REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL DEALING WITH QUESTIONS OF INTEREST IN SCOTS LAW.

(Continued from page 533 ante.)

HOUSE OF LORDS.

Friday, November 12, 1915.

(Before the Lord Chancellor (Buckmaster), Viscount Haldane, Lords Dunedin, Atkinson, and Shaw.)

BRADFORD CORPORATION *v.* MYERS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Limitation of Actions—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1—"*Public Duty or Authority*"—*Voluntary Contract—Bradford Corporation Gas and Improvement Act* 1871 (34 *and* 35 *Vict. cap. xciv*), *sec.* 20.

By section 20 of its private Act of 1871 the Corporation of Bradford, who are the gas-supply authority and under obligation to supply gas in the town, "may sell, manufacture, store, and dispose of coke . . . in such manner as the Corporation may think fit." On 10th October 1912, in pursuance of an order from the respondent, the appellants, the Corporation, delivered coke to him. Through the negligence of the appellants' servant the coke was put through the respondent's shop window in place of down the shoot in the pavement. The respondent sued for damages. The appellants pleaded in defence the Public Authorities Protection Act, sec. 1.

Held (*affirming* the judgment of the Court of Appeal—1915, 1 K.B. 417) that the coke was delivered in pursuance of a voluntary contract, and not in execution "of any Act of Parliament or of any public duty or authority," and consequently the Public Authorities Protection Act did not apply.

Scots cases *reviewed* by Lord Shaw.

The *facts* and the relevant clauses of the Acts in question are detailed in their Lordships' judgment, which was delivered as follows:—

LORD CHANCELLOR (BUCKMASTER)—This appeal arises out of circumstances connected with the execution of a simple contract by which the respondent, on the 10th October 1912, bought one ton of coke from the Bradford Corporation, the appellants before your Lordships. On the same day as the order the appellants sent a cart containing the coke for delivery at the respondent's premises. The cart duly arrived, but by a mistake for which the appellants have been held responsible the coke was discharged through the respondent's shop window instead of into his cellar. On the 7th May 1913 the respondent accordingly brought an action against the appellants at the County Court of Bradford to recover the sum of £20, the damage which he said he had suffered by this negligent method of delivering goods. The jury found that the method of delivery was not due to any act or invitation of the respondent but to the appellants' negligence, and they assessed the damages at £17, 2s. The appellants then raised the contention of which they had given proper notice on the 10th June 1913. The validity of this defence is the sole subject of consideration by your Lordships, and was that the action could not be maintained because the appellants were, by virtue of the Public Authorities Protection Act 1893, protected against any such suit after the expiration of six months from the date of the occurrence which gave rise to the action.

The learned County Court Judge decided against the respondent. The Divisional Court differed in opinion, so that the judgment of the County Court Judge remained. The Court of Appeal have unanimously reversed the judgment of the County Court Judge, and from their judgment the present appeal has been brought.

The relevant section of the statute is section 1, the material part of which is in the following terms:—"Where after the commencement of the Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect: —(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. (*b*) Wherever in any such action a judgment is obtained by the defendant it shall carry costs, to be taxed as between solicitor and client."

The appellants urge that they are within the protection of this section, because the sale of coke was a transaction in execution

of an Act of Parliament, or of a duty or authority cast upon them by the various statutes under which they supply gas to the district. These statutes only need a brief reference. The first in point of date is the Bradford Corporation Gas and Improvement Act of 1871, by which power was given to the Corporation to acquire the undertaking of the Bradford Gaslight Company, to carry on the business so acquired, and in particular by section 20 to sell and dispose of coke.

The Gas-works Clauses Act of 1871 was passed later in the same year. By this the undertakers of every gas undertaking were compelled to supply gas to the owners or occupiers of premises situated within the defined limits, and to fill up and forward to the local authorities the statement of accounts in the form mentioned in Schedule B of the Act, which included an item on the credit side of the account for the sale of coke. Finally, by an Act of 1873 the provisions of the Gas-works Clauses Act of 1871 were made applicable to the Corporation of Bradford.

The position therefore is this—The appellants are authorised by Act of Parliament to carry on the undertaking of a gas company, and they are bound to supply gas to the inhabitants of the district. They also have power to sell coke, though if there were any other use to which it could be put they are not bound to do so, and the accounts which they are directed to furnish contemplate that the coke will be sold in the ordinary way.

The act complained of was negligence in breaking the respondent's window, and that arose in the execution of a private obligation which the appellants owed by contract to the respondent, for breach of which no one but the respondent was entitled to complain.

Lush, J., who decided in favour of the respondent in the Divisional Court, dealt with the matter entirely upon the footing that these circumstances caused the action to become an action in the nature of an action for breach of contract and not an action for tort, and relied on cases such as *Sharpington* v. *The Fulham Guardians*, 1904, 2 Ch. 448, which have decided that an action for breach of contract is not within the protection of the Act. This reasoning does not appear to me to be convincing, because although it is true that the action could be fashioned in such a manner as to be founded on contract, and instances of such pleas are to be found in the books on pleading, yet in reality the action was an action in tort; and I can see no difference between the right which the respondent had to maintain the suit and that which would have been enjoyed by his next-door neighbour had he suffered similar damage from the same cause.

The difficulty cannot, I think, be resolved by the simple distinction between questions of tort arising out of contract and questions of tort arising independently of contract; but the fact that actions on contract made by the local authorities have been held to be outside the statute shows that the Courts have considered that the words of the Act need careful and strict scrutiny. This, indeed, is apparent from the purpose and the language of the statute. Its effect is to limit, as against the general public and in favour of certain persons, the period for bringing actions not already fixed by existing statutes, and at the same time to penalise all persons who bring such actions and fail, by making them pay solicitor and client instead of party and party costs.

It must be conceded that the Act applies only to a definite class of persons and to a definite class of action. If the section stood alone, and were construed without reference to the introductory words of the statute, it would be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the Courts have pointed out that this cannot be its true interpretation, and that "any person" must be limited so as to apply only to public authorities. The case of *Attorney-General* v. *The Company of Proprietors of Margate Pier and Harbour*, 1900, 1 Ch. 749, is an excellent illustration of such a case, and this was expressly approved by Channell, J., in *Parker* v. *The London County Council*, 1904, 2 K.B. 501. While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform.

In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute ; it is because the act is one which is either an act in the direct execution of a statute or in the discharge of a public duty or the exercise of a public authority. I regard these latter words as meaning a duty owed to the public or an authority exercised impartially with regard to all the public. It assumes that there is a duty and an authority which is not a public one, and that in the exercise or discharge of such a duty this protection does not apply.

This distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products, but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way. Still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent had not been supplied, nor had any member of the public the right to require the local authority to contract with him.

The act complained of arose because one of the servants of the appellants, acting in the course of an errand on which they had power to send him, but on which they were not bound in the execution of any Act or in the discharge of any public duty or authority to send him, in breach of his common law duty to his fellow-citizens, caused damage by his personal negligence.

In my opinion an action for such negli-

gence is not within the class of action contemplated by the statute.

There have been many authorities, to which reference was made in the course of the argument, but to my mind there are none that conflict with this view.

On the other hand, some of the earlier cases decided before the passing of the Act, and relating to similar though not identical conditions contained in other Acts of Parliament, might, I think, be used as an authority for even a more limited construction than that which I have placed upon the statute. The case of *Palmer* v. *Grand Junction Railway Company*, 4 M. & W. 749, is just such a case. There the railway company had the power to carry horses, but they were under no obligation to carry them. They received nine horses for the purpose of carriage, and one was killed and three were injured in the course of transit. The section in their special Act of Parliament provided that no action should be brought for anything done or omitted to be done in pursuance of the statute or in execution of the power or authority of any of the orders made, given, or directed in reference to or under this Act, unless fourteen days' previous notice in writing should be given. Parke, B., in deciding that this section afforded them no protection in an action brought for damage to the horses, said this —"The Act does not compel them to be common carriers; it only enables them to be so, so far as they think fit; and when they have elected to become so they are liable in that character in the same way that other common carriers are."

There are also a series of cases, which do not touch the present case, relating to proceedings arising in the course of the direct execution of an Act of Parliament or discharge of their public duties by the local authorities.

The cases of *Edwards* v. *Vestry of St Mary*, 22 Q.B.D. 338, and *Parker* v. *London County Council*, 1904, 2 K.B. 501, and *Lyles* v. *The Southend-on-Sea Corporation*, 1905, 2 K.B. 1, are all instances of such proceedings.

There are two other cases of a different character which deserve attention because of the importance attached to them by counsel for the appellants. They are the cases of *The Ydun*, 1899, P. 236, and *Fielden* v. *Morley Corporation*, 1899, 1 Ch. 1, and 1900 A.C. 133. The former of these cases was a case where a local authority was acting as the port and harbour authority for the port and harbour of Preston, and were charged with negligence for having in execution of that authority towed a vessel up the river so that she took ground in the channel. Jeune, J., before whom the case came, stated that he saw no distinction between an act done by a local authority as a private trader and an act done in discharge of its public duties and authorities; but the judgment of the Court of Appeal did not proceed on any such broad basis. It appears from the judgment of A. L. Smith, L.J., that he regarded the local authority as exercising a duty imposed on them by law, and Vaughan-Williams, L.J., and Romer, L.J., both expressed their view that the act complained of was in execution of a statutory duty. I am not prepared to accept the statement of Jeune, J., as an accurate interpretation of the statute. It must depend upon the circumstances in which the company is carrying on the trade. If it is carried on under conditions which enable every member of the public to have the right to trade with the corporation, and to complain if the trade is stopped, then it might be that, however this may be, acts done in connection with such trading would be within the provisions of the Act, but there is a great distinction between an incidental power to trade and a direct duty to trade, and the present case falls under the former head.

In the case of *Fielding* v. *Morley Corporation*, the corporation had obtained power to add to their water-works, and it was in the course of executing these powers that the damage arose. In other words, it was in the direct execution of an Act of Parliament that they caused the damage which was the subject of complaint. In that case in the Court of Appeal counsel argued that there was a distinction between it and the case of *Harrop* v. *Mayor of Ossett*, 1898, 1 Ch. 525, because in the latter case the Ossett Corporation were bound to provide the smallpox hospital, while in the *Morley* case the water supply was not a positive duty; but this distinction was rejected by Chitty, L.J., who obviously regarded the supply of water as just as serious a positive public duty as the supply of the smallpox hospital. There is nothing in the judgments in these cases that gives further assistance in the present dispute.

The difficulty is to draw a line between the class of cases that are within and those that are without the statute, and I am conscious that this opinion does not establish as clear and distinct a line as I should like to see. But the statute itself is so framed that such distinction is not easy, and there may well be cases about which greater doubt may arise and more uncertainty be felt than about the present, which to my mind lies clearly outside the area of statutory protection.

My noble and learned friend Lord Dunedin desires me to state that he agrees with the judgment that has just been read.

VISCOUNT HALDANE—There is an assumption which is sometimes made in construing the language of documents. It is that it must be possible to discover some clear principle or purpose, expressed or implied, in the words. But it is one thing to say that it is the duty of a court of construction to endeavour to give a meaning to every word used in the document, and quite another to say that this can always be done, or that a clear principle or purpose can always be determined by exegesis. It is often obvious from the words he has employed that the draftsman has had instructions which have been too vague and insufficient to admit of the expression of a comprehensive principle with exactness, or at all. In such a case the Court can only

take the particular facts in the case before them, and decide as best it can why they come within the words, or whether they fall altogether outside them. The essentially negative method of the second alternative often renders it the easiest and the safest one to use, and sometimes it admits of a principle of exclusion being laid down where no principle can be formulated affirmatively with any confidence in its legitimacy.

Section 1 of the Public Authorities Protection Act 1893 appears to me to afford an excellent example of language which necessitates this treatment. It yields no precise definition of the kind of act in respect of which protection is given. The word person is so used as to make it clear that it does not merely include corporations which owe their existence and powers exclusively to some statute. A natural person or a common law corporation is equally within the section. All that is said is that where proceedings are taken against any sort of person for an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or for any neglect or default in the execution of such statute, duty, or authority, the ordinary right of the subject to his remedy is to be cut down by stringent provisions as to time and costs.

In the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority. What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define *a priori* the meaning of being done directly than it is to define the number of grains that will make a heap. But just as it is not difficult to tell a heap when it is seen, so it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case. In *Sharpington* v. *Fulham Guardians*, 1904, 2 Ch. 449, Farwell, J., decided that the Act did not apply where in the execution of a public duty the guardians had contracted with a builder to build for them a receiving house for the children of paupers, and the builder was suing them for breach of the particular contract they had entered into. He pointed out that although the general duty made it *intra vires* to do so, there was no duty to enter into that particular contract. He declined to hold that the mere fact that the contract was within the power of a public body to make rendered the breach anything more than a breach of the private duty to the individual builder arising out of the terms of the contract.

I think that Farwell, J., was right. For it seems to me that the language of section 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all. If this be so it is fatal to the contention of the appellants in the present case, and I think that it would have been equally fatal had the action been brought against them by a stranger to the contract, who had suffered damage from negligent unloading of the coke in question. For the damage would not have arisen directly from the breach of a public duty but from a private and separate transaction.

More than I have now said I do not propose to say, for I do not think that an exhaustive attempt at any abstract interpretation of the words would be safe. In *Lyles* v. *Southend-on-Sea Corporation*, 1905, 2 K.B. 1, where a claim by a passenger who was injured while travelling on a municipal tramway was held to fall within the section, the Court of Appeal held that the particular facts were such that in substance the action was not based on a contract but on the breach of a public duty to carry. This is quite in harmony with the method that seems to me the true one in approaching such questions.

I agree that the appeal fails.

LORD ATKINSON—The action out of which this appeal has arisen was brought to recover "damages sustained by the plaintiff (the respondent) by reason of the negligence of the defendants (the appellants), their servants or agents, in delivering a load of coke at the plaintiff's premises, 52 Manningham Lane, Bradford, on the 10th October 1912, whereby part of the coke was precipitated through a large plate-glass window." The action was instituted on the 7th May 1913, more than six months after the occurrence was complained of. Coke is one of the bye-products of the manufacture of coal gas. The appellants had sold this load of coke to the respondent, to be delivered by them at his premises. Now negligence is a breach of duty. To give a cause of action the duty must be due from the defendant to the plaintiff. And in my view this case turns upon the nature of the duty owed by the appellants to the respondents for the breach of which the latter sues. Was it a private duty created by the specific contract entered into between the parties for the sale and delivery with reasonable care of this load of coke, or was it a public duty within the meaning of section 1 of the Public Authorities Protection Act 1893? The appellants contend that this statute applies, and that owing to the lapse of time the action is unsustainable. The County Court Judge gave judgment for the appellants. On an appeal to the Divisional Court the two learned Judges who composed the Court were divided in opinion. On the appeal to the Court of Appeal that Court delivered a unanimous judgment in the respondent's favour. This is the judgment appealed from.

By the Bradford Corporation Gas Improvement Act 1871 the appellants were authorised to purchase, and did in fact pur-

chase, the undertaking of the Bradford Gas Light Company. By section 2 of that Act the Gas Clauses Act of 1847 was incorporated. By section 20 the corporation were empowered to "make, store, and supply gas within the borough and within any place within the limits for the supply of gas by the company." That is the first member of the section; it then proceeds—"and may sell, manufacture, store, and dispose of coke, coal tar, &c., &c., and other matters, the products of coal or other materials employed in the manufacture of gas." That is the second member; and the third is that they may sell, let, or deal in gas fittings. These are enabling, not obligatory, provisions. By sec. 11 of the incorporated Act the Gas-works Clauses Act of 1871, however, it is provided that "the undertakers shall on being required so to do by the owner or occupier of any premises situate within 25 yards from any main of the undertakers, or such other distance as may be, give and continue to give a supply of gas for such premises under such pressure in the main as may be prescribed, and they shall furnish and lay any pipe that may be necessary for such purpose, subject to the conditions following." Nothing turns upon these conditions.

Here an obligation is by statute cast upon the appellants to supply gas, but there is no provision in any of the Acts to which the House has been referred imposing expressly a like obligation in reference to any of the by-products of their manufacture. By section 64 of the Bradford Corporation Act the corporation are bound to apply all the moneys they receive in respect of gas for the sole purposes therein mentioned, the last of which is "in any manner they may think fit for the improvement of the borough and the public benefit of the inhabitants."

I shall assume that the term "gas" here used covers the by-products of its manufacture. It may well be that under these clauses there would be a duty imposed by law upon the corporation to conduct and manage their undertaking in the way most beneficial to the interest of the inhabitants. If the sale of coke was a reasonably good and proper way of dealing with it for this end, it might well be their duty to sell it. It did not necessarily follow, however, that they were bound to deliver what they sold at the residences of the purchasers, and above all they were under no obligation whatever to sell to any particular individual or to any specified class or to any member of any class. If the respondent had, before he made his contract, required them to sell to him, they might with impunity have refused to do so. If they had agreed to sell to him but refused to deliver, they could not be compelled to deliver or to agree to deliver. If they had refused to deliver except at the purchaser's risk, they could not be compelled to deliver on any other terms.

One cannot find, therefore, the obligation or duty to deliver with reasonable care, for the breach of which the action is brought, except in the contract made with a particular individual, the respondent. The only duty owed by the appellants to him emerges from that contract, not from the statute. It is a duty owed to one man, not to the public. The negligence of the appellants' servants complained of was not, therefore, a neglect or default in the execution of any "public duty or authority." It was a neglect or default in the discharge of a private duty due to one individual, and arising altogether out of that individual's contract with the public authority. Into this contract both the parties to it were free to enter or to abstain from entering. It was, however, as I understood, argued that the act complained of, the negligent precipitation of this coke through the plaintiff's plate glass window, could be regarded and should be regarded as an act done by the corporation "in execution or intended execution of an Act of Parliament," inasmuch as the corporation were bound by statute to manufacture gas, that coke was a necessary product of that manufacture, that the corporation were thus bound to produce it, and impliedly bound to get rid of it when produced, and that the sale of it was the most prudent way of disposing of it in the interest of the inhabitants, for whom the corporation were somewhat in the position of trustees.

It may well be that law or equity would hold the corporation bound in their character of quasi-trustees for the inhabitants to sell their coke, as the most prudent and profitable way of disposing of it. The plaintiff could not enforce that trust or duty as regards himself, and compel them to sell and deliver coke to him, unless he had a contract with them so to do. And, moreover, though a statute may create a corporation for a certain purpose, statutes somewhat similar to the Public Authorities Protection Act 1893 have been held not to apply to the breach by such bodies of duties imposed upon them by the common law, not by the statute, while if the duties which the common law would of itself impose are also imposed by statute, then statutes such as the Public Authorities Act would apply. The cases of *Palmer* v. *Grand Junction Railway*, 4 M. & W. 749, and *Carpue* v. *London, Brighton, and South Coast Railway*, 5 Q.B.R. 747, are examples of the first class of cases; and the case of *Lyles* v. *Southend-on-Sea Corporation*, 1905, 2 K.B. 1, of the second.

In the first of the two former the special Act of the company authorised them to act as carriers, entitled them to a notice of action "for anything done or omitted to be done in pursuance thereof, or in the execution of the powers and authorities or any orders made, given, or directed in, by, or under the Act." And further provided that such an action should be brought within three months after the occurrence. The action was brought against them as carriers for not safely carrying the plaintiff's horses in their trucks. Parke, B., delivered the unanimous judgment of the Court of Exchequer. He said—"If the action was brought against the railway company for the omission of some duties imposed upon them by the Act this notice would be required. If, for instance, it was founded on a neglect in not duly fencing

the railway, on account of which the travelling was more dangerous to those passing along it, assuming that that obligation resulted from the 180th section or from the general provisions of the Act, that case would have fallen under the 214th section" (which required notice to be given). "But when the matter is looked at and explained it appears that the action is not of that nature, but the defendants are sued as common carriers who have received nine horses for the purpose of being taken to their journey's end, which they have not so delivered; but that on the contrary one was killed and three severely injured in consequence of an accident on the railway. The action is brought against them therefore in the character of common carriers, and it appears to me that a breach of their duty in that character is not a thing done or omitted to be done in pursuance of the Act or in the execution of the powers and authorities given by it. The Act does not compel them to be common carriers; it only enables them to be so so far as they think fit, and when they have elected to become so they are liable in that character in the same way as any other common carriers are." On the same principle it may in the present case I think be said that the Act of the appellants does not compel them to become coke merchants. At the most it enables them to be so if they think it prudent, and when they have elected so to be, and have voluntarily contracted to sell and deliver coke to the respondent, they are liable to him to the same extent as any other coke merchant would be who had entered into a similar contract. In the second case, in which the action was brought to recover damages for personal injuries sustained through the negligent management of the train in which the plaintiff was travelling, the judgment of Parke, B., was commented on by Lord Denman, C.J., and approved of. Notice of action was held for the similar reasons not to be necessary.

In the last of the three cases Vaughan Williams, L.J., distinguishes that case from the two former on the very ground that by the 47th section of the Southend Order of 1899, under which the tramway was constructed, it was provided that the railway might be used for conveying passengers, goods, minerals, parcels, and animals, and by the 48th section that the corporation were bound at all times after the opening of the railway to provide for public traffic such service of cars as may be reasonably required in the public interest, under a penalty for default in complying with the provisions of the clause. The corporation were thus compelled, not merely authorised, to become carriers, and the action was brought against them by the plaintiff, who had paid his fare, in respect of injuries he received while travelling in their car, through the negligence of their servant, whereby the conducting rod was broken and fell upon his head. It was held that the Statute of 1893 applied, on the ground that the carrying of passengers on their light railway was something done by the corporation in the execution of the Light Railways Order of 1889, which had the force of a statute, and that they were guilty of neglect in performing their public duty or authority in carrying passengers by their tramway. Stirling, L.J., said, p. 21—"The plaintiff's cause of action does not depend on contract, but arises out of the breach of the duty to carry the plaintiff safely cast upon the defendant corporation by the fact of his being taken as a passenger. That head of duty is a 'neglect or default' in the execution of a public duty within the meaning of section 1 of the Public Authorities Protection Act of 1893." At p. 13 Vaughan Williams, L.J., says—"Now I do not think that it can have been the intention of the Legislature that every act done by the corporation which was *intra vires* conferred by this order should be subject to the protection afforded by this Act. In my judgment an act which is done, not only in pursuance or execution or intended execution of the Light Railways Order, but also in pursuance or execution or intended execution of some obligation incurred by a public authority voluntarily beyond the obligation cast upon them by the order, is not an act done in pursuance or execution or intended execution of the order. In the first place I doubt very much whether an act done by virtue and in compliance with an express contract to do that act is done in pursuance or execution or intended execution of the order merely because the making of the contract only became *intra vires* by reason of the passing of the order."

The case of *Parker* v. *London County Council*, 1904, 2 K.B. 501, appears at first sight to be irreconcilable with this decision. Channell, J., held in that case that the Act of 1893 applied to an action brought against the defendants to recover damages for injuries sustained by a passenger on a tramcar through a collision due to the negligence of their servants. He based his decision on the case of *The Ydun*, 1899, P. 236, but in *Selmes* v. *Judge*, 6 Q.B. 724, at p. 727, Blackburn, J., speaking of the Act of 5 and 6 Will. IV, c. 50, sec. 109, said—"It has long been decided that such provision as that contained in this section is intended to protect persons from the consequences of committing illegal acts which are intended to be done under the authority of an Act of Parliament but which by some mistake are not justified by its terms and cannot be defended by its provisions." This statement is in strict agreement with the decisions in such earlier authorities as *Greenway* v. *Hurd*, 4 T.R. 553; *Waterhouse* v. *Reeve*, 4 B. & C. 200. In both these cases the action was *in assumpsit* to recover back duties and tolls illegally exacted through a *bona fide* mistake by a person acting *colore officii*. In *Midland Railway* v. *Withington Local Board*, 11 Q.B.D. 788, which was an action to recover back money paid under the Public Health Act of 1875 in mistake of fact, it was held that sec. 150 of that statute applied and notice of action was necessary, but Brett, M.R., as he then was, at p. 794, having stated that he thought an action

for money had and received would come within the section, said—"It has been contended that this is an action in contract, and that whenever an action is brought upon contract the section does not apply. I think where an action has been brought for something done or omitted to be done under an express contract the section does not apply. According to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold and the price is to be paid upon a *quantum meruit* the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute. It may be said that this is an implied contract. I think that argument fallacious; no contract was intended to be entered into, but where money was paid under mistake of fact the judges held that under the old forms of procedure it might be recovered back in an action *quasi ex contractu*. This is not a case where the parties intended to contract without saying so in express terms."

In *Sharpington* v. *Fulham Guardians* (1904, 2 Ch. 448) the defendants, as Guardians of the Poor of the Fulham Union, entered into a contract with a builder to do certain work in order to convert an old mansion-house into a receiving house for pauper children. The provision of this receiving house was within the statutory powers and duties of the defendants. The work was completed and the contract price paid. There was some delay in completion, due, as the plaintiff alleged, to the defendants' constant change of plans, &c., subjecting him to greatly increased cost in the execution of the work. He brought an action to recover this increased cost. It was referred to arbitration under an arbitration clause contained in the contract. Before the arbitrator the point was raised that the acts complained of occurred six months before the bringing of the action, and that the Public Authorities Protection Act of 1893 applied. By agreement an action was brought to have this preliminary point decided. Mr Justice Farwell delivered an elaborate and in my view a most convincing judgment, in which, after examining all the relevant authorities, he came to the conclusion that the Act did not apply, for the reasons stated in his own words at page 456—"That the public duty cast upon the Guardians is to supply a receiving house for poor children, a breach or negligent performance of that duty would be an injury to the children, or possibly to the public, who might be injured by finding the children on the highway. In order to carry out this duty the Guardians have power to build a house or alter a house, and they accordingly enter into a private contract. It is a breach of this private contract which is complained of in this action. It is not a complaint of a number of children or by a member of the public in respect of a public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all is, as I have already pointed out, that if it were not for the public duty any such contract would be *ultra vires*. But that would apply to every contract. I cannot find any ground for saying that the particular contract comes within the Act." In an earlier portion of his judgment (p. 455) the learned Judge had pointed out that "every contract entered into by a public body is necessarily, in a sense, entered into in discharge of a public duty, or under statutory authority, for otherwise it would be *ultra vires*." And he adds that if he decided in the defendants' favour it would necessarily follow that every contract entered into by a public authority was an act done in pursuance of a public duty or authority, and therefore one to which the Act applied. Every word of that judgment, which in my view, as in that of the learned Lord Justices in the Court of Appeal, is sound in principle and consistent with authority, is applicable to the present case. I think that the negligent act complained of here was not done in pursuance or execution or intended execution of any Act of Parliament, since there was no statutory obligation on the appellants to do it. I think it was not done in execution or intended execution of any public duty or authority, since no public duty was imposed upon the appellants to deliver this coke. I think the appellants were not guilty of any neglect or default in the execution of any Act of Parliament, or public duty or authority, since no public duty rested upon them. I think, if the respondent's case be true, the appellants were guilty and only guilty of a neglect or default in the discharge of the private duty owed by them to the respondent, which their express contract with him, and that alone, had created and imposed upon them. I am therefore of opinion that the Public Authorities Protection Act 1893 does not apply, that the judgment and decision appealed from were absolutely right and should be upheld, and this appeal be dismissed with costs here and below.

LORD SHAW—The sole question in the appeal has reference to the construction of the words of section 1 of the Public Authorities Protection Act 1893.

This statute is one of much importance to local authorities throughout the country. By the limitation which it imposes it prevents belated and in many cases unfounded actions. In this way it, *pro tanto*, allows a safer periodical budget, prevents one generation of ratepayers from being saddled with the obligations of another, and secures steadiness in municipal and local accounting. I accordingly express no surprise at the appeal. Speaking for myself, I much regret that the argument was not heard on both sides. My regret is deepened by these two further considerations—(1) It is possible, even from the judgments now being pronounced in this House, to observe the difficulty which surrounds the case and which accompanies the attempt to enumerate a principle of construction for the statutory words employed. (2) Furthermore there is a not inconsiderable body of autho-

rity on the subject in Scotland, where the Public Authorities Protection Act has been frequently considered; no exposition of these Scots cases was made; they were not even cited. I cannot but think that they might have been so with advantage, and in a full argument. Whether our loss will lessen the usefulness or weight of the present judgment the future will disclose. It has increased, however, my own sense of difficulty and of the possibility of mischance.

The putting of the question "What is it that this statute did not mean"? does not as a general rule—I speak for myself, and differing from the noble Viscount who has preceded me—appear to me to be a helpful proceeding; it may lead to confusion instead of construction, and at best it is a method and not a principle. I say so being well aware of its temptations, even as a method. And in all cases, unless the method of exclusion leads by exhaustion to the true inclusive meaning of the actual terms employed, it is without real advantage. I take the interpretation of the actual words as they are found.

The respondent having ordered a ton of coke from the appellants, the carter negligently delivered it through a window instead of into a cellar. It is the damage caused by this neglect which is sued for. The action was commenced more than six months after the neglect; if the statute applies the action is too late.

By the Bradford Corporation Acts, taken in connection with the general Gas Statutes —the details and references have been already given by your Lordships — the appellants have the right, and are charged with the duty, of supplying gas to the inhabitants of Bradford. They have also the right, and are given authority, to "sell" and "dispose" of "coke."

The limitation of action under the Public Authorities Protection Act covers "any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority." The pinch of this case, Mr M'Call has cogently urged, lies in the word "authority." Granted that the appellants had not a statutory duty to sell coke, still they had "authority" to do so, and what is here complained of is neglect in doing a thing which is authorised by statute.

I think the appellants' counsel were justified in attaching weight to this word, and that it does extend the ambit of the limitation. But there is another word in the section which must not be left out of view. It is not enough that the neglect occurs in the doing of a thing which is authorised by statute, but the thing done is not every or any thing done but must be something in the execution of a public duty or authority, and it is only neglect in the execution of such duty or authority that is covered by the statute. This restriction appears to me to be vital. The Act seems to say—There are many things which a public authority, clothed, say, with statutory power, may do which the limitation will not cover, but when the act or neglect had reference to the execution of their public duty or authority, something founded truly on their statutory powers or their public position, to that, and that only, will the limitation apply. I gather that this is the view taken by my noble and learned friend on the Woolsack, and while I concur in his views as a whole, I express my pointed agreement with him on this head.

Notwithstanding certain expressions in the course of judicial opinions which might seem to import doubt, I think that this distinction has been on the whole well observed both south and north of the Tweed. In Scotland the question has been, for instance, more than once tried in connection with the running of tramways by municipal authority acting under statutory powers, the limitation being upheld in the case both of passengers and of non-passengers sustaining damage by neglect in the management or running of the cars, and such decisions as *Spittal* v. *Glasgow Corporation*, 6 F. 828, 41 S.L.R. are entirely in line with *Lyles* v. *Southend Corporation*, 1905, 2 K.B. 1, and *Parker* v. *London County Council*, 1904, 2 K.B. 501, in the English Courts. Whereas cases such as *M'Phie* v. *Corporation of Greenock*, 7 F. 246, 42 S.L.R. 190, and the *City of Edinburgh* v. *George Heriot's Hospital*, reported *sub. nom. Edinburgh Magistrates* v. *Heriot's Trust*, 1900, 7 S.L.T. 371, are decided essentially upon the same principle as that applied by Farwell, L.J., in *Sharpington* v. *Fulham Guardians*, 1904, 2 Ch. 449. The judgment of Lord Low in *M'Phie* is notable, and I may be allowed to refer more at length to the case of the *City of Edinburgh* v. *George Heriot's Hospital*.

There the action was for repayment of large sums of money said to have been received by the hospital in excess of their just claims under contracts of feu. The hospital pleaded that if they received overpayments of feu-duty they were acting in execution of the Statute 6 and 7 Vict. cap 35, and of a scheme approved thereunder by Order in Council. Without deciding whether they were or were not a public authority in the sense of the Protection Act, that very careful judge Lord Kincairney put the matter thus—"I am not prepared to say that there may not have been many acts by the governors of George Heriot's Hospital which were done in execution of their statute and scheme, and in regard to which they may on that account enjoy the protection of the statute. But I am of opinion that the alleged acts for remedy of which this action has been brought were not of that character. The relations between Heriot's Hospital and the magistrates so far as relating to the sums sued for were simply the relations of superior and vassal and creditor and debtor; and in recovering their feu-duties they were merely using the rights of superior and of creditor and not any statutory rights; and if they recovered more than was due that must have been through a mistake in regard to their rights as superior and creditor, and

not through any miscarriage in the exercise of their statutory powers."

This consideration stated by Lord Kincairney—the consideration of what is the foundation of the relations of parties—forms a good key to the solution of the problem.

And, I will venture to add, it will be found that the position, not of the one party but of both parties, must rest on the same foundation. If there be a duty arising from statute or the exercise of a public function there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public Acts, and the corporation in running it is performing a public duty. When a citizen boards such a car in one sense he makes by paying his fare a contract, but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage, are all matter of right on the part of the passenger—a public right of carriage which he shares with all his fellow-citizens, correlative to the public duty which the corporation owes to all. Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking the public duty of manufacture and supply finds its correlative in the right of the consumer—a public right which he has in common with all his fellow-householders—to supply and to service. In both of these cases accordingly the Public Authorities Protection Act applies.

But where the right of the individual cannot be correlated with a statutory or public duty to the individual the foundation of the relations of parties does not lie in anything but a private bargain, which it was open for either the municipality or the individual citizen, consumer, or customer, to enter into or to decline. And an action on either side founded on the performance or non-performance of that contract is one to which the Protection Act does not apply, because the appeal, which is made to a court of law, does not rest on statutory or public duty, but merely on a private and individual bargain.

The same principle applies whether the act complained of arose through breach of contract or through tort. I take no stock of such distinction, for the Act does not. It speaks of "an act done." In numerous cases the one legal denomination and the other may be convertible according to the will and skill of the pleader, and I must record my dissent from all those judicial opinions which have been cited in which such a distinction is treated as having a vital bearing on the question. But where a person not under contract with a corporation—say, a neighbour of the respondent to whose premises damage was done by the neglect of the carriers—when such a person suffers damage by the act of the local authority the question at once arises what was the kind of duty in which the corporation was engaged. Was it a public duty or a private duty owed to some individual, and that exactly in the sense already explained? If the former the Act applies; if the latter it does not.

Judged by this consideration the appellants' defence and their appeal must fail.

Appeal dismissed.

Counsel for the Appellants—M'Call, K.C.—Ryde, K.C.—Mason. Agents—Cann & Son, for Frederick Stevens, Town Clerk, Bradford, Solicitors.

Counsel for the Respondent—Scott Fox, K.C.—Lowenthal. Agents—Edgar Bogue, for Scott Eames & Mossman, Bradford, Solicitors.

HOUSE OF LORDS.

Friday, November 5, 1915.

(Before Viscount Haldane, Lords Dunedin and Atkinson.)

STOTT (BALTIC) STEAMERS LINE *v.* MARTEN AND OTHERS.

(On Appeal from the Court of Appeal in England.)

Ship—Insurance—Perils of the Sea—Institute Time Clauses—"Inchmaree" Clause—Marine Insurance Act 1896 (6 *Edw. VII, cap.* 41), *sec.* 30, *Sched. I, Rule* 12.

A marine insurance policy covered "perils of the seas," "in port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, in all places, and on all occasions." Clause 7 provided—"This insurance also specially to cover . . . loss of or damage to hull or machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any defect in the machinery or hull."

The pin of a shackle broke whilst a boiler was being lifted into the hold and damaged the hull. The owners claimed under the policy.

Held that the damage was not caused by a peril of the seas or *ejusdem generis*, and that the Institute time clauses were not intended to extend the scope of the risks insured against.

Decision of the Court of Appeal (1914, 3 K.B. 1262) *affirmed.*

The facts and arguments sufficiently appear from the considered judgment dismissing the appeal.

Viscount Haldane—I think that the decision of the Court of Appeal was right.

Turning first of all to the well-known language of the policy itself, I am of opinion that it is now settled law that the words of the clause describing the adventures and perils insured against indicate that the scope of this clause is confined to the genus of adventures and perils of the seas, and that the reference to other perils, losses, and misfortunes with which the clause concludes is limited to those that are of this genus. Since the judgment of this House