Monday, July 1.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, and Lord Parmoor.)

HOOD *v.* ANCHOR LINE (HENDERSON BROTHERS), LIMITED.

(In the Court of Session, October 31, 1917, 55 S.L.R. 48.)

Ship — Carriage — Contract — Liability of Carrier—Condition Restricting Liability for Damages.

The prospective passenger on a steamer to cross the Atlantic, in exchange for his cheque, received an envelope containing a ticket. On the envelope, with a hand pointing to them, were these words printed in capitals—"Please read conditions of the enclosed contract." On the ticket itself was printed—"Notice. This ticket is issued to and accepted by the passenger subject to the following conditions," and, after the conditions, at the foot of the document, in capital letters—"Passengers are particularly requested to carefully read the above contract."

Held (*aff.* judgment of the Second Division) that the steamship owners had done all that could reasonably be required of them to bring the conditions of the contract under the notice of the prospective passenger, who consequently was bound by them.

This case is reported *ante ut supra.*

The pursuer, Hood, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The appellant in this case sued the respondents for damages in respect of injuries sustained by him through alleged negligence of the respondents' servants. He was a passenger in the "California," a steamship belonging to the Anchor Line on a voyage from New York to Glasgow. The vessel grounded off the Irish coast, and the appellant with a number of other passengers was put on board the "Cassandra" for conveyance to Glasgow. It is alleged by the appellant that the servants of the respondents were guilty of negligence in hoisting him on board the "Cassandra" from the lifeboat, with the result that he was thrown out and seriously injured. This action was brought in the Court of Session to recover damages. The defenders pleaded that by a condition in the pursuer's ticket he could not claim damages beyond £10. The appellant denied that this condition formed part of his contract with the respondents, and a proof was taken upon this point. The Lord Ordinary found that the condition was binding upon the appellant, and he was affirmed by the Second Division. From their decision this appeal is brought to your Lordships' House.

The appellant had reserved accommodation for the voyage from New York on the "California." A day or two before the steamship was to sail, Mr Newson, one of the respondents' clerks at New York, inquired of the appellant by telephone whether he was going by the vessel on that voyage, and on hearing that he was, requested that the passage money—$150—should be sent. The appellant sent one of his clerks, Mr Paul May, with a cheque to take the ticket. Mr May handed the cheque to Mr Newson and got from him in return the ticket enclosed in an envelope. Mr May did not take the ticket out of the envelope, but kept it at the appellant's office. Neither the appellant nor Mr May read the ticket, and neither had any actual knowledge of its contents. Mr May brought Mrs Hood to the "California" on the day of sailing and on board met the appellant, who put into his pocket, without reading it, the ticket which Mr May had brought down from the office.

The "ticket" was a document, partly printed and partly in writing, on yellow paper in three portions separated by perforations. The middle portion and that on the right-hand side were detached on going on board the ship by the representatives of the steamship, and kept by them. The left-hand portion is that which contains the condition relied on by the respondents, and it was retained by the passenger. This left-hand portion was headed with the name of the Anchor Line, and signed by their agent. In its body it stated that the respondents engaged to provide passage with certain accommodation on a particular voyage, and that they had received the passage money. The conditions were printed below and prefixed to them was this notice—"Notice. This ticket is issued to and accepted by the passenger subject to the following conditions." The fourth condition is that which is material to the present case—"Neither the shipowner, nor the passage broker or agent is in any case liable for loss of or injury to the passenger or his luggage, or delay in delivery of luggage or personal effects of the passenger, beyond the amount of £10 in the case of each first-class passage, or £5 in the case of each second-class or steerage passage, unless the value of the passenger's luggage in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description, upon which one per cent. will be charged) is paid." At the foot of the conditions were printed the following words:—"All questions arising on this contract shall be decided according to British law, with reference to which this contract is made"; and at the foot of the document in capital letters were the following words:—"Passengers are particularly requested to carefully read the above contract." It will be observed that this "ticket" really professes to be a memorandum of the contract. The ticket was handed to Mr May in a white envelope, which appears not to have been closed, although this is not expressly stated in the evidence. On the face of the envelope were given particulars of the ticket, voyage, &c., and at the top of it there was a hand pointing to the following words printed in capitals, "Please read conditions of the

enclosed contract," while at the foot were printed some directions as to baggage to be carried in stateroom or in hold.

The Lord Ordinary (Lord Anderson) in his opinion of the 23rd December held that the *onus probandi* as to this condition forming part of the contract was upon the respondents, and that they had failed in proving that the pursuer was aware of the condition in question. He then proceeded to deal with the question "Did the defenders do what was reasonably sufficient to give him notice of the conditions?" He set out the circumstances, and stated in conclusion that he was unable to conceive what further or better means the defenders could have employed to bring to the knowledge of passengers the existence of the contract conditions. He therefore decided in favour of the respondents. The Lord Ordinary's decision was affirmed, and on the same grounds, by the Second Division, consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie.

In my opinion the Courts below were right. Out of the many authorities bearing upon the point I think it necessary to refer to three only—*Henderson* v. *Stevenson*, 1875, 2 R. (H.L.) 71, L.R., 2 S. and D. App. 470; *Parker* v. *South-Eastern Railway Company*, 1877, L.R., 2 C.P.D. 416; and *Richardson, Spence, & Company* v. *Rowntree*, [1894] A.C. 217. The first of these cases is a decision of this House that a condition printed on the back of a ticket issued by a steamship packet company absolving the company from liability for loss, injury, or delay to the passenger or his luggage, was not binding on a passenger who has not read the conditions and has not had his attention directed to the conditions by anything printed on the face of the ticket, or by the carrier when issuing it. The second and third of these cases show that if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket the person taking the ticket would be bound by such conditions.

In the present case the Lord Ordinary and the Second Division found that the company had done what was reasonably sufficient to give the pursuer notice of the conditions. It appears to me that it is impossible to dissent from this conclusion. The contract was entered into on behalf of the appellant by Mr May as his agent, and the case must be dealt with just as if the appellant in person had done what Mr May did for him. The envelope in which the ticket was handed to Mr May had a conspicuous notice upon its front, asking the passenger to read the conditions of the enclosed contract. The ticket itself had on its face a notice in conspicuous type that it was subject to the conditions, and at the foot was printed very plainly in capital letters, "Passengers are particularly requested to carefully read the above contract." What more could have been done to bring the conditions to the notice of the passenger? It was argued that the clerk who issued it ought to have given the appellant verbal notice of the conditions. I cannot think that such a verbal notice in addition to the printed notice was necessary; indeed a verbal notice would be much more likely to give rise to doubt and dispute than a printed notice on the envelope and the ticket itself. It was argued on behalf of the appellant that the contract was complete as soon as the cheque had been paid and the ticket had reached the hands of Mr May, and that any knowledge subsequently acquired of the conditions could not vary the contract. It is quite true that if the contract was complete subsequent notice would not vary it, but when the passenger or his agent gets the ticket he may examine it before accepting, and if he chooses not to examine it when everything reasonable has been done to call his attention to the conditions he accepts it as it is.

The law is settled by the cases I have quoted above, and the Courts below appear to me to have been right in holding that the company had taken all reasonable steps to call attention to the condition. In my opinion this appeal should be dismissed with costs.

VISCOUNT HALDANE—The question on this appeal is of the nature of those in which the boundary line between law and fact is not of an abstract or definite character. There is a large and varied class of cases where the legal duty of a member of society to his neighbour cannot be laid down *a priori* or without examining the special circumstances of the situation. The duty in these instances is ascertained by a standard which depends not on mere general principles fashioned by the jurist, for no such general principles can provide for all the concrete details of which account must be taken, but on the opinion of reasonable men who have considered the whole of the circumstances in the particular instance, and can be relied on to say how, according to accepted standards of conduct a reasonable man ought to behave in these circumstances towards the neighbour towards whom he is bound by the necessities of the community to act with forbearance and consideration. When the law takes cognisance of duties imposed by such social standards it usually refers questions relating to them to a tribunal which is thus one of fact rather than of abstract legal principle. In cases where the question is whether there is alleged to have been negligence such as entitles the party injured by it to a remedy from a court of justice we are familiar with this procedure, and I think that it is really embodied in the practice adopted by our jurisprudence in the other kind of case that is now before us. Where there is a jury the question is really one of fact for the jury, and the function of the judge is simply to see that the proper question is considered by them, a question which must, up to the point at which it is put, of course to some extent depend on certain general principles which belong to jurisprudence.

I agree that the appellant here was entitled to ask that all that was reasonably necessary as matter of ordinary practice

should have been done to bring to his notice the fact that the contract tendered to him when he paid his passage-money excluded the right which the general law would give him, unless the contract did exclude it, to full damage if he was injured by the negligence of those who contracted to convey him on their steamer. Whether all that was reasonably necessary to give him this notice was done is, however, a question of fact, in answering which the tribunal must look at all the circumstances and the situation of the parties. On this question even your Lordships sitting here are a tribunal of fact far more than of law, and what we have to do as lawyers is no more than to see that we have shaped for ourselves the question of fact to which I have referred. If this is borne in mind I think that it explains decisions which are not really divergent. In *Henderson* v. *Stevenson*, 2 Sc. & Div. App. 470, what this House seems to me to have considered was only the particular question of fact which arose in the circumstances of that appeal. In *Parker* v. *The South-Eastern Railway Company*, 2 C.P.D. 416, the only question was whether the question had been properly put to the jury. Mellish and Baggallay, L.JJ., thought that it had not. Bramwell, L.J., *dissenting*, thought that the facts were such that the jury ought to have been at once directed to find a verdict for the defendants. In *Grand Trunk Railway Company* v. *Robinson*, [1915] A.C. 740, the Judicial Committee obviously thought that the question was in substance one of fact, of the nature which I have indicated, and that no difficulty as to the law applicable arose.

What happened in the transactions before us was very simple. The appellant being desirous of being conveyed by one of the respondents' steamers from New York to Glasgow, sent his confidential clerk Mr May to pay the fare and get the ticket at the respondents' office in the former city. Mr May paid the money and was handed in exchange an envelope on which was printed prominently "Please read conditions of the enclosed contract." The envelope contained a contract for carriage of the passenger, which included a condition that the respondents were not to be liable in any case for injury to the passenger beyond the amount of £10. No doubt the burden of proof lies on the respondents to show that they did all that was reasonably required in order to bring this condition to the notice of Mr May, who represented the appellant in the transaction. Have they shown that they did all that could be required reasonably under the usages of proper conduct in such circumstances? I think the Courts below, sitting as a tribunal of fact rather than of mere law, have properly decided that they have. It is true that Mr May did not look at the envelope closely or refer to the condition. He took the contract away and put it in a safe, and ultimately gave it to the appellant, who did not read it either. But I am of opinion that the real question was, not whether they did read it but whether they can be heard to say that they did not read it. If it had been merely a case of inviting people to put a penny into an automatic machine and get a ticket for a brief journey, I might think differently. In such a transaction men cannot naturally be expected to pause to look whether they are obtaining all the rights which the law gives them in the absence of a special stipulation. But when it is a case of taking a ticket for a voyage of some days, with arrangements to be made among other things as to cabins and luggage, I think ordinary people do look to see what bargain they are getting and should be taken as bound to have done so, and as precluded from saying that they did not know.

The question is not whether the appellant actually knew of the condition. I have no doubt that he did not. The real question is whether he deliberately took the risk of there being conditions, in the face of a warning sufficiently conveyed that some conditions were made and would bind him. If he had signed the contract he certainly could not have been heard to say that he was not bound to look. The common sense of mankind which the law expresses here would not permit him to maintain such a position. And when he accepted a document that told him on its face that it contained conditions on which alone he would be permitted to make a long journey across the Atlantic on board the steamer, and then proceeded on that journey, I think he must be treated according to the standards of ordinary life applicable to those who make arrangements under analogous circumstances, and be held as bound by the document as clearly as if he had signed it. I am of the opinion that the appeal must fail.

Lord Dunedin—This is a class of case in which of citing of authorities there is no end, and yet it is, I think, quite possible to say "Hear the conclusion of the whole matter." The case of *Parker* v. *South-Eastern Railway Company*, 2 C.P.D. 416, which has been approved in every case decided since its date, really stereotyped the question which the tribunal, be it jury or judge, must put to itself when such a question arises.

The way in which such a question arises is in this class of cases nearly always the same. The action is founded on an allegation of negligence. Now negligence presupposes a duty. Duty may arise from contract, or it may arise from the rules of the common law, using the term common law in the non-technical sense. It has often been pointed out that in the case of carriage there is an admixture, or perhaps I should rather say an overlapping, of both these elements. The duty of a carrier by sea or land to carry a passenger safely may be ascribed to either of the two. But it is clear that when the carrier alleges an exception to that duty the exception must rest on contract. The question therefore always comes to this when such an exception is alleged—Was that the contract between the parties?

So far as the law is concerned a contract

of carriage may be constituted by writing or by parole, or may be inferred from the acquiescence of the carrier in the presence of the passenger on the conveyance. Contracts of carriage are not usually made by parole, nor are they usually embodied in signed writings. In so saying I am proceeding on common knowledge as to railways, stage coaches, and steamers. But what is usual is in truth a question of fact. Accordingly it is in each case a case of circumstance whether the sort of restriction that is expressed in any writing (which, of course, includes printed matter) is a thing that is usual, and that being usual it has been fairly brought before the notice of the accepting party. It was to put this question in the form of a convenient issue that the question in *Parker's* case was framed. How that question is to be answered depends not only on the circumstances of that particular case, but also on the circumstances of the class of cases of which it is one. It is vain to attempt to lay down general rules such as the learned counsel for the appellants sought to extract from the decided cases, *e.g.*, that *Richardson's* case, [1894] A.C. 217, decided that a passenger was not bound to read his ticket. In the circumstances of this case the learned Judges of the Court of Session, who in this matter exercised the functions of both judges and jurors, have found that the respondents did what was reasonably sufficient to bring to the appellant's notice the existence of the condition. I should not disturb such a finding unless I were very clear that it was wrong. As it is it represents the conclusion at which I should have arrived unaided. I will only add that I had the advantage of reading the opinion of the noble Viscount who preceded me, and I agree with the view he takes of the cases which he cites.

LORD PARMOOR—[*Read by Lord Dunedin*]—The only question involved in this appeal is whether the condition on which the respondents rely was a condition of the contract under which the respondents undertook to convey and did convey the appellant as a passenger in their ocean-going steamer from New York to Glasgow. The relevant facts for consideration can be shortly summarised. The contract under which the respondents undertook to convey and did convey the appellant as a passenger in their ocean-going steamer was concluded when the agent of the appellant received the document or ticket in return for the cheque handed by him to the respondents. This document or ticket was enclosed in an envelope containing on the outside a finger pointing to the words "Please read conditions of the enclosed contract." The enclosed contract was in ordinary printed form, containing on its face the engagement of the respondents to provide the appellant with a passage from New York to Glasgow. There was in prominent type on the face of the document the word "Notice," followed by the words—"This ticket is issued to and accepted by the passenger subject to the following conditions." Among the conditions is the one on which the respondents rely in their defence—"Neither the shipowner nor the passage broker or agent is in any case liable for loss of or injury to the passenger or his luggage, or delay in delivery of luggage or personal effects of the passenger, beyond the amount of £10 in the case of each first-class passage, or £5 in the case of each second-class or steerage passage, unless the value of the passenger's luggage in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description upon which one per cent. will be charged) is paid." Some criticism was made on the wording of this condition, but it is clear that if the condition attaches to and forms part of the contract the appellant cannot recover more than £10 in respect of the injuries he has received, and that the action was properly dismissed, There is a further note in special type at the foot of the ticket—"Passengers are particularly requested to carefully read the above ticket."

The Lord Ordinary has found that the respondents did what was reasonably sufficient to give the appellant notice of the conditions. It appears to me that he could not have come to any other conclusion on the question of fact. It is not material that other or different steps might have been taken so long as the respondents did in fact take sufficient steps to give a reasonable notice. It is not really relevant to inquire whether the passenger can make suggestions for some different form of notice. The object of a notice is to call the attention of the intending passenger to the conditions of the proposed contract, and a clearly printed notice on the enclosing envelope, on the face of the ticket, is as effective for this purpose as if the representative of the respondents had at the time when he issued the ticket verbally called the attention of the appellant to the conditions and asked him to read them. If an intending passenger either personally or through his agent has reasonable notice that the ticket or document handed to him by a carrier contains certain conditions, and accepts the document or ticket as handed to him without objection and without taking the trouble to make himself acquainted with such conditions, he must be taken to have assented to them, and that they thereupon become evidence of the contract of carriage made between such passenger and the carrier. I cannot doubt that in the present case the conditions printed on the face of the ticket were part of the contractual relationship between the parties and as such binding on the appellant.

Much weight was placed by the Lord Advocate in his argument on behalf of the appellant on the principle that the *onus* of proving that the appellant had assented to special conditions in the contract is placed upon the shipowner. This, no doubt, is a correct proposition, but I am unable to assent to the further proposition that to discharge this *onus* some exceptional standard of proof is required, based on the theory of the improbability of a passenger on an

ocean-going steamer having assented to a contract containing any variation of the ordinary common law obligation. In all cases in which a defendant relies for his defence on the conditions of a contract he must prove that such conditions form part of the contract bargain. It is, however, an extravagant assumption that a passenger by an ocean-going steamship from New York to Glasgow would expect to be carried without a contract containing some conditions, or that he would regard the ticket issued to him merely as a voucher or receipt for payment. Such an assumption might have been admissible in case of a passenger by railway in the early days of railway travelling, but the conditions have changed, and the appellant in spite of his evidence is not entitled to claim to be in a better position than other passengers who in the exercise of ordinary intelligence and common-sense took care to become acquainted with the conditions of the contract, having had their attention called thereto by a reasonable notice. The position as stated by Lord Haldane in *Grand Trunk Railway Company of Canada* v. *Robinson*, [1915] A.C. 740, is applicable—"In a case to which these principles apply it cannot be accurate to speak, as did the learned Judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined."

In my view the appeal should be dismissed.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Appellant (Pursuer)—Lord Advocate and Dean of Faculty (Clyde, K.C.)—MacRobert. Agents—G. H. Robb & Crosbie, Glasgow—Macpherson & Mackay, S.S.C., Edinburgh—W. A. Crump & Son, London.

Counsel for the Respondents (Defenders)—Macmillan, K.C.—C. H. Brown. Agents—Bannatyne, Kirkwood, France, & Company, Glasgow—Webster, Will, & Company, W.S., Edinburgh—Botterell & Roche, London.

COURT OF SESSION.

Tuesday, May 21.

FIRST DIVISION.

HALL'S TRUSTEES *v.* M'ARTHUR.

Trust—Administration—Nobile Officium—Special Powers—Power to Sell—Trustees Proposing to Sell Trust Property to Two of their Number.

Testamentary trustees presented a petition to the *nobile officium* craving authority to sell the major part of the trust estate to two of their own number at prices fixed by a valuator, or alternatively to expose the subjects by public roup with a right to bid thereat by the two trustees in question. The trust-disposition gave the trustees power to sell to these two certain portions of the trust estate at a price fixed by the trustees or by arbitration, and also a general power to sell the trust estate by public roup or private bargain. *Held* that the Court had no power to grant the authority craved, and petition *refused.*

Coats' Trustees, 1914 S.C. 723, 51 S.L.R. 642, *distinguished.*

Alexander Hall, James Hall, and others, the sole surviving testamentary trustees of the late Adam Hall, woollen-carder, Newtown St Boswells, *petitioners*, brought a petition craving the Court to authorise the petitioners as trustees to sell (1) a villa at Newtown St Boswells to James Hall as an individual for £725, and (2) other subjects in Newtown St Boswells and Langlands Mill (excluding the machinery and plant therein) to James Hall and Alexander Hall as individuals for £5800, in terms of offers made by them, or to sell the villa and other subjects respectively to James Hall and James and Alexander Hall at such other price or prices and upon such other terms and conditions as the Court might direct, or alternatively to authorise the sale of the subjects by public roup with a right to bid thereat in James and Alexander Hall.

Answers were lodged by Mrs M'Arthur, a daughter of the testator, and her children, *respondents.*

The *facts* of the case appear from the following narrative, which is taken from the opinion of Lord Johnston—"The late Adam Hall died in 1908 possessed of estate to the value of about £8000, which consisted of his interest in the business of A. Hall & Sons, woollen-carders and spinners, Langlands Mill, Newtown St Boswells, including the machinery and plant therein, together with certain heritable properties. These latter were (1) tenements in Galashiels, (2) dwelling-house at Newtown St Boswells, (3) Langlands Mill, (4) certain tenements in Newtown St Boswells, mostly erected by Mr Hall, and many of them occupied by workers engaged in his mill. There was also a good deal of spare ground adjoining the mill available for extension thereof or for feuing or building. The various tenement properties were