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* May 5, 6, 7.
* Oct. 6.

ALFRED WILLIAM LUDDITT AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

GINGER COOTE AIRWAYS LTD. (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Carrier—Aviation—Air transport company—Licensed air carrier of passengers—Forced landing—Injury to passengers and loss of baggage through negligence of company—Condition on ticket relieving company from liability—Validity of—Effect of fixing of fare by statutory regulation—Whether air company a "common carrier"—Whether a "carrier" within definition enacted by Transport Act—Liability of company as common carrier—Transport Act, 1938 (Dom.), 2 Geo. VI, c. 53, ss. 3, 13, 17, 19, 20, 21, 22, 25, 26, 32, 33—Aeronautics Act, R.S.C. 1927, c. 3—Air Regulations, 1938—Railway Act, R.S.C., 1927, c. 170, ss. 340, 345, 346, 347, 348.

The plaintiffs appellants took passage by the defendant respondent's aeroplane from Vancouver to Zeballos, B.C., and, during the flight, a fire started on board forcing the plane to land. The appellants lost their baggage and were severely injured. They brought action against the respondent, an air transport company, alleging that the accident was caused by its negligence. The tickets issued by the respondent to each of the appellants were expressed to be subject to the conditions that the flight was at their own risk against all casualties to themselves or their property and that the respondent should in no case be liable to the passengers for loss or damage to the person or property of such passengers, whether the injury, loss or damage be caused by negligence, default or misconduct of the respondent, its servants or agents or otherwise. The respondent was operating its air transport service under a licence issued under the authority of the *Aeronautics Act*, and it also held a licence issued by the Board of Transport Commissioners under the *Transport Act*, 1938. The trial

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc*.

judge held that the term contained in the ticket, that passengers travelled at their own risk entirely, did not bind them; but the appellate court, reversing that judgment, held that the respondent was within its rights in issuing such special ticket.

Held, affirming the judgment appealed from ([1942] 1 W.W.R. 465), Kerwin and Taschereau JJ. dissenting, that the appellants' action was barred by the term of the special contract contained in the ticket and, therefore, the respondent was relieved of any liability towards them.—The respondent company (it being immaterial whether it should be regarded as common carrier) is a "carrier" within the definition contained in the interpretation section of the *Transport Act,* its licence was issued by the Board and the charge of $25 asked from and paid by each of the appellants was made in accordance with a special tariff duly filed with the Board. Such tariff therefore must be examined in the light of the *Transport Act* and of the general orders and regulations of the Board; and, as a result, it must be held that the respondent company has complied with the provision of the Act and with these orders and regulations. The special tickets were issued to the appellants under a special tariff which, by the Act itself, is declared to "specify a toll or tolls lower than in the standard tariff," and the conditions of which were governed by regulations of the respondent deemed to have been assented by the Board, not having been disallowed by it, with special reference to the terms and conditions of these passenger tickets. It cannot be assumed, although not specifically established in evidence, that the Board allowed the special tariff and its regulations to come and to remain into force in the form in which they were made and filed by the respondent, without taking cognizance of the terms and conditions of the company's passenger tickets to which the schedules and regulations made special reference and which were stated to govern the liability of the company in respect of the transportation by it of its passengers. The terms and conditions of the tickets were made part of the special tariff and schedules, and, accordingly, were valid and binding under the *Transport Act* and the general orders and regulations of the Board, the latter having full authority to allow the issue of passenger tickets in the form of the tickets issued to the appellants.—Section 348 of the *Railway Act* does not apply in the case of transport by air, that section having apparently been deliberately omitted in the *Transport Act;* but, even if it did apply, the form of the contract or ticket in issue in this case should be taken to have been authorized by the Board within the meaning of that section.—This case is governed by the decision of the Privy Council in *Grand Trunk Railway Co.* v. *Robinson* ([1915] A.C. 740).

Per Kerwin and Taschereau JJ. (dissenting)—The terms and conditions on the back of the tickets, which excluded the respondent's liability for negligence, are void, and the judgment of the trial judge, maintaining the appellants' action, should be restored.—The contract upon which the respondent relies is not in compliance with the provisions of the *Transport Act* and the Board's orders and regulations.—Moreover, whether or not section 25 of the *Transport Act,* taken in conjunction with other provisions of the Act and the relevant parts of the Board's orders, constitutes the respondent company a common carrier of passengers at common law, the evidence disclosed that it held itself as being such; and, if so, the contract absolving the respondent from

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its liability for negligence is invalid. As a common carrier of passengers, the respondent's duty was to take due care to carry its passengers safely; and the company is not entitled, at common law, to rely upon such a contract without having given the appellants the option of travelling at a higher fare without any such condition: *Clarke* v. *West Ham Corporation* ([1909] 2 K.B. 858) approved.—The same result follows if no such common law liability exists. By force of the *Transport Act,* the licence issued to the respondent and the Board's orders, the respondent was under a statutory duty to carry at the only scheduled rate all unobjectionable passengers. This case should be decided upon the principle laid down in the following decisions which held that a company empowered by statute to construct works for the use of the public and to take tolls from persons using its works was bound to take all reasonable care to have its works in a safe condition: *Parnaby* v. *Lancaster Canal Co.* (11 Ad. & E. 223) and *Mersey Docks Trustees* v. *Gibbs* (Q.R. 1 H.L. 93). The same principle is applicable to the respondent, and the latter cannot escape the performance of its duty by demanding a contract relieving it of its liability for negligence without some consideration other than the payment of the scheduled fare.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Smith J. (2) and dismissing the appellants' action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

Paul D. Murphy for the appellants.

Charles W. Tysoe for the respondent.

The judgment of Rinfret and Hudson JJ. and of Gillanders J. *ad hoc* was delivered by

RINFRET J.—The appellants' claim in damages is for loss and injury suffered by each of them on and about the 29th day of November, 1940, as a result of the negligence of the respondent, its servants or agents, in connection with their passage in a certain aeroplane owned and operated by the respondent.

In the Supreme Court of British Columbia, the plaintiffs recovered damages; and the question of negligence or the quantum of damages are not in issue in this appeal. The whole case of the respondent is that the action was barred

(1) [1942] 1 W.W.R. 465; 57 B.C.R. 176; [1942] 2 D.L.R. 29.
(2) [1941] 2 W.W.R. 397; 56 B.C.R. 401; [1901] 3 D.L.R. 504; 53 C.R.T.C. 60.

by special contract, the appellants' tickets each containing a term that passengers travelled at their own risk entirely. The trial judge held that the term did not bind them.

The special contract relied upon by the respondent read as follows:

This ticket is expressly subject to the conditions below:

In consideration of the Ginger Coote Airways Ltd. of Vancouver, B.C., permitting me, at my own risk against all casualties, to fly as a passenger in any aircraft owned or operated by the said Ginger Coote Airways Ltd., I hereby agree with the Ginger Coote Airways Ltd. that such flight is, and shall be at my own risk against all casualties to myself or my property and that I take all risk of every kind, no matter how caused, and I hereby release and discharge the Ginger Coote Airways Ltd., and indemnify it of and from all actions, claims and demands of every nature and kind whatsoever, which I, or my heirs, executors, administrators or assigns may now, or may or can at any time hereafter, have against the Ginger Coote Airways Ltd., for or on account of any loss, damage or injury to me, my person or property while so flying, and whether in or on any such aircraft or getting to or from, into or off, or in or out thereof; or in any manner in connection with or in consequence of such flight, and whether any such loss, damage or injury be caused by negligence, default or misconduct of the Ginger Coote Airways Ltd. itself, servants, agents or members, or otherwise howsoever.

It is further agreed that Ginger Coote Airways Ltd. is not bound to carry any passenger or baggage except when space is available, nor shall it be liable for any delay or detention of any passenger or baggage for any reason whatsoever. Ginger Coote Airways Ltd. may refuse to commence or complete any flight whatsoever for any reason without any liability.

Thirty-five (35) pounds of baggage only per passenger shall be carried free; any excess subject to charge at the Company's rates.

I hereby acknowledge having read and agreed to the above conditions.

(Signed): (Passenger's signature.)

Witness:

M. Lane.

Each of the appellants signed such a ticket; and the evidence shows that they knew of its terms and understood them.

The respondent set up these special tickets on which the appellants travelled and claimed that, as a result of the contract thereby entered into by the parties, the respondent was released of any liability.

The appellants replied that the respondent was a common carrier and that the appellants received no consideration for agreeing to any conditions of carriage.

The respondent rejoined that if it was a common carrier, which it denied, it did not contract as such.

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At the material time, the respondent operated its Air Transport Service under a licence granted to it under the Air Regulations 1938 and amendments thereto and issued under the authority of the *Aeronautics Act*. This licence authorized the respondent to operate a schedule service over the route Vancouver-Zeballos, via Tofino, and contained several conditions and provisions to which it is unnecessary to refer for the purposes of this appeal.

The respondent also held a licence to transport passengers and/or goods by aircraft, issued by the Board of Transport Commissioners for Canada under the *Transport Act 1938*. The written conditions stated in this licence were to the effect that the licensee shall be subject at all times to the *Aeronautics Act* and any other statutes of the Parliament of Canada and any other general or specific regulations from time to time made thereunder.

It provided that the licence may be cancelled at any time for

(*a*) non-compliance by the licensee, or his employees, with the *Transport Act, 1938;*

(*b*) non-compliance by the licensee, or his employees, with any regulation of the Board of Transport Commissioners for Canada;

* * *

(*d*) failure to comply with the *Aeronautics Act* and Air Regulations, 1938, or any other regulations from time to time made thereunder; or any other statute of the Parliament of Canada.

The regulations for the carriage of passengers and goods on the licensed service of the respondent under the provisions of the *Transport Act* effective at the time of the accident provided, amongst other matters:

(1) As to liability, that these rules and regulations cover transportation over the routes of Ginger Coote Airways Ltd. in accordance with the terms and conditions of the company's passenger tickets. The company is responsible for the transportation only over its own lines.

* * *

Refusal of Passage

(3) Ginger Coote Airways Ltd. reserves the right to refuse to carry, or to put off en route, any person whose status, physical or mental condition is such, in the Company's opinion, as to:

(*a*) Render him incapable of caring for himself.

(*b*) Make him objectionable to other passengers.

(c) Involve hazard to himself, other persons or property, and the sole responsibility of the Company shall be to refund the unused portion of the fare.

These regulations were filed in the Record Office of the Transport Commission.

The charge asked, and paid for by each of the appellants, for transportation between Vancouver and Zeballos was the sum of $25.

Such a charge was made in accordance with a special passenger and goods tariff duly filed with the Transport Commission, to which was appended the following provision:

All charges for passengers and goods and minimum charges for special trips between airports listed herein, governed, except as otherwise provided, by regulations for carriage issued by Ginger Coote Airways Ltd.

The Board of Transport Commissioners for Canada was established by an Act (2 Geo. VI, c. 53) assented to on the 1st of July, 1938, under the title *The Transport Act.*

It was given authority in respect of transport by railways, ships and aircraft.

In the Act, " aircraft " is stated to mean and comprise all machines which can derive support in the atmosphere from reaction of the air.

" Carrier " means any person engaged in the transport of goods or passengers for hire or reward to whom the Act applies, and includes any company which is subject to the *Railway Act.*

" Licensee " means a person licensed under the Act to engage in transport by water or by air.

" Toll " or " charge " means and includes any toll, rate, charge or allowance charged or made in connection with the transport of passengers * * * and includes also any toll, rate, charge or allowance as charged or made in connection with any instrumentality or facility of shipment or transport irrespective of ownership, or of any contract express or implied with respect to the use thereof.

The interpretation section of the Act says that:

Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Railway Act.*

Under sec. 3 of the *Transport Act 1938,* it is the duty of the Board to perform its functions with the object of co-ordinating and harmonizing the operations of all carriers

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engaged in transport by railways, ships and aircraft, and the Board is instructed to give to the *Transport Act* and *Railway Act* such fair interpretation as will best attain the object aforesaid.

The provisions of the *Railway Act* relating to orders and decisions of the Board are made applicable in the case, amongst others, of every application or other proceeding under the Act; and the Board exercises and enjoys the same jurisdiction and authority as was vested in the Board by the *Railway Act*.

Before any application is granted for the transport of goods and passengers under the Act, the Board must determine whether public convenience and necessity requires such transport; and, in so determining, it must take into consideration, *inter alia*, the quality and permanence of the service to be operated by the applicant and his financial responsibility, including adequate provision for the adequate protection of passengers, shippers and the general public by means of insurance.

Now, under Part III, which is entitled "Transport by air", it is provided that, notwithstanding anything contained in the *Aeronautics* Act, the Board may license aircraft to transport passengers, prescribing in the licence the route or routes which the aircraft may follow and the schedule of services which shall be maintained; and no passenger shall be transported by air other than by means of an aircraft licensed under this Part.

In respect of tolls to be charged, the licensee, under Part IV, is governed as follows:

Every licensee must file a standard tariff of tolls with the Board for approval; and it may also file such other tariffs as are ordered by this Part. The tariffs which are thus authorized are divided into five classes, three of which concern freight, and the two others are the "standard passenger tariffs" and the "special passenger tariffs".

The standard tariff must specify the maximum mileage tolls to be charged for passengers; and it requires the approval of the Board before it becomes effective.

The special tariff must specify a toll or tolls lower than in the standard tariffs.

Every licensee must, according to his powers and within the limits of the capacity of the ships or aircraft specified

in the licence, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic (s. 25).

The Board may disallow any tariff or any portion thereof which it considers unjust or unreasonable or contrary to any provisions of the *Transport Act;* and it may require the licensee, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed (s. 26).

Notwithstanding anything in the Act contained, a licensee engaged in transport may carry traffic free or at reduced rates to the same extent and subject to the same restrictions, limitations and control as are applied in the case of a railway company under the *Railway Act* (s. 32). This apparently is a reference to ss. 345, 346 and 347 of the *Railway Act.*

Section 33 deals with the regulations which the Board may make and contains several provisions, of which it is only necessary to refer to the last one, which is as follows:

(i) provide generally for such matters as, in the opinion of the Board, may be required for the purpose of this Act.

The above appear to be the only sections of the *Transport Act* which are material for our present purposes.

Acting under the powers given by the Act, the Board issued General Order 580 governing the construction and filing of air transport tariffs with the Board and stipulating that all tariffs must conform to the regulations therein contained.

According to that Order, the word "schedule", as used therein, means a tariff or supplement.

Section 5 provides that, in the order named, the title page of every tariff and supplement shall show:

(*a*) On the upper right-hand corner, each tariff shall be numbered beginning with No. 1. Such number shall be shown as follows:
C.T.C. No. .....

(*b*) When tariffs are issued cancelling a tariff or tariffs previously filed, the C.T.C. number or numbers of the tariff or tariffs cancelled must be shown in the upper right-hand corner immediately under the C.T.C. number of the new tariff.

* * *

(*e*) Whether tariff is standard, special or competitive.

A note at the foot of this section reads as follows:

See Appendix B for example of title page of a freight tariff conforming to this rule. Passenger tariffs to be similarly arranged.

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Then, section (6) states that schedules shall contain:

* * *

(*e*) All rules and regulations which govern the tariff stated in clear and explicit terms so as to leave no doubt as to their proper application.

And, under s. (8) of this Order, a separate tariff may be filed containing rules and regulations. Such rules and regulations may be made part of the rate tariff by the following reference therein:

Governed, except as otherwise provided, by rules and regulations published in C.T.C. No. ....., supplements thereto or re-issue thereof.

This order is dated the 16th December, 1938.

On the 23rd day of March, 1939, the Board issued General Order No. 584, adding to Rule No. 6 regulating what schedules shall contain, the following subsection:

(*g*) Specific rules setting out the conditions under which service will be provided to each point to or from which a rate is published.

There can be no doubt that the respondent company, for purposes of transport by air, of licences, of tolls or charges and of tariffs, comes under the provisions of the *Transport Act, 1938*, and of the General Orders Nos. 580 and 584. It is a carrier engaged in the transport of passengers for hire, to whom the Act, the Orders and the Regulations apply. Its licence was issued by the Board; its tariffs were filed with the Board and must be examined in the light of the *Transport Act* and of the general orders and regulations of the Board.

If they are so examined, we find that the charge or toll of $25 for transportation from Vancouver ,B.C., to Zeballos is the charge provided for in a tariff the title page of which designates it as " Special Passenger and Goods Tariff ".

This, as we have seen, is in accordance with the requirements of subs. (*e*) of s. 5 of General Order 580.

Indeed, this special tariff is exactly in the form of Appendix B referred to in General Order 580.

It contains at the foot of the schedule of charges, as already stated, the words: " Governed, except as otherwise provided, by regulations for carriage issued by Ginger Coote Airways Ltd.", which are also the words in the form contained in Appendix B. And the regulations for the carriage of passengers thus referred to, and by which it is stated that the charges for passengers are to be governed,

are those already mentioned above in this judgment, among other things stipulating, with regard to liability towards passengers,

> These rules and regulations cover transportation over the routes of Ginger Coote Airways Ltd. in accordance with the terms and conditions of the Company's passenger tickets. The Company is responsible only for transportation over its own lines.

It will be seen, therefore, that the terms and conditions of the Company's passenger tickets are there specially referred to.

And then, we find the tickets issued to each of the appellants in particular, accepted and signed by each of them; and whereby, in consideration of the respondent permitting each of the appellants to fly as a passenger in the aircraft owned and operated by the respondent, each appellant agreed that the respondent would be relieved of any liability for damage or injury, " no matter how caused ", * * * " in connection with or in consequence of such flight ".

This constitutes a special contract entered into between each of the appellants and the respondent which evidently covered the claim for damages now asserted by the appellants and which undoubtedly has the necessary effect of releasing and discharging the respondent of and from such a claim and its consequences, unless the appellants succeed in showing that the contract is illegal and void.

It seems immaterial to inquire whether the respondent in the premises must be regarded as a common carrier. The *Transport Act* does not in so many words make it a common carrier.

In our view, it is sufficient to note that the respondent comes within the definition of a " carrier ", in the interpretation section of *The Transport Act*. As such, it is and was subject to the prescriptions of that Act. We have, therefore, to examine whether, in respect of the matters herein concerned, the provisions of the Act, including the regulations and orders made thereunder, have been followed in what the respondent did.

It is not claimed that the licence issued to it by The Board of Transport Commissioners was not issued strictly in accordance with the Act.

As for the tariff of tolls, the charge of $25 made to the appellants is the charge indicated for the transport which they sought, in a tariff filed with the Board as a special passenger tariff.

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By force of s. 22 of the Act, such a special tariff specifies a toll lower than the standard tariffs.

The standard tariffs require the formal approval of the Board, as they provide for the maximum mileage tolls to be charged for passengers. But the special tariffs are merely filed with the Board; and, as soon as they are filed, they are deemed to be approved, so long as the Board does not disallow them or requires a substituted tariff satisfactory to the Board to be filed in lieu thereof (s. 26).

The schedules, conditions and regulations accompanying this special tariff were authorized by General Orders 580 and 584, which, among other things, permitted the setting out of the "conditions under which service will be provided to each point to and from which a rate is published."

The schedule containing the rules, regulations and conditions in respect thereto was duly filed with the Board and must be taken to have been approved by it, as it does not appear to have been disallowed.

These regulations contained a special reference to the question of liability, wherein it was stated that transportation by the respondent was undertaken "in accordance with the terms and conditions of the Company's passenger tickets"; and the tickets themselves contained an agreement, accepted and signed by each of the appellants, whereby it was stipulated that the flight was to be at the appellants' own risk against all casualties, no matter how caused, and the respondent was released and discharged of all claims "in any manner in connection with or in consequence of such flight and whether any such loss, damage or injury be caused by negligence, default or misconduct of the Ginger Coote Airways Ltd. itself, servants, agents or members, or otherwise howsoever."

The consequence is that the special tickets under which the appellants were being transported were issued to them under a special tariff which, by the Act itself, is declared to "specify a toll or tolls lower than in the standard tariff", and the conditions of which were governed by regulations deemed to have been assented to by the Board, with special reference to the terms and conditions of these passenger tickets. It cannot be assumed, although not specifically established in evidence, that the Board allowed the special tariff and its regulations to come and to remain into force in the form in which they were made and filed by the Com-

pany without taking cognizance of the terms and conditions of the Company's passenger tickets to which the schedules and regulations made special reference and which were stated to govern the liability of the Company in respect of the transportation by it of its passengers. The terms and conditions of the tickets were made part of the special tariff and schedules. Accordingly, they were valid and binding under *The Transport Act* and the General Orders Nos. 580 and 584.

In our view, the Board had full authority to allow the issue of passenger tickets in the form of the tickets issued to the appellants. The special tariff and the rules, regulations and conditions therein contained are linked together.

We do not think s. 348 of *The Railway Act* applies in the case of transport by air. On the contrary, we think that section was deliberately omitted in *The Transport Act*. But even if it did apply, it would seem to us that the form of the contract or ticket in issue in this case, relieving the company from liability in respect of the carriage of passengers, should be taken to have been authorized by the Board within the meaning of that section.

As a consequence, we fail to see why the case should not be governed by the judgment of the Privy Council in *Grand Trunk Railway Co.* v. *Robinson* (1).

In that case, it will be remembered, the respondent Robinson, by arrangement with the owner of a horse, travelled in charge of it upon the appellant's railway. The owner's representative, in the presence of the respondent, signed a live stock special contract in a form authorized by the Board of Railway Commissioners for Canada. This contract provided for the carriage of the horse and contained upon its face a condition relieving the appellant from liability for death or injuries, even where caused by negligence, to a person permitted to travel with the horse at less than full fare. The document was handed to the respondent in order, as he knew, to show that he was travelling with the horse, but neither he nor the owner's representative read the conditions. A half fare was charged for the conveyance of the respondents, and, together with the freight for the horse, was payable by the owner upon delivery. Across the face of the contract was printed in

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large red type "Read this special contract"; and at the side was written (but not as a part of the authorized form) "Pass man in charge half fare".

The respondent, having been injured during the journey by the negligence of the railway company, sued to recover damages.

It was held, (1) that the inference was that the respondent accepted the document knowing that it contained a contract made on his behalf for his conveyance and that he was bound by the condition on its face exempting the appellants from liability; (2) that the railway company was entitled, under s. 340 of *The Railway Act* (R.S.C. 1906, c. 37) to rely upon the form of contract authorized by the Railway Board, giving them complete freedom from liability in the case of negligence, notwithstanding s. 284, sub-s. 7 of that Act.

Viscount Haldane, L.C., delivered the judgment of their Lordships of the Judicial Committee and said (p. 744):

> Apart from statute a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. * * * Their Lordships think that where, under s. 340 and the other sections which deal with special tariffs, forms of stipulation limiting liability have been approved by the Board, and the conditions for making them binding have been duly complied with, the companies are enabled in such cases to contract for complete freedom from liability for negligence.

And, at page 747:

> There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish or exclude it. If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a Court of Justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.

And then, at page 748:

> 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.

We see no reason why the decision in the above case should not completely govern the facts and the legal points arising in the present case.

And it must be noticed that the judgment of the Judicial Committee in that case was based strictly on the contract itself between the passenger and the railway company. No question is there raised about the particular obligation of a common carrier, or with regard to the reasonableness of the terms and conditions of the contract, or as to whether the passenger had been offered the option of paying the normal or maximum charge in order to avoid the stipulation of limited liability on behalf of the railway company. The decision is not made to depend upon any of these considerations. It states that there was this contract between the company and its passenger and that the terms thereof must be held to govern.

Of course, the present case is stronger than that of *Grand Trunk Railway* v. *Robinson* (1), since here there existed no possible doubt that the appellants had accepted the conditions of the ticket or contract; and it is common ground that they read and understood the nature and effect of the conditions therein, to which they affixed their signature freely and voluntarily, without reservation of any kind.

In view of what we have already said, there does not seem to be any necessity of referring to any of the other cases relied on either by the appellants or by the respondent or mentioned in the judgments of the courts of British Columbia.

In *Peek* v. *North Staffordshire Railway Company* (2), the advice of Mr. Justice Blackburn shows that, up to the adoption of the *Railway and Canal Traffic Act* (1854)—17 & 18 Vict., c. 31—it had become established law that a carrier might, by a special notice, make a contract limiting

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his responsibility, even for gross negligence or fraud on the part of its servants and for all loss or injury, however caused. His opinion was that a condition of that kind was looked upon as incorporated into the agreement with the carrier; it operated by way of contract and the passenger became bound by the contents. In his advice, Mr. Justice Blackburn reviews all the decisions under the common law up to the year 1862, date of the hearing before the House of Lords, and his opinion is based upon this exhaustive review.

Of this conclusion, Bankes, L.J., in *Great Northern Railway Company* v. *L.E.P. Transport & Depository Ltd.* (1), had this to say:

> The elaborate review of the law by Blackburn, J., in his advice to the House of Lords in *Peek* v. *North Staffordshire* (2), seems to me to indicate plainly that a common carrier can limit his liability by contract while still retaining his common law character of common carrier.

And, in the same case, at page 771, Atkin, L.J., referring to Blackburn, J.'s advice to their Lordships in the *Peek* case (2) adds:

> It is an authoritative exposition of the law, and was accepted as such by the House of Lords in that case.

The learned trial judge, who maintained the appellants' action and whose judgment was reversed by the majority of the Court of Appeal, based his decision entirely on *Clarke* v. *West Ham Corporation* (3). Without going into an analysis of the judgments delivered in that case, we think, with respect, that the reasoning therein can have no application here. That case, in our view, turned purely on the construction of the statutes governing the defendant; and whatever general principles may be found there expounded cannot prevail against the plain terms of *The Transport Act* and the conditions of the special contract here existing between the parties; more particularly in light of the decision of the Judicial Committee, in 1915, in *Grand Trunk Railway Co.* v. *Robinson* (4).

In Canada, as stated by the Lord Chancellor in that case, under the existing law and statutes, a carrier of passengers can contract out of the liability which attaches to him, by

(1) [1922] 2 K.B. 752, and 754.
(2) (1863) 10 H.L.C. 473.
(3) [1909] 2 K.B. 858.
(4) [1915] A.C. 740.

the use of apt words in the contract or ticket which he issues, provided the conditions for making them binding have been duly complied with.

For these reasons, the appeal should be dismissed with costs.

The judgment of Kerwin and Taschereau JJ. (dissenting) was delivered by

KERWIN J.—While being carried as paying passengers on the respondent's aeroplane from Vancouver to Zeballos on Vancouver Island, the appellants were severely burned and injured and their personal effects were destroyed. It is not now contested that this unfortunate ending of the trip resulted from the respondent's negligence but liability is denied by the respondent because of the contracts entered into between it and the appellants. The contracts are identical. One appears on the back of the ticket issued by the respondent to each appellant and is signed by each appellant. It is in the following terms:

This ticket is expressly subject to the conditions below:

In consideration of the Ginger Coote Airways Ltd. of Vancouver, B.C., permitting me, at my own risk against all casualties to fly as a passenger in any aircraft owned or operated by the said Ginger Coote Airways Ltd., I hereby agree with the Ginger Coote Airways Ltd. that such flight is, and shall be at my own risk against all casualties to myself or my property and that I take all risk of every kind, no matter how caused, and I hereby release and discharge the Ginger Coote Airways Ltd. and indemnify it of and from all actions, claims and demands of every nature and kind whatsoever, which I, or my heirs, executors, administrators or assigns may now, or may or can at any time hereafter, have against the Ginger Coote Airways Ltd., for or on account of any loss, damage or injury to me, my person or property while so flying and whether in or on any such aircraft or getting to or from, into or off, or in or out thereof; or in any manner in connection with or in consequence of such flight, and whether any such loss, damage or injury be caused by negligence, default or misconduct of the Ginger Coote Airways Ltd. itself, servants, agents or members, or otherwise howsoever.

It is further agreed that Ginger Coote Airways Ltd. is not bound to carry any passenger or baggage except when space is available nor shall it be liable for any delay or detention of any passenger or baggage for any reason whatsoever. Ginger Coote Airways Ltd. may refuse to commence or complete any flight whatsoever for any reason without any liability.

Thirty-five (35) pounds of baggage only per passenger shall be carried free; any excess subject to charge at the Company's rates.

I hereby acknowledge having read and agreed to the above conditions.

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If valid, the contract is undoubtedly a good defence to the action. The trial judge decided against its validity as he concluded that whether the respondent was or was not a common carrier of passengers, it was bound to carry all persons not in an unfit condition for whom it had accommodation in its aeroplane and who tendered the legal fare. He considered this to be the effect of section 25 of *The Transport Act, 1938,* c. 53 (Dominion), and that, in any view of the matter, the respondent's duty was to take all due care and to carry its passengers safely as far as reasonable care and forethought could attain that end. He agreed with the appellants' contention that the respondent could only operate its aircraft under the licence which it obtained under the provisions of *The Transport Act* and at the approved scheduled fare of $25 from Vancouver to Zeballos; that the fare being established under the statutory regulations, conditions could not be attached to the contract of carriage to abolish the respondent's liability, at least without a new and valuable consideration; that the case was indistinguishable from *Clarke* v. *West Ham Corporation* (1); and he accordingly gave judgment for the appellants for damages.

The Court of Appeal for British Columbia reversed this judgment and dismissed the action. The Chief Justice of British Columbia and Sloan J. deemed the *West Ham* case (1) to have been wrongly decided and that, in any event, it was inconsistent with the decision of the Privy Council in *Grand Trunk Ry. of Canada* v. *Robinson* (2). The appellants do not seek to support their appeal on the basis suggested by the dissenting judge in the Court of Appeal, McQuarrie, J., but rely on the judgment of the trial judge and the reasoning in the *West Ham* case (1).

Under the provisions of the *Aeronautics Act,* R.S.C. 1927, c. 3, and the Air Regulations, 1938, the respondent was licensed to operate a secheduled air transport service for mail, passengers and goods. The "schedule of service" authorized by this licence included

"Return trips: Vancouver-Zeballos—Tri-Weekly."

And by clause 19 of the licence:

> 19. Flights must take place according to schedules stated in the licence subject to weather conditions and except during the freeze-up and break-up periods.

(1) [1909] 2 K.B. 858. (2) [1915] A.C. 740.

The respondent was also authorized to transport passengers and/or goods by aircraft between Vancouver and Zeballos by a licence issued by the Board of Transport Commissioners for Canada. This Board was established under the provisions of *The Transport Act*, section 13, whereof authorizes the issuance of such a licence. Subsection 1 of section 17, sections 19, 20, 21, 22 and 25 read as follows:

17. (1) Every licensee shall file a standard tariff or tariffs of tolls with the Board for approval and may file such other tariff or tariffs as are authorized by this Part.

19. When a tariff is filed with and approved by the Board, where approval is necessary under this Act, the licensee shall thereafter, until such tariff is disallowed or suspended by the Board, or superseded by a new tariff, charge the toll or tolls as specified therein.

20. The tariff of tolls which a licensee shall be authorized to issue under this Part shall be divided into five classes:—

(*a*) Standard freight tariffs;

(*b*) Special freight tariffs;

(*c*) Competitive freight tariffs;

(*d*) Standard passenger tariffs;

(*e*) Special passenger tariffs.

21. (1) The standard tariff or tariffs shall specify the maximum mileage tolls to be charged for passengers and for each class of the freight classification for all distances covered by the licensee.

(2) Every standard tariff and every amendment and supplement thereto shall require the approval of the Board before it becomes effective.

22. Special tariffs shall specify a toll or tolls lower than in the standard tariffs.

25 (1) Every licensee shall, according to his powers and within the limits of the capacity of the ships or aircraft specified in the licence, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic.

(2) No licensee shall,—

(*a*) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever;

(*b*) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading or delivery of the goods of a similar character in favour of or against any particular person or company;

(*c*) subject any particular person or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever.

Section 32 provides:

32. Notwithstanding anything in this Act contained a licensee engaged in transport by water or air may carry traffic free or at reduced rates to

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the same extent and subject to the same restrictions, limitations and control as are applied in the case of a railway company under the *Railway Act*.

I mention this section merely to set it aside as it does not make applicable section 348 of the *Railway Act*, R.S.C. 1927, c. 170, which provides that contracts, conditions, etc., limiting liability shall have no effect unless approved by the Board of Railway Commissioners for Canada (now, by section 3 of *The Transport Act*, the Board of Transport Commissioners for Canada).

Under the provisions of *The Transport Act* the Board issued its general order, 580. In a foreword to this order, it is pointed out that all initial tariffs or schedules filed will be deemed to comply with the law relative to filing, unless rejected by the Board. By the order itself, the title page of every tariff shall show *inter alia* whether the tariff is standard, special or competitive, and (clause 6 (*e*)) shall contain all rules and regulations which govern the tariff, stated in clear and explicit terms so as to leave no doubt as to their proper application. Clause 8 reads as follows:

> A separate tariff may be filed containing rules and regulations. Such rules and regulations may be made part of the rate tariff by the following reference therein:
>
> "Governed, except as otherwise provided, by rules and regulations published in C.T.C. No. * * * supplements thereto or re-issues thereof."

By amending Order 584 the Board added clause 6 (*g*) requiring that all tariffs shall contain:

> (*g*) Specific rules setting out the conditions under which service will be provided to each point to or from which a rate is published.

If the effect of *The Transport Act* and the Board's order is to make the respondent a common carrier of passengers at common law, the contract absolving the respondent from its liability for negligence is invalid. The distinction between common carriers of goods and common carriers of passengers is well known. The decision in the House of Lords in *Peek* v. *North Staffordshire Ry. Co.* (1) is a decision under the *Railway and Canal Traffic Act, 1854*. Blackburn J., in advising the House, discussed the position at common law but his discussion was confined to common carriers of goods and his remarks have no bearing upon the position of common carriers of passengers. The responsi-

(1) (1863) 10 H.L.C. 473.

bility of the former was much greater and that may be one of the reasons that, as pointed out by Blackburn J., the common law in England changed after 1832 and permitted common carriers of goods to impose conditions upon their liability. These conditions became so onerous that legislation was enacted in order to relieve the public from the hardship thus occasioned. No such change as had occurred in the common law as to common carriers of goods took place with reference to common carriers of passengers, and the latter never had the right, at common law, to limit their responsibility in the same way as the former. I agree with that part of the judgment of Lord Coleridge in the *West Ham* case (1) where he says, at page 868:

> It is settled law that a railway company—and for this purpose a tramway company seems to me to be in a similar position—may under certain circumstances limit their liability. They may, if they please, offer a free pass to a passenger, or permit him to travel under conditions which necessarily involve a greater risk to himself on payment of a lower fare or none, and call upon him to absolve them of their liability in whole or in part: *McCawley* v. *Furness Ry. Co.* (2); *Gallin* v. *London and North Western Ry. Co.* (3); *Hall* v. *North Eastern Ry. Co.* (4); but no case has been decided which permits a railway, canal, or tramway company, which has a duty to serve the public at large in the matter of carriage, to limit their liability without giving the passenger the option to travel at their risk.

Certainly no such case has been cited to us. The common law is sufficiently broad to prevent the respondent, which operates an aeroplane for passenger traffic, from limiting its liability without giving a passenger the option to travel at the respondent's risk.

In the *West Ham* case (1), Lord Justice Farwell, in the Court of Appeal, placed his decision upon the ground that the West Ham Corporation were common carriers of passengers at common law in the sense that they were bound to carry according to their profession. Lord Justice Kennedy placed his decision upon that ground and also upon the construction of certain statutes regulating the tramways. The Master of the Rolls placed his decision upon the latter ground. Both the Master of the Rolls and Lord Justice Kennedy were careful to make it plain that they did not consider that the railway legislation referred to by Lord Coleridge had any application to the case.

(1) [1909] 2 K.B. 858.
(2) (1872) L.R. 8 Q.B. 57.
(3) (1875) L.R. 10 Q.B. 212.
(4) (1875) L.R. 10 Q.B. 437.

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In the present case the respondent was compelled by its licence under the *Aeronautics Act* and Air Regulations to operate a tri-weekly service between Vancouver and Zeballos, subject to weather conditions, etc. (clause 19 of the licence). It was also licensed under *The Transport Act* to transport passengers. By subsection 1 of section 17 of that Act, it was under an obligation to file a standard tariff. So far as the evidence discloses, the only tariff filed is the one that fixes the fare between Vancouver and Zeballos at $25, and that must be taken to be the standard tariff required by the Act. The mere fact that the respondent designated it a "Special Passenger and Goods Tariff" can make no difference. In using the word "special", the respondent but copied the heading in a form attached as Appendix B to the Board's order 580. The numbering of this tariff and of certain regulations, to be mentioned shortly, also indicates that no prior tariff was filed, and the examination for discovery of Mr. Slesser, a past official of the respondent, put in at the trial, and the written argument of counsel for respondent, submitted to the trial judge, indicates that no tariffs and regulations except C.T.C. Nos. 1 and 2 were ever filed.

The so-called "Special Passenger and Goods Tariff" is numbered C.T.C. No. 2 and contains the following statement:

> All charges for passengers and goods and minimum charges for special trips between airports listed herein, governed, except as otherwise provided, by regulations for carriage issued by Ginger Coote Airways Ltd. C.T.C. No. 1, supplements thereto, or successive issues thereof.

The same day that this was issued, the respondent issued, as C.T.C. No. 1, "Regulations for carriage of passengers and goods carried on the licensed services of Ginger Coote Airways Ltd. under the provisions of *The Transport Act*." Under Part 1 of these regulations, headed "Passengers", appears the following:

> 1. Liability. These rules and regulations cover transportation over the routes of Ginger Coote Airways Ltd. in accordance with the terms and conditions of the Company's passenger tickets. The Company is responsible for the transportation only over its own lines.

The contract upon which the respondent relies does not appear anywhere except on the back of its tickets. A form of ticket containing this contract is not shown by the evidence to have been filed with the Board. By clause 8 of the Board's general order 580, the respondent's rules and regu-

lations might be made part of the rate tariff by referring, in the latter, to rules and regulations published in another filed tariff. A mere reference in the respondent's regulations to " the terms and conditions of the Company's passenger tickets " is not a publication of a filed tariff within the meaning of clause 8; it is not in compliance with clause 6 (*e*) that all rules and regulations governing the tariff shall be stated in clear and unequivocal terms so as to leave no doubt as to their proper application; and it is not a specific rule setting out the conditions under which service will be provided, as required by clause 6 (*g*). What would be the effect of compliance with the Board's order need not be considered.

By clause 19 of the licence to the respondent under the *Aeronautics Act* and the Air Regulations, flights must take place according to the schedules stated in the licence, subject to weather conditions, etc. Being licensed to transport passengers under *The Transport Act,* the respondent, by section 25 thereof, was required to furnish all reasonable and proper facilities for the receiving, forwarding and delivering of traffic. Whether or not this section, taken in conjunction with other provisions of the Act and the relevant parts of the Board's order, constitutes the respondent a common carrier of passengers for hire, the evidence discloses that the respondent held itself out as being such. The fact that it would not have accepted the appellants or others as passengers unless they signed the contract on the back of the ticket does not alter its status. Nor does the circumstance that in the respondent's C.T.C. No. 1 appears the following:

> 3. Refusal of Passage Ginger Coote Airways Ltd. reserves the right to refuse to carry, or to put off en route, any person whose status, age, physical or mental condition is such, in the Company's opinion, as to:
>
> (*a*) Render him incapable of caring for himself.
>
> (*b*) Make him objectionable to other passengers.
>
> (*c*) Involve hazard to himself, other persons or property, and the sole responsibility of the Company shall be to refund the unused portion of the fare.

A clause, not identical but in substance the same, appeared in the West Ham Corporation's by-laws.

As a common carrier of passengers, the respondent's duty was to take due care to carry its passengers safely. That being so, I think the law is correctly set forth in the judg-

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ments of Lord Justice Farwell and Lord Justice Kennedy in the *West Ham* case (1) and that the present respondent is not entitled, at common law, to rely upon a contract limiting its liability for negligence without having given the appellants the option of travelling at a higher fare without any such condition.

The same result follows if no such common law liability exists. By force of *The Transport Act,* the licences issued to it, and the Board's order, the respondent was under a statutory duty to carry at the only scheduled rate all passengers who presented themselves,—not being objectionable in the sense indicated in clause 3 of the respondent's regulations. A company empowered by statute to construct works for the use of the public and to take tolls from persons using its works is bound to take all reasonable care to have its works in a safe condition. *Parnaby* v. *Lancaster Canal Co.* (2); *Mersey Docks Trustees* v. *Gibbs* (3). The same principle should be applied to the present respondent and it cannot escape the performance of that duty by demanding a contract relieving it of its liability for negligence without some consideration other than the payment of the scheduled fare.

There remains for consideration the decision of the Privy Council in *Grand Trunk Ry. of Canada* v. *Robinson* (4). That was a case where the plaintiff, by an arrangement with the owner of a horse, travelled in charge of it upon the railway and (as it was held) upon the terms of a "Live stock special contract" in a form authorized by the Railway Commission. This contract had a condition relieving the appellants from liability for death or injury, even if caused by negligence, to a person permitted to travel with the horse at less than full fare. The decision was that where, under section 340 of the Dominion *Railway Act,* as it then stood, forms limiting liability had been approved by the Board, the companies were able to contract in such cases for complete freedom from liability for negligence. At page 744 Viscount Haldane states:

> Apart from statute, a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry, unless he has effectively stipulated that he shall be free from such liability.

(1) [1909] 2 K.B. 858.
(2) (1839) 11 Ad. & E. 223.
(3) (1866) Q.R. 1 H.L. 93.
(4) [1915] A.C. 740.

And at page 747:

> If the law authorizes it (a special contract) such a contract cannot be pronounced to be unreasonable by a court of justice.

Viscount Haldane was not writing an essay in general on the common law liability of carriers of passengers; he does not, for instance, mention the case of an infant signing such a contract. Indeed, in the extract quoted, at page 744, he is careful to point out that the common law liability remains unless the carrier has "effectively" stipulated that he should be free from liability, and in the extract at page 747 he qualifies his statement by the proviso "if the law authorizes it". Effective stipulations and those that the law authorizes would be such as are discussed in the cases referred to by Lord Coleridge. In my view neither the decision in the *Robinson* case (1) nor anything in the remarks of Viscount Haldane are at variance with the conclusions expressed.

The appeal should be allowed and the judgment at the trial restored with costs throughout.

Appeal dismissed with costs.

Solicitor: for the appellant: *Paul D. Murphy.*

Solicitor for the respondent: *Charles W. Tysoe.*