preciation in view. And there is still in force in the will a direction that in making certain payments to his sister they should make due provision for depreciation. But in a question between the trustees and the widow her rights fall to be regulated by the codicil, and any direction as to setting aside part of the income to meet depreciation is conspicuous by its absence. Accordingly I have no doubt that the widow is entitled to the whole income from the ship investments so far as received by the trustees as income.

There remains a group of questions arising out of the widow's claim that the price received by the trustees from the purchaser of the shipping investments ought to be divided as between capital and revenue. It is settled by decision and by long-continued practice in Scotland that such an appropriation falls to be made. I do not think that it is possible to lay down any universal rule as to how such an appropriation should be effected; but in view of the statements in article 10 of the case I have no doubt that the second party is entitled to have treated as income all the profits set forth in the 11th article of the case, except those arising from the "Parthenia," the "Cassandra," and the "Saturnia," in regard to which the parties were agreed that if there had been no sale to a new company the old shipping companies would have been bound to appropriate these profits as capital. There remains the small return from the Glasgow and Newport News Shipping Company, which counsel for the first parties conceded to the widow.

LORD JOHNSTON, who had not heard the case, delivered no opinion.

The Court answered the questions as follows:—Question 1 in the negative; 2 (*a*) in the affirmative; 2 (*b*) in the negative; 3 (*a*) in the affirmative; 3 (*b*) in the negative; 4 (*a*) and (*b*) were superseded; 5 (*a*) in the negative; 5 (*b*) in the affirmative; 6 (*a*) in the negative; 6 (*b*) in the affirmative; 7 first alternative in the negative, second alternative in the affirmative.

Counsel for the First Parties—Moncrieff, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Second Party—Chree, K.C.—R. C. Henderson. Agents—Wishart & Sanderson, W.S.

Friday, February 25.

SECOND DIVISION.

[Lord Anderson, Ordinary.

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

(See *Williamson* v. *Orkney and Shetland Steam Navigation Company, Limited, ante*, vol. lii, p. 241, and *infra, following case.*)

Process — Ship — Carriage — Contract — Carriage of Passengers — Conditions on Ticket Limiting Liability of Carrier — Notice of Conditions.

In an action at the instance of a passenger on an Atlantic steamer against the shipping company for damages for injuries sustained by him on the voyage the pursuer averred that his attention had not been drawn to conditions on the ticket limiting the liability of the shipowner to £10 in the case of accident, and that he was not aware of the same. The Court *allowed* a proof before answer as to the terms and conditions of the contract of carriage between the parties.

John Hood, linen importer, Belfast, *pursuer*, brought an action against the Anchor Line (Henderson Brothers) Limited, Glasgow, *defenders*, for payment of £10,000 damages for personal injuries sustained by him while a passenger on one of the defenders' steamers on the voyage between New York and Glasgow.

The *contract* between the parties was expressed on the ticket received by the pursuer on booking his passage, and was in the following terms:—

"ANCHOR LINE.
TRANSATLANTIC STEAM PACKET SHIPS
Sailing Regularly between
NEW YORK and GLASGOW *via* Moville
(Londonderry) and
NEW YORK and MEDITERRANEAN PORTS.
Agency at June 16th, 1914.

"We hereby engage that the persons undernoted (equal to 2 adults) shall be provided with Saloon Passage from New York to Glasgow in the British steamship 'California' to sail from New York on the 20th day of June 1914 at noon (unless prevented by unforeseen circumstances), and we have received the sum of One hundred and fifty 2/100 dollars in payment of same.
Room D.
Berth.

Name. Age.
Mr John Hood.
Mrs ,, ,,

"*Notice. — This ticket is issued to and accepted by the passenger subject to the following conditions:—*

. . . . . .

"Neither the shipowner nor the passage broker or agent is responsible for loss of or injury to the passenger, or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the steamer, her machinery, gear, or fittings, or from

the act of God, king's enemies, perils of the sea or rivers, restraints of princes, rulers and people's barratry or negligence in navigation of the steamer, or of any other vessel.

"Neither the shipowner nor the passage broker or agent is in any case liable for loss of or injury to the passenger or his luggage, or delay in delivery of luggage or personal effects of the passenger, beyond the amount of £10 in the case of each first-class passage, or £5 in the case of each second-class or steerage passage, unless the value of the passenger's luggage in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description, upon which one per cent. will be charged) is paid.

. . . . . .

"HENDERSON BROTHERS,
General Agents,
per WM. B. NEWSON, *Sub-Agent.*

"*Passengers are particularly requested to carefully read the above contract.*"

The pursuer averred — "The pursuer on booking his passage received a ticket. His attention was not drawn to the condition quoted, and he was not aware of same."

The defenders pleaded, *inter alia* — "(1) The pursuer's averments being irrelevant and insufficient, if proved, to support the conclusions of the summons, the action ought to be dismissed. (2) In respect that in terms of the contract between the pursuer and the defenders the pursuer cannot in any event recover a larger sum than £10, the action is incompetent in the Court of Session and ought therefore to be dismissed."

The *facts* of the case appear from the opinion of the Lord Ordinary (ANDERSON), who on 16th December 1915 allowed parties a proof before answer.

Opinion. — "The pursuer is the chief director and shareholder of John Hood & Company, Limited—a company which carries on business as linen importers in New York and Belfast. The management of this business by the pursuer necessitates his visiting several times a year the United Kingdom and the Continent of Europe, and he avers that he has frequently crossed the Atlantic by the defenders' steamers. In June 1914 he booked for himself and his wife two first-class berths in the defenders' steamship 'California' from New York to Glasgow, and on 16th June he paid the fares and received the document. He had this document in his possession until the 'California' sailed from New York on 20th June.

"On 28th June the 'California' ran ashore on Long Island, off the north coast of Ireland. On the morning of the 29th the passengers on the 'California' were transhipped by means of the 'California's' lifeboats to the steamship 'Cassandra' of the Donaldson Line, which had come to the assistance of the 'California,' and was standing by at some distance from her. The passengers on arriving at the side of the 'Cassandra' were transferred to her deck by means of an iron bucket or trough attached to a rope and hauled up by means of a winch and derrick. As the pursuer was being hoisted in this manner he avers that when he had reached the level of the deck of the 'Cassandra' the bucket or trough turned over and threw him out. In his fall he struck the side of the lifeboat and fell into the sea, from which he was rescued with difficulty. He alleges that he sustained serious injuries, for which he claims £10,000 as damages. The defenders deny fault, and plead that the pursuer was guilty of contributory negligence.

"The defenders plead further that the action is incompetent in the Court of Session in respect that in terms of the contract between the pursuer and defenders he cannot in any event recover a larger sum than £10.

"On this plea, so important to both parties, I heard an argument in the procedure roll, and what I have to determine is whether or not I can dispose of it without further inquiry.

"The material available for the determination of the question at this stage consists of—(1) the terms of the document No. 11 of process, (2) the averments on record, and (3) the undisputed fact that the pursuer had the document in his possession for four days prior to embarking.

"The stipulations contained in No. 11 of process are all printed in legible type on the face of the document. They are preceded by these words, printed in bolder type — 'Notice. — This ticket is issued to and accepted by the passenger subject to the following conditions'; and at the foot of the document this sentence appears in bold type —'Passengers are particularly requested to carefully read the above contract.'

"The pursuer's averments on this part of the case are these—'The pursuer on booking his passage received a ticket. His attention was not drawn to the conditions quoted, and he was not aware of same.'

"There are many decisions bearing on this question. They will all be found in the case of *Williamson* which I decided last session (*v. infra, following case*). *Williamson* is before the Second Division on reclaiming note, and as the present case is marked to that Division it seems to me that I may with propriety refer to the case of *Williamson* for my views as to the law which has to be applied.

"In *Williamson* I decided that a question like the present is one of fact and not of law, and that the proper mode of expressing the question is this—Did the defenders do what was reasonably sufficient to give the pursuer notice of the condition? The Solicitor-General, for the defenders, while disclaiming acceptance of the views I gave effect to in *Williamson*, argued the present question on the footing that these views were sound.

"He maintained that the defenders had discharged any *onus* which was on them of establishing the pursuer's assent to the conditions (1) by the production of No. 11 of process, which shows that the conditions were made plainly manifest on the face of

the document, and (2) by establishing that the pursuer had reasonable opportunity before embarking to ascertain what the conditions of carriage were. It was asked, What more could the defenders have done, assuming that their liability can be limited in the way adopted, to bring the conditions to the knowledge of the pursuer. It is difficult to give this query a satisfactory answer.

"On the other hand it was maintained for the pursuer that the document No. 11 of process was primarily a receipt for the passage-money, and that nothing was done by the defenders, extrinsically of the document, to inform the pursuer that it was anything else. It was contended that if the pursuer made out that he accepted the document as being nothing more than a receipt, and that on this assumption he never troubled to read the document, then he cannot be held to have assented to the conditions printed thereon.

"If this contention is sound the result seems to be that shipowners cannot effectively limit their liability in the way adopted. This would be to carry the decisions much further than they have yet gone, as it seems to me the cases have hitherto assumed that liability may be effectively limited in this way.

"The pursuer's counsel further maintained that his averments, if proved, would establish a stronger case against the defenders than was made out in the case of *Richardson* v. *Rowntree*, [1894] A.C. 217, because on the averments in the present case every one of the three questions which were put to the jury would fall to be negatived.

"In the case of *Williamson* the Second Division ordered a proof before answer to be taken (52 S.L.R. 241). If I could hold that the Division by their decision in that case laid it down that a similar course should be followed in all cases of this nature, there would be an easy solution of the question I have to decide. But I do not think the Division were enunciating any such general rule of procedure. Each case falls to be decided on its own averments.

"I have found the decision of this question a matter of difficulty, but I have reached the conclusion that the proper procedure is to allow a proof before answer for these reasons in addition to those already alluded to—(1) because I am not aware of any case of this nature which has been decided without proof, and (2) because there is less likelihood of injustice being done after a full disclosure of the facts than there would be if the case were decided on the pleadings."

The defenders reclaimed, and argued—A shipowner was not a common carrier and was not an insurer. As between shipowner and passenger there was perfect freedom of contract. If a shipowner carried passengers for payment, then in the absence of an express agreement to the contrary he was bound to carry with reasonable care and was liable for the negligence of his servants, but he could contract that his liability for such negligence could be limited or excluded. It was the duty of a passenger to make himself acquainted with the terms of the contract on which he travelled, provided he had an opportunity to do so. In the present case on the pursuer's averments he had such an opportunity. When the passenger took his ticket on board the ship or at an office at the quay, the owner was bound to give him notice of any limiting terms on the ticket, but that only applied when the ticket was taken at the beginning of the journey on the quay or on board the ship. If at the time of taking the ticket the passenger accepted the ticket knowing that its terms regulated his right of passage, he was bound by any conditions on the face of the ticket limiting his liability whether he had read them or not. The present case was ruled by *Grand Trunk Railway Company of Canada* v. *Robinson*, [1915] A.C. 740. In that case no doubt the pursuer signed the ticket, but that fact was not made the ground of judgment. In the present case the pursuer admitted that there were conditions on the ticket. The pursuer could not say he knew the conditions but did not think he was bound by them—*W. H. White & Company, Limited* v. *Dougherty*, 1891, 18 R. 972, 28 S.L.R. 732. If the pursuer knew there were conditions he could not say he did not read them—*Parker* v. *South-Eastern Railway Company*, 1877, 2 C.P.D. 416, *per* Mellish, L.J., at p. 421. Where a shipowner gave a passenger a ticket with the conditions printed on it so clearly that he could not fail to read it, and sufficiently long before the departure of the ship that he had time to do so, he would be bound by the conditions—*Acton* v. *Castle Mail Packet Company*, 1895, 73 L.T. 158, 8 Asp. Mar. Law Cas. 74; *Cooke* v. *T. Wilson & Sons*, 1915, 32 T.L.R. 160; *Marriott* v. *Yeoward Brothers*, [1909] 2 K.B. 987; *Watkins* v. *Ryemill*, 1883, 10 Q.B.D. 178; *Lyons & Company* v. *Caledonian Railway Company*, 1909 S.C. 1185, 46 S.L.R. 848; *Ryan* v. *Oceanic Steam Navigation Company, Limited*, [1914] 3 K.B. 731. The present case was on the same footing *re* notice as many cases in other branches of the law, *e.g.*, auction sale-room cases and cases under the Food and Drugs Acts and Weights and Measures Acts.

Argued for the pursuer—The pursuer had stated a relevant case. Mere notice on the ticket without the assent of the passenger could not discharge the shipowner from performing what was the essence of his duty, viz., to carry with care. A passenger was not bound by limiting conditions unless he knew or must be held to have known of the conditions and assented to them either expressly or impliedly. Any limitation or exclusion of the legal liability of the shipowner ought to be most strictly construed and the passenger's assent thereto distinctly proved. The *onus* was on the shipowner to prove that the conditions limiting or excluding liability were assented to by the passenger. Whether the defenders did what was reasonably sufficient to notify the pursuer of the conditions was entirely a question of fact for the jury and not a question of law for the Court—*Zunz* v. *South-Eastern Railway Company*, 1869,

L.R. 4 Q.B. 539, which was founded on *Van Toll* v. *South-Eastern Railway Company*, 1862, 12 C.B. (N.S.) 75; *Parker* v. *South-Eastern Railway Company, cit. sup.*; *Henderson and Others* v. *Stevenson*, 1875, 2 R. (H.L.) 71; *Richardson, Spence, & Company* v. *Rowntree*, [1894] A.C. 217; *Harris* v. *Great-Western Railway Company*, 1876, 1 Q.B.D. 515; *Hooper* v. *Furness Railway Company*, 1907, 23 T.L.R. 451; *Stephen* v. *The International Sleeping Car Company, Limited*, 1903, 19 T.L.R. 621; *Skrine* v. *Gould and Others*, 1912, 29 T.L.R. 19; *Caledonian Railway Company* v. *Symington*, 1912 S.C. (H.L.) 9, 49 S.L.R. 49; *Caird* v. *Adam*, 1907, 15 S.L.T. 543; *Grieve* v. *The Turbine Steamers, Limited*, 1903, 11 S.L.T. 379; *Denton* v. *Great Northern Railway Company*, 1856, 5 E. & B. 860. [*M'Connell & Reid* v. *Smith*, 1911 S.C. 635; 48 S.L.R. 564, was referred to by the Lord Justice-Clerk.] In some of the earlier cases the construction placed by the Courts on limiting liability had been more favourable to the carrier, *e.g.*, *Stewart* v. *The London and North-Western Railway Company*, 1864, 3 H. & C. 135, but that law had been overruled in *Henderson and Others* v. *Stevenson, cit. sup.*, which was further supported by *Richardson, Spence, & Company* v. *Rowntree, cit. sup. Harris* v. *The Great Western Railway Company*, 1876, 1 Q.B.D. 515, was a decision against the passenger, but did not affect the principle. Cases arising out of the Food and Drugs Acts, the Weights and Measures Acts, and auction sales depended on the interpretation of special Acts raising wholly different questions — *Galbraith's Stores, Limited* v. *M'Intyre*, 1912 S.C. (J.) 66, 6 Ad. 641, 49 S.L.R. 783.

At advising—

LORD JUSTICE-CLERK—In this case the Lord Ordinary, following the judgment of this Division in the case of *Williamson*, 1915 S.C. 295, 52 S.L.R. 241, has allowed a proof before answer, and though I am to move your Lordships to restrict the proof which the Lord Ordinary has allowed, I think his Lordship could not have done otherwise than pronounce the interlocutor which he did.

In the argument before us the pursuer supported the Lord Ordinary's interlocutor, while the defenders maintained that they were entitled to decree of absolvitor. We had a very full argument submitted to us, and all the authorities were commented on. As the result I am satisfied that we cannot dispose of this case without inquiry.

The pursuer avers that he took a first-class ticket, and there his averments in so far as it can be argued that they relate to the conditions of the contract end except in so far as he replies to the defenders' averments.

The defenders aver that the pursuer travelled under a documentary contract made in New York and produce a copy thereof, which on the face of it is referred to several times as a ticket and once as a contract. It contains the conditions set out. The defenders aver further that these conditions were well known to the pursuer, who on the other hand avers that his attention was not drawn to the conditions and that he was not aware of them. The parties are agreed that the pursuer had previously travelled on the defenders' steamers with similar tickets or under similar contracts.

I confess I find myself very much in accord with the views expressed by Lord Justice Bramwell in *Parker's* case, 2 C.P.D. 416, and more recently by Lord Kinnear in the case of *Lyons*, 1909 S.C. 1185, in which case his Lordship in important respects founded on the proof. But having regard to the current of decisions I do not feel that without proof we would be justified in deciding this case.

It seems to me, however, that the proper course is to allow a proof before answer of the averments as to the conditions in question, and so to avoid in the meantime the expense and probable delay which would result from remitting to proof the other and quite separable questions as to fault.

I think we should recal the Lord Ordinary's interlocutor of 20th July 1915, and remit to him before answer to allow parties a proof of their averments as to the terms and conditions of the contract of carriage between them.

LORD DUNDAS — The question for our decision at this stage of the case is purely one of pleading and procedure. It is not, I think, free from difficulty, but I have come to the conclusion that the notice cannot be thrown out without some inquiry into the facts. I agree, however, that the proof now to be allowed should in the interest of both parties be limited in the manner proposed by your Lordship. The principles or rules applicable to such questions are admirably defined in a passage in the judgment of Mellish, L.J., in *Parker* v. *South-Eastern Railway Company*, 2 C.P.D. 416, at p. 423, where that learned Judge lays down the proper direction to be given to a jury. That passage was the origin of the three questions subsequently approved by the House of Lords in *Richardson* v. *Rowntree*, [1894] A.C. 217, as the proper ones for a jury to consider and answer. Now we have before us the pursuer's ticket (or a duplicate of it) for the voyage in question. It is an important adminicle of proof in the case, but the pursuer does not admit that its terms constitute the contract upon which he embarked. It contains on its face conditions which if assented to by the pursuer would end his case, and the defenders aver that these "were well known to" him. But the pursuer states on record that "his attention was not drawn to the conditions quoted, and he was not aware of same." If the pursuer can prove that he was not in fact aware of the conditions, the question would then arise whether or not the defenders did what was reasonably sufficient to give him notice of the conditions. Upon that issue the *onus* would be upon the defenders to show that the pursuer is barred from saying that he was not aware of the conditions. Thus the Lord Chancellor (Haldane), in delivering the judgment of the Privy Council in a very

recent and highly authoritative case — *Grand Trunk Railway of Canada* v. *Robinson*, [1915] A.C. 740—laid it down as one of the principles of general application which it is necessary to bear in mind that "if the contract is one which deprives the passenger of a duty of care which he is *prima facie* entitled to expect that the company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed." The defenders' counsel pressed upon our attention the language and the appearance of the ticket, which bears upon its face a "notice" that it is "issued to and accepted by the passenger subject to the following conditions," which are printed in clear and legible type, and at its foot the legend in strong square letters that "passengers are particularly requested to carefully read the above contract." It was urged that the defenders have manifestly done what was reasonably sufficient to give the pursuer notice of the conditions, that there was indeed nothing more that they could reasonably have done to that end, and that his record is irrelevant and insufficient in respect that he makes no attempt to aver what (if anything) it was that the defenders left undone which they could reasonably have done in the way of notice, or how it came that he was "not aware" of the conditions on the ticket. I appreciate the force of these contentions; and I cannot avoid seeing that the pursuer may have a very uphill case before him at the proof. The observations of Lord (then L.J.) Lindley in *Richardson* v. *Rowntree* when that case was in the Court of Appeal (reported only, it seems, in 9 T.L.R. 297) are significant in this connection, especially as the facts will be investigated in this case by a judge and not by a jury. But we are here on a question of pleading, not on a concluded proof. I do not feel warranted in holding that the pursuer's record is utterly irrelevant. The parties have not renounced probation, and I do not think we should be safe in throwing the case out of Court upon the pleadings. There is admittedly no precedent for adopting such a course. We were strongly pressed but declined to do so in *Williamson's* case, 1915 S.C. 295, 52 S.L.R. 241, in which judgment on the concluded proof is to be delivered to-day (*v. infra*). The record there (as amended) was perhaps somewhat less jejune than the one here before us; but I am not prepared to dismiss this action on the strength of criticisms (forcible as they seem) upon the appearance of the ticket without full knowledge of the facts and circumstances constituting and surrounding the contract between the parties. As already said, however, I am of opinion that in the circumstances of this case the proper course is that we should limit the proof *in hoc statu* in the manner indicated by your Lordship in the chair. This proof ought to lie within a comparatively narrow compass, whereas it seems plain that inquiry upon the merits of the case might be of a very extensive, complicated, and costly character. It is possible that the result of the proof now to be allowed will be such as to obviate the necessity for any further inquiry, and it seems to be plainly for the interests of both parties that evidence should be confined, in the first instance, to the preliminary point. The pursuer should as matter of convenience lead in the ordinary way, though the *onus probandi* may lie upon one party or the other at successive periods of the proof.

LORD SALVESEN and LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Lord Ordinary, remitted to him before answer to allow the parties a proof of their averments as to the terms and conditions of the contract of carriage between them, and to proceed in the case as accords.

Counsel for the Pursuer and Respondent—Moncrieff, K.C. — MacRobert. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defenders and Reclaimers —Dean of Faculty (Clyde, K.C.)—Solicitor-General (Morison, K.C.) — C. H. Brown. Agents—Webster, Will, & Company, W.S.

Friday, February 25.

SECOND DIVISION.

[Lord Anderson, Ordinary.

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

(Reported *ante*, vol. lii, p. 241.)

Carriage — Ship — Contract — Condition Limiting Liability of Carrier to Passenger—Notice of Condition.

In an action by a passenger against a steamship company for damages for personal injuries sustained by him while on a voyage on one of their ships through the fault of their servants, the defenders pleaded that they were exempted from liability in respect of a condition in their contract of carriage with the pursuer which was known to the pursuer, and was printed on the ticket issued to him. It was proved that the ticket, which the pursuer had taken when on board, bore on the face of it the words—"This ticket is issued subject to the conditions . . . that the company is not liable for any injury . . . or accident to passengers . . . however the same may be caused, whether by negligence of their servants or otherwise, . . ." but the printing was in very small type and without distinguishing features; the pursuer knew that there was printing on the ticket but did not know that the printing contained conditions relating to the terms of the contract of carriage. The Court granted decree, *holding* that the defenders had not done what was reasonably sufficient to give the pursuer notice of the condition.

Mitchell Humphrey Williamson, commercial traveller, Lerwick, *pursuer*, brought