October 15, 1872, up to the date of this action. We do not yet know what sums he has received, so at present we cannot give decree without further inquiry.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for James Alexander Robertson (Wright's trustee) against Lord Ormidale's interlocutor of 25th June 1873—Recall the interlocutor submitted to review: Find that the defenders, Messrs Blyth & Cunningham, came under no obligation to pay to the defender Wright, during the period libelled, any larger sum in name of salary, or otherwise, than £1, 10s. per week, and that gratuities allowed to the defender Wright, which the other defenders, Blyth & Cunningham, might have withheld at their pleasure, did not become part of the income of the defender Wright till actually paid to him, and consequently were not carried in the hands of the said other defenders by the assignation libelled: Assoilzie the said defenders, Blyth & Cunningham, from the conclusions of the libel, and decern: Find the defender Robert Pringle Wright liable for one-third of the gratuities received by him from the said other defenders between the 15th October 1872 and the date of the present action: Find, of consent of parties, that one-third of said gratuities paid during said period amounts to £25, 11s. 8d., and decern against the defender Wright for that sum accordingly, with interest from and after the date of citation till payment: *Quoad ultra* find the conclusions of the action against the defender Wright excluded by the receipts produced, and assoilzie him therefrom, and decern: Find the defenders Blyth & Cunningham entitled to expenses, and remit the amount of said expenses, when lodged, to the auditor to tax the same and report; and as between the defender Wright and the pursuer, find no expenses due to either party."

Counsel for Robertson—Fraser and Blair. Agent—W. B. Hay, S.S.C.

Counsel for Wright—Solicitor-General (Clark) and Mackintosh. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Blyth & Cunningham—Lord Advocate (Young) and Maclean. Agents—Millar, Allardice, & Robson, W.S.

B., Clerk.

Wednesday, November 26.

SECOND DIVISION.

[Lord Gifford, Ordinary.

STEVENSON *v.* HENDERSON.

Contract—Common Carrier—Peril of the Sea—Liability for Passenger's Luggage—Condition.

A passenger took a ticket by a steamer from port to port; on the ticket were endorsed conditions disclaiming liability for loss from whatever source arising. The vessel was lost on the voyage, and with it the passengers' luggage,—*held*, in an action to recover the value of the luggage against the Steamboat Company, that (1) they had failed to complete their part of the contract; (2) that the conditions on the ticket were insufficient to protect them against the consequences of such failure.

This case came up by reclaiming-note against an interlocutor of Lord Gifford, of date 3d June 1873. The circumstances were as follows:—On 13th July 1871 the pursuer Lieutenant Stevenson, of the 18th Regiment, purchased at the office of the defenders (Robert Henderson and Robert Henderson junior, shipowners, Belfast and Ardrossan, and John Moffat, C.E., Ardrossan), North Wall, Dublin, a ticket which bore to carry him by their steamer "Countess of Eglinton" from Dublin to Whitehaven in Cumberland. The ticket was purchased from the clerk at their booking office in the shed alongside where the steamer was then lying, and it was delivered up by the pursuer to an official of the defenders. The pursuer went on board the steamer immediately after he purchased the ticket. On the afternoon of the same day the steamer, with Lieut. Stevenson on board as a passenger, started on a voyage from Dublin to Silloth, calling at certain intermediate ports, under the command of Mr James Agnew. On the morning of the 14th July the said steamer ran ashore upon the rocks off Langness Point, near Castletown in the Isle of Man, and became a total wreck. The passengers were after some hours rescued from the wreck by means of a communication which was contrived to be effected with the rocks, and they all made their way over the rocks and found refuge in a peasant's hut in the adjacent country. The pursuer arrived at Douglas along with some of the other passengers in a car provided by the defenders' agent, about ten hours after the steamer was stranded, with nothing but the clothes he wore, which were much torn and destroyed, and he was himself thoroughly wet—all in consequence of the wreck. Early in the morning of the following day, viz., the 15th of July, the pursuer proceeded from Douglas to Silloth in a steamer provided by the defenders, and he was forwarded from Silloth to Whitehaven by the defenders, free of expense. The defenders refuse to pay the pursuer the expenses to which he was necessarily put in the Isle of Man. These expenses amount to the sum of £1. Mr Stevenson had with him on his journey a large leather portmanteau, which, together with a few loose articles of luggage belonging to him, were duly put on board the steamer at Dublin. The portmanteau and also all the loose articles of luggage were lost when the wrecked vessel broke up, and were never recovered; and the pursuer claimed as the value thereof, and for damage done to his clothes, a sum of £70.

He further averred that (Cond. 5) "the vessel was wrecked as aforesaid through the fault of the defenders or of those in charge of the said vessel, for whom the defenders are responsible. In particular, as the pursuer believes and avers, the negligence of the master or other officers in charge of the vessel, who neglected, although on the morning in question surrounded by a dense fog and near land, either to slow the engines or to use the lead. The Board of Trade inquiry into the circumstances of the wreck was held at Ardrossan on 1st August 1871, and the result of that inquiry was that the cause of the wreck was found to be as above stated, and that the certificate of the said James Agnew was suspended for three months."

The defenders, in answer, stated that the going ashore of the vessel was an accident of the seas, and that if the pursuer purchased a ticket as alleged in his Condescendence, the ticket had printed upon it a declaration that it was issued "on the condition that the Company incur no liability whatever in respect of loss, injury, and delay to the passenger or to his or her luggage, whether arising from the act, neglect, or default of the Company or their servants, or otherwise." Further, that the defenders never entered into any contract with the pursuer for the safe carriage of his luggage; and the contract was subject to the conditions as to non-liability for injury to passengers or their luggage above expressed. The condition was part of any contract made with the pursuer, and he agreed thereto. The defenders would not have carried the pursuer as a passenger had he declined to agree to the said condition. At the time when the steamer went ashore, she was completely equipped and manned for the voyage, and was under the charge of a careful and able seaman as master.

The pursuer pleaded—"(1) The pursuer having suffered loss and damage by the fault of the defenders to the amount concluded for, he is entitled to decree for said amount. (2) The defenders are, *quoad* the pursuer's luggage, subject to the liabilities of common carriers, and are, as such, liable to make good the loss and damage thereby sustained."

The defenders pleaded—"(1) The pursuer's statements are not relevant, or sufficient in law to support the conclusions of the summons. (2) The action cannot be maintained, in respect that no contract was entered into between the pursuer and the defenders. (3) In the event of its being held that the defenders were under contract, or the liabilities resulting from contract, with the pursuer, they are entitled to absolvitor in respect of the condition which, as above mentioned, formed part of such contract. (4) The going ashore of the steamer not having been due to the fault of the defenders, or any one for whom they are responsible, but having been an accident of the seas, the defenders are entitled to absolvitor. (5) The pursuer's whole material statements being unfounded in fact, the defenders ought to be assoilzied, with expenses."

The interlocutor pronounced by the Lord Ordinary was as follows:—

"*Edinburgh*, 3*d June* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process, Finds that it is sufficiently instructed in point of fact that on or about 14th July 1871 the steamship 'Countess of Eglinton' got upon the rocks off Langness Point, near Castletown, in the Isle of Man, and became a total wreck, and that in consequence thereof certain luggage and articles belonging to the pursuer, who was a passenger on said steamer, were lost and injured: Finds that the loss of the said steamer, and the loss of the pursuer's luggage and property, was occasioned by the fault of the defenders, or those in charge of the said steamer, and for whom the defenders are responsible: Finds, in point of law, that the defenders are liable to make good to the pursuer the loss and damage which he has sustained by and through the loss of the said steamer and property thereon: Assesses the said damage at £50 sterling; therefore decerns and ordains the defenders to make payment to the pursuer of the said sum of £50 sterling in full of the damage concluded for: Finds the pursuer entitled to expenses, and remits the account thereof to the Auditor of Court to tax the same, and to report.

"*Note.*—In the Lord Ordinary's view it is not necessary to determine whether, if there had been no proof of fault, the defenders would have been liable for the value of the pursuer's luggage as common carriers, or as *quasi* insurers, who are liable for the goods entrusted to them, unless they can show that they perished by the act of God or of the Queen's enemies. Passengers' luggage, when lost, and when the cause of its loss does not appear, may often be in a different situation from goods entrusted in ordinary course to a common carrier; and the cases cited at the bar show that it is competent to instruct special contracts, or special limitations of liability, in reference to personal luggage of passengers, for which no separate fare or freight is paid.

"All these questions, however, are really superseded in the present case, for the Lord Ordinary thinks that the pursuer has succeeded in showing that the loss of the steamer 'Countess of Eglinton' was caused by the fault of those in charge of the vessel. It appears to the Lord Ordinary that if this be instructed, then the defenders are liable for the value of the pursuer's luggage, there being no question raised as to any limitation of liability in point of amount.

"On the question, By whose fault the steamer was lost? the Lord Ordinary entertains no doubt the loss was a preventible one. The voyage was the familiar and well-known voyage from Dublin to Douglas, Isle of Man, a voyage performed by many steamers every week. The Langness Rocks, on which the vessel was run, are as well known as any rocks or promontory of the Isle of Man; and if, as is said, these rocks are dangerous, that is only a reason why ships should avoid them, and give them a wide berth. There was no storm, no violent wind, no inevitable accident befel the ship or her machinery; and if there was to some extent a fog, which does not seem to have been very serious, such fog was just a reason why the ship should either stop or proceed with such caution as not to run ashore on any part of the land. There were serious faults in the management of the ship. It is said that the distance she had run was miscalculated; but then, no means whatever were taken to ascertain the distance she had run. The log was never heaved, so as to measure her speed; and no patent log was used, by means of which the distance run would be at once indicated. Then, if the ship's position was merely to be ascertained by observation, the captain was below when the Calf Lights were passed, and did not see these lights, by means of which he could have checked the vessel's position. It is incredible that, from some occult cause which can hardly be suggested, the vessel should have lost or gained way so as to lead to a serious mistake as to her position between the hour of passing the Calf Lights and the hour of the accident.

"Again, when the fog came on, the duty of those in charge of the ship was either to have stopped altogether, or to have gone half-speed, or dead slow, so that, in any possible case, they would be able to back and stop in less than the distance they could see, according to the thickness of the fog. Nothing short of this would prevent collisions. It

is in evidence that when the breakers were seen a good way ahead the ship was going so fast that she had not time to back off them. The lead was never heaved, so as to take the vessel's soundings; and if there was any difficulty in doing this, it was but another reason for stopping her progress, or altering her course. The Lord Ordinary, without inquiring on what individuals the fault rests, has no hesitation in saying that the ship was lost by the fault of those in charge of her.

"If this be so, the defenders are responsible to the pursuer for his luggage. They have failed to prove any special contract with the pursuer in regard to the luggage. It has not been shown that the pursuer's attention was called either to the bills in the office, or to the notice on the back of the ticket, or that the pursuer knew either of the one or of the other. There is no reason to doubt the pursuer's word when he says he never read the conditions on the back of the ticket. Now, it seems fixed that, in a case like this, mere notice, not brought home to and not assented to by the pursuer, is not enough.

"It is not necessary to consider a point which would be of more difficulty, viz., that even if the pursuer had assented to the condition, it would not bind him. Certainly a contract that a person is not to be responsible for his own fault—it may be his own wilful fault—is a most unfavourable contract for the party so stipulating, and will be read very strictly against him; but mere notice on one side does not make a contract.

"The fact that the pursuer was a passenger is not disputed; and although the value of his luggage, or indeed its loss, rests on the pursuer's own evidence, there is no reason to doubt it. Without imputing any exaggeration, however, to the pursuer, the Lord Ordinary has used the privilege of a jury, and has assessed the damage at somewhat less than the pursuer's claims. Full price can hardly be allowed for articles partly used."

Argued for the defenders (reclaimers)—In the first place, we deny any fault whatever in the loss of the vessel, either on our own part, or on that of our servants. Even supposing it were held that the fault were proved by the evidence adduced before the Lord Ordinary, any claim is excluded by the condition endorsed on the ticket. As to the question of the pursuer's having read the ticket or not, see the cases of *Walker* v. *York and North-Eastern Railway; Peninsular and Oriental Steam Navigation Company* v. *Shand; Slim* v. *Great Northern Railway;* and *Zunz* v. *South-Eastern Railway*. If we are under a special contract in this case there can at all events be no doubt as to the meaning of that contract. *Carr* v. *Lancashire and Yorkshire Railway; Austin* v. *Manchester Railway; Hinton* v. *Dibbin; Stewart* v. *London and North-Western Railway; Macaulay* v. *Tenby Railway*. In short we maintain—(1) The Lord Ordinary was wrong in holding fault proved. (2) Even were fault proved, it does not signify under the contract. The case is governed by the following material considerations. (1) The defenders are carriers at common law, not under the statute; neither the Carriers Act nor the Railway and Canal Traffic Act apply. (2) The pursuer entered with the defenders into the contract, and his not having seen the conditions printed on the back of the ticket affords him no relief. (3) There can be no doubt as to the terms of the contract if there was one.

Argued for the pursuer (respondent)—By the law of Scotland public carriers cannot enter into a contract by which they are absolved from their own liability. 1 Bell's Com. § 501–4. Public carriers are bound to take goods or passengers on the ordinary terms, and are not entitled to make any limitations of the kind to their contracts. None of the cases quoted by the defenders' counsel were authorities coming up to the point that carriers were to be freed from the consequences of their own negligence by special contract. Addison on Contracts, 446, 472, and 479. In order to escape liability by negligence the carrier must show not only notice but actual assent. Here there is no express consent, and there cannot be held to be an implied consent. Was Mr Stevenson bound to know what was on the back of the ticket? We do not admit that the ticket was part of the contract; it was merely the voucher thereof. There are certain conditions which a company are entitled to make, and others which they are not so entitled to make. This is one of the latter, for it nullifies the material elements of the contract. Three propositions may be laid down—(1) There must be evidence of assent, actual or constructive. (2) There is no evidence of such consent. (3) Looking to the nature of the condition, we cannot construe the mere fact that pursuer went on board the vessel into an assent.

Pursuer's authorities—1 Bell's Com. (M'Laren), 501–2–3; *Walker* v. *York and North-Eastern Railway*, 2 Ellis and Blackburn, 750, and 25 L. J. (Q.B.), 75; *Peninsular and Oriental Steam Navigation Company* v. *Shand*, 3 Moore P.C. Rep., N.S., 272; *Slim* v. *Great Northern Railway*, 23 L.J. (C.P.), 166; *Zunz* v. *South-Eastern Railway*, May 1869, 4 L.R. (Q.B.), 539, and opinion of Cockburn, C.J., p. 545; *Carr* v. *Lancashire and Yorkshire Railway*, 21 L.J. (Exch.), 261, and 7 Ex. 707; *Austin* v. *Manchester Railway*, 21 L.J. (C.P.), 179, and C. B., 454; *Hinton* v. *Dibbin*, 2 Ad. and Ellis (Q.B.), 646; *Macaulay* v. *Tenby Railway*, Nov. 15, 1872, 8 L. R. (Q.B.), 57; *Stewart* v. *London and North-Western Railway*, 33 L. J. (Exch.), 199.

Defenders' authorities—*M'Role*, 6 L. R. (Q.B.), 618; Addison on Contracts, 446 and 472–9; *Ferguson, Rennie, & Co.*, 2 Macph., 76.

At advising—

The Lord Justice-Clerk read the following opinion:—

The case stated on the record for the pursuer is, that on the 13th July 1871 he purchased a ticket from the defenders which authorised him to travel as a passenger, with his luggage, by their steamer "Countess of Eglinton" from Dublin to Whitehaven, on the coast of Cumberland; that through the negligence of the defenders or their servants the vessel was wrecked on the voyage; and that thereby his portmanteau was lost, for the value of which he now sues.

I concur with the Lord Ordinary so far as his judgment proceeds on the proof of negligence on the part of the defenders, and that on the grounds which he has explained in his Note. The defenders, however, plead that they are liberated from responsibility for their own negligence by reason of the conditions printed on the back of the ticket which was delivered to the pursuer on payment of his fare, and which appear to have been inserted also in the published bills of the company, These conditions are as follows—"that the com

pany incurs no liability whatever in respect of loss, injury, or delay to the passenger, or to his or her luggage, whether arising from the act, neglect, or default of the company or their servants or otherwise." The ticket also bears to be "subject to all the conditions and arrangements published by the company."

The law on this subject has been matter of much controversy, and even now is not in a precise or satisfactory state. In Scotland the responsibility of common carriers by sea as well as by land is regulated by the rules which have been founded or engrafted on the Roman edict. It has been frequently questioned how far common carriers can limit their obligations as to safe carriage by general notices to the public, or even special notice to the customer, in cases of special risks. Prior to the Carriers Act in 1831, the opinion of Scottish lawyers, as expressed by Mr Bell, seems to lean to the view that while a carrier might cover special risks by special charges, he could not limit his liability by notice. This was probably too restricted a view; but we have few precedents in recent decisions on the subject. In England the authority of the edict is not acknowledged; but the rules of the common law are not materially different. In that country, also, prior to the Carriers Act, the effect of such notices gave rise to much difference of opinion. Lord Ellenborough went so far as to affirm absolutely that a common carrier might by notice exclude all liability for loss in the carriage of persons or goods. An instructive account of the progress of the law on this subject will be found in a very full and able opinion delivered by Chief Justice Earle, while one of the Judges of the Court of Common Pleas, in the case of *Macmanus* v. *The Lancashire & York Railway Company*, 4 Thurlston & Norman, p. 327, in which he describes the diversity of opinion and decision which led to the passing of the Carriers Act. That distinguished lawyer expressed a strong opinion in favour of the carrier's right to prescribe for himself the terms on which he was willing to carry; looking on these arrangements not as contracts in the strict sense of the word. But he gives no sanction to the view that they could exclude liability for negligence. Some twenty years after the Carriers Act, the statute called the Traffic Act was passed, which, however, was confined to railways and canals, leaving carriage by sea to be regulated by the law as it had previously stood.

The leading provision of this statute, which Mr Smith in his work on Mercantile Law justly calls obscure, has been the subject of much discussion and of some conflicting decision. As now interpreted, it declares all notices, conditions, or declarations made by a company of carriers, exempting themselves from loss arising from their own neglect or default, to be null and void; but excepts from this provision special contracts, provided they are signed by the customer and are such as a court of law may find to be reasonable. Whether, and to what extent, these provisions restrict or enlarge the common law remains doubtful. Many cases have occurred since the statute, which are collected and referred to in Mr Smith's work, and several of these, applicable to cases which were found not to be regulated by the statute, were quoted to us from the bar.

The present case, however, presents this subject n an aspect different from that of any of the decided cases. All the authorities cited relate to exceptions from the ordinary liabilities of carriers in regard to special incidents or risks; and we may assume that in such cases, conditions printed on the back of the ticket delivered to the customer, coupled with previous notice to the public, and followed by the use of the conveyance on the part of the customer, may be evidence from which a jury may infer a special contract by which the passenger or owner will be bound. The consideration in such a case is the undertaking by the carrier to carry for the ordinary fare. But the question here is, Whether, where no special risk is averred, and when the conditions go to the very essence of the ordinary obligations and risks imposed by the common law, such evidence as we have here will be sufficient to infer assent on the part of the customer; and if so, how far these conditions extend?

It was admitted in argument that conditions which are repugnant to the essential nature of the contract are not to be presumed. It is therefore important to inquire what was the nature of the contract made between these parties.

Apart from the alleged conditions, I do not think it doubtful that the defenders, as common carriers, were bound on the offer of their published fare to carry the defender and his luggage from Dublin to Silloth. They could not have refused him, and he might have sued them if they had. In regard to a passenger and his luggage, they were not absolute insurers, but undertook to perform the transit with reasonable care and diligence. They did not perform the voyage with reasonable care and diligence, but in consequence of their own neglect they wrecked the vessel on a rock upon the Isle of Man, and one result of their doing so was the loss of the pursuer's luggage. They therefore broke their contract, and are liable in reparation.

But if the conditions founded on, which are printed on the back of the ticket which was given to the pursuer as a voucher for his money, formed a constituent part of the contract, and bear the construction put upon them by the defenders, it follows that the defenders did not undertake to perform the voyage with reasonable care and diligence; and therefore were guilty of no breach of contract when they failed to do so. What, then, did they undertake to do, as the counter part of the payment made to them? For as they could only perform the voyage by their servants, if they are not liable for the fault of their servants in failing to perform it, it follows that the performance of the voyage was no part of their obligation. Thus the contract would not have been broken if the master had refused to sail, or had wilfully left the pursuer on shore, or had stopped half way. Under the Traffic Act such a stipulation is illegal. See the remarks of Chief Baron Kelly in the case of *Rooth* v. *The North Eastern Railway*, 2 Law Reports, Exch. p. 173, where such a stipulation in regard even to a special risk was found to be unreasonable. It is true that this case is not under the statute; but it seems not immaterial that the Legislature has declared notices to such effects to be illegal, and that the Courts of law have found contracts to that effect to be unreasonable in regard to land carriage. And as regards the evidence of special contract, it is also important that the Legislature thought the signature of the customer essential to the validity of such contracts for carriage by land. If, indeed, in cases outside the statute, there is a clear and deliberate contract to this effect on the

part of the customer, the law, I apprehend, must enforce it. But the evidence of assent to such a stipulation must be clear and explicit. It by no means follows that because such a contract may be readily inferred from such evidence as we have here, where the risk is special, and the consideration sufficient, the same thing must be inferred where the risk is not special but ordinary, and where therefore there is no special consideration.

The cases cited to us were all of the former description. In the case of *Zunz*, in which Lord Chief-Justice Cockburn delivered the opinion so strongly founded on, the company had covenanted to be free from the consequences of the neglect of the servants of another company, over whom they had no control. So in the case of *Stewart*, where the stipulation regarded luggage carried by an excursion train at less than the ordinary fare. These cases were found not to fall under the Traffic Act, because the companies were not acting as common carriers, but under special contract. So in the cases of *Carr*, and *Austin*, and others which have been cited, relative to the carriage of horses, or cattle, or fish, these were all held to be and were cases relative to special risks. But when I am asked to find on such evidence as we have before us that a company of common carriers have freed themselves of all common law obligation in the ordinary conduct of their trade, I feel that I am asked to go much farther than any of the decisions, and am inclined to concur with the Lord Ordinary in thinking that no such engagement has been proved. Without saying absolutely that the defenders could not stipulate to be free from the consequences of their own fault, or, what is nearly the same thing, from all absolute obligation whatever, I hesitate to accept the evidence as sufficient to establish such a contract.

But there still remains the second question: Did these conditions, expressed on the back of the ticket, and contained in the printed bills, embrace the contingency of the non-performance of the voyage; or did they only relate to incidents and risks occurring during the voyage? I am of opinion that the non-performance of the voyage, caused by the fault of the defenders, was a breach of the essence of their contract, which the conditions did not touch, and were not intended to reach. Even if an exemption from liability for the incidental negligence or fault of servants during the voyage had been shown to be part of the stipulation between the parties, I do not think that the terms of this stipulation can be held to liberate the company from the obligation to complete the voyage.

Even in the cases of special risk which have been referred to, it is by no means clear that if the goods carried had perished by a collision or other accident independent of the special risk, and caused by the fault of the carriers, they would have been held free. In the present case, apart from the question of evidence altogether, I think the conditions did not cover the event which occurred.

If your Lordships concur with me in this last view, it is sufficient for judgment.

Lord Cowan read the following opinion —

I concur with the Lord Ordinary in holding it established by this proof "that the loss of the steamer and the loss of the pursuer's luggage and property was occasioned by the fault of the defenders, or those in charge of the said steamer, and for whom the defenders are responsible;" and this loss of the steamer, and of the pursuer's luggage with it (it is farther proved), occurred through the vessel being run on certain rocks near to the Isle of Man, when she became a total wreck, the crew and passengers escaping only with their lives. It is all material, with reference to the defence stated to the action, to keep in view that this occurred in course of the voyage from Dublin to Whitehaven, and that thereby the primary obligation of the defenders to carry passengers and their luggage in the steamer to her port of destination was left unfulfilled.

The defence to the pursuer's claim for payment of the value of his lost luggage is based upon certain conditions, which are printed on the back of the ticket given to him on payment of his passage money when going on board the steamer. These conditions are to the effect "that the company incur no liability whatever in respect of loss, injury, and delay of the passenger, or to his or her luggage, whether arising from the act, neglect, or default of the company, or their servants, or otherwise." Upon the effect of these words in limiting the liability that might otherwise have attached to the defenders there has been a great deal of argument addressed to the Court, and the decisions in England bearing on the question have been fully canvassed. It was admitted that the statutes 11 Geo. IV., and 17 and 18 Vict., did not apply to this case, inasmuch as they had regard to land carriage, and not to the carriage of goods and others by sea. The principles to rule the case must therefore be sought for in the liability imposed upon carriers by sea or by land at common law, and the validity of notices to limit their liability for such loss or damage as occurs in this case.

Two questions arise on which it is necessary for the Court to form their judgment. The first is, whether there was here a special contract or arrangement to which the pursuer must be held to have acceded, and by the terms of which, according to the just construction of the words of it, he must be bound; and the second question is, whether the agreement can be held to be applicable in the peculiar circumstances of this case, having regard to the breach of contract chargeable against the defenders, inasmuch as that through their own fault the voyage from Dublin to Whitehaven was never completed. These two questions to some extent run into and interlace each other; and the result at which I have arrived is, that the defence against the claim of the pursuer is not well founded.

As regards the contract alleged to have been constituted by means of the indorsation on the back of the ticket, it appears to me that the argument of the defenders is so far well founded. On the cases to which reference was made in the argument, I cannot think it doubtful that the terms of the condition endorsed on the ticket must be held to have been assented to by the pursuer, and to enter into the contract between him and the defenders. The law is so stated by Lord Chief Justice Cockburn in his judgment in the case of *Zunz*, May 1869, 4 Law Reports, Q.B. 544; and there is no adverse authority in any more recent case by which that statement of the law has been impugned. A question has, no doubt, been stirred in some of the cases to the effect that gross negligence on the part of the company, or their servants, cannot be legally held to be within the notice of limitation, however expressed. This view, however, was not sanctioned by the Court, and I am

not sure whether, though it had been, we would have held that in this case, on the facts held to be proved, it could have been availably pleaded by the pursuer. Did the decision of this case, therefore, depend simply on the terms and effect of the indorsement on the ticket, I could not have acquiesced in the decision of the Lord Ordinary. But I have arrived at the same conclusion on the ground that, having regard to the circumstances in which the pursuer has been deprived of his property through the fault of the defenders, the condition is inapplicable, and does not preclude his right to redress.

The primary obligation undertaken by the defenders was that the pursuer and his belongings should be conveyed safely in the steamer to Whitehaven, the port of destination, and hence, when through their fault the voyage was never completed, and their agreement thereby broken, it is a necessary sequence that the loss and damage suffered in that manner must be made good to the party injured. The question is, whether the notice indorsed on the ticket can be held to have contemplated such a case. The terms of it do not express any such eventuality as having the effect of limiting the defenders' liability. Loss or injury suffered by passengers in the ordinary prosecution of the voyage may be held to be fairly within the terms of the notice, and the limitation of the company's liability in that respect to have been assented to by the pursuer when he took his ticket. But when, through the fault of the defenders, the voyage itself was terminated ere the vessel reached its destination the loss thereby suffered by passengers stands in a totally different situation. The wreck of the vessel and consequent frustration of the voyage are directly traceable to the defenders' breach of their primary contract to convey the pursuer from the one port to the other. Can the limiting words of the notice embrace loss suffered from that cause—be it that it originated in the fault or negligence of the company or their servants? It is here that the importance of the distinction arises which was pressed in argument by the pursuer's counsel. A passenger by taking his ticket indorsed as this was, may well enough be held to have assented to the limited liability stipulated for in respect of losses arising in the course of a voyage duly prosecuted, or fairly sought to be completed, though frustrated by the act of God or the Queen's enemies. But can his assent be implied to such extraordinary circumstances as occurred in this case, whereby, through fault of the defenders, the voyage was never accomplished, and the vessel, with the pursuer's property, sent to the bottom of the sea? I do not think that this can be implied. Had the limitation been intended to cover such a case, it ought to have been expressly stipulated that it should receive effect though the voyage was interrupted and never completed through the fault or negligence of the defenders or their servants. Whether such a stipulation would have been legal had it been expressly made it is not necessary to inquire. All that the pursuer is concerned with is, that it cannot be implied from the terms of the notice to which he is presumed to have assented.

Lord Benholme—I concur in your Lordship's judgment in this case; and as between the two alternative views which have been stated by the Lord Ordinary in the note to his interlocutor, and by Lord Cowan, I am clearly of opinion that the former is the correct one. I concur in what I understand to be your Lordship's view, namely, that the question as to whether such a condition as that imposed by the defenders in this action is to be binding or not, depends on the nature of the evidence of assent on the part of the passenger. I very much agree with the view arrived at and stated by the Lord Ordinary in his note, that the condition in this case is such a special one that nothing short of express evidence of assent by the passenger would suffice to bind him.

Lord Neaves—In this case I cannot possibly concur in the grounds upon which the Lord Ordinary has arrived at his decision. The matter of the general liability of a merchant ship in a question of carriage is itself attended with considerable difficulty. A shipowner when he conveys goods in his ship undertakes not to carry the goods to their destination, but only to use his best efforts to do so. He certainly does not become an insurer or place himself in the position of one who insures the goods to the amount of their value. The edict *nautae et caupones* is a prætorian explanation of the Roman law of deposit, and this law of deposit in the case of an innkeeper and the captain of a ship has, from the special surrrounding circumstances by which persons in those positions are invested, fallen under especial rules devised for the equitable regulation of those circumstances. A passenger is not a deposit at all; he is in quite a different position. As to his luggage, it does not appear to me to be at all clear that it is necessarily deposit either. Many a passenger, for instance, when on board ship, takes his luggage to his own berth, and keeps it there in his own charge, and never entrusting it to the care of the ship's officers at all.

My opinion is, that in the position in which the owners of this steamship were, and in which similarly situated persons are, they are not necessarily bound to become common carriers, they are only bound to become carriers on that footing on which they themselves chose, according to the conditions which they advertise. There is not any statute applicable to their position, and the only requisite is that there be assent to the conditions by the other contracting party. I think, as to the nature of these conditions, that it is competent for them to make any conditions they please. In cases such as this, and in this case, I am of opinion that the ticket with the conditions printed on the back of it is part of the contract, and in that matter I cannot agree with the view adopted by the Lord Ordinary. The circumstances of the case render this special contract as binding as any contract entered into under particular conditions.

Upon this view, then, the only question which arises is, how this agreement must be construed. I cannot look at this as a question for a jury, a question whether or not in point of fact, Lieutenant Stevenson assented to these printed conditions, for there was not required in my opinion in this case any particular evidence of assent at all. What then is the import of this case? I acknowledge that the enquiry is attended with considerable difficulty, but, my Lords, I am disposed to think that the contract does not cover the case in hand, and did not as entered into contemplate the special event which subsequently occurred. It would have been a different matter altogether if nothing had happened except the disappearance of this gentleman's luggage when he arrived at the termination of his

journey, but that was not at all his position. The damages here given must not be held as for the lost luggage—this £50 awarded by the Lord Ordinary is the consequence of gross misfeasance and mismanagement on the part of the shipowners, it is not for Lieutenant Stevenson's luggage that he was bound to take care of, but he was by the fault of the Steamboat Company placed in a position in which, for his own safety he was obliged to withdraw his care of the luggage, and for the loss caused by that fault he is entitled to claim compensation.

The Court adhered with additional expenses.

Counsel for Pursuers (Respondents)—Mackintosh and Watson. Agents—Dundas & Wilson, W.S.

Counsel for Defenders (Reclaimers)—Solicitor-General (Clark) Q.C. and Balfour. Agents—Maconochie & Hare, W.S.

Wednesday, November 26.

FIRST DIVISION.

[Sheriff of Mid-Lothian.

APPEAL—ROBERT GIBSON NEILL, IN NEILL'S SEQUESTRATION.

Bankruptcy Act 1856, 19 *and* 20 *Vict. cap.* 79, § 146.

Circumstances in which a bankrupt applying for discharge in terms of the Bankruptcy Act 1856—*held* not entitled to discharge.

The estates of Mr Robert Gibson Neill, farmer, were sequestrated in February 1871, and a trustee was appointed. In July 1873, more than two years after the date of his sequestration, he presented a petition to the Sheriff for discharge without consent of his creditors.

The Sheriff-Substitute (HAMILTON) pronounced the following interlocutor:—

"*Edinburgh*, 18*th July* 1873.—The Sheriff-Substitute having resumed consideration of the foregoing petition, with the report by the trustee as to the petitioner's conduct, and other documents produced, and having heard counsel for the petitioner and the agent for the trustee—Refuses, *in hoc statu*, the prayer of the petition.

"*Note.*—When a bankrupt applies for his discharge after the lapse of two years from the date of sequestration, without the consent of creditors, it is essential that the trustee's report as to his conduct, which is held to come in the place of such consent, should be favourable, at least upon the main points specified in the 146th section of the statute.

"In the present case, while the application is presented in the circumstances referred to, the report of the trustee, so far from being favourable, is to the effect that the bankrupt 'has not made a fair discovery and surrender of his estate; that he has attended the diets of examination, but has failed to make a proper disclosure of the state of his affairs; that he has been guilty of collusion and concealment of his estate; and that the bankruptcy has not arisen from innocent misfortunes or losses in business, sequestration having been awarded on the petition of the bankrupt when he had under his control funds sufficient to have settled with his creditors.' It is impossible, in the face of such a report, to do otherwise than refuse the discharge.

"In supporting the application, counsel for the bankrupt relied mainly upon the fact that when tried before the High Court of Justiciary in February last upon a charge of fraudulently putting away or concealment of his effects, or fraudulent bankruptcy, the bankrupt was acquitted by the unanimous verdict of the jury. It does not seem to the Sheriff-Substitute that that fact has any real bearing upon the present question.

"At the most, it would suggest a doubt as to the accuracy of some of the statements contained in the trustee's report. The Sheriff-Substitute, however, is well acquainted with the circumstances of the sequestration, the lengthened public examination of the bankrupt having been taken before him, and he is satisfied that the trustee could not have reported otherwise than he has done.

"It appears that, notwithstanding that the bankrupt has thrown every obstacle in the way of the discovery and realisation of the estate, the trustee has succeeded in recovering sufficient funds not only to meet the expenses of the sequestration, but to yield a dividend of 18s. in the pound for the creditors.

"In these circumstances the bankrupt should have no difficulty in overcoming the opposition which the trustee has thought it right, in the interest of the creditors, to make to the present application."

On August 1, 1873, the Lord Ordinary on the Bills remitted to the Accountant in Bankruptcy to report as to the matters contained in the trustee's report. The accountant concurred with the trustee in holding that the bankrupt's conduct had not been such as to entitle him to discharge.

The bankrupt appealed against the judgment of the Sheriff-Substitute.

At advising—

LORD PRESIDENT—This is an application for discharge by a bankrupt in terms of sec. 146 of the Bankruptcy Act of 1856. It is presented more than two years after the date of the sequestration, and so without the consent of the creditors, but it is indispensable to the granting of such an application that the trustee should report as to the bankrupt's conduct, and it is in the power of the Lord Ordinary, of the Sheriff, or of your Lordships, to discharge the bankrupt, to refuse the application, or to defer consideration of it. Now the points on which the trustee is directed to report are, first, how far the bankrupt has complied with the Act, and has made in particular "a fair discovery and surrender of his estate, and whether he has attended the diets of examination, and whether he has been guilty of any collusion, and whether his bankruptcy has arisen from innocent misfortunes, or losses in business, or from culpable or undue conduct." Now the report of the trustee is to the following effect:—"(1) That the bankrupt Robert Gibson Neill has not made a fair discovery and surrender of his estate. (2) That he has attended the diets of examination, but has failed to make a proper disclosure of the state of his affairs. (3) That he has been guilty of collusion and concealment of his estate. (4) That the bankruptcy has not arisen from innocent misfortunes, or losses in business, sequestration having been awarded on the petition of the bankrupt when he had under his control funds sufficient to have settled with his creditors. The bankrupt has sustained losses through speculation in the shares of 'bubble companies,' but such losses, so far as disclosed, do not