

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.

Counsel for the Respondents—Clyde, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S., Edinburgh—Thompsons, Quarrell, & Jones, London.

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

Workmen's Compensation Act 1906 in respect of his injuries, the present action is incompetent, and should be dismissed."

The facts of the case appear from the opinion of the Lord Ordinary, LORD CULLEN, who on 10th December 1914 sustained the first plea-in-law for the defenders and dismissed the action with expenses.

Opinion.—“The pursuer's son, the deceased Thomas Gray, was in the service of Messrs James Nimmo & Company, Limited, coalmasters, Longriggend, Lanarkshire. On 14th June 1910 Thomas Gray, while acting as a brakeman in the working of his employers' traffic on a branch railway line belonging to them, received serious injuries through an accident. He died on 21st September 1913, his death having been the result of said injuries, according to the pursuer's averments.

“The coal waggons which were being used at the time of the said accident were the property of the defenders. The pursuer avers that the accident in question was due to the defective condition of a waggon in which the deceased was standing at the time. He avers that the defect was due to the negligence of the defenders, that the defenders were answerable to his son for his injuries, and that they are now liable in damages to him, the pursuer, for his son's supervening death.

“The defenders' first plea-in-law is that the action is incompetent. It is based on the admitted fact that, following on the accident, Thomas Gray claimed from his employers compensation in respect of his injuries under the Workmen's Compensation Act 1906, and that he received from them full compensation in terms of that Act.

“Section 6 of the Act provides as follows:—‘. . . [quotes, v. sup.] . . .’

“If the pursuer's averments in the present action are well founded in fact and law, the deceased had a common law claim against the defenders, and under the Act he was entitled both to take proceedings against them for recovery of damages and to take proceedings against his own employers for statutory compensation. He was not entitled, however, to recover payment of both damages and compensation. He elected to take the course of claiming compensation from his employers, and he admittedly recovered from them the full amount of such compensation. It follows that his claim for damages against the defenders was, *vi statuti*, sopped and discharged. This, the defenders say, excludes a second claim by the pursuer against the defenders in respect of death having supervened as the result of the injuries for which the deceased himself was duly compensated during his life. They appeal to the well-known case of *Darling v. Gray & Son*, 18 R. 1164 and 19 R. (H.L.) 31. Lord Watson there said—‘There is no case to be found in the reported decisions of the Court of Session in which an action was sustained after the deceased's claims had been settled or extinguished by an adverse judgment, or where he had raised an action which passed to and might be insisted in by his executor, and

the existence of such a right of action has not been affirmed or even suggested by a single text writer.’ And it was held that the exception in our law which permits of claims by relatives in respect of death was not to be extended beyond the class of cases sanctioned by legal usage. It appears to me that this ratio applies to the present case. The deceased did not, it is true, claim against the present defenders. But he took the alternative course of claiming and receiving full compensation from his employers under the statute; and by his doing so his claim against the defenders, if he had one, was excluded and satisfied. That being so, it appears to me that the pursuer's case is incompetent.

“Following the views which I have above expressed, I shall sustain the defenders' first plea-in-law and dismiss the action.”

The pursuer reclaimed, and argued—The pursuer had a right at common law to maintain an action in respect of the death of his son against any person through whose fault his death had been caused. This claim was not excluded by a claim of the son in his lifetime against his employer. The claim against the employer was given by statute and did not depend on fault. The son might have maintained both claims, but by the Workmen's Compensation Act 1906 (6 Edw. VII. cap. 58), sec. 6, he was only entitled to recover in respect of one of the claims. That was the only exclusion of right made by the statute. The right of a dependant to sue was separate from the right of the workman—*Darlington v. Roscoe & Sons*, [1907] 1 K.B. 219; *Williams v. Vauhall Colliery Company, Limited*, [1907] 2 K.B. 433. The fact that some relatives had recovered under the Act did not bar others from recovering at common law—*Blain v. Greenock Foundry Company*, June 5, 1903, 5 F. 893, 40 S.L.R. 639; *Stocks v. Hall's Collieries, Limited*, 132 L.T. 272. The claims open at common law were entirely different from those under the Act—*New Monckton Collieries, Limited v. Keeling*, [1911] A.C. 648, 49 S.L.R. 664. The claim in the present case was entirely different from the dead man's and was for *solatium*—*M'Ginty v. Kyle*, 1911 S.C. 589, 48 S.L.R. 474. *Darling v. Gray & Sons*, July 14, 1891, 18 R. 1164, 28 S.L.R. 872 and May 31, 1892, 19 R. (H.L.) 31, 29 S.L.R. 910, was clearly distinguishable. At that date there was no Workmen's Compensation Act. In *Darling* there was an action raised by the deceased still pending, and a second action on the same facts could not be competent. But the present action was the only one against the Railway Company. The Railway Company, if at fault, were liable by the Workmen's Compensation Act 1906 to proceedings by the employers for recovery of the compensation which had been paid, but that statutory liability could not alter their liability to the pursuer at common law. The policy of the Act was not to protect third parties who were at fault.

Argued for the respondents—If the pursuer had a claim derived from his son, it was excluded by section 6 of the Workmen's

Compensation Act 1906, which prevented the recovery of both compensation under the Act and damages independently of the Act. As the son had been paid compensation under the Act any further claim derived through him was barred. If the pursuer's claim was not derived from his son, then *Darling v. Gray & Sons (cit.)* was in point and excluded his claim. *Blain v. Greenock Foundry Company (cit.)*, *Darlington (cit.)*, and *Williams (cit.)* had no bearing on the present case.

LORD PRESIDENT—I am of opinion that the Lord Ordinary is right, for the reasons that his Lordship has stated. In consequence of an accident which befell him, the deceased workman, it is averred, had a claim against the North British Railway Company based on fault. He had also a claim against his employers for compensation under the Workmen's Compensation Act. He is entitled to recover on one or other of these claims, but not on both. He elected to claim compensation, and, as the Lord Ordinary says, he recovered the full amount of the compensation from his employers. From that moment any claim against the North British Railway Company, either by him or by others claiming through him, for the consequences of his accident was discharged. The North British Railway Company, for aught that appears, may require to pay Messrs Nimmo & Company all that they have paid to the deceased workman. It would be out of the question, therefore, to maintain that they are still liable to a claim at the instance of his representatives in consequence of the mishap for which he himself has claimed and recovered full compensation. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD MACKENZIE and LORD SKERRINGTON concurred.

LORD JOHNSTON was not present.

Counsel for the Reclaimer—Lippe—Aitchison. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Respondents—Cooper, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Tuesday, December 15.

FIRST DIVISION.

[Lord Anderson, Ordinary.]

WILSON v. GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Reparation—Railway—Negligence—Relevancy—Boy Injured through Entering Lift at Railway Station.

An action of damages was brought against a railway company on averments that a boy, following a companion, who, with the consent of a servant of the company, was operating a luggage lift at a railway station, entered the lift, descended to the platform, and was in-

jured, on ascending, by getting his foot crushed between the edge of the landing and the floor of the cage. The boy was lawfully present on the station at the time, but had no permission to use the lift. Held (*disc.* Lord Skerrington) that there being no sufficient averment of neglect properly to fence the lift, or of faulty construction of the lift, and it being irrelevant in these circumstances to aver that it was the duty of the company to exclude from the lift all except those authorised to use it, there was no relevant averment that the company had been negligent in the care of their property, and accordingly that the action against them should be dismissed.

William Wilson, coal merchant, Paisley, residing at Avonbank, Elderslie, Renfrewshire, as tutor to his pupil son William Wilson junior, residing with him at Avonbank aforesaid, *pursuer*, brought an action against the Glasgow and South-Western Railway Company, *defenders*, for £1000 sterling, as damages which he alleged had been sustained by the said William Wilson junior through the fault or negligence of the defenders or their servants at Elderslie Station on the defenders' line between Glasgow and Greenock.

The pursuer, *inter alia*, averred—“(Cond. 2) The said Elderslie Station consists of two platforms erected on the island principle, with a bridge crossing above the said platforms and railway lines. On the said bridge are the booking and stationmaster's offices. The entrance to the station is by means of a sloping way, and by a flight of stairs which lead on to said bridge. The said island platforms are reached by stairs leading from the said bridge. On either side of the said offices on the said bridge there is a hoist connecting the said bridge with each of the said island platforms. These hoists are for the purpose of conveying luggage and goods from the said bridge to the said island platforms. The said hoists, which are hydraulic, are worked by means of chains. The cage of the northmost hoist after mentioned is about 7 feet in height and about 5 feet in width. (Cond. 3) About 5:30 or 6 o'clock in the evening of Tuesday, 13th January 1914, the said William Wilson junior had gone to Elderslie Station to meet his father on the latter's return home from business. The said William Wilson junior was in the habit of going to the station almost every evening to meet his father, and on this occasion while waiting the arrival of the train from Paisley, he was standing, as he usually did, at the head of the stairs on the said bridge, and immediately opposite the booking office. (Cond. 4) As the said William Wilson junior was waiting for his father on the date mentioned a boy called James Stafford came forward and entered the northmost of the said hoists with a barrow and parcel on it, which he was taking down to the platform below, and the said William Wilson junior also stepped on to the cage of the hoist. They reached the platform all right, but on the return journey the right leg of the said William Wilson junior was caught and jammed between the floor of the cage and