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

in *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, & Company*, 12 A.C. 484, I conceive that this point has become a settled one.

Turning next to the Institute time clauses incorporated in the policy, I am of opinion that clause 3 makes it clear that the risks in question extend, among other things, to risks in port, but does not extend the character or genus of the risks. I am further of opinion that clause 7, known as the "Inchmaree" clause, is not to be read as inserted into or expanding the description of risks contained in the policy, but is to be regarded simply as a supplemental and independent clause, adding to the risks covered loss or damage to hull or machinery arising out of the negligence of those managing the ship, or from, among other things, breakage of shafts or latent defects. Clause 7 does not in this view enlarge the genus, but simply provides that if this kind of accident happens it is to be covered independently as an addition to the perils described in the policy. The words of clause 7 do not, as I shall presently point out, of themselves cover the case which has occurred, and if I am right, they do not alter the construction of the general clause in the policy.

Now what actually happened was that the "Ussa," the steamer the subject of the policy, was in course of having three boilers loaded into her hold as part of her cargo. These boilers were brought alongside her by means of a steam crane mounted on a mobile floating structure called the "Atlas," belonging to the Mersey Docks and Harbour Board, and itself a vessel propelled by steam. The boiler which caused the damage was lifted and swung over the "Ussa's" side, and it had to be tilted in order to get it into her hold. As the boiler was being lowered it caught on the hatch coamings, and the weight being thus taken off the jib of the steam crane, a water counterbalance on the other side of the "Atlas" caused her to list away. The result was that the end of the jib of the crane was lifted. The chain-fall became taut, the pin of the shackle holding the sling gave, and the boiler fell and damaged the "Ussa."

Notwithstanding what was said in argument, I think that the "Atlas" was simply a machine independent of the "Ussa." It was essentially a crane, and for all that appears to the contrary it might have been used for loading trucks by the riverside as well as for loading ships. It therefore did not, for the purposes of the question before us, differ from a crane on the quay, and it was not under the control of the "Ussa's" crew. What happened while it was being used on the face of it does not fall within the words of clause 7 of the Institute clauses, and the only question is whether the accident comes under the genus of the other perils described in the policy. Now this genus is limited, as I have already said, to perils of the seas. No doubt under this policy these include perils of the seas maturing in port. But the accident which occurred was one which might happen in loading a railway truck just as much as in loading a ship, so far as its general character was concerned. I am unable to attach any importance to the nature of the "Atlas," or to the fact that she sailed about the river and was liable to list by reason of her water-balance. For the present purpose she was, as I have said, a mere machine for loading, and I am of opinion that there is no real analogy between what happened and the infliction of damage by collision or otherwise by one vessel on another at sea. I do not think that the accident which occurred arose out of a peril of the seas within the meaning of the policy.

I therefore move that the appeal be dismissed.

LORD DUNEDIN—[*Read by* LORD SUMNER]—I concur. I think this case is practically settled by what is decided by this House in the case of *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, & Company*, 12 A.C. 484.

I need not quote the words of the policy, which, apart from the Institute time clauses, in that case and this are in common form. In both cases it was admitted that what had happened did not fall under the words which enumerate certain specific perils, but reliance was placed on the general words—all other perils, losses, and misfortunes.

The *Thames* case decided first that these general words must be restricted to meaning perils and losses *ejusdem generis* of perils of the sea or the other enumerated perils, and second, that it did not make a peril *ejusdem generis* because it was in connection with something which was being done and was necessarily being done for the prosecution of a voyage.

In that case the donkey engine, which had been split, was being used to fill the boilers. Without filled boilers the vessel could not proceed on her voyage, and Lord Halsbury put the point quite plainly when he says (12 A.C. 490) — "On the one side it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other it is said that the accident, peril, or misfortune had nothing to do with the sea, and was in no sense of the like kind with any of the perils enumerated."

That seems to me to dispose of what the learned counsel called his wider proposition, namely, that all accidents in loading are covered. Loading is a necessary preliminary to the voyage of a freighted ship, but so is the filling of the boiler. In both cases you have to look further and see whether the accident itself had, as Lord Halsbury put it, "anything to do with the sea."

The accident here was that a heavy thing was dropped by a loading crane, partly owing to the pin of a shackle being insufficiently strong, and partly because, owing to the load catching on the coamings of the hatchway, a strain was relaxed and then suddenly put on again with a jerk. As to the pin, obviously no point could be made, but the learned counsel rested what he called his narrower proposition upon the idea that you imparted what one may call a marine

character to the accident by saying that hatchways are narrow. Now an aperture is small or not according as to whether the thing you want to put into it is big or not, and precisely the same difficulty as arose here might and does arise with putting any unwieldy and heavy object into a railway truck. I cannot therefore accede to the smaller proposition, and the fact that the crane itself was water-borne can have nothing to do with it, because that fact had nothing to do with the cause of the accident.

There remains an argument which was founded on clause 7 of the Institute time clauses. That clause adds certain specific causes of loss or accident for which the underwriters make themselves responsible. They may be generally described as causes of loss or accident which are to be found in defects of the ship itself or machinery therein. This clause has no general words attached. To make it available the appellant has first to say that as it is an addition to the enumerated perils clause it must be read as embodied in that clause, and thus get the benefit of the general words attached to that clause, and secondly, that the cause of loss here is *ejusdem generis* with the causes of loss described therein. I think this argument fails in both branches. I think the new clause comes in its own place, and must have had general words attached to it if such general words were intended to be added; and further, I think that the breakage of machinery belonging to and introduced by other people is not *ejusdem generis* with the breakage of machinery forming part of the ship.

For these reasons I am of opinion that the appeal should be dismissed.

LORD ATKINSON—This is an appeal from a judgment of the Court of Appeal, dated the 29th July 1914, dismissing an appeal from the judgment of Pickford, J., dated the 13th November 1913, in favour of the respondents, the defendants, in an action brought by the appellants against them to recover in respect of a loss under a certain time policy effected on the steamship "Ussa" for twelve months from the 16th March 1911.

The appellants are the owners of the steamship "Ussa." The respondents are underwriters at Lloyds. During the currency of the policy the "Ussa" was being loaded in dock at Liverpool. Part of her cargo was a large boiler longer than her hatchways. This boiler was carried alongside the "Ussa" by a vessel called the "Atlas." The two vessels were placed alongside each other starboard to starboard. By means of a crane erected on the "Atlas" the boiler was lifted, swung over the side of the "Ussa," and was being lowered into her hold through one of her hatchways. The chain, or fall as it is called, of the crane was fixed, and prevented from running out by a pin fixed in a shackle of this chain. The boiler caught in the hatch coamings. The strain on the chain being thus lessened, the movement of the water in the automatic counter-balance caused the "Atlas" to list to port, away from the "Ussa." The boiler came free with a jerk, the pin of the shackle was carried away, and the boiler fell into the hold, injuring the ship. It was found as a fact that the water in the dock was not agitated.

The clause in the policy was of the usual kind, insuring the ship against perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, &c., &c., and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the goods, merchandise, or ship." And there was a provision that the policy should include the conditions of the Institute time clauses attached. The seventh of these latter is the only one of importance. It runs thus — "7. This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosion, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer."

This condition is styled the Inchmaree clause or condition. It was admittedly specially introduced after the decision of this House in the case of *Thames and Mersey Marine Insurance Company, Limited* v. *Hamilton, Fraser, & Company*, 12 A.C. 484, to cover injuries not caused by perils of the sea, properly so called, or covered by the general words of such policies covering perils akin to or resembling or of the same kind as perils of the sea. Mr Leslie Scott contended that the policy of insurance should be read and construed as if this seventh condition had been inserted in the body of the policy before the general words, so that in effect the policy should be held to cover not only the risks *ejusdem generis* with those specifically mentioned in the body of the policy itself, but also risks *ejusdem generis* with those mentioned in the seventh condition.

In my view that is wholly illegitimate. This seventh clause is merely an addendum to the policy covering risks not covered by the policy as it stood, and cannot by adding to it general words such as are found in the policy itself expand it. Putting the seventh clause aside, there remains the question, Is the accident which caused injury to the ship a peril of the seas or a peril *ejusdem generis* as a peril of the seas? That it is not a peril of the seas properly so called is admitted. So then the question is thus, Is it one of the same genus of perils of which true perils of the seas are species? A peril whose only connection with the sea is that it arises on board ship is not necessarily a peril of the seas, nor a peril *ejusdem generis* as a peril of the sea. The breaking of the chain of a crane or of a shackle of that chain, if overloaded or subjected to too severe a strain, is not more maritime in character

when it occurs on board a ship than when it occurs on land. Nor is the catching the ends of a lengthy boiler on the coamings when being lowered into the hold of a ship through a hatchway more maritime in its character than would be the catching on land of any piece of machinery on the sides of an opening shorter than itself through which it was being lowered. Neither the winds nor the waves contributed to this accident. Nor did the fact that the ship on which it occurred was water-borne. The listing of the "Atlas" to port tended to take up the slack of the chain and to diminish the extent of the drop, and therefore of the strain when the boiler got free, rather than the contrary. The statement of Lord Ellenborough in *Cullen* v. *Butler*, 5 M. & S. 461, as to the proper construction of general words such as those used in the present case, in a policy of marine insurance, has been many times approved of. He said due effect would be given to them by "allowing them to comprehend and cover other cases of maritime damage of a like kind to those which are enumerated and occasioned by similar causes." By the words "maritime damage" Lord Herschell in the *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, & Company*, took Lord Ellenborough to have meant not only damage caused by the sea, but damages of a character to which a marine adventure is subject.

In my view the present case is covered by this last-mentioned case. The operation which the working of the donkey-engine in that case was designed to effect was, no doubt, a preparation for the sailing of the ship, namely, the filling of her boilers with water, but the accident arose from the outlet for the water pumped up by the pump which the engine worked being closed, with the result that the air chamber of the pump gave way under the excessive pressure of the water which could not escape, and it was held on the principle laid down by Lord Ellenborough that it was impossible to say that this damage, the bursting of the air chamber, was occasioned by a "cause" similar to perils of the sea. The loading of a ship with her cargo is, no doubt, in one sense a preparation for her sailing. It is certainly not so directly connected with her sailing as was the pumping of water into the boilers of a steamship, but unless the accident which occurs in the course of those preparatory operations be occasioned by a cause similar to perils of the sea it is not covered by such a policy as this. Well, it seems to me quite as impossible in this case to say that the breaking of the crane chain or the pin of one of it shackles was occasioned by a cause similar to the perils of the sea, as it was in the last-cited authority to say that the bursting of the air chamber of the donkey-engine pump was occasioned by a cause similar to a peril of the sea. The two cases are really in principle on all fours. I am therefore of opinion that the judgment appealed from was right and should be affirmed, and this appeal be dismissed with costs here and below.

Appeal dismissed.

Counsel for the Appellants—Leslie Scott, K.C.—Darby. Agents—Lightbound, Owen, & Company, Solicitors.

Counsel for the Respondents — Adair Roche, K.C.—Mackinnon, K.C. Agents—W. A. Crump & Son, Solicitors.

HOUSE OF LORDS.

Monday, November 15, 1915.

(Before Earl Loreburn, Lords Atkinson, Parker, Sumner, and Parmoor.)

PRODUCE BROKERS COMPANY, LIMITED *v.* OLYMPIA OIL AND CAKE COMPANY, LIMITED.

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

Contract—Arbitration—Custom of Trade—Sale of Goods—"All Disputes from Time to Time Arising Out of this Contract"—Award of Arbitrator as to Custom of Trade.

In connection with a contract for the sale of goods a dispute had arisen between the parties as to whether a certain appropriation was good or not. The question was referred to arbitration under the clause in the contract, and a special case was stated for the opinion of the Court, in which certain questions were put to the Court, including one whether under the terms of a certain contract there could be appropriation of a cargo shipped on board the "C." to the buyers at a time when the vessel was wrecked and the cargo had become a total loss. The Court answered those questions in the negative. Thereupon the matter went back, and the arbitrators made an award in which they stated that while they "unreservedly accepted the said answers upon the construction of the contract as a matter of law, apart from the custom of the trade," they nevertheless found that there was a long-established and well-recognised custom of the trade by which in the circumstances of this contract there was an appropriation of the cargo to the buyers.

Held (*rev.* decision of the Court of Appeal) that under a submission to decide disputes arising out of the contract it was competent for the arbitrators to determine the existence of a custom attaching to the particular trade, inasmuch as it was impossible without introducing the custom to decide what were the rights and liabilities under the contract of the respective parties.

Hutcheson & Company v. *Eaton & Son*, 13 Q.B.D. 86, and *Re Arbitration North-Western Rubber Company and Huttenbach & Company*, 1908, 2 K.B. 907, *overruled.*

On the 30th May 1912 the Produce Brokers Company sold to the Olympia Oil and Cake