild* v. *Ross*, December 21, 1809, F.C.; *Tait* v. *Earl of Lauderdale*, February 10, 1827, 5 S. 330; *Martin* v. *Easton*, June 18, 1830, 8 S. 952; *Christie* v. *Caledonian Railway Company*, December 18, 1847, 10 D. 312; *Duke of Atholl* v. *Torrie*, June 3, 1852, 1 Macq. 65, *per* Lord St Leonards, L.C., at pp. 74-5, *affg.* 12 D. 328; *Beckett* v. *Campbell*, January 22, 1864, 2 Macph. 482, *per* Lord Cowan at 486; *Haining* v. *Commissioners of Police for Dumfries* (*cit. sup.*); *Institute of Patent Agents* v. *Lockwood*, January 26, 1893, 20 R. 315, 30 S.L.R. 375; Ersk. Inst. (Nicolson) i, 3, 22, note (*b*), p. 71, iv, 1, 17. The case of *Clyde Steam Packet Company, Limited* v. *Glasgow and South-Western Railway Company* (*cit. sup.*), founded on by the respondents, was not in point, because there the disputants were rival traders both entitled to run vessels on the Clyde. The English cases founded on by the complainers were not in point, because the Attorney-General in England occupied quite a different position from the Lord Advocate in Scotland and his concurrence as nominal pursuer could be obtained on the relation of any private person suing in the public interest provided the action was a genuine one—*Stockport District Water-works Company* v. *Mayor of Manchester* (*cit. sup.*); *Pudsey Coal Gas Company* v. *Corporation of Bradford*, 1872, L.R. 15 Eq. 167; *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Company*, 1882, 21 Ch. D. 752, *per* Fry, J., at p. 754; *Attorney-General* v. *London County Council*, 1901, 1 Ch. 781, *affd.* 1902, A.C. 165; *Attorney-General* v. *Leicester Corporation*, 1910, 2 Ch. 359. In Scotland, on the other hand, the Lord Advocate was only the King's Counsel and had no common law right to sue, but could only do so by express authority from the King or under Act of Parliament—Crown Suits (Scotland) Act 1857 (20 and 21 Vict. cap. 44); *King's Advocate* v. *Dunglass*, December 24, 1836, 15 S. 314, *per* Lord Medwyn at p. 324 *et seq.* There was no case in Scotland where a public right had been infringed where the Lord Advocate had in point of fact come forward. If the complainers' title were not sustained

here, then there would be no means of restraining the respondents' *ultra vires* actions at all. The Court of Session in Scotland was, however, always entitled to find a remedy for a new complaint, and had similar powers to the Court of Equity in England. There might be no *actio popularis* in Scots law except rights-of-way and ferry, but the Court would not refuse a title to the complainers where in addition to public interest there was added private injury as a trader—*Magistrates of Edinburgh* v. *Blackie* (*cit. sup.*); *Institute of Patent Agents* v. *Lockwood* (*cit. sup.*). In any event, if the complainers had not a title as rival traders, at least they had a title and an interest as ratepayers, or alternatively as electors in the Harbour Trust, which paid deficiencies in the ferry accounts without being entitled to any surplus—Dundee Harbour and Tay Ferries Consolidation Act 1911, secs. 208, 214, 215. In the present case the ratepayers were in the same position as shareholders of a limited company. (2) If the complainers had a title to sue, the acts complained of were clearly *ultra vires*. The question was whether the use made of the steamers was fairly incidental to the purpose for which the Trustees had been incorporated. It could not be maintained that it was. If the present use was valid, then any use for profit would be valid. The answer to the argument on waste by disuse was that Parliament must have contemplated this and yet gave no power. This was not a commercial company, and if their plant was wasting they had their remedy in an application to Parliament for extra powers. There was a presumption in such a case that what was not either expressly or by fair implication within the charter of the Trust was to be held as prohibited—*Ashbury Railway Carriage and Iron Company* v. *Riche*, 1875, L.R., 7 H.L. 653; *Attorney-General* v. *Great Eastern Railway Company* (*cit. sup.*).

At advising—

LORD SALVESEN — Two questions are raised in this case, both important and difficult of solution. The first is, whether the complainers have a title to sue; the second, whether the respondents are contravening the statute under which they are constituted. I shall deal with these in their order.

The complainers rest their title upon two considerations—(1) that part of their business consists in running excursion steamers from Dundee, and that the respondents are competing with them in this business, although impliedly prohibited from doing so by their incorporating statute; and (2) that as shipowners who regularly use the harbour of Dundee they pay dues for the use of the harbour, and have an interest in seeing that the funds under the control of the respondents, which consists of harbour dues and rates on shipping and goods, are applied strictly to the purposes for which the respondents obtained statutory authority. The Lord Ordinary has upheld their title on the first head but has repelled it on the second.

A strenuous argument was maintained by the respondents to the effect that the decision of the Lord Ordinary in sustaining the title of the complainers as rival traders was erroneous, and on the other hand the complainers contended that he was equally wrong in repelling their title as ratepayers, although, of course, if their title is sustained upon any ground they have no interest to quarrel the judgment. In my opinion the complainers have a good title on both heads, and I should have thought this reasonably clear on principle but for the authorities which have been cited.

If this action had been raised by the complainers simply as members of the public I should have agreed that however grave a contravention of the statute the respondents had committed their title could not have been sustained. Such an action would have been a proper *actio popularis*, which with the apparent exception of a declarator of right-of-way is unknown in our law. Even a declarator of right-of-way, I take it, is not a real exception to the general rule, because every inhabitant in Scotland has a right to use and may have occasion to use any public right-of-way. He has therefore an interest to pursue such an action, the interest being greater or less according to its actual or possible use. Such an interest is entirely absent where the question is whether a statutory body of trustees having a limited jurisdiction are or are not expending the trust funds under their charge in terms of the authority conferred upon them by Parliament. In order to maintain an action the pursuer must not merely have a title but an interest in the subject-matter of the suit. Even an inhabitant of Dundee who is more or less interested in the maintenance of the harbour and ferries which primarily serve the public of that seaport, might have no interest in preventing the running of excursion steamers by the respondents. As such inhabitant he might rather be expected to favour the increase of facilities for summer outings, more especially if the fares charged were less than those that were exacted by excursion steamers run upon commercial lines. To such a person it would be a matter of indifference whether the steamers were run at a profit or at a loss, for he would neither share in the profit nor have to contribute to the loss.

An entirely different question is raised, however, when it is alleged that the acts sought to be interdicted constitute an invasion of patrimonial rights. In such a case any person aggrieved has a clear interest in having the illegal actings restrained, and the Lord Ordinary has held that the complainers of this action have established such an interest. The excursion traffic from Dundee to places up the Tay is of a limited nature, for it appears that in the last year referred to in the proof there were only ten excursions. Of these, seven were secured for the "Newport," one of the ferry-boats belonging to the respondents, the remaining three being run by the "Marchioness of Bute," a passenger steamer belonging to the complainers. It is a fair inference that but for the competition of the respondents some if not all of these seven excursions

would have been obtained by the complainers and yielded them substantial profit. The goodwill of the complainers' business in passenger traffic has thus been invaded, and their probable profits reduced by the competition to which they have been exposed. Their interest as shipowners to sue is therefore undoubted, and I think was not seriously disputed.

It is, however, not sufficient for the complainers to qualify an interest; they must also have a title. If the respondents here had been a private partnership who were prohibited by their contract of copartnery from engaging in excursion traffic, while the complainers' interest to restrain such traffic would be the same, they would have had no title to sue. The reason is that only the parties to a contract can enforce a contractual obligation. A stranger to the contract has no right to inquire into its terms, and if the thing done is not illegal in itself, it does not concern such a stranger whether it is in breach of the contract of copartnery. The same is, of course, true of a limited liability company incorporated under the Companies Acts. The contract between the company and its members is usually embodied in a memorandum and articles of association. Any member of the company is entitled to complain of a violation of the contract, but no one outside the company can challenge its administration. The rule would seem also to apply to companies formed for profit, such as railway companies, which cannot be incorporated except under statutory authority because of the necessity of their being armed with powers for the compulsory acquisition of the land necessary for the purposes of their undertaking.

In my opinion the same considerations do not apply as between a statutory body such as the respondents, who are incorporated by Act of Parliament to serve the public interests of a particular community, and one of the members of that community. Had the bill which resulted in the Act of 1911, under which the respondents are now incorporated, proposed to take powers to run steamers for profit whether carrying goods or passengers, I do not think it doubtful that the complainers would have been entitled to oppose in Parliament the granting of such powers as prejudicial to their interests. A successful opposition would be of no value if the respondents could immediately thereafter proceed to do the very thing which they had been refused authority to do without being liable to be called in question by the persons at whose instance the powers had been refused; yet if the respondents' argument is sound, that would be exactly their position, subject only to the suggestion that the Lord Advocate might intervene on their behalf—a suggestion which I shall afterwards consider. No Scottish decision was cited in support of this somewhat startling proposition, which would result in the denial of justice to an individual whose business or property was being injuriously affected by an illegal act. On the contrary, there are authorities which appear to be precisely in point. In the case of *Adamson*, 5 Macph. 533, two omnibus and cab proprietors in Edinburgh were held entitled to complain of the breach of an obligation in the Edinburgh Tramways Act, by which it was provided that where in any road in which a double line of rails was laid there should be not less width between the footpath and the nearest rails than 9 ft. 6 inches the company should construct a passing place. The pursuers of that action had occasion to use the street in question, and this was held sufficient to entitle them to enforce the statutory obligation. The case is all the more striking because by the Act the local authority were expressly authorised to take action, and perhaps might do so to the exclusion of those members of the public whose patrimonial interests were not affected. So also in the case of *Guild* v. *Scott*, F.C., 21st December 1809, an action was sustained at the instance of certain persons who had occasion to travel a turnpike road calling upon the trustees to put the road in repair or remove the toll-bars.

The patrimonial interests of the complainers as harbour ratepayers to maintain this action is of a less direct character. The Lord Ordinary has held it to be too remote and indirect to support their title. I cannot assent to this view. A contingent interest is in my opinion sufficient. If in any year the ferries are run at a loss the deficiency falls to be made up out of increased dues levied upon shipowners and merchants. If the risk of such a deficiency is increased by the illegal use of the respondents' ferry boats complained of, I think a Dundee shipowner is entitled to invoke the jurisdiction of the Courts to protect him against this. It appears that in the summer time two ferry boats are required in order to maintain a proper service across the Tay. A third boat was built for the express purpose of taking the place of one of these if it should happen to be laid aside by accident or was undergoing repair. If the third vessel were simultaneously employed in excursion traffic and met with damage it might well happen that only one boat would be available for the public traffic; and as the respondents run their vessels uninsured the loss occasioned by any perils of navigation would have to be made up out of the rates. The respondents might, of course, obviate this latter objection by insuring their boats; but while this would prevent the ultimate loss falling upon the rates it would not obviate the objection arising from a possible interruption of a proper service for ferry purposes. If a boat is kept in reserve to take the place of one of the two regularly employed it is not exposed to accident; if, on the other hand, it is employed in excursion traffic up the Tay, it might easily meet with such a casualty as would temporarily disable it from serving the very purpose for which it was constructed. I incline to think that an inhabitant of Dundee would have a sufficient title and interest to prevent such a misuse of the respondents' property, although he did not in fact pay rates or dues to the respondents and had never done so. As such inhabitant he might be interested in a regular service

being maintained at the ferry, and entitled to protest against any actings of the respondents by which they diverted the steamers—which they were only authorised to acquire for ferry purposes—to other uses and so endangering the regularity of the service. But a ratepayer who in addition to this public interest may be called upon to pay increased rates would have this added interest to support his title. It might indeed happen that the only private persons who could challenge the respondents' actings would be inhabitants of Dundee or persons who paid harbour rates there. This would be the case if there were no shipowners who were engaged in the excursion traffic, and nobody therefore whose individual patrimonial rights were prejudiced. Assuming a clear abuse of their statutory powers by the respondents, it would be an odd thing if no one was entitled to call them to account.

Recognising this difficulty the respondents argued that the Lord Advocate might bring an action in the public interest. They were unable, however, to cite a single case where the Lord Advocate had intervened for the purpose of vindicating either public or private rights, although in the case of the former the Lord Ordinary seemed to think he might do so. Some support for the Lord Ordinary's view may perhaps be derived from a passage in Lord Kyllachy's opinion in the case of *Kesson*, 1 F. 36. Referring to the case of *Ewing and Others*, 15 S. 389, M'L. & R. 847, which I shall afterwards notice, he says—"The doctrine of these cases is that an individual corporator cannot merely as such complain of misapplication of the corporate property—the title so to complain being in general confined to the Crown." For this latter statement he quotes as his authority the case of *Muir* v. *Rodger*, 9 R. 149. On referring to that case I find nothing in the decision to support it, and only a tentative suggestion by Lord Deas that possibly the law officers of the Crown might interfere if the existing members of a corporation proposed to distribute the funds amongst themselves. It is true that it is settled law that a citizen as such is not entitled to complain of the manner in which the common good of a burgh is administered by the town council, but the reason of this is explained by Lord Kyllachy in the case of *Conn*, 8 F. 905. The common good of a burgh is corporate property, which falls as such to be administered by the town council as the executive of the corporation, and provided they apply it for public purposes the absolute discretion with which they are vested cannot be challenged. I do not think, however, it has ever been held that if they were proposing to divide it amongst themselves an individual citizen might not challenge their proceedings, and that on the assumption that the Crown, from whom the corporate property has originally been derived, might also intervene. No such case as I have figured has ever been dismissed on the ground of want of title, nor is there any instance of the Crown having taken action to prevent acts of malversation on the part of magistrates in relation to the common good. The distinction, however, between corporate property which is held under no specific trust title, but which may be employed for the benefit of the community in the discretion of its then administrators, and property which is the product of rates contributed by the community, and which must be administered in accordance with the same statutes as authorise the collection of the rates, is too obvious to need comment. A decision which has more bearing, and which, indeed, was the sheet anchor of the respondents' argument on this head, was that of the House of Lords affirming the judgment of the Court of Session in the case of *Ewing* against the *Glasgow Commissioners of Police*, 15 S. 389, M'L. & R. 847. When that case is examined it is found to have proceeded upon entirely technical grounds. It did not lay down the proposition that an individual ratepayer who was illegally assessed was not entitled to challenge the assessment. As Lord Kyllachy pointed out in the case of *Conn*, it was an extension to police funds of the principle which had been applied to the common good, and I think its true bearing was correctly interpreted by Lord Mackenzie in the case of the *Stirling County Council*, 1912 S.C. 1281. It is further to be noted that the pursuers there were not without a remedy, for any person aggrieved by any order or other proceeding of the Commissioners was entitled to appeal to the Circuit Court of Justiciary at Glasgow, and it was also made competent to certain corporate bodies to bring actions against the Commissioners before the Court of Session or Court of Exchequer for misapplying their funds. Where specific legislative provision is made there is a presumption that it is so because no common law remedy exists, but this consideration is absent from the present case, where the only possible remedy is one at common law.

Could then the Lord Advocate on behalf of the Crown or in the public interest have instituted this action? We were referred to no statute which confers the right upon him, and a common law right can scarcely be predicated for a right which has never in fact been exercised since the office of Lord Advocate was instituted. It is unnecessary to trace in detail the origin of the official who now plays so important a part in the administration of the law in Scotland. That was done by Lord Medwyn in the case of the *King's Advocate* v. *Dunglass*, 15 S. 314, where that learned Judge conclusively shows that all the functions which he exercises either on behalf of the Crown or in the public interest are of statutory origin, and that at common law he has no rights or duties beyond those of an ordinary citizen. In the early days, where he acted on behalf of the Crown, he was authorised so to act by a warrant under the sign-manual. He was in fact merely, as his original designation indicates, a counsel whom the Crown selected for advice in legal matters or for the conduct of litigations which it found necessary to institute. Instead of the special warrant which formerly used to be

granted under the sign-manual in order that the King's Advocate might sue an action in the interest of the Crown, there are now a number of statutes which serve the same purpose as regards the matters to which they relate. None of these, is it pretended, applies to a case such as the present. I am therefore of opinion that the Lord Advocate would not be in *titulo* to sue the present action,

If this latter conclusion is well founded, it seems to establish the title of the present complainers beyond doubt, for there is no illegality which can be committed by persons in Scotland which cannot be restrained at the instance of some party interested, and the respondents were not able to indicate any person with a higher interest or a better title than the present complainers. The idea that a special Act of Parliament would require to be passed in order to secure the enforcement of a statutory prohibition already made is, I think, entirely out of the question; nor can I hold that the officers of State, who used at one time to sue and be sued as representing the Crown in its patrimonial interest, have a title as such to represent the public of a given community, still less the interests of private individuals.

The point which I have been stating is one of purely Scots law, and no useful light is to be obtained from the decisions of courts which administer an entirely different system. It has been decided in England in the case of *Stockport District Waterworks Company*, 7 L.T. (N.S.), and *Pudsey Coal Gas Company*, L.R., 15 Eq. 167, that such an injury as the pursuers here allege did not entitle the injured parties to maintain a similiar suit. The reason of this judgment is to be found in the passage quoted by the Lord Ordinary from the opinion of Lord Westbury, namely, "that the constitution of the country has wisely entrusted the privilege with the public officer (Attorney-General) and has not allowed it to be usurped by a private individual." The later authorities show that the law and practice of England differ radically in this matter from those of Scotland. It appears that the Attorney-General is in the habit of lending his name at the instance of "relators," who bear the costs and have the entire control of the suit. In this way any person who can satisfy the Attorney-General that his action is not frivolous may pursue his remedy in name of that public officer. We have no similar law or practice in Scotland, and it is unsafe to quote English authorities on a question of essentially Scotch procedure. It may be that the system there is better than our own, but we have no right to import it into our Scotch jurisprudence. The one advantage that it seems to possess, viz., that it tends to restrain the abuse of actions at law at the instance of private persons against public incorporations is more theoretical than practical, for there is no instance of a private right of this kind having been abused in our courts.

The only other question is whether the respondents have an implied power to run excursion steamers to points outside the ferry limits. On this point I adopt the reasoning of the Lord Ordinary. At first sight there is a good deal to be said for the view that it is not against the public interests that the respondents should employ one of their steamers for such trips during her spare time, and that such use must be regarded as incidental to their right of ownership. The case could not be more plausibly put than it is by the Master of the Rolls, Sir John Romilly, when deciding the case of *Forrest*, 30 Bevan, p. 40, but his views on the merits were apparently not in accordance with those of Lord Westbury, L.C., and in any case were applied to somewhat different facts. The respondents have satisfied the Lord Ordinary that the "Newport" was built in order that they might suitably maintain the public ferry, which was one of the purposes for which they were incorporated, although they employ this boat in excursion traffic at the very time when their other two boats are required for ferry purposes and when she ought to be available as a reserve boat. But the respondents do not limit their claim to the use which they have in the past made of the "Newport." As I understand, they maintain their right to employ her in such general trading as she is fit for, and although under her present certificate she cannot leave the Tay, their case would be the same if she obtained a certificate enabling her to engage in general coasting traffic. I do not think this right can be conceded, for it is not within the authority conferred upon the respondents to employ the boat which they have acquired for ferry purposes in conveying goods or passengers for profit outside their ferry limits. Within these limits they have a monopoly; outwith them they are not entitled, in my opinion, to run a boat at all unless such running be strictly incidental to the use of the boats as ferry boats. I think this disability applies as much to a demise of the ships as to the use of them while they retain possession and control of the crews, although the Lord Ordinary seems to doubt this proposition. The respondents founded upon the rates stated in Schedule "J" of their Act as justifying what they have done and the charges they have made. So far from this schedule aiding their argument, it shows that the statute did not contemplate that they should employ a ferry boat beyond the ferry limits, for the only rates enumerated are ferry rates, and if their claim is valid they may fix the rates both for passengers and goods at their discretion. I have accordingly come to the conclusion that on this part of the case also the Lord Ordinary is right, and that his interlocutor should be affirmed.

LORD GUTHRIE—I agree with the Lord Ordinary that the action of the reclaimers in carrying passengers by means of their ferry steamers from and to places outwith the statutory boundaries of the ferries under their charge, is not authorised by their Statute of 1911 either expressly or by implication, and is not incidental to their

statutory undertaking. I also agree with him that the complainers have shown sufficient title and interest as traders to raise the question of the reclaimers to run these excursion steamers. But I am also prepared, differing from him, to sustain their title as harbour ratepayers.

It was admitted that the reclaimers' Statute of 1911 does not expressly authorise them to run excursion traffic. Their argument for authority by implication was founded on the first two items in Schedule J of their Act, namely, "Hire of a steamboat —each, £15 per day. Hire of a steamboat —each £10 per half day." The Lord Ordinary, dealing with this point, says—"The respondents are entitled to found upon these rates as a guide to what they ought to charge when they hire out a steamboat for excursion purposes, but the schedule refers to the hire of a steamboat for ferry purposes only." I agree with the Lord Ordinary's conclusion, but it seems to me in view of the different conditions in the two cases that the sums stated in the schedule for ferry traffic could afford no standard for an excursion rate.

But the reclaimers maintained that the employment of their steamers for excursions when not required for ferry purposes was a purpose fairly incidental to the necessity which their undertaking is under to keep a margin of carrying power in the shape of surplus boats. Instead of excursion traffic being in its nature incidental to ferry traffic, it seems to me to be different in essential particulars, including the original construction of the boats, the number and class of men employed, and the character of the weather risks and other risks run. The loss of or disabling accident to a ferry boat when being used for excursion purposes would involve interruption of ferry traffic, unless indeed carrying power is to be provided supplementary not only to ferry but also to excursion traffic.

If excursion traffic run by the reclaimers is neither authorised expressly or by necessary implication, and is not a mere incident of their main businesss, I agree with the Lord Ordinary that the principle stated by Lord Watson in *Attorney-General* v. *Great Eastern Railway Company*, (1880) 5 A.C. 486, is fatal to their contention.

The complainers' interest, at all events as traders, is clear enough, whether the reclaimers' ferry boats are run for excursion purposes gratuitously or for a charge. The question of the complainers' title is more difficult. As traders the only difficulty arises from the *Stockport* case in England, followed in Scotland by Lord Low in the *Clyde Steam Packet Company* case. But I agree with Lord Salvesen that the ratio of the English judgment depended on rights and duties, or in Lord Westbury's phrase "privileges," possessed by the Attorney-General which have no parallel in Scotch jurisprudence, under which the Lord Advocate only acts on the express mandate of the Sovereign or of one of the State Departments or under statutory authority.

The reclaimers' argument implies that a remedy which through the medium of the Attorney-General, acting for the public interest, would be open to traders in England was denied to traders in an identical position in Scotland—a result not lightly to be reached. It also involves another extraordinary result, namely, that while the complainers would have had a Parliamentary locus to oppose a clause in a bill promoted by the reclaimers authorising the excursion traffic now in question, they would, in the event of such a power being refused and the clause struck out, have no title to complain if the reclaimers proceeded to run excursion traffic in defiance of what had passed in Committee in Parliament.

As to the complainers' position as ratepayers, I differ from the Lord Ordinary. He says "their patrimonial interest as harbour ratepayers is of a remote and indirect character." This seems to me not to give sufficient weight to the financial dependence of the ferries on the harbour. The reclaimers aver in answer 1—"The complainers do not contribute either directly or indirectly to the undertaking of the Tay ferries, and have no interest whatever in its finances." But if it be the fact that any deficiency in the ferries is charged on the harbour, harbour ratepayers have necessarily a substantial interest in the ferry finances. The Lord Ordinary points out that loss incurred in *ultra vires* excursion traffic could not be charged on the harbour rates in which the complainers are directly interested. But such loss would be so charged unless the complainers or others similarly interested chose to raise the question of *ultra vires*. It seems difficult to hold that if they would have a title as harbour ratepayers to challenge the result of the reclaimers' *ultra vires* excursion traffic, they have no title to raise the question at an earlier stage so as to prevent the emergence of any such questions.

LORD DEWAR—The complainers are shipowners in Dundee, and the respondents are the Dundee Harbour Trustees, who are vested with powers under Act 1 and 2 Geo. V, cap. 80, and have the duty imposed upon them of carrying on the Tay ferries within a defined area in the neighbourhood of Dundee. The complainers have brought this note of suspension and interdict with a view to restraining the respondents from engaging in what is alleged to be illegal trading. The alleged illegality consists in occasionally using the ferry boats—when they are not required for ferry purposes—to carry excursion passengers to points outwith the ferry area. The boats were so used on seven occasions last year. Such use is said to be in contravention of the respondents' statutory powers, and the complainers claim the right to stop it on the ground that it subjects them to competition in their business. The respondents' defence is (1) that their actings are not in the circumstances *ultra vires*, and (2) that in any event the complainers have no title to sue. I am of opinion that they are right on both points.

I agree that the respondents have no express power to use their vessels for excur-

sion purposes. I think Schedule J clearly refers to the hire of steamboats for ferry purposes only. The question therefore comes to be whether they have implied powers. I think they have. In the case of the *Ashbury Railway Carriage and Iron Company* v. *Riche*, L.R., 7 H.L. 653, it was decided that where an Act of Parliament creates a corporation for a particular purpose and gives it powers for that purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited. And in the later case of *Attorney-General* v. *Great Eastern Railway Company*, 5 App. Cases, 473, the Lord Chancellor, commenting on that decision, said—"This doctrine ought to be reasonably, and not unreasonably, understood and applied, and whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*." Applying that law to the circumstances of this case, I am of opinion that the occasional use to which the respondents put the ferry steamboats, to prevent loss to the ferry business, may fairly be regarded as incidental to that business which they were authorised to carry on.

The case which the complainers presented on record, and attempted to prove in evidence, was that the respondents had purchased a steamer, ostensibly for ferry purposes, but really to carry on the business of conducting excursion traffic, and had applied capital moneys and rates and revenues of the harbour and ferries to the maintenance and equipment of a vessel for excursion purposes. If it had been proved I should have had no difficulty in holding that it was *ultra vires*. But the Lord Ordinary has held that it is disproved, and his judgment on that matter is not challenged. It is therefore established that they have not misapplied their funds by establishing an unauthorised business. All their capital is employed, and all their vessels are required, to carry on the ferries efficiently. The ferry business does not suffer on account of the excursion traffic; on the contrary it gains, because the vessels have been used in the interests of that business to prevent loss through its plant lying idle. The respondents have really no interest in the excursion traffic except in so far as it is beneficial to the ferry. It is because they have discovered in the course of their administration and management that the ferry cannot be efficiently and economically conducted unless the vessels when available are put to a profitable use, that they have engaged in this traffic at all. It is a mere incident in the course of management, and they have very wide powers in the matter of management. By section 189 they are empowered to "purchase, build, hire, keep, and maintain a sufficient number of vessels, of such construction and description as they may deem expedient," to carry on the Tay ferries. The Legislature presumably knew that it was impossible to conduct an efficient service without having reserve vessels. What were the respondents expected to do with them when they were not required for ferry purposes? They get no directions against putting them to a profitable use. The only instructions they receive as to the manner in which the business was to be conducted is contained in section 90, which provides that they shall "work the ferries . . . so that there shall be at least sixteen trips each lawful day and five trips each Sunday. . . ." Everything else, all details of management, are left to their own discretion. They are to work the ferries, and I presume that the Legislature intended that they should work them, like prudent business men, to the best advantage. But no prudent business man would dream of permitting a vessel to lie idle when he could put it incidentally to a profitable use, and I do not see any reason to suppose that the respondents were expected to manage on a different principle. To interfere with their management and restrain them from putting their vessels incidentally to a profitable use will result in a needless waste of public money. I cannot believe that this was the intention of Parliament, and I know of no principle or authority which compels me in construing the Act to assume that it was. I think their wide powers of management imply authority to use the plant as they shall deem expedient so long as it is used, directly or incidentally, to promote the efficient and economical conduct of the ferry.

Authority is not of much assistance in a question of this kind where so much depends upon fact. But the case of *Forrest*, to which the Lord Ordinary refers, is in many respects similar to this, and it was there held by the Master of the Rolls that it was within the implied parliamentary powers of a company to employ steamers, when not required for their statutory purpose, in excursion traffic. It is true that Lord Westbury decided the case on other grounds, but he did not dissent from the doctrine laid down by the Master of the Rolls, and although, as I read the report, he probably thought it too wide for general application, he appears to have regarded it as applicable to the particular facts of that case. I am of opinion that it also applies here.

The next question is, assuming *ultra vires*, whether the complainers have a title to sue. I agree with the Lord Ordinary in thinking that they have no title as ratepayers, and I adopt his argument on that matter. Indeed, the complainers do not pretend to appear as ratepayers anxious to see that public money is properly applied. That is not their case at all, and they are quite frank about it. Mr Nicol says—"Our real reason for raising this case is because we consider that we have lost a good many trips through the action of the Harbour Trustees. . . . It is unfair competition that we complain of. . . ." They do not profess to have any interest as ratepayers. On the contrary, their complaint is that the ratepayers' plant is being profitably employed to their disadvantage in business. The real question therefore is—whether they

have a good title to sue as rival traders. I am of opinion that they have not.

The appellants complain that competition is injurious to their trade. I doubt whether that can be assumed. There is probably a good deal of truth in the business maxim that "competition is the life of trade." It certainly encourages enterprise and makes for efficiency, and enterprise and efficiency generally result in success. But I shall assume that if this competition is stopped it will enable the complainers to exact higher rates and make large profits. To that extent they have an interest to restrain it. But such an interest is not sufficient to give them a title to sue. They have no monopoly of excursion traffic on the Tay, and they cannot, in my opinion, prevent competition—which is not wrong in itself—unless they can show either (1) that some private right belonging to them has been invaded, or (2) some duty owing to them by the respondents has been violated. I can conceive no other ground upon which the Court can reasonably be asked to restrain a trade rival from doing that which is in itself lawful. These are the grounds upon which Lord Low decided the case of the *Clyde Steam Packet Company, Limited* v. *Glasgow and South-Western Railway Company*, 4 S.L.T. 327, and I respectfully think that sufficient attention has not been given to that decision. It is an Outer House case, and the report is short, but it is exactly in point, and, in my opinion, the judgment is sound. The facts were these—The Steam Packet Company, on the narrative that part of their business consisted in employing vessels in excursion traffic on the Clyde, brought an action against the Glasgow and South-Western Railway Company to have them interdicted from making certain alleged *ultra vires* uses of the steamers owned by the company under powers conferred upon them by Act of Parliament, and they pleaded that these *ultra vires* actings were interfering with their legitimate trade. Lord Low held that the complainers had no title to sue—that mere "trade competition gives no right to sue for restraint of *ultra vires* actings. The Firth of Clyde is public water, on which anyone is entitled to have ships and trade. Therefore no private right is invaded by the actings of the respondents."

In the present case the complainers argued that the goodwill of their business was being invaded. But that is just another way of saying that they are being subjected to competition. From any other source competition would have precisely the same effect on the goodwill of their business, yet they could not prevent it. Then it is said that the competition is unfair, in respect that the respondents use vessels built with public money. But I do not think that we can take that into consideration. If the respondents have exceeded their parliamentary authority, they will be restrained at the instance of the proper party, not to enable the complainers to make a larger profit, but because they have misapplied public funds contrary to the interests of those whom the Act intended to benefit. Unfair trading only means that one of the traders is in the stronger position to compete. The Court does not concern itself with that. A wealthy firm may compete with a poor one. A powerful company may, and sometimes does, compete in such a way that weak rivals are crushed out of existence; yet the law does not interfere unless it can be shown that some private right has been invaded or a duty owing violated, and, in my opinion, no private right of the complainers has been invaded here. The fact that they happen to be shipowners may give them an interest, but it cannot give them a right which other citizens do not enjoy. Shipowning has no more rights or privileges under the Act than any other trade. Nor do I think that any duty owing to the complainers by the respondents has been violated. If A contracts with B that he will not compete in trade within a limited area, B may restrain him if he violates his obligation. But C cannot interfere because he was not a party to the contract, and A accordingly owes no duty to him. So, if a limited company trades beyond its powers under the articles of association, a shareholder may call it to account, but a rival trader cannot, because the company, although in a sense acting illegally, owes no duty to him. It appears to me that the complainers stand in a very similar position. As private shipowners they have no rights under the Act, and the respondents owe no duty to them. The Act was not passed to protect their business. Its purpose was to provide an efficient ferry service in the public interests. The parties to it were the Legislature and the respondents, acting on behalf of the public who might require to use the ferry. I can understand that a member of the public who uses the ferry may have a right to complain if he does not receive the services provided for him under the Act, because he is a creditor in the obligation to provide a certain service at a fixed price. But the complainers cannot invoke the Act to protect their trade, because they have no trade protection under it. If they had followed the familiar course of opposing the Bill, and had had a clause inserted in the Act protecting them against competition, they would have secured private rights. And if an attempt had been made to invade such rights, they would have had a good title to sue for interdict. But as matters stand, it appears to me that they have no protective rights under the Act at all. I do not think that the case of *Adamson*, 10 Macph. 533, helps them. In that case cab proprietors were held entitled to interdict the Edinburgh Street Tramway Company from encroaching on the public street, which the complainers had the right to use, to a greater extent than the Act of Parliament warranted. The restriction was placed on the Tramway Company for the protection of those who had a right to use the street. The complainers were creditors in this restriction, and the Tramway Company owed a duty to them not to encroach on the street to a greater extent than the Act permitted, and it was because they violated

this duty and invaded the complainers' rights that interdict was granted. The case here is entirely different, because, as I have said, no restriction was placed upon the respondents for the protection of the complainers' business. What they are attempting to do is to sue in respect of the breach of a statutory obligation which was not conceived in their favour. It is settled by authority that that is not permissible—*Monklands Railway Company* v. *Waddel*, 23 D. 1167; *Gorris* v. *Scott*, (1874) L.R. 9 Exch. 125.

We have had a great many authorities quoted to us, but none of them, so far as I can see, supports the claim which the complainers now make. The only occasion upon which a similar claim was presented was in the *Clyde Steam Packet Company* case, to which I have already referred, and it was rejected. The law of Scotland therefore has never recognised the claim. And it has been authoritatively settled in England in the case of the *Stockport Waterworks Company* v. *The Mayor of Manchester*, (1863) 7 L.T. (N.S.) 545, that although a corporation may exceed its parliamentary powers, the Court will not restrain it at the instance of a private trader who complains that he is being deprived of profits by illegal competition. In delivering judgment the Lord Chancellor said—"... The only arguments which I am disposed to accept are the arguments founded on the public interests, and the general advantage of restraining an incorporated company within its proper sphere of action. But in the present case the transgression of these limits inflicts no private wrong upon these plaintiffs, and although the plaintiffs in common with the rest of the public might be interested in the larger view of the question, yet the constitution of the country has wisely entrusted the privilege with a public officer, and has not allowed it to be usurped by a private individual." It appears from this that two points were decided—(1) that the plaintiffs had no title to sue in their own private interests, because no private wrong had been inflicted upon them; and (2) that it would be contrary to public policy to permit them to appear in the public interests. It is said that this decision, which has settled the law in England, should not be followed here, because the Attorney-General may intervene in England in the public interests, whereas the Lord Advocate in Scotland has no such power, or at all events never exercises such power, and consequently if we applied the English rule there would be no one entitled in a case such as this to call public bodies to account when they transgressed their parliamentary powers. That is to say, it is proposed to permit the complainers to sue, not because they have a good title of their own, but because the Lord Advocate has no title at all. I cannot assent to that view. If it be true that public bodies require further control in the public interests, and that the Lord Advocate has at present no power to control them, that matter can easily be remedied by the Legislature. But I am of opinion that it would be contrary to public policy to permit the complainers, upon whom no private wrong has been inflicted, and who have a private purpose of their own to serve, which may be, and I think is, contrary to the public interests, to appear on behalf of the public. It is just as important in Scotland as it is in England that the control of public interests should be entrusted to a public officer, and that this privilege should not be usurped by a private individual.

I am accordingly of opinion that the complainers have failed to establish their case, and that the note should be dismissed.

The LORD JUSTICE-CLERK was absent and LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Complainers—Clyde, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for the Respondents—Sandeman, K.C.—Ingram. Agents—J. K. & W. P. Lindsay, W.S.

Saturday, July 12, 1913.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

HEPBURN *v.* LAW.

Sale—Right in Security—Sale or Security—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 61, *sub-sec.* 4.

L., who had lent £130 to W., pressed him for payment. W. offered an assignation of his furniture in security. L. being advised that an assignation in security without delivery would be of no avail in a question with other creditors, and that there should be simply a contract of sale, granted a receipt for £130 "in payment" of certain specified articles of furniture "sold to him at date hereof." These articles had been picked out as approximately worth £130. No discharge of indebtedness was granted by L. to W., no money then passed, nor was the policy of insurance transferred, and W. remained in possession of the furniture. It was understood that L. would give W. the opportunity of buying back or redeeming the furniture. Following upon a decree obtained by another creditor, W.'s effects were poinded, but L. claimed that the specified articles of furniture should be excluded from the sale as being his property. He explained that he had not removed the furniture from the house, as he did not want to raise a "claick" throughout the parish.

Held that the parties intended the transaction to operate as a security and not as a sale.

Robertson v. *Hall's Trustee*, November 10, 1896, 20 R. 120, 34 S.L.R. 82, *followed.*