Friday, December 18.

SECOND DIVISION.

[Lord Anderson, Ordinary.

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

Process—Proof or Jury Trial—Reparation—Questions of Law Involved—Injury to Passenger on Steamer—Effect of Conditions on Ticket Excluding Liability.

In an action at the instance of a passenger on a passenger steamer against the owners for damages for personal injuries sustained by him on the return voyage, the defenders pleaded that any liability on their part was excluded by the conditions printed on the face of the ticket issued to and accepted by the pursuer. The Court (*rev.* judgment of Lord Anderson, Ordinary, allowing an issue and a counter-issue) *remitted* the cause to the Lord Ordinary to allow a proof before answer.

Mitchell Humphrey Williamson, commercial traveller, Lerwick, *pursuer*, brought an action against the North of Scotland and Orkney and Shetland Steam Navigation Company, Aberdeen, *defenders*, in which he claimed £500 damages for personal injuries while travelling as a passenger in the steamer "St Clair" on his return journey from Aberdeen to Lerwick.

The parties, *interalia*, averred—"(Cond. 2) In the beginning of February 1913 the pursuer embarked as a passenger on board the defenders' steamer "St Nicholas," one of said fleet, at Scalloway Pier, where she lay for the purpose of embarking passengers, and left for Aberdeen on his way to Leith in order to interview his employers on business matters. Some considerable time after the steamer had left Scalloway Pier, and in the course of her voyage, the pursuer was asked by the defenders' servants to pay his fare, and he paid to one of the defenders' servants the first-class return fare between Scalloway and Aberdeen. The defenders' said servant thereafter handed to the pursuer a return first cabin ticket between Scalloway and Aberdeen. The defenders' statements in answer so far as not coinciding herewith are denied. Explained with reference thereto that neither when the pursuer paid the fare as before condescended on, nor at any other time, did the defenders or any of their servants inform the pursuer or otherwise bring to his notice that the condition referred to was part of the contract. Nor was the pursuer aware, nor did he see, that said alleged condition appeared on said ticket or formed part of said contract, and at no time was he asked to assent, nor did he ever assent, to said condition or any condition. Not known and not admitted that steamers engaged in similar trades to that of the defenders in Scottish waters carry passengers only on the same or similar conditions. In any case he had no option but to pay his fare, which he did when the ship was at sea. The only contract between the pursuer and defenders when they received him on board at Scalloway as aforesaid was to carry him safely on board the steamer on which they had unconditionally received him for conveyance. Further, the said alleged condition is printed in type so small that it is practically illegible. Explained further that it is the defenders' custom when issuing return tickets to retain the outward half or to collect the same immediately after issue. (Ans. 2) Admitted that in the beginning of February 1913 the pursuer left Scalloway on one of the defenders' steamers for Aberdeen; that after the steamer had left Scalloway Pier, and in the course of her voyage, the pursuer paid to one of the defenders' servants the first-class return fare between Scalloway and Aberdeen, and that the defenders' said servant thereupon handed to the pursuer a return first-class cabin ticket between Scalloway and Aberdeen. The purpose of the pursuer's journey was unknown to the defenders. *Quoad ultra* denied. Explained that the pursuer was a frequent traveller by the defenders' steamers, and was at one time an A.B. serving on board one of these steamers. As a traveller by the defenders' steamers he had frequently received and used their tickets, both single and return, which have printed across the face the following condition—'This ticket is issued subject to all the conditions mentioned on the company's sailing bills, and that the company is not liable for any injury, loss, delay, or accident to passengers or their luggage, however the same be caused, whether by negligence of their servants or otherwise, nor for any sea, river, or steam risks whatsoever.' The pursuer was thus well aware of the terms of said condition. On the occasion of the voyage in question a complete return ticket with the usual condition in the terms above quoted (a sample of which is herewith produced and referred to) was handed to the pursuer in return for his fare by one of the defenders' servants shortly after the steamer left Scalloway. The pursuer without protest accepted said ticket, which, with the said condition on the face of it, constituted the contract of carriage entered into between the pursuer and the defenders for the voyage to Aberdeen and back to Scalloway. It was not till after the steamer had left Stromness on the voyage to Aberdeen that the half ticket for the passage from Scalloway to Aberdeen was collected by the mate from the pursuer. Further explained that, as is well known to the pursuer, steamers engaged in similar trades to that of the defenders in Scottish waters only carry passengers on the same or similar conditions."

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

On 19th June 1914 the Lord Ordinary (ANDERSON) approved of the following issue proposed by the pursuer, viz.—"Whether

on or about 18th February 1913, upon the defenders' steamship 'St Clair,' lying at Scalloway Pier, Shetland, the pursuer was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer?" and of the following counter-issue proposed by the defenders, viz.—"Whether at the time of the accident to the pursuer he was a passenger by the defenders' steamer 'St Clair' under and in terms of the conditions which are set forth on the ticket issued by the defenders to him, whereby the defenders are not responsible for personal injury to him while a passenger?"

Note.—"In this case the pursuer sues for damages in respect of personal injuries sustained by him while he was in course of disembarking from the defenders' steamship 'St Clair' at Scalloway in Shetland.

"The pursuer is a commercial traveller residing at Lerwick, and he represents a Leith firm in the Orkney and Shetland Islands. In the beginning of February 1913 he left Scalloway for Aberdeen on the defenders' steamer 'St Nicholas' with the object of going to Leith to interview his employers on business matters. He avers that, after the steamer had left Scalloway pier and was in the course of her voyage, he purchased from one of the defenders' servants a first-class return cabin ticket from Scalloway to Aberdeen. He states that the defenders did not inform him, or otherwise bring to his notice, that the condition printed on said ticket was part of the contract; and he avers that he was not aware, nor did he see, that said alleged condition appeared on said ticket or formed part of said contract. It will be observed from the sample ticket produced that the condition referred to is printed on the front or face of the ticket, and in such a way that if either half of the ticket is removed, what remains of the printed conditions is unintelligible. The pursuer alleges that it is the defenders' custom when issuing return tickets to retain the outer half or to collect the same immediately after issue. He further points out that the condition is printed in type so small that it is practically illegible.

"The pursuer journeyed safely to Leith, and left Aberdeen on his return journey to Scalloway on 17th February 1913 by the defenders' steamer 'St Clair.' As the pursuer was proceeding to leave the steamer at Scalloway at an early hour on the following morning he fell to the main deck of the vessel from a gangway which was laid between the poop and bridge decks. He avers that he fell from said gangway and sustained injuries because of the negligence of the defenders' servants in leaving the railing of said gangway in an insecure and dangerous condition.

"The pursuer proposed an issue of fault in ordinary form, and at the adjustment of issues it was not disputed that he had relevantly averred fault on the part of the defenders' servants, for which the defenders are in law responsible.

"The defenders, however, maintained that they were entitled at this stage of the action to have their 5th plea-in-law sustained and decree of absolvitor pronounced. That plea is as follows—"The pursuer having accepted the passenger's ticket issued by the defenders, subject to the condition thereon, and being aware of said condition, all as condescended on, the defenders are entitled to absolvitor.' The condition referred to, which is printed on the face of the ticket, is set forth in answer 2, and purports to absolve the defenders from liability for any damage occasioned to passengers by the negligence of their servants. It will be observed that the plea-in-law which I was asked to sustain postulates two things—(1) that the pursuer was aware of the condition; and (2) that he accepted the condition as a part of the contract under which he was carried by the defenders. These appear to me to be questions of fact, and *prima facie* are for the jury and not the judge to determine. It seems to me that I would only be entitled to decide the case as suggested by the defenders if I could hold that there were no questions to go to the jury relating to this condition—in other words, that I would be bound in the jury court to nonsuit the pursuer at the conclusion of his evidence. I am unable to hold that the case presents this aspect.

"There are two initial difficulties which face the defenders and which may be solved one way or the other by an elucidation of the facts. The first arises on the pursuer's averment that he did not get the ticket until he was on the high seas. If this be so, it is difficult to see how he can be bound by a condition attempted to be adjected to a contract of carriage already concluded. The shipping notices, setting forth the time and place of sailing, constitute an offer which the pursuer says was accepted, and the contract of carriage thus completed by his boarding the ship as a passenger. The common law incidents and obligations of that contract were thereupon set up, and the ticket which he subsequently got had no other efficacy or legal signification than as vouching the payment of his fare. If the condition referred to was intended by the defenders to qualify the common law obligations of the contract, the pursuer should have had an opportunity of accepting or rejecting it before he embarked on the voyage. No option was open to him when he received the ticket on the high seas.

"The second difficulty which may face the defenders depends also on proof of the facts. If the pursuer had one half of the ticket taken from him before he had time or opportunity to read the condition, how could it be affirmed that he assented to the condition?

"On the main question I had an interesting debate and ample citation of authority. The cases quoted were mainly English, and there is a difficulty in applying these to our procedure, the practice in England being to have the facts ascertained and adjudicated upon by a jury before considering and determining the question of law.

"It seems to me that there is a presumption against the defenders in the matter. They are endeavouring to escape their com-

mon law responsibility for the negligence of their servants. The *onus* is therefore upon them to establish that the pursuer assented to this limitation of his common law rights. This, as I have said, seems to be a question of fact. The defenders say I must answer it as suggested by them on these grounds—that the condition was on the face of the ticket; that the pursuer must therefore have seen it; that having seen it, he must be held to have read it; that as he made no demur or protest, it must be assumed that he accepted the condition, and so is bound by its terms. I feel myself unable to draw these inferences in the absence of a full elucidation of the facts, and therefore I think it is for the jury and not for me to determine the point.

"The English cases cited were these—*Zunz* v. *South-Eastern Railway Company*, 1869, L.R., 4 Q.B. 539; *Parker* v. *South-Eastern Railway Company*, 1877, L.R., 2 C.P.D. 416; *Burke* v. *South-Eastern Railway Company*, 1879, L.R., 5 C.P.D. 1; *Watkins* v. *Rymill*, 1883, L.R., 10 Q.B.D., 178; and *Richardson, Spence, & Co.* v. *Rowntree*, 1894, A.C. 217.

"These decisions cannot all be reconciled. The judgments in *Zunz*, *Burke*, and *Watkins* are certainly in the defenders' favour, and appear to decide that if there are conditions on a ticket they bind the person who receives the ticket, that his acceptance of the conditions is to be presumed, and that the question is one of law to be determined by the Court. On the other hand it is laid down by the majority of the Court in *Parker*, and by the House of Lords in *Rowntree*, that the question whether the printed condition has been accepted is a matter of fact to be decided by the jury. This was also the decision of the House of Lords in the Scotch case of *Henderson* v. *Stevenson*, 1875, 2 R. (H.L.) 71. In that case the conditions were printed on the back of a railway ticket, and it was held by the Second Division and the House of Lords that these conditions were not imported into a contract of carriage, the person receiving the ticket not having actually read the conditions, and not having had his attention directed to them by anything printed on the face of the ticket or by the carrier himself when issuing it. The Lord Chancellor (Cairns) puts the matter thus—'The question therefore resolves itself simply into this—Is the mere fact of handing a ticket of this kind to an intending passenger at the time that he pays his fare sufficient to hold him so affected by everything which is printed upon the back of the ticket that even without seeing or knowing what is printed on the back he is to be held to have contracted in the terms indicated upon the back of the ticket?' It was urged that the Lord Chancellor emphasised the point that the conditions were on the back of the ticket, and that it makes all the difference that in the present case the printed conditions were on the face of the ticket. I am unable so to hold. If the recipient of a ticket ought to read, or is to be presumed to have read, what is on the face of a railway ticket, it seems to me the same should apply to what is on the back of the ticket, and the one side of the ticket is as likely to catch the eye as the other. Lord Chelmsford puts the matter quite generally where he says—'I think that such an exclusion of liability for negligence cannot be established without very clear evidence of the notice having been brought to the knowledge of the passenger and of his having expressly assented to it. The mere delivery of a ticket with the conditions endorsed upon it is very far, in my opinion, from conclusively binding the passenger.'

"The other Scotch cases cited were *Lyons & Company* v. *The Caledonian Railway Company*, 1909, S.C. 1185, 46 S.L.R. 848—a case which was decided after a proof in the Sheriff Court, in which the recipient of the ticket admitted that he was aware of a notice on the face of the ticket which referred him to conditions printed on the back thereof; and the Outer House cases of *Grieve* v. *The Turbine Steamers, Limited*, 1903, 11 S.L.T., 379, decided by Lord Stormonth Darling, and *Caird* v. *Adam*, 1907, 15 S.L.T., 543, decided by Lord Salvesen, in both of which the facts and pleadings are similar to those in the present case. Mr Murray contended that these cases ought not to be regarded as authorities against him because the point now maintained was not argued. I am not prepared, however, to hold that an argument was not submitted on this point in these cases, although the reports do not disclose that this was done, as I find that in each case a plea-in-law similar to plea 5 in this case was stated, and in the case of *Caird* it was stated in the same terms as in the present case. The views expressed by Lord Salvesen in *Caird*, moreover, seem to me to indicate that he took the same view of the law as was laid down in the House of Lords decisions to which I have alluded, and I am unable to understand why Lord Salvesen should have so expressed himself if the point now under consideration had not been raised.

"I shall accordingly approve of the pursuer's issue.

"The defenders have lodged a counter-issue, which Mr Crabb Watt contended was unnecessary, as the defence therein set forth could be maintained without a counter-issue. This may be so, but the counter-issue is useful as markedly directing the attention of the jury to what is the main ground of defence. I am content, moreover, on this point to follow the practice established by the experienced Judges who decided the cases of *Grieve* and *Caird*, in each of which a counter-issue was allowed in terms similar to that now proposed.

"I shall accordingly approve also of the counter-issue."

The defenders reclaimed, and argued, quoting numerous authorities, that the action should be dismissed as irrelevant on the ground that there was no common law contract of carriage of passengers, and that the receipt of the ticket with the conditions printed on the face of it thus constituted the contract between the parties. At the close of the reclaimer's argument, the Court intimated that they only desired

to hear the respondent on the question of proof or jury trial. Counsel for the respondent argued that there was no special legal difficulty to justify the Court in depriving the respondent of his right to a jury trial, and cited *Grieve* v. *The Turbine Steamers, Limited*, 1903, 11 S.L.T. 379, and *Caird* v. *Adam*, 1907, 15 S.L.T. 543, in which, though only in the Outer House, the pursuer's claim, in actions of a similar nature, to have his case determined by a jury had been sustained.

LORD JUSTICE-CLERK—This case is really a very exceptional one. During the debate no less than seventeen or eighteen cases were referred to, in all of which decisions on questions of law were pronounced. It seems to me that that in itself shows that this is an eminently unsuitable case to be sent to a jury. I certainly should not like to try it myself. The presiding Judge would have to listen—and the jury would have to sit and listen too—while practically the great mass of this debate was gone over again. I do not think that would be advisable, and I have no difficulty in deciding that the case should not go to a jury.

I quite understand that the Lord Ordinary, following as he did two cases which apparently were never brought before this Court after the issue was allowed, felt himself bound to do as the Judges had done in these two cases in the Outer House, but it is plain that what is decided in a particular case in the Outer House, or what the Lord Ordinary has done because he thought he must follow previous decisions there, cannot be binding upon us. Certainly in the ordinary case we should not interfere with the discretion of the Lord Ordinary, but in this particular case Lord Anderson has not proceeded except upon the idea that as other Judges had sent similar cases to jury trial he must send this too. He does not appear to have exercised his discretion in this particular case at all. On the whole matter I am satisfied that the proper course to take is to remit this case to the Lord Ordinary for proof.

LORD DUNDAS—In this case the Lord Ordinary approved of an issue and a counter-issue for the trial of the cause by jury. The defenders reclaimed, and argued at our bar that the case should be thrown out without inquiry of any sort. That was the main question argued at our bar—the only question, indeed, except the subordinate one which would arise in the event of there being inquiry, namely, as to the mode of the inquiry. At the back of this case there does seem to lie a legal question of great interest and probably of first-class importance. Upon the merits of that legal question I desire to say nothing at all, agreeing with your Lordship that there must be inquiry before it is dealt with. The pursuer's record even as amended seems to me to be far from artistic, but I am not prepared to throw the case out without inquiry into the facts. So far as the reported decisions go—and a great number of them were quoted to us—that would be a new departure in procedure, and it would, to my mind, be very unsatisfactory to decide the question of law as an abstract one without precise knowledge of all the facts which might bear upon the decision. I think a good deal may turn upon the way in which the facts come out.

Upon the minor point I think the inquiry should be by way of proof and not by way of jury trial. For my own part I consider the case to be eminently unfitted for trial by jury, and, as your Lordship has pointed out, in sending it to proof we are not to be taken as overriding any deliberate exercise by the Lord Ordinary of his discretion. The Lord Ordinary, as I gather, allowed an issue in this case, not as the outcome of his own opinion or in the exercise of his own discretion, but upon the authority of a couple of Outer House decisions which he cites and which he thought he ought to follow. But these cases are not binding upon us, and therefore, as we consider the case to be ill-fitted for jury trial, we are free, and without interfering with any exercise of discretionary power by the Lord Ordinary, to send the case to proof.

I think, therefore, the amendment should be allowed, the interlocutor recalled, and the case remitted to the Lord Ordinary to allow a proof before answer in common form, and to proceed as may be just.

LORD GUTHRIE—That is my opinion also.

LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court recalled the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary to allow a proof before answer.

Counsel for the Pursuer and Respondent—Crabb Watt, K.C.—Thornton. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defenders and Reclaimers—Murray, K.C.—Lippe. Agents—Boyd. Jameson, & Young, W.S.

Friday, December 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

AKTIESELSKABET "FJORD" OF KRISTIANIA *v.* THE STEAMSHIP "BEECHGROVE" COMPANY, LIMITED.

Ship—Collision—Pilot—Compulsory Pilotage—Collision Outwith Compulsory Pilotage Area, but where Pilot Necessarily on Board—Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *sec.* 633—*Clyde Navigation Consolidation Act* 1858 (21 *and* 22 *Vict. c. cxlix*).

A steamship inward bound for Glasgow, while on her way up the Firth of Clyde in charge of a licensed pilot, collided with an outward-bound steamship within the area for which the pilot was licensed, and where he was necessarily on board under the local regulations, but before reaching that part of