contracts were only valid if they were in writing and were just and reasonable. But apart from the Act the general freedom possessed by carriers was unimpaired and the Act clearly had no reference to the conveyance of passengers. It was therefore only with reference to carriers of goods that Blackburn, J. observed at p. 511 that a condition exempting the carriers wholly from liability for the neglect and default of their servants was *prima facie* unreasonable. When making that observation that learned Judge was discussing the effect of section 7 of the Act which as already stated contained an express enactment that the terms of the special contract should be reasonable and it was in that connection that he went on to say that an offer to carry at a lower rate than the normal rate might be reasonable for purposes of the Act. He added: " For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the firm having that option." But this principle, stated in regard to a railway company as a carrier of goods and in regard to the operation of the Railway and Canal Traffic Act, has no bearing on the position of a carrier of passengers whose complete freedom at common law to make such contracts as he thinks fit, has not been curtailed by the Act of 1854. What limitations on this freedom result from the relevant legislation for the control of the carriage of passengers by air will be examined later, but light is thrown on the common law position of carriers of passengers by the decision of this Board in *Grand Trunk Railway Company of Canada* v. *Robinson* [1915] AC. 740. The main question in that case is whether a passenger carried at half fare under what was called a " livestock special contract " was bound by a term of the contract giving the carrier complete exemption from liability even when caused by the negligence of the railway company. A subsidiary question was whether the passenger who went on the train to look after a horse during the transit was bound by the special contract which his employer had made on his behalf. The subsidiary issue, which was decided against the man, is not material in this case, but the general law was stated by Lord Haldane, delivering the judgment of the Board in the following terms at p. 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 an 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."

Their Lordships accept this statement of general principle, and therefore must now consider the effect in this case of such statutory restrictions as exist in Canada in order to determine whether they qualify or supersede the exemption of liability for negligence which is clearly set out in the contract agreed to and signed by each of the appellants as already stated.

The legislative provisions to be considered are to be found in the (Dominion) Transport Act, 1938, in certain Regulations made thereunder by the Board of Transport Commissioners for Canada and in certain " Schedules " containing its tariffs and regulations, which were drawn up by the Respondent under powers conferred upon it by the Regulations of the Board. The general effect of the Transport Act, 1938, so far as concerns matters arising in the present case, is to lay on every operator licensed to operate aircraft the obligation to afford

to all persons all reasonable and proper facilities for the conveyance of passenger and goods traffic; further, to oblige operators to file " standard tariffs " of their charges, which themselves are subject to the approval of the Board; and, lastly, to empower operators to file, in addition to their standard tariffs, " special tariffs " lower than their standard tariffs.

All the material provisions of these instruments have been elaborately analysed by the Chief Justice of the Supreme Court of Canada and need not here be repeated in detail. It should however be observed that by the Transport Act the Board of Railway Commissioners for Canada as constituted under the Railway Act (R.S.C. 1927, c. 170) are designated to act as the Board of Transport Commissioners for Canada and are vested with the duties of licensing aircraft to transport passengers between various points in Canada and of approving tolls to be charged or made in connection with the transport of passengers. The respondent had obtained and at all material times held the necessary licence permitting it to transport passengers on its aircraft between Vancouver and Zeballos.

Part IV of the Transport Act contains a code of provisions relating to Traffic, Tolls and Tariffs to which all licensees under the Act must adhere. The provisions of this part so far as they are relevant to this appeal are to be found in Sections 16, 17, 19, 20, 21, 22, 24, 25, 26, 32 and 33. In pursuance of the powers conferred by this Part, the Board of Transport Commissioners have issued two General Orders, Numbers 580 and 584, dated respectively the 16th December, 1938, and the 23rd March, 1939, containing regulations " governing the construction and filing of air transportation tariffs." When entering upon their duties under the Act the Board were taking under their control a wide variety of existing services and accordingly special attention is drawn to the " Foreword " forming part of General Order 580 in which the Board announces its decision not to exercise its powers by imposing forthwith a preconceived plan for the detailed control of air services but to impose upon the traffic arrangements of individual carriers such modifications or restrictions as experience may show to be necessary. In the third paragraph of the " Foreword," the Board laid down the following general rule as to initial tariffs or schedules: " All initial tariffs or schedules filed will be deemed to comply with the law relative to filing, unless and until they are rejected by the Board with directions to file other tariffs or schedules in lieu thereof." The respondent duly filed with the Board a special Passenger and Goods Tariff incorporating by reference a tariff of rules and regulations which were drawn up by it on the same date and specified that passengers were carried only in accordance with the terms and conditions of the respondent's passenger ticket. The fare of $25 paid by each appellant was that prescribed by the Special Passenger Tariff just referred to, and some question arose whether the fare was a special or standard fare within the tariff filed. Special tariffs were defined as those specifying a toll or tolls lower than the standard tolls, but there was no evidence that any other toll than $25 for the journey had been filed or that it had been approved by the Board. If, however, it was a special tariff no approval was required and in any case their Lordships agree with the conclusion of the Supreme Court that there is no ground for holding that the provisions of the Act were not satisfied. In particular there is no ground for holding that the fare charged and the terms of the contract, which were either actually or by sufficient reference before the Board, were not duly approved. There was thus no reason to hold that statutory restrictions had been infringed and no reason under the statute to set aside or refuse to give effect to a specific contract which the law authorises. Such a contract cannot be pronounced unreasonable, invalid or illegal by a Court of Justice.

The contrast between the provisions of the Canadian Transport Act and Section 7 of the English Railway and Canal Traffic Act is that whereas the former requires an administrative decision of the Board to be complied with, the latter leaves it to the Court to determine whether its provisions have been carried out. It follows in their Lordships' judgment that there is no valid reason against holding the appellants and each of them bound by their contract.

In their Lordships' opinion the view they have expressed provides an answer to the contention so strenuously urged that if the passenger is not given an option either to retain his full rights against the carrier at the higher fare or to waive them in whole or in part at the lower, the specific contract must be invalid. As their Lordships have pointed out Blackburn J. in *Peek's* case (*supra*) merely said that such a contract may (not must) be invalid, and he only said that in reference to the construction of Section 7 of the Railway and Canal Traffic Act. Indeed even if the carrier were obliged to comply with the conditions imposed by Section 7, it might be considered that a carrier of passengers by air could reasonably if he thought fit refuse to carry anyone save at the passenger's own risk. It does not matter for this purpose whether the carrier was a common or general carrier or not. His duty to carry for all and sundry according to his profession is something different from the terms on which he so carries. A carrier of goods or of passengers may or may not be a common carrier. In the words of Maule J., quoted by Atkin L.J. in *G.N. Railway Co.* v. *L.E.P. Transport and Depository Ltd.* ([1922] 2 K.B. at p. 771) " I deny the truth of the position that a man who is not an insurer is therefore not a common carrier. A common carrier who gives no notice limiting his responsibility is an insurer; but, if he gives notice that he will contract only to a limited extent and with respect to articles of a given value, he ceases to be an insurer beyond that, though in all other respects he remains a common carrier." In this passage Maule J. is speaking of carriers of goods but the same principle is true, *mutatis mutandis*, of a carrier of passengers who in law is neither an insurer nor precluded from making a special contract with his passengers. From this aspect it is not material whether he is a common carrier or not—nor is his position altered by the terms of Section 25 (1) of the Transport Act, which require the carrier to afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic, inasmuch as this provision does not in their Lordshisp' judgment relate to the particular terms of any special contract or their reasonableness but simply to external physical and mechanical facilities.

Finally it may be observed that their Lordships do not regard the decision of the Court of Appeal in *Clarke* v. *West Ham Corporation* [1909] 2 K.B., 858, as giving any real help or guidance in the decision of the present appeal. While they do not think it necessary to give any opinion on the correctness of much that was said in that case or of the actual decision, the judgment at least of the majority in the Court of Appeal turned largely on the construction of the statutes regulating the tramways operated by the Corporation for the carriage of passengers. These statutory regulations were substantially different from those in question in this appeal.

For all these reasons their Lordships will humbly advise that the appeal in their judgment fails and should be dismissed. The appellants will pay the costs of the appeal.

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In the Privy Council

ALFRED WILLIAM LUDDITT
AND OTHERS

v.

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