without any default on their respective parts, be each left substantially free to exercise the rights and discharge the obligations the contract conferred and imposed upon them; that the continued existence of that freedom of action till the contract was performed must have been in their contemplation as the very foundation of it at the time they entered into it; and that to give effect to that intention a condition should by implication be read into the contract to the effect that the obligation to perform it should cease if by *vis major*, such as the action of the Executive Government of this country, they should be deprived to a very substantial extent of their freedom of action."

Now I think that this passage is precisely applicable to the present case. By the contract the defenders had complete freedom of disposal of the goods contracted for, and the continued existence of that freedom till the contract was performed must therefore have been in their contemplation as the very foundation of the contract at the time they entered into it. As they were deprived to a very substantial extent of their freedom of action by *vis major*, it follows that, if one reads into the contract an implied condition that their rights under it would not be interfered with, the obligation to perform the contract on the occurrence of that event came to an end.

I am therefore for recalling the interlocutor of the Lord Ordinary and assoilzieing the defenders.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders from the conclusions of the action.

Counsel for the Pursuers and Respondents —A. M. Mackay, K.C.—Gentles. Agents—Douglas & Miller, W.S.

Counsel for the Defenders and Reclaimers —MacRobert, K.C.—Dykes. Agents—Guild & Shepherd, W.S.

Thursday, May 27.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'NIVEN *v.* GLASGOW CORPORATION.

Process—Summons—Time—Limitation of Action — Commencing Action — Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*a*).

An accident took place on 2nd May. The 2nd November was a Sunday; and on 3rd November the person injured obtained a warrant to cite the defenders, a burgh corporation, in an action in the sheriff court for damages on the ground that the accident was caused by the fault of their servants. *Held* that the action had not been commenced in the sense of the Act of 1893, sec. 1 (*a*), within six months after the act complained of, and action *dismissed.*

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) enacts—Section 1—"Where after the commencement of this 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. . . ."

Mrs Christina Connell or M'Niven, with consent, *pursuer*, brought an action against the Corporation of Glasgow, *defenders*, concluding for decree for £500 in name of damages for personal injuries alleged to have been sustained by the pursuer owing to the negligence of the defenders' servants on one of their tramway cars on 2nd May 1919.

The *warrant to cite* the defenders was dated 3rd November 1919, and the summons was served on that date.

The defenders *pleaded, inter alia*—"1. This action not having been commenced within six months after the default complained of, it ought, under and in pursuance of the Public Authorities Protection Act 1893, to be dismissed."

On 9th March 1920 the Sheriff-Substitute (BOYD) sustained the first plea-in-law for the defenders and dismissed the action.

Note.—"The pursuer sues the Corporation of Glasgow for damages in respect of an accident which she says was caused by the fault of a servant or servants of the defenders on 2nd May 1919. The first deliverance in the action is dated the 3rd November, and the defenders plead—'This action not having been commenced within six months after the default complained of, it ought, under and in pursuance of the Public Authorities Protection Act 1893, to be dismissed.' The pursuer replies that the six months expired on the 2nd of November, but that day was a Sunday, which must be counted as a *dies non*, and the six months must be held to include Monday 3rd November till 12 midnight.

"A similar question arose in the case of *Taylor* v. *Corporation of Glasgow*, A 1062/1918, in which I sustained a similar plea for the defenders by interlocutor dated 21st March 1919, and I drew the attention of parties to it. But the agent for the pursuer desired to be heard, and argued that in deciding that case sufficient weight had not been given to the case of *Hutton* v. *Garland*, June 13th, 1883, 10 R. (J.) 60, and *M'Vean* v. *Jameson*, January 8th, 1896, 23 R. (J.) 25.

"In *Hutton*, under the Summary Prosecution Appeals Act 1875, an appellant within three days after the determination of the inferior judge required to lodge in the hands of the Clerk of the Inferior Court a bond of caution to abide the judgment of the Superior Court and pay the costs of that Court, or in the discretion of the inferior judge to consign certain sums to meet the penalty of Superior Court costs.

"The appellant was convicted in the Inferior Court on Saturday, and the appellant offered to lodge the sum fixed on next Wednesday. It was held that Sunday was not a *dies non*, and that the money had not been lodged in time. In that case the appellant had to do either of two acts which required to be done in the office of the Clerk of Court, and he had Monday and Tuesday for performance. As Lord Young said—'Of course if Sunday happens to be the last of three days it is impossible to lodge the papers on that day because the office is shut and they may be lodged on the following Monday.' In *M'Vean* an application under the Summary Protection Appeals Act 1871 to the Sheriff-Substitute to state a case for appeal was made on Monday 28th, after the applicant had been convicted on Thursday the 24th. It was held that the application was not within the statutory three days even although the last day was a Sunday; and in that case a sharp distinction was drawn between an act which required to be done in the office of the Clerk of Court, and one which the appellant could do for himself.

"As I pointed out in *Taylor* v. *Corporation of Glasgow*, the first step in raising an action is the warrant to cite the defender on seven days' *inducice* and to appoint him to lodge appearance. It is usually signed by the Sheriff Clerk or one of his deputes, but may be signed by the Sheriff or Sheriff-Substitute. In the present case the pursuer could have had the warrant to cite signed between 1 p.m. on Saturday 1st November, when the Sheriff Clerk's office closed, and midnight on Sunday the 2nd November by any of these officials, and have posted it by registered letter even on Sunday, and the Post Office receipt of registration would have been evidence of the date of execution of the summons (*Alston* v. *Macdonald*, 1878, 15 R. 78). It would have given the pursuer a little more trouble than he would have had if the Sheriff Clerk's office had been open, but it could have been done although the office was shut, and I think that this is the point on which it depends whether the statutory limit is to be regarded as ending on Sunday 2nd November or extending to Monday 3rd November."

The pursuer appealed, and argued—The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) was restrictive of the liberty of the subject, and in case of doubt must be construed in favour of liberty. The limitation to six months imposed by section 1 (*a*) of that Act necessarily must mean that full six months should be allowed. If the last day of the six months was a day on which no *actus legitimus* could be performed, then unless an additional day was allowed, the litigant would not get full six months, but six months less one day. That was a matter of moment, for it might well be that the statement of a material witness could only be obtained on the second last day of the period. In the present case the last day of the six months was a Sunday, which was a *dies non* except for service of warrants *de meditatione fugæ*—Darling, Messengers-at-Arms, pp. 43 and 270; Shand's Practice, vol. i, p. 260; Trayner's Latin Maxims, *s.vv. Dies non* and *Diebus feriatis;* Graham Stewart, Diligence, p. 317. The general rule was that when an official act had to be done in a period, and the last day of the period was one on which the act could not be done, an additional day was allowed—*Russell* v. *Russell*, 1874, 2 R. 82, 12 S.L.R. 58; *Hutton* v. *Garland*, 1883, 10 R. (J.) 60, 20 S.L.R. 658; *Henderson* v. *Henderson*, 1888, 16 R. 5, 26 S.L.R. 11; *M'Vean* v. *Jameson*, 1896, 23 R. (J.) 25, *per* Lord M'Laren at p. 27, 33 S.L.R. 267; *Blackburn* v. *Lang's Trustees*, 1905, 8 F. 290, 43 S.L.R. 209. When the act was to be done within a month, it could be done timeously on the last day of the month—*Radcliffe* v. *Bartholomew*, [1892] 1 Q.B. 161, *per* Wills, J., at p. 163; *Ashley* v. *Magistrates of Rothesay*, [1873] 11 Macph. 708, 10 S.L.R. 513. Had the last day not been a Sunday the whole procedure of serving the action could have been done on that day, and was timeous on that day up to midnight. The commencement of an action was a composite thing. No doubt it consisted of a series of consecutive acts, but each of those was essential to the whole result, and the mere fact that one of those acts, *e.g.*, posting, might have been possible on Sunday did not make the commencing of the action possible on Sunday. The Sheriff-Substitute was wrong in proceeding on the footing that the commencement of the action could be split up, and holding that if the last of those acts could be done on Sunday, Sunday was a day available for the pursuer to commence her action. On commencing an action the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, Rules 1, 4, and 7, were referred to. *Watt's Trustees* v. *More*, 1890, 17 R. 318, 27 S.L.R. 259, and *Brodie* v. *Anderson & Company*, 1897, 25 R. 10, 35 S.L.R. 4, were distinguished.

Argued for the respondents—The terms of the statute were clear and unambiguous, and hence were not open to construction. An action commenced with the execution of the summons—*Alston* v. *Macdougall*, 1887, 15 R. 78, 25 S.L.R. 74. Under the Act therefore the sole question was, was the writ served within six calendar months from the date of the accident? The cases upon days were not in point. "Days" was open to construction. It might or might not mean lawful days. But even if those cases were in point they were not uniformly in favour of the pursuer—*Rowberry* v. *Morgan*, 1854, 9 Exch. (W. H. & S.) 730; *Foulds* v. *Fotheringhame*, 1844, 16 Sc. J. 177, *per* Lord Ivory at p. 178; *Watt's* case; *Brodie's* case. Service by post was possible on the Sunday, and if a messenger had been employed service by him on Sunday would have been valid, for Sunday, though it might not be a day competent for acts of diligence, at least in the seventeenth century—Act 1469, cap. 34; Stair, iv, 47, 27; *Earl of Cassilis* v. *Macmartin & Lows*, 1627, M. 15,001; Bell's Comm., ii, 460—was not necessarily a *dies non* for the service of writs in an action. The negative prescription might well run out on a Sunday. In the *Lord Advocate* v. *Cameron*, N.R., March 1911, the warrant was signed on Sunday. The present case was

completely covered by *Gelmini* v. *Moriggia*, 1913, 2 K.B. 549, *per* Channell, J., at p. 551. The Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, cap. 65), section 26; *Simpson* v. *Marshall*, 1900, 2 F. 447, 37 S.L.R. 314; Morrison's Dict., *s.v.* Sunday; and Green's Encyclopædia of Scots Law (2nd ed)., *s.v.* Sunday, were referred to.

LORD PRESIDENT (CLYDE) — This is an action in which the pursuer sues the Corporation of Glasgow for damages in respect of a tramway accident, for which she says the negligence of the Corporation's servants was responsible. The first plea-in-law stated for the defenders is—"This action not having been commenced within six months after the default complained of, it ought, under and in pursuance of the Public Authorities Protection Act 1893, to be dismissed." The Sheriff-Substitute sustained that plea and dismissed the action, and the present appeal is against that interlocutor. It appears from the condescendence that the accident of which the pursuer complains having happened on the 2nd of May 1919, a full period of six calendar months elapsed on the 2nd of November 1919. It was only next day, viz., on the 3rd of November 1919, that the pursuer applied for and obtained a warrant of citation and executed her summons. The provision of the Public Authorities Protection Act, to which in these circumstances appeal is made by the defenders, is to be found in section 1 (*a*) of the Act — "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." *Prima facie* the present case falls within the terms of this section. It is argued, however, on behalf of the pursuer that this provision should be subjected to equitable construction or to equitable modification at the hands of the Court, on the ground that the last day of this period of six months happened in the present case to be a Sunday, and that upon a Sunday it was incompetent or illegal either to obtain a warrant of citation from the Sheriff or to make actual service of the writ. I am not sure that I understand what the appellant means by equitable modification. In my opinion the claim which the appellant makes to have the period of six months extended by one additional day must be conceded upon some principle of construction of the enactment which I read a few moments ago or not at all.

A good deal of discussion has taken place on the question as to what constitutes the commencement of an action, and on the very broad but by no means unimportant question of the alleged incompetence or illegality of obtaining a warrant of citation and of serving a writ through the post on Sunday. I think it is well settled that the commencement of the action is the service of the writ. With regard to the more troublesome question as to whether a warrant can be competently obtained, or a summons competently served by registered letter posted on a Sunday, had it been necessary for us to pronounce any judgment dealing with those matters I should have found it necessary to take time to consider. But I have come clearly to the conclusion that it is unnecessary to dispose of that question in the present case, which can be determined on other, and on what appear to me to be perfectly satisfactory, grounds.

I have already said that *prima facie* the provisions of the Public Authorities Protection Act with regard to the bringing of a action within six months have not been complied with in the present case. The argument of counsel for the pursuer in favour of applying a construction to these provisions concerned itself with considerations borrowed from authorities which deal with time limitations in reference to steps of process and the like, in which the measure of the computation of the time is by days. It is true that where a certain number of days are prescribed as the period within which a particular step must be taken, the Court has repeatedly construed the limitation to mean that if the last day of the period so prescribed is one on which the step cannot be taken or completed, then an additional day may be allowed in order to admit of the final step being effectively taken or completed. But the measure which is adopted in this Act for the computation of the time composing the limited period within which the right of action is confined is the month, not the day. I acknowledge as a logical proposition that if one can imagine the case of an entire month (being the last month of the period) presenting no available opportunity for performing the act to which the limited period of six months is assigned, one would be faced with a case exactly similar to that which occurs when the computation of the time is made by days and the last day is one on which the act in question cannot be done or cannot be completed. But accepting as I do the full authority of those decisions which have given that licence in the case of a period computed by days, I think it necessary to bear in mind that even in those cases a day albeit the last day is computed as a useful day, and as part of the period, even though only a part—it may be a relatively small part—of that day is in fact available for the purpose of performing or completing the act in question. The subject-matter of such limitations has usually been the performance of some act in a Court process. The office at which the act requires to be done may be shut the whole of Sunday, in which case the act cannot be performed or at least completed on that day. It is very likely that such an office is open only half a day on Saturday; but it has never been suggested that because Saturday was the final day of the period of limitation any construction of the limitation was called for. Such construction has been confined to the case where the final day is a full *dies non*. Accordingly I can find nothing, in a limitation which is measured by months, to warrant my holding that such limitation implies not merely that in each of the unit months there shall be opportunity of performing and completing the act, but that there shall be on each of

the days composing such unit, or (to bring the matter to the crucial point) on the last of the days composing the last unit opportunity of performing and completing the act. I see no more reason to suppose that that is the result with regard to a prescribed period of six months, than to suppose that, in the case of a prescribed period of six days, every hour, and in particular the last hour of the sixth day, must be available for the purpose of performing and completing the act. I see no ground in the present case for applying any construction to this Act, or for endeavouring to make it mean anything else than just what it says, viz.—that no action will lie at all unless it is commenced within six months. It was pointed out to us—indeed it underlies what I have just been saying—that a month is a unit of time which you cannot with any safety or consistency reduce to days. It is vain to say that a month is a period of 30 days, for it may contain 31, or 28, or possibly 29 days. A period of six months is not the same as a period of any given number of days, for all the months have not the same number of days in them, and they do not always end or begin on the same day of the week.

I am accordingly prepared to dismiss this appeal. It is in the view I have taken not only unnecessary to enter upon the large and interesting topic as to the legal competency of acts performed on Sunday, but it is also unnecessary to canvass the particular grounds upon which the Sheriff-Substitute determined the case when it was before him.

LORD MACKENZIE — I am of the same opinion. Although we have listened to an argument which has ranged over a wide field, I think the case admits of being disposed of, and ought to be disposed of, on the short ground put by your Lordship in the chair.

The language of section 1 (*a*) of the Public Authorities Protection Act seems to me to be conclusive of the case against the pursuer. The act complained of occurred on the 2nd of May and the summons was not served until the 3rd of November. The subsection says that an action shall not lie unless it is commenced within six months. From the dates I have given it is apparent that the action was not commenced until outwith the six months, because it has been conclusively settled—indeed I think in the end it was not seriously disputed—that it is the service of the summons that is the commencement of the action, and if you compare the date of the act complained of with the service of the summons then the action is statute-barred.

The argument which was pressed upon us was that though the language of the section was plain yet something was to be read into it. The ground upon which we were urged to imply something additional was that it was only equitable to do so in a case such as the present in consequence of certain views expressed in cases which have been cited to us in which the last day of the term was a Sunday. None of the cases deal with months, and it was conceded that no case could be found in which the month was the unit. I am unable to see that the cases dealing with the construction of a definite number of days can be usefully imported into the decision of such a question as we have here. There is no warrant for breaking up the unit of time, which is a month. Months vary in length and must be taken as months, just as days must be taken as days, although it may be that part of a day only, it may be a short part of a day only, is available for the purpose in hand.

Taking that view I think it is unnecessary to say anything in regard to the question as to whether Sunday can usefully be taken advantage of for any of the purposes which were put forward in the argument in the case. I agree in the judgment proposed.

LORD SKERRINGTON—I have been unable to discover any legal justification for placing an interpretation upon the Public Authorities Protection Act 1893 which would render this action competent. Indeed I have difficulty in formulating the words which must by implication be inserted into the statute in order to obviate the *prima facie* objection that the action was not raised in due time. Various cases were cited where the time for taking a particular step of process was limited to so many days. As your Lordships have pointed out, these cases have no application, because here the unit with which we are concerned is the month. The pursuer must make out that if the last day of the last month happens to be a *dies non*, as I assume Sunday to be, she is entitled to have a day added to that month in order that she may be put in as good a position as if the last month had been a more desirable month and not subject to this disadvantage. The suggestion seems to me to be a fanciful one and there is no authority for it.

That is a sufficient ground of judgment, and accordingly I express no opinion as to what legal acts may be done on Sunday or as to the meaning and effect of the Citation Amendment (Scotland) Act 1882.

LORD CULLEN — I agree. We have no power to change the wording of the Act of Parliament as the appellant proposes. The Act does not give persons desiring to raise actions against public authorities any fixed number of days but a period of six calendar months. I think the pursuer was bound to accept and make use of the particular six months available to her as she found them, and the circumstance that the last of these months had the feature of ending on Sunday does not alter the fact that the full period of six calendar months allowed by the Act had run out before the action was raised, the action thus being incompetent.

The Court refused the appeal.

Counsel for the Appellant — Mackay, K.C.—R. M. Mitchell. Agent — R. D. C. M'Kechnie, Solicitor.

Counsel for the Respondents—The Lord Advocate (Morison, K.C.)—Keith. Agents —Simpson & Marwick, W.S.