recent and highly authoritative case—*Grand Trunk Railway of Canada* v. *Robinson*, [1915] A.C. 740—laid it down as one of the principles of general application which it is necessary to bear in mind that "if the contract is one which deprives the passenger of a duty of care which he is *prima facie* entitled to expect that the company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed." The defenders' counsel pressed upon our attention the language and the appearance of the ticket, which bears upon its face a "notice" that it is "issued to and accepted by the passenger subject to the following conditions," which are printed in clear and legible type, and at its foot the legend in strong square letters that "passengers are particularly requested to carefully read the above contract." It was urged that the defenders have manifestly done what was reasonably sufficient to give the pursuer notice of the conditions, that there was indeed nothing more that they could reasonably have done to that end, and that his record is irrelevant and insufficient in respect that he makes no attempt to aver what (if anything) it was that the defenders left undone which they could reasonably have done in the way of notice, or how it came that he was "not aware" of the conditions on the ticket. I appreciate the force of these contentions; and I cannot avoid seeing that the pursuer may have a very uphill case before him at the proof. The observations of Lord (then L.J.) Lindley in *Richardson* v. *Rowntree* when that case was in the Court of Appeal (reported only, it seems, in 9 T.L.R. 297) are significant in this connection, especially as the facts will be investigated in this case by a judge and not by a jury. But we are here on a question of pleading, not on a concluded proof. I do not feel warranted in holding that the pursuer's record is utterly irrelevant. The parties have not renounced probation, and I do not think we should be safe in throwing the case out of Court upon the pleadings. There is admittedly no precedent for adopting such a course. We were strongly pressed but declined to do so in *Williamson's* case, 1915 S.C. 295, 52 S.L.R. 241, in which judgment on the concluded proof is to be delivered to-day (*v. infra*). The record there (as amended) was perhaps somewhat less jejune than the one here before us; but I am not prepared to dismiss this action on the strength of criticisms (forcible as they seem) upon the appearance of the ticket without full knowledge of the facts and circumstances constituting and surrounding the contract between the parties. As already said, however, I am of opinion that in the circumstances of this case the proper course is that we should limit the proof *in hoc statu* in the manner indicated by your Lordship in the chair. This proof ought to lie within a comparatively narrow compass, whereas it seems plain that inquiry upon the merits of the case might be of a very extensive, complicated, and costly character. It is possible that the result of the proof now to be allowed will be such as to obviate the necessity for any further inquiry, and it seems to be plainly for the interests of both parties that evidence should be confined, in the first instance, to the preliminary point. The pursuer should as matter of convenience lead in the ordinary way, though the *onus probandi* may lie upon one party or the other at successive periods of the proof.

LORD SALVESEN and LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary, remitted to him before answer to allow the parties a proof of their averments as to the terms and conditions of the contract of carriage between them, and to proceed in the case as accords.

Counsel for the Pursuer and Respondent—Moncrieff, K.C.—MacRobert. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Reclaimers—Dean of Faculty (Clyde, K.C.)—Solicitor-General (Morison, K.C.)—C. H. Brown. Agents—Webster, Will, & Company, W.S.

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*Friday, February* 25.

## SECOND DIVISION.

[Lord Anderson, Ordinary.

## WILLIAMSON *v.* NORTH OF SCOTLAND AND ORKNEY AND SHETLAND STEAM NAVIGATION COMPANY.

(Reported *ante*, vol. lii, p. 241.)

*Carriage — Ship — Contract — Condition Limiting Liability of Carrier to Passenger—Notice of Condition.*

In an action by a passenger against a steamship company for damages for personal injuries sustained by him while on a voyage on one of their ships through the fault of their servants, the defenders pleaded that they were exempted from liability in respect of a condition in their contract of carriage with the pursuer which was known to the pursuer, and was printed on the ticket issued to him. It was proved that the ticket, which the pursuer had taken when on board, bore on the face of it the words—"This ticket is issued subject to the conditions . . . that the company is not liable for any injury . . . or accident to passengers . . . however the same may be caused, whether by negligence of their servants or otherwise, . . ." but the printing was in very small type and without distinguishing features; the pursuer knew that there was printing on the ticket but did not know that the printing contained conditions relating to the terms of the contract of carriage. The Court granted decree, *holding* that the defenders had not done what was reasonably sufficient to give the pursuer notice of the condition.

Mitchell Humphrey Williamson, commercial traveller, Lerwick, *pursuer*, brought

an action against the North of Scotland and Orkney and Shetland Steam Navigation Company, Aberdeen, *defenders*, for damages in respect of personal injuries sustained by him through the fault of the defenders' servants.

In the beginning of February 1913 the pursuer left Scalloway for Aberdeen on the defenders' steamer "St Nicholas" with the object of going to Leith. After the steamer had left Scalloway pier, and was in the course of her voyage, he purchased from one of the defenders' servants a first-class return cabin ticket from Scalloway to Aberdeen. The defenders did not inform the pursuer of, or otherwise bring to his notice, the fact that there were conditions printed on the ticket relating to the contract of carriage between him and them. On 17th February 1913, while the pursuer was on his return journey from Leith to Scalloway, as he was proceeding to leave the steamer at Scalloway, he fell to the main deck of the vessel from a gangway which was laid between the poop and the bridge decks, the railing of the gangway having been left in an insecure condition.

The following is a facsimile of the ticket:—

| 3497 | N. of S. & O. & S.S.N.Co.<br>FIRST CABIN.<br>ABERDEEN TO SCALLOWAY | N. of S. & O. & S.S.N.Co.<br>FIRST CABIN.<br>SCALLOWAY TO ABERDEEN | 3497 |
|---|---|---|---|
| | This ticket is issued subject to all the conditions mentioned on the Company's Sailing Bills and that the Company is not liable for any injury, loss, delay or accident to Passengers or their luggage however the same be caused, whether by negligence of their servants or otherwise, nor for any sea, river or steam risks whatsoever. No goods allowed to be carried as Luggage. OVER. | | |

*Endorsed on back*—Not transferable. Available to return within three calendar months.

The defenders pleaded, *inter alia*—"5. The pursuer having accepted the passenger's ticket issued by the defenders, subject to the condition thereon, and being aware of said condition, all as condescended on, the defenders are entitled to absolvitor."

After sundry procedure and a proof led, the Lord Ordinary (ANDERSON) pronounced an interlocutor finding that the pursuer had been injured owing to the defenders' fault, and finding him entitled to damages.

*Opinion.*—"For a statement of the facts of the case and of the leading authorities on the question of the limitation of the defenders' liability for negligence, I refer to the opinion I formerly pronounced (52 S.L.R. 241). I have now taken the proof allowed by the interlocutor of the Second Division, and have to determine the various questions raised by the evidence.

"Logically, the first point which falls to be decided is as to the legal effect of the condition printed on the defenders' tickets, of which No. 10 of process is a sample. I have found this an exceedingly difficult question to determine, in respect of the many conflicting decisions which bear on the point.

"It would certainly simplify the law on this subject if authority were to be found for either of these propositions—(*a*) that a passenger is only to be bound by the terms of a contract of carriage which he has subscribed, or (*b*) that he is to be bound by all the conditions, printed or written, of such a contract, whether signed or not. But there is no binding authority for either of these propositions. It would probably be impracticable to give effect to the first, and it may be that in certain cases injustice would be done if the second were universally applied.

"It has now been established by the proof that tickets are not sold to the passengers until the vessel is at sea. It seems to me, however, that this circumstance does not affect the question which has to be decided, and I accordingly modify the view I formerly expressed that this fact might be material. If a passenger boards a ship without a ticket he must be held to have embarked on the footing that he is bound to pay the advertised fare, and the defenders' position in such a case is that they undertake to carry passengers for that fare only on the conditions printed on their tickets.

"As I have already said, the *onus* appears to be on the defenders to establish that the passenger has assented to the condition on the ticket limiting their common law liability for negligence.

"The defenders maintained, on the authority of certain judicial opinions to be found in English cases, that the question whether or not the passenger has assented to the conditions of the contract is a question of law to be determined by the Court. In any event, they urged that in the present case, where the whole terms of the contract were to be found on the face of the ticket, the question was one of law. I am unable to hold that the place where the conditions of the contract are to be found is determinative of the point whether the matter is one of law or fact.

"I cannot see how this question—whether or not the passenger has accepted the conditions of the contract—can ever be anything else than a question of fact.

"It may be that the fact of assent is so conclusively established against the passenger—as where he has signed the contract—that the Court will not look beyond it for evidence of assent; but this does not make the question one of law, but only one of self-evidenced fact. Moreover, the authorities which are most binding on me have decided that this question is one of fact.

"The accurate statement of the question to be decided may aid its determination. The defenders state the question thus, Has the pursuer fulfilled his duty to make himself familiar with the terms of the contract under which he was travelling? In this form of query the *onus* is apparently placed upon the pursuer. I am of opinion that the *onus* is the other way, as the condition in question is in the defenders' favour and limits their common law liability for negligence. The other mode of stating the question—which in my judgment is the correct mode of stating it—is, Did the defenders do what was reasonably sufficient to give the pursuer notice of the condition? This rightly lays the *onus probandi* on the de-

fenders, who must satisfy the Court that they have taken adequate means to make the pursuer acquainted with the terms of the contract.

"I propose to follow the case of *Rowntree*, [1894] A.C. 217, both because it is a judgment of the House of Lords and because the facts are very similar to those in the present case. In that case a passenger ticket was sold on board the steamer. There was, as here, absence of any extraneous calling of attention to the conditions on the ticket, which, as in the present case, were printed in small type. Three questions were put to the jury, who found for the pursuer. I shall put these three questions to myself as covering the whole ground in this case, and shall endeavour to answer these questions from the evidence which was led.

"The first question is, Did the pursuer know that there was printing on the ticket? The jury in *Rowntree* answered that question in the affirmative, and I give a similar answer in this case, as the pursuer admitted that he knew there was printed matter in small type on the face of the ticket. The second question is, Did the pursuer know that the printing on the ticket contained conditions relating to the terms of the contract of carriage? The jury in *Rowntree* answered that question in the negative, and I give the same answer in this case, as the only evidence on this point is that of the pursuer, which I believe. The third question is that which causes difficulty, Did the defenders do what was reasonably sufficient to give the pursuer notice of the condition? The jury in *Rowntree* answered that question in the negative, and as the evidence in this case points with at least equal strength in the same direction, I am of opinion that I ought to give the same answer here.

"On this last question there was a good deal of evidence as to defenders' practice in reference to the distribution and collecting of tickets. What I hold to be proved is this—the tickets are always sold on board after the vessel has left port. They are sold by the purser and collected by the mate. On a direct voyage—say from Aberdeen to Lerwick—the ticket, if single, is collected by the mate practically simultaneously with its issue by the purser, and if it is a return ticket the outward half is similarly collected. If there are intermediate ports of call on the voyage, as when the vessel goes from Aberdeen to Lerwick *via* Kirkwall, a single ticket to Lerwick, or the outward half of a return ticket to that port, is not collected until the last stage of the voyage. The materiality of this evidence in the case of a passenger in the position of the pursuer, who made frequent voyages in the defenders' steamships, has reference to the opportunity afforded him for making himself acquainted with the condition printed on the ticket.

"The ticket which the pursuer took out for the voyage with which this case is concerned, was a return cabin ticket from Scalloway to Aberdeen, and the ticket as a whole was in his possession for several days after it was issued to him.

"There is no evidence as to the condition of the ticket issued to the pursuer for the voyage in question in reference to what was printed on its face—whether or not the printed matter was blurred. I shall assume that the printed matter on that ticket was as legible (or illegible) as that on the ticket produced.

"It is common ground that no official of the company ever called the attention of passengers to the condition in question, as might well have been done by the purser when issuing the tickets. There were no placards exposed on the ship in prominent places directing the passengers' notice to the printed condition. There is no arresting phrase, word, or sign on the ticket itself referring to the condition, such as 'Read this,' 'N.B.;' or the sketch of a hand with index finger directing to the condition. There is no attempt to compel attention to the printed matter by having some prominent word thereof, such as 'Conditions,' set in a bolder type.

"My duty, in conformity with *Rowntree*, is to decide the case on the evidence led. If the question be, as I think it may be, expressed in yet another form—'Have the defenders taken adequate means to bring the existence of the condition to the knowledge of the travelling public?' the best testimony on that point is that of members of the travelling public who use the defenders' vessels. If the evidence of that nature which was given in the present case be weighed and given effect to, there is only one answer to the question as I have put it, and that is an answer in favour of the pursuer's contention. He has adduced a large number of witnesses in the habit of travelling in the defenders' ships, who depone that they had never read the condition. These witnesses are mostly commercial travellers. I cannot discard this large body of evidence on the ground suggested by the defenders, that these witnesses were careless of their own interests, and that they ought to have read the condition. The defenders could only find one witness of this type who had read the condition.

"I therefore hold that the defenders failed to do what was reasonably sufficient to give the pursuer notice of the condition.

"The pursuer founded on the case of *Hooper*, (1907) 23 T.L.R. 451, where a divisional court in England decided in favour of the pursuer in circumstances similar to the present case.

"The defenders founded on the recent Privy Council case of **Robinson**, [1915] A.C. 740. It is plain, however, that that case does not touch the point which I have to decide—to wit, whether reasonable notice of the condition was given—because the contract in that case was signed and, as was pointed out by the Lord Chancellor in *Henderson*, 2 R. (H.L.) 71, where a person has signed a contract he is bound by all its terms, whether he has chosen to make himself familiar with these or not.

"The defenders accordingly in my judgment have not succeeded in eliding their common law liability for negligence, and

the next question is whether the pursuer has proved that they were negligent."

[*His Lordship then discussed the question of the defenders' negligence and the question of contributory negligence.*]

The defenders reclaimed, and argued—The defenders were exempted from liability in respect that the condition on the ticket was imported into the contract of carriage between them and the pursuer — Beven's Negligence (3rd ed.), vol. ii, p. 922. There was an *onus* on the defenders to prove the special condition, but they had discharged that *onus* by showing that there was a ticket which contained the condition, and that the pursuer had travelled upon it—*Harris* v. *Great Western Railway Company*, (1876) L.R., 1 Q.B.D. 515, *per* Blackburn, J., at 525; *Rowntree* v. *Richardson, Spence, & Company and Others*, (1893) 9 T.L.R. 297, *per* Lindley, L.J., at 298; *Parker* v. *South-Eastern Railway Company*, (1877) L.R., 2 C.P.D. 416, *per* Mellish, L.J., at 421; Browne & Theobald's Law of Railways (4th ed.), p. 317. By accepting the ticket the pursuer was barred from pleading that the condition was not a part of the contract. The Court was very slow to allow a passenger to disregard conditions on a ticket by failing to read them, and since the pursuer admitted that he knew that there was printing on the ticket there was an *onus* on him, which he had failed to discharge, of showing that he did not know that the printing contained conditions relating to the contract of carriage—*Zuntz* v. *South-Eastern Railway Company*, 1869, L.R., 4 Q.B. 539, *per* Cockburn, C.J., at 544; *Harris* v. *Great Western Railway Company* (*cit.*) *per* Lord Blackburn at 534; *Watkins* v. *Rymill*, (1883) L.R., 10 Q.B.D. 178; *Richardson, Spence, & Company and "Lord Gough" Steamship Company* v. *Rowntree*, [1894] A.C. 217; *Lyons & Company* v. *Caledonian Railway Company*, 1909 S.C. 1185, 46 S.L.R. 848; *Grand Trunk Railway Company of Canada* v. *Robinson*, [1915], A.C. 740, *per* Viscount Haldane, L.C., at 747; *Acton* v. *The Castle Mail Packets Company Limited*, (1895) 8 Asp. 73. The question in all such cases was one of fact only, viz.—Did the facts show that the company had taken all reasonable means to bring the condition to the notice of the passenger—*Burke* v. *South-Eastern Railway Company*, (1879) L.R., 5 C.P.D. 1; *Cooke* v. *T. Wilson & Sons*, (1915) 32 T.L.R. 160. In the present case the defenders had taken all reasonable means to do so. The pursuer had for long been in the habit of travelling with these tickets. The fact that he did not get the ticket till on board was of no moment, as he was familiar with these tickets, and on the voyage in question had had the ticket in his possession for some days before the accident happened. Admittedly the type was small, but the pursuer did not say that he could not read it, and in no case had smallness of printing been held sufficient by itself to invalidate notice of a condition. *Henderson and Others* v. *Stevenson*, (1875) 2 R. (H.L.) 71, was distinguishable. In that case the condition was written on the back of the ticket—see *Harris* v. *Great Western Railway Company* (*cit.*), *per* Mellor, J., at 521, and Blackburn, J., at 531. In *Parker* v. *South-Eastern Railway Company* (*cit.*) the Court merely reversed the verdict of a jury on a question of fact. It did not overrule the decision in *Harris* v. *Great Western Railway Company* (*cit.*)—see Mellish, L. J., at 421 and 423.

Argued for the respondent—The defenders were not exempted from liability in respect of the condition on the ticket. There was an *onus* on them, which they had failed to discharge, of showing that the pursuer had consented to the condition either expressly or impliedly. The *onus* could only be discharged by the strongest evidence. Knowledge on the part of the pursuer must not be assumed—*Henderson and Others* v. *Stevenson* (*cit.*); *Parker* v. *South-Eastern Railway Company* (*cit.*). The defenders must show, and this they could not do, that they had taken adequate steps to bring the condition to the notice of the pursuer—*Richardson, Spence, & Company, and "Lord Gough" Steamship Company* v. *Rowntree* (*cit.*); *Grieve* v. *The Turbine Steamers, Limited*, (1903) 11 S.L.T. 379; *Caird* v. *Adam*, (1907) 15 S.L.T. 543; *Stephen* v. *The International Sleeping Car Company, Limited*, (1903) 19 T.L.R. 621; *Hooper* v. *Furness Railway Company*, (1907) 23 T.L.R. 451; *Skrine* v. *Gould and Others*, (1912) 29 T.L.R. 19; *Ryan* v. *Oceanic Steam Navigation Company, Limited*, [1914] 3 K.B. 731, *per* Buckley, L.J., at 756; *M'Connell & Reid* v. *Smith*, 1911 S.C. 635, 48 S.L.R. 564; *Van Toll* v. *South-Eastern Railway Company*, (1862) 12 C.B. (N.S.) 75; *Lightbody's Trustee* v. *J. & P. Hutchison*, (1886) 14 R. 4, *per* Lord Young at 6, 24 S.L.R. 7, at 9. The case of *Zuntz* v. *South-Eastern Railway Company* (*cit.*) was disapproved in *Henderson and Others* v. *Stevenson* (*cit.*), and *Watkins* v. *Reymill* (*cit.*) was disapproved in *Marriott* v. *Yeoward Brothers*, [1909] 2 K.B. 987, *per* Pickford, J., at 992. *Lyons & Company* v. *Caledonian Railway Company* (*cit.*) was distinguishable from the present case. There the printing was in red ink. In *Grand Trunk Railway Company of Canada* v. *Robinson* (*cit.*) the passenger was bound by the condition, but that was because it had been signed by his duly authorised agent.

At advising—

LORD JUSTICE-CLERK—Three points were argued before us on this reclaiming note—(First) Did the condition printed on the ticket and exempting the defenders from liability for the negligence of their servants afford a good defence? (Second) If not, had negligence causing the accident been established against the defenders? and (Third) if so, had the defenders made out their case of contributory negligence on the part of the pursuer?

(First) In my opinion the first of these questions falls to be answered in the negative. I do not propose to canvass the numerous authorities which were cited to us. I think the decisions are perhaps capable of reconciliation, but in some respects the opinions expressed by the many eminent

Judges in the House of Lords and other courts who have considered and decided the cases cannot in my opinion be so reconciled, at least if they are severed from the particular circumstances of each case as the defenders sought to do.

So far as the present case is concerned the result of the authorities may be expressed thus—that the common law right of a passenger to be carried with due care and without negligence on the part of the carrier can only be displaced if it is shown that by special contract this right has been surrendered, and such special contract may be express or implied, or the passenger may be barred from maintaining his original common law right.

In this case the pursuer embarked at Scalloway on the defenders' vessel with a view to his making a return voyage to Aberdeen and back. Shortly after the vessel left Scalloway the pursuer received a return ticket, for which he paid. The original ticket has not been produced, but it is admitted that No. 10 of process is a duplicate of that ticket. The small print on it contains the conditions printed in answer 2. The defenders maintain in their fifth plea that "the pursuer having accepted the passenger's ticket issued by the defenders subject to the condition thereon, and being aware of said condition, all as condescended on, the defenders are entitled to absolvitor." In my opinion the *onus* of making good that plea lies on the defenders, and I think they have failed to discharge it. I do not think the ticket constituted the contract between the parties

The three questions which seem to have originally been formulated in *Parker's* case, 2 C.P.D. 416, and which were expressly approved of by Lord Herschell in *Rowntree's* case, [1894] A.C. 217, I accept as aptly expressing the points to be determined.

There is no difficulty as to the first question. The pursuer admits that he knew there was printing on the ticket. As to the second and third questions, in my opinion the evidence in the case would not justify us in answering either of them in the affirmative. On the contrary, I think both of them as a result of the proof fall to be answered in the negative. The pursuer says in his evidence-in-chief (I admit in answer to leading questions) that he did not know that the printed matter contained conditions relating to the contract of carriage. In cross-examination the precise question was not put to the pursuer, counsel apparently preferring (I am far from saying unwisely) to rely on the legal inference to be drawn from the acceptance of the ticket with the condition printed on it. But I think the true result of the pursuer's evidence, supplemented by that of other witnesses with experience of the defenders' tickets, is that it was not brought home to the pursuer that there were conditions relating to the terms of the contract of carriage set out in the small type. The proof for the defenders is not in my opinion sufficient to alter this result.

I think that the defenders have not made out that they did what was reasonably sufficient to give the pursuer notice of the conditions. They adopted a card the size of the familiar railway ticket with its very limited area as their basis, and this compelled them to adopt for printing the condition the smallest type known. They printed in larger type the word "over" to direct special attention to what was printed on the back of the ticket. Nothing, however, was done to direct attention to the condition printed in small type on the face of the ticket, which must have been difficult to read by any passenger, and impossible to read by many passengers, without artificial assistance and very favourable surroundings, though the pursuer does not say that with ordinary care if he had directed his attention to it he could not have read it. We were referred to several methods of directing attention to such conditions which have been adopted by other steamship companies. I think the defenders contented themselves with doing the very least they could have done to give the necessary notice of the condition to their passengers, that that very least was not in fact effective, and was not reasonably sufficient.

As to the question of the defenders' fault it seems to me conclusively made out by the evidence of the defenders' own witnesses that there was such fault. [*His Lordship then discussed the question of the defenders' fault.*]

As to the plea of contributory negligence I do not think this question really arises. [*His Lordship then discussed the question of contributory negligence.*]

Lord Dundas—On the merits of the case I have no difficulty in holding that the Lord Ordinary's conclusion is right. That there was negligence on the defenders' part—not indeed of a gross kind, but quite sufficient to found liability in damages—seems to me to be clear. [*His Lordship then discussed the question of the defenders' negligence.*] But the defenders' counsel urged that the pursuer himself was to blame for the accident. I am unable to see that this was so. [*His Lordship then discussed the question of contributory negligence.*]

A more difficult point in the case, which logically precedes consideration of the merits and is of general interest and importance, arises out of the defenders' fifth plea-in-law. A mass of cases, Scots and English, was cited to us. I think there is, as is perhaps natural, some conflict here and there amongst judicial dicta, but the decisions themselves do not appear to me to be so out of harmony with one another as learned counsel would have us suppose. I have, however, no intention of discussing the various cases in detail. I am content to base my opinion upon the principles (or I would rather say the rules) laid down in a passage which has become a *locus classicus* in the judgment of Mellish, L.J., in *Parker* v. *South-Eastern Railway Company*, 2 C.P.D. 416, at p. 423, from which sprang the three questions afterwards approved by the House of Lords in *Richardson* v. *Rowntree*, [1894] A.C. 217, as the proper

ones to leave to a jury in such cases. I refrain from quoting the passage at length, but I shall endeavour to apply the learned Judge's directions to the facts of the present case. The pursuer depones, and (like the Lord Ordinary) I accept his evidence as true, that he knew there was printed matter on the ticket, but that he did not know or believe that it contained conditions; and in these circumstances Mellish, L.J., says that "nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was in the opinion of the jury reasonable notice that the writing contained conditions." The theory is that, though a pursuer depones that he did not know or believe that printed matter on the ticket (of the existence of which he was aware) contained conditions, yet he may be barred from succeeding in his suit if the Court (or the jury as the case may be) are satisfied that the defenders did what was reasonably sufficient to give him notice that there were conditions. On that assumption he may be held as assenting to the conditions in spite of his evidence to a contrary effect. The issue raised is the same as that expressed in the third question in *Rowntree's* case—"Did the defendants do what was reasonably sufficient to give the plaintiff notice of the conditions?" This question (as well as the second of the three questions) must be answered in the negative if the pursuer is to succeed. I have come to be of opinion, with the Lord Ordinary, that the third question, like the second, ought here to be answered in that sense. I do not think that the defenders did what was reasonably sufficient to give the pursuer notice of the condition. The appearance of the ticket itself goes far to support this view. It is the size of an ordinary railway ticket; the names of the ports of departure and destination are clearly printed; but the remainder of the ticket's face is covered with printed matter of so insignificant a type as to attract the minimum of attention to its presence. Whether it be legible or illegible would, of course, depend upon the eyesight of the passenger, the conditions of light, and other surrounding circumstances. But there is nothing *ex facie* of the ticket to draw attention to this obscure legend, or to indicate that it contains a condition of any sort bearing upon or modifying the ordinary legal relations of passenger and company to one another. As the Lord Ordinary points out, "there is no arresting phrase, word, or sign on the ticket itself referring to the condition, such as 'Read this,' or 'N.B.' or the sketch of a hand with index finger directing to the condition. There is no attempt to compel attention to the printed matter by having some prominent word thereof, such as 'Conditions,' set in a bolder type." The printed matter could not, I think, have been presented in a more unobtrusive manner compatibly with its appearance on the ticket at all. The pursuer does not in his evidence take his stand upon illegibility. He says quite frankly in cross-examination—"Prior to the accident, although I was travelling regularly from 1906, and occasionally before that, I never on any occasion read the condition on the front of the ticket. I saw that there was something printed on the front of the ticket, but I never thought of reading it." In the course of his examination-in-chief he had said in answer to the learned judge—"When I got the ticket I just looked at it to see if the ports of embarkation and destination were right, and that was all. I suppose there would be some printing on it, but it did not occur to me to read it. The type of that printing is so small that it is pretty difficult to read it." This passage occurs later on—"(Q) Did you know that the printed matter which you say you saw contained conditions at all?—(A) No, I did not. (Q) Is there anything on the ticket in the nature of attention being called in any way to the conditions or the nature thereof?—(A) No, there is nothing." I think the gist of this evidence is that nothing on the face of the ticket conveyed to the pursuer's mind any notice that it contained conditions. But it is not only the pursuer's impression one has to consider. The question is whether the defenders were entitled to assume that a person receiving this ticket, in such a way as to perceive that something besides the names of the ports was printed on it, would understand that it contained contractual conditions—"whether people in general would in fact, and naturally, draw that inference." The quotation is from the opinion of Mellish, L.J., in *Parker's* case, already referred to. His Lordship states, and I agree, that the company must "take mankind as they find them," and do what is "sufficient to inform people in general that the ticket contains conditions." Now the pursuer has adduced a considerable body of "people in general," travellers on this line, who depone that they never read this printed legend, some of whom found it more or less illegible even with the aid of spectacles; others of whom give reasons like those stated by a witness named Pole, which I quote—"It was not perhaps because it was illegible that I did not know what was on it, but if it had been in bigger type I might have read it. I would not say that I did not take the trouble to see what was on my ticket. I say that if the type had been of sufficient size that commanded attention, and not put in the most unobtrusive manner possible, I would have been compelled to read it." Looking to the ticket itself, and to the whole evidence in regard to it, I come to the conclusion, agreeing with the Lord Ordinary, that the defenders did not do what was reasonably sufficient to give the pursuer notice of the conditions. It would not, I think, be difficult for them in the future to find means of sufficiently conveying to the minds of their passengers in general that their tickets do contain conditions.

For the reasons stated, I am of opinion that we should adhere to the interlocutor reclaimed against.

LORD SALVESEN—On the first and only interesting question, whether the condition

freeing the defenders from responsibility for the negligence of their servants was imported into the contract of carriage which the pursuer entered into with them, I have come to be of the same opinion as your Lordships. I agree that it has not been proved that the pursuer knew of the conditions and assented to them either expressly or impliedly by accepting his ticket without objection. This, however, is not necessary in order to free the defenders from responsibility if they did what was reasonably sufficient to give the pursuer notice of the conditions by which they sought to limit their common law liability. The test of this, as expressed by Lord Justice Mellish in *Parker's* case, 2 C.P.D. 416, at p. 423, is that if the carrier does what is sufficient to inform people in general that the ticket contains conditions, then a particular pursuer ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. In the general case I think that the carrier satisfies this test if on the face of the ticket which he issues, and which constitutes evidence of the contract of carriage, there is printed in type such as ordinary persons can easily read the conditions upon which he contracts, or if there is printed upon the face of the ticket a notice which calls the passenger's attention to conditions in similar type printed upon the back. In the present case, although the condition founded on is on the face of the ticket, it is in such small type that it cannot be read at all by many persons without the aid of spectacles, and can only be read by most in a good light such as is not generally available in the cabin of a passenger steamer. Moreover, we must not leave out of view in this connection the evidence of a considerable number of persons of average intelligence, who may be taken as typical of mankind as we find them, which is to the effect that these persons, although they have often travelled by the defenders' boats, were quite unaware that there was on the face of the tickets issued to them a printed condition limiting the defenders' common law liability. This evidence goes some way towards showing that the defenders did not do what was reasonably sufficient to give the passengers who travelled by their lines notice of the conditions. I confess that this evidence would not have impressed me much if the ticket had been of a different form and size and the conditions had been printed upon it in type easily read, for it would only have shown that many people are careless of their own interests. Coupled as that evidence is, however, with the extreme smallness of the type, it appears to me sufficient to support the result at which the Lord Ordinary has arrived.

We had a very full citation of authorities on this particular branch of the law, and some of these were represented as conflicting. For my own part I think there is no conflict. There are, indeed, dicta by Lord Chelmsford and Lord Hatherley in the case of *Henderson* v. *Stevenson*, 2 R. (H.L.) 71, which read by themselves, and apart from the context, are not in harmony with later decisions. These dicta were made the subject of comment in the case of *Harris*, 1 Q.B.D. 515, and especially by Blackburn, J., in whose opinion I respectfully concur. All the authorities subsequent to the decision in *Henderson* v. *Stevenson* proceed on the assumption that the broad propositions of Lord Chelmsford, as stated in the last paragraph on page 76 of the report, do not state the law as it has now been settled. Were it otherwise, the third of the questions which were put to the jury in the case of *Richardson* v. *Rowntree*, [1894] A.C. 217, and were there approved by the House of Lords, would be entirely superfluous if the first and second were answered in the negative, for it would then be plain that assent to the terms of the contract of carriage had not been proved in fact. In every case where conditions have been found not binding upon passengers it was because the Court held as a mixed question of fact and law that the carrier did not do what was reasonably sufficient to give the pursuer notice of the special conditions on which alone he was prepared to carry passengers.

On the question of fault and contributory negligence I am content with the findings of the Lord Ordinary. [*His Lordship then discussed the question of contributory negligence.*]

LORD GUTHRIE—[*His Lordship discussed the question of the defenders' fault and the pursuer's contributory negligence, finding the defenders to have been in fault and the pursuer not guilty of contributory negligence.*]

The defenders' case based on the words printed on the front of the pursuer's ticket, namely—to read the condition short—"The Company is not liable for any injury . . . to passengers . . . by negligence of their servants," raises a question of *onus*. Is the *onus* on the pursuer or the defenders, and what is its extent?

I agree with your Lordships that the *onus* is on the defenders, and that the extent of the *onus* is that they must prove that they took reasonable means to bring to the pursuer's notice that the ticket contained conditions relating to carriage, which conditions varied, or might vary, their common law liability. On the one hand the condition in question is clearly expressed, and is not hidden away among other conditions; it is so printed that the pursuer could not check his place of embarkation and disembarkation, and the class of ticket, as the defenders were entitled to expect that he would do, without seeing the print containing the condition; and while the pursuer was on his outward journey—the accident happened at the end of the return journey—he had ample opportunity to read the condition on the ticket while it was still undivided. On the other hand, the defenders have done nothing to indicate on the front of the ticket—in marked contrast to what they have done for the conditions on the back of the ticket—that the print containing the condition in question is something that the passenger ought to read and is expected to

read, as, for instance, by the word "notice," or by the use of red ink, or larger type, for the half-dozen essential words of the condition. But it seems to me sufficient to say that if a passenger is to be bound by a condition on a ticket, varying his common law liability, of the existence of which it is not proved that he was aware, that condition must be printed so as to be reasonably legible, allowing for the contingencies of bad light, blurred type, feeble eyesight, and short time for examination, all of which the defenders were bound to anticipate. As it happens in this particular case, however, it is not even necessary to take any of these contingencies into account, for in ordinary light, examining a fresh copy of the ticket in question, by the aid of spectacles restoring vision to the normal, and with ample time, I cannot read the condition. I can only read it, and that with difficulty, in brilliant light. To negative the defenders' case on this head does not seem to me to conflict with any of the decisions or even with any of the dicta when properly read. I read the statements of learned Judges, and in particular Lord Bramwell, Lord Blackburn, and Mr Justice Stephen, as to the obligation of a passenger who takes a ticket seeing that there is printing on it, which printing he does not take the trouble to read, as assuming that the printing was in point of fact reasonably legible. Whether the defenders, in order to discharge their obligation to bring the condition to the passenger's notice, would have been bound, in addition to providing reasonably legible type, to have called the pursuer's special attention to the print by any such word as "notice," or the use of red ink, or by some other device, does not arise in this case. It is enough that the condition was not reasonably legible.

The Court adhered.

Counsel for the Pursuer (Respondent)—Crabb Watt, K.C.—D. M. Wilson. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defenders (Reclaimers)—Horne, K.C.—Lippe. Agents—Boyd, Jameson, & Young, W.S.

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*Thursday, March 2.*

## FIRST DIVISION.

[Lord Hunter, Ordinary.

## MOORE & WEINBERG *v.* ERNSTHAUSEN, LIMITED.

*Arrestment — Jurisdiction — Arrestment jurisdictionis fundandæ causa — Specimen Bales of Goods Deposited for the Purposes of an Arbitration with Arrestees by Arrangement between Pursuers and Defenders— Validity.*

For the purposes of an arbitration between the sellers and purchasers of goods, specimen bales of the goods were deposited with a warehouseman in Dundee. The bales were thereafter arrested in the hands of the warehouseman by the purchasers to found jurisdiction against the sellers in an action by them against the sellers for payment of the amount awarded by the arbiter. In the circumstances it was *held* that the property in the specimen bales was in the defenders and that jurisdiction had been validly constituted against them by the arrestment.

Moore & Weinberg, merchants, Dundee, *pursuers*, brought an action in the Court of Session against Ernsthausen, Limited, merchants, 61 Mark Lane, London, *defenders*, for payment of £344, 10s. 8d.

On 7th September 1912 the pursuers bought from the defenders 70,000 Calcutta twilled sacks, and later two further quantities of 5000 sacks each. The whole of the goods were to be shipped from Calcutta and delivered at Arecibo, Porto Rico. On 27th March 1913 the pursuers intimated to the defenders that the goods being found disconform to contract on delivery, a heavy claim for loss and damage was being made against them by their customers. The parties thereafter proceeded to arbitration under their contract. They each nominated an arbiter, and the arbiters nominated Mr Andrew Spalding, manufacturer, Dundee, as oversman. The arbiters did not agree and the reference devolved upon the oversman, who on 18th September 1913 issued an award finding the defenders liable to the pursuers in the sum of £344, 10s. 8d. damages for breach of contract.

On 27th March 1913 the pursuers wrote to the defenders stating that they were willing to get a number of intact bales of bags returned for the purposes of the impending arbitration, and the defenders instructed them to get five bales returned. When the bales were on their way the defenders wrote to the pursuers stating that they wished only three bales opened and used for the arbitration between them. The other two bales might be required for an arbitration between the defenders and the makers of the goods in Calcutta if the arbitration in Dundee resulted in favour of the pursuers. On arrival the five bales were warehoused with the Trades Lane Calendering Company in Dundee, who on 7th June 1913 notified the pursuers that they had received the five bales on their account. Three bales were opened and used in the arbitration between the pursuers and defenders. The arbitration award ordered the defenders to pay to the pursuers the value of the five bales and the costs of returning them. On 30th September 1913 the pursuers wrote to the warehousemen stating that they had informed the defenders that the two unopened and the contents of the three open bales were lying at the defenders' disposal with them, and on 30th September the warehousemen wrote to the pursuers stating that they had transferred the goods to the defenders and had formally advised them thereof. Thereafter the pursuers arrested the goods in the hands of the warehousemen to found jurisdiction against