CA BEFORE : LORD JUSTICE DENNING, LORD JUSTICE JENKINS and LORD JUSTICE MORRIS. 29th October 1954

LORD JUSTICE DENNING:

1. In June, 1952, Mrs Adler, a widow, who keeps a shop, decided to go for a cruise upon the P. & O. Steamship "Himalaya". She booked her passage through the travel agents Thomas Cook & Son. She travelled first-class and paid £188 for the trip. In return the Steamship Company issued her with a first-class passage ticket by virtue of which she joined the ship at Southampton and sailed on the cruise. On the 16th July, 1952, the ship reached Trieste and Mrs Adler went ashore. A gangway was placed horizontally from the ship to a gantry on the quay. She went ashore across that gangway. When she returned to the ship, she was walking along the gangway and had got about half way across when suddenly the gangway came adrift from the gantry at the shore end, and it fell down against the side of the ship. She was thrown on to the wharf below, a distance of 16 feet, and suffered severe injuries, including a broken leg, broken pelvis, and broken ribs. She claims damages against the Master and the Boatswain of the ship alleging that they were negligent in that they failed to see that the gangway was properly secured. They deny this and say that the gangway was properly placed and secured and that the cause of the accident was that there was an exceptionally violent gust of wind which suddenly blew the ship several feet off the quay dragging the gangway with it.

2. On those allegations there is obviously a serious issue as to whether the Master and the Boatswain were negligent or not. The trial of that issue would be very expensive. The Master and Boatswain say that it is unnecessary to go to that expense because in any event, even if they were negligent, they are protected by the exception clause in the ticket. The clause says that "Passengers and their baggage are carried at Passengers' entire risk" and "The Company will not be responsible for and shall be exempt from all liability in respect of any damage or injury whatsoever of or to the person of any passenger". Mrs Adler admits that, if she had sued the Steamship Company, the exemption clause would have protected the Company; but she says that it does not protect the Master and Boatswain. Indeed, it is for that very reason, so as to overcome the exemption clause, that she has sued the Master and Boatswain and not the Steamship Company.

3. This raises a point of law which the Court has ordered to be tried first before the facts are gone into. We must assume for the purposes of the argument that the Master and the Boatswain were personally guilty of negligence and are prima facie liable in tort for their wrongdoing. The question is whether they are protected by the exemption clause. It is an important question, because the Steamship Company say that, as good employers, they will stand behind the Master and Boatswain and meet any damages or costs that may be awarded against them. They say that if Mrs Adler's claim is admissible, it means that a way has been found of getting round the exemption clause which no one has ever thought of before.

4. I pause to say that, if a way round has been found, it would not shock me in the least. I am much more shocked by the extreme width of this exemption clause which exempts the Company from all liability whatsoever to the passenger. It exempts the Company from liability for any acts, default or negligence of their servants under any circumstances whatsoever, which includes, I suppose, their wilful misconduct. And this exemption is imposed on the passenger by a ticket which is said to constitute a contract but which she has no real opportunity of accepting or rejecting. It is a standard printed form upon which the Company insist and from which they would not depart, I suppose, in favour of any individual passenger. The effect of it is that, if the passenger is to travel at all, she must travel at her own risk. She is not even given the option of travelling at the Company's risk on paying a higher fare. She pays the highest fare, first-class, and yet has no remedy against the Company for negligence. Nearly 100 years ago Mr Justice Blackburn in a memorable Judgment said that a condition exempting a carrier wholly from liability for the neglect and default of their servants was unreasonable, see ***Peek v. North Staffs Railway Company*** (1863) 10 House of Lords Cases at page 511. I think so too.

5. Nevertheless, no matter how unreasonable it is, the law permits a carrier by special contract to impose such a condition; see ***Ludditt v. Ginger Coote Airways Ltd*** (1947 Appeal Cases, page 232: except in those cases where Parliament has intervened to prevent it. Parliament has not so intervened in the case of carriers by sea. The Steamship Company are therefore entitled to the protection of these clauses, as indeed this Court held in Law Reports, ***Beaumont-Thomas v. Blue Star Line*** (1939) 64 Lloyd's List Law Reports page 155. The question is whether the Master and the Boatswain — the actual wrongdoers — are entitled also to the protection of them.

6. I can imagine that some lawyers would decide in Mrs Adler's favour out of hand: and for a reason which appears at first sight both simple and sufficient. It is this: The Master and Boatswain were not parties to the contract of carriage and cannot therefore claim the benefit of the exemption clause in it, because no one can enforce a contract to which he was not a party. It was reasoning on those lines which appealed to the Court in ***Cosgrove v. Horsfall*** (1945) 62 Times Law Reports, page 140: and if that decision was right, it concludes the case in Mrs Adler's favour. Mr Mocatta has, however, urged us to say that that decision was wrong. It is, he says, inconsistent with the decision of the House of Lords in the case of ***Paterson Zochonic v. Elder Dempster*** (1924 Appeal Cases, page 522) which was not cited to the Court. He says further that, in the case of carriage of goods by sea, it is well established that the Master and crew are entitled to the protection of the exemption clauses: and that there is no reason why they should not also be so entitled in the carriage of passengers.

7. This is a serious argument which makes it necessary for us to consider the cases on carriage of goods. They undoubtedly show that when a carrier issues a bill of lading for goods, the exception clauses therein enure for the benefit, not only of the carrier himself, but also for the benefit of the shipowner, the Master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract. Such persons

are not parties to the contract of carriage, but nevertheless when they are rendering their services, they are protected by the exceptions contained therein; and this is so, even though the clauses are not expressed to be made for their benefit, at any rate, not in so many words. It follows that if they are guilty of negligence in rendering their services and are sued in tort, they can nevertheless rely on the exceptions to relieve them from liability. These propositions have been established in England by the case of ***Paterson v. Elder Dempster*** (1924 Appeal Cases, page 422), in Australia by ***Gilbert Stokes v. Dalgety*** (1948) 81 Lloyd's List, page 357, and ***Waters v. Dalgety*** (1951, 2 Lloyd's List, page 385), and in the United States of America by ***Collins v. Panama*** (1952) 197 Federal Recorder 983, and ***Ford v. Jarka*** (1954) American Maritime Cases, 1095. The propositions are further supported by the Rules in the Carriage of Goods by Sea Act, 1924. Article IV (2) exempts "the carrier" and "the ship" from divers responsibilities and Article IV (5) limits their liability in any event to £100 per package. Neither the Master nor the crew nor the stevedores are expressly given the benefit of these exceptions and limitations but Parliament must have intended that they should have the benefit of them.

8. There was much discussion before us as to the true principle underlying these propositions. No one doubted their correctness but the difficulty is to reconcile them with the proposition that no one can claim the benefit of a contract except a party to it. The speeches in the House of Lords in the ***Elder Dempster*** case are so compressed on this point that we have a variety of reasons to choose from. One suggestion which was much canvassed was that, in addition to the contract of carriage between the goods owner and the carrier (which was evidenced by the bill of lading), there were a number of collateral contracts between the goods owner and all the various persons concerned in the carriage. Take, for instance, the stevedores. It was said that there was a collateral contract between the goods owner and the stevedores whereby the, goods owner agreed that the stevedores should have the benefit of the exceptions. This collateral contract was said to be made by the carriers either as agents for the goods owner or as agents for the stevedores or alternatively to arise out of a bailment upon terms. Take next the crew. It was said that there were collateral contracts with each of them, although there was clearly no bailment to each one. This suggestion of a large number of collateral contracts does not appeal to me, for the simple reason that there are never any such contracts in fact. The goods owner makes one contract only, namely, his contract with the carrier. He makes no contract with anyone else. In particular he makes no contract with the stevedores, or with the Master or the crew. It seems to me that these supposed collateral contracts are nothing but a legal fiction devised to give the stevedores and the others protection under a contract to which they were not parties. The truth is there was only one contract, namely, the contract evidenced by the bill of lading: and the reason why the stevedores and others are protected is because, although they were not parties to the contract, nevertheless they participated in the performance of it, and the exception clause was made for their benefit whilst they were so performing it. The clause was not made expressly for their benefit, it is true, but nevertheless it was by necessary implication which is just as good: and they have a sufficient interest to entitle them to enforce it. Their interest lies in this: they participated in so far as it affected them and can take those benefits of it which appertain, to their interest therein. It is one of those cases — by no means rare — where a third person is entitled to enforce a contract made for his benefit. I referred to some of these cases in ***Smith v. River Douglas Catchment Board,*** 1949, 2 King's Bench, at pages 514, 515, and Mr Justice Devlin has recently mentioned some more in his illuminating Judgment in ***Pyrene v. Scindia,*** 1954, 2 Weekly Law Reports, page 1016.

9. Such being the rule in respect of goods, the question is whether a similar rule applies to the carriage of passengers? In principle it clearly does. A good instance is ***Hall v. North Eastern Railway Company,*** Law Reports, 10 Queen's Bench, page 437, which was decided eighty years ago. A drover was given a free pass to take some sheep on the railway from Scotland to England. The North British Company gave him a ticket which said that, as he travelled free, he travelled at his own risk. His journey took him over an English line, the North Eastern Railway, and he was injured by the negligence of the servants of the English Company, not by the servants of the Scottish Company. It was admitted that there was only one contract, namely, the contract with the Scottish Company. The English Company was not a party to that contract but nevertheless it was entitled to the benefit of the exception which it contained. The reason was, in Mr Justice Blackburn's words, that the drover "*must be taken to have assented that the ticket should protect the North Eastern Company just as well as the North British*". In short it was a necessary implication that the English Company should be protected. I should add that in Mr Justice Blackburn's Judgment as reported in the Law Reports there are some words which suggest a contract between the drover and the English Company but the suggestion seems to me unreal as I notice that the Law Journal (44 Law Journal, Queen's Bench, page 164) does not contain those words. In further support of the rule in respect of passengers, I would refer to the Carriage by Air Act, 1932. The provisions under that Act contain certain exemptions and limitations in favour of the "carrier". The pilot of the aircraft is not expressly given the benefit of them, but Parliament must have intended that he should have the same protection as the carrier.

10. My conclusion therefore is that, in the carriage of passengers as well as of goods, the law permits a carrier to stipulate for exemption from liability not only for himself but also for those whom he engages to carry out the contract: and this can be done by necessary implication as well as by express words. When such a stipulation is made, it is effective to protect those who render services under the contract, although they were not parties to it, subject however to this important qualification: The injured party must assent to the exemption of those persons. His assent may be given expressly or by necessary implication, but assent he must before he is bound: for it is clear law that an injured party is not to be deprived of his rights at common law except by a contract freely and deliberately entered into by him; and all the more so when the wrongdoer was not a party to the contract, but only participated in the performance of it.

11. In all cases where the wrongdoer has escaped it will be found that the injured party assented expressly or by necessary implication to forego his remedy against him. In the case of goods it is not difficult to infer an assent because the owner of the goods habitually insures them against loss or damage in transit. If the carrier is protected by an exemption clause, so should his servants be, leaving the owner to recover against the insurance company. As Lord Justice Scrutton said in the ***Elder Dempster*** case: *"Were it otherwise there would be an easy way round the bill of lading"*; and as Lord Finlay said: *"It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading ... by suing ... in tort"*.

12. In the case of passengers, however, it is not so easy to infer an assent. It was inferred in ***Hall v. North Eastern Railway Company*** but not in ***Cosgrove v. Horsfall*** even though the clause there purported expressly to exempt the servant. At least, that seems to me the correct explanation of those cases.

13. Applying those principles to the present case, the important thing to notice is that the Steamship Company only stipulated for exemption from liability for themselves. They did not in terms stipulate for exemption for their servants or agents, and I see no reason to imply any such exemption. The servants or agents are therefore not excused from the consequences of their personal negligence, see ***City of Lincoln v. Smith***, 1904 Appeal Cases, page 250. In any case, even if the Company intended that the stipulation should cover their servants, nevertheless I see nothing whatever to suggest that Mrs Adler knew of their intention or assented to it. If she read the conditions of the ticket (which she probably did not) and considered the possibility of being injured by the negligence or default of the Company's servants (which I trust she thought unlikely) she might well think that her remedy against the Company was barred, but she would not think her remedy against the servants was also barred. Suppose a steward on a liner were to strike a passenger or falsely to imprison her, or injure her by some wilful misconduct, then albeit it was done in the course of his employment, he could not claim the protection of the clause, for the simple reason that the passenger never agreed to his being exempted. She could sue the steward personally, even though her remedy against the Company was barred. So also if the steward is negligent in the course of his employment, for there is no difference in principle between the cases. The passenger has not agreed to forego his remedy against the actual wrongdoer and can still pursue it.

14. The result in my opinion is that Mrs Adler can pursue her claim against the Master and the Boatswain without being defeated by the exemption clause. I think the appeal should be dismissed.

LORD JUSTICE JENKINS:

15. This appeal arises in an action brought by the Respondent/Plaintiff, Mrs. Rose Marks Adler, against the Appellant/Defendants, Dickson and Wallis, respectively Master and Boatswain of the P. & O. Steam Navigation Company's steamship "Himalaya", in the following circumstances.

16. On the 15th or 16th July, 1952, the "Himalaya", in which the Plaintiff was travelling as a first-class passenger, was lying berthed at Trieste in the course of a Mediterranean cruise, and gangways had been placed between the ship and the shore to enable passengers to go ashore and return on board. The Plaintiff had been on shore and was walking along one of these gangways on her way back to the ship when it suddenly moved and fell to the side of the ship, with the result that the Plaintiff was thrown from the gangway on to the wharf, some 16 feet below, and sustained serious injuries.

17. The contract between the Company and the Plaintiff, as evidenced by the ticket issued to her by the Company, included the following provisions. Printed on the ticket itself were the words:

"Your attention is specially directed to the conditions of transportation on the covers containing this ticket. Passengers and their baggage are carried at passengers entire risk".

18. Printed on the inside front cover were certain conditions which (so far as material for the present purpose) ran thus:

"Conditions and Regulations. This ticket is issued by the Company and accepted by the passenger subject to the following conditions and regulations. The Company will not be responsible for and shall be exempt from all liability in respect of any..... injury whatsoever of or to the person of any passenger.....whether such injury of or to the person of any passenger.....shall occur on land, on shipboard or elsewhere.....and whether the same shall arise from or be occasioned by the negligence of the Company's servants on board the ship or on land in the discharge of their duties, or while the passenger is embarking or disembarking, or whether by the negligence of other persons directly or indirectly in the employment or service of the Company, or otherwise, or by the Act of God.....dangers of the seas.....or by accidents.....or any acts, defaults or negligence of the..... Master, Mariners.....Company's agents or servants of any kind under any circumstances whatsoever.....".

19. The above-quoted provisions of the contract admittedly precluded the Plaintiff from suing the Company for damages in respect of the injuries she had sustained, even if the accident could be shown to have been due to the negligence of the Company's servants. She therefore brought the present action against the Defendants, Dickson and Wallis, claiming damages from them on the ground that the injuries she had sustained through the fall of the gangway were caused by their negligence. The way in which this claim is formulated appears from the following passages in the Statement of Claim:

> *"4. The Defendants in the course of their respective duties as Master and Boatswain of the ship were, and each of them was, responsible for berthing the said ship at Trieste and for placing and maintaining gangways leading from the said ship to the shore so as to enable the passengers of the said ship to go ashore and to return to the said ship, and such berthing and the placing and maintaining of such gangways were carried out under the supervision,*

control, management and direction of the Defendants and each of them, who at all material times well knew and intended that the Plaintiff should use the said gangway.

6. The said injuries and loss and damage" (i.e. those resulting from the accident as described and particularised in paragraph 5) "were occasioned to the Plaintiff by reason of the negligence and/ or breach of duty on the part of the Defendants and each of them".

20. Then follow a number of sub-paragraphs of particulars of the alleged negligence and/or breach of duty, from which I select the following:

"(a) Failing to make any or adequate precautions for the safety of the Plaintiff in the use which they knew or ought to have known she would be making of the said gangway.

(b) Causing or permitting the said gangway to be placed from the ship to the shore without taking any or any adequate or effective measures to ensure that it was and would remain safe and secure for the Plaintiff to use.

(c) Causing or permitting the said gangway to be used by the Passengers of the said ship, including the Plaintiff, without taking any or any adequate measures to ensure that the same was properly and effectively secured and made fast and would not and could not move suddenly while the Plaintiff was lawfully using the same,

(e) Causing or permitting the Plaintiff to use the said gangway without first ascertaining or ensuring that it was safe for her to do so, and when they knew or ought to have known it was in an unsafe, unstable and insecure state and condition, and was a danger and trap for the Plaintiff to use.

(g) Failing to make any or any adequate measures or to provide any or any proper system to maintain the said gangway in a safe and secure state and condition".

21. The Defendants by their Defence pleaded (inter alia) the material provisions of the ticket issued to the Plaintiff, to which I have already referred, and founded upon them (in paragraph 3 of the Defence) the following conditions:

"3. The accident to the Plaintiff referred to in the Statement of Claim.....occurred while the Plaintiff was a passenger on the 'Himalaya' upon the terms of the said ticket. If (which is denied) either of the Defendants was personally responsible for the safety of the gangway.....then the Defendants' acts or omissions (if any) in relation to the said gangway and any other material acts or omissions on the part of either of the Defendants took place in pursuance or performance of the contract between the Plaintiff and the Peninsular and Oriental Steam Navigation Company (herein referred to as 'the Company') as contained in or evidenced by the Plaintiff's said ticket and/or subject to the terms of the said ticket and the Defendants are in the premises entitled to rely upon the terms of the said ticket. Further or alternatively any such acts or omissions on the part of either of the Defendants occurred while the Defendants were acting as the servants or agents of the Company and the Defendants are accordingly entitled to the same protection as that afforded to the Company by the terms of the said ticket. Further or alternatively in contracting with the Plaintiff upon the terms of the said ticket the Company acted in all material respects as the agent of its servants and agents (including the Defendants) and thereby exempted the Defendants from any liability such as is referred to in the Statement of Claim. The said agency arises by implication of law. Further or alternatively by reason of her acceptance of the ticket and of the terms thereof the Plaintiff expressly or impliedly agreed to travel in all respects at her own risk and/or impliedly agreed with the Company's servants and agents (including the Defendants) that they should be under no liability to the Plaintiff in connection with any injury sustained by her as a passenger on the 'Himalaya'".

22. On the 14th June, 1954, an Order was made under the Rules of the Supreme Court, Order 25, Rule 2, for the trial as a preliminary issue of the point of law raised by paragraph 3 of the Defense, namely, whether the terms of the ticket held by the Plaintiff as a passenger on the ship at the time of the accident, afforded a defence to the Defendants against the Plaintiff's claim upon the assumption that the Plaintiff could establish the matters referred to in her Statement of Claim. This issue was argued before Mr. Justice Pilcher on the 19th and 20th July, 1954, and on the 30th July he delivered a reserved Judgment determining it in the Plaintiff's favour, and made an Order to that effect, from which the Defendants now appeal to this Court. If the matter were free from authority I would have little hesitation in agreeing with the learned Judge's conclusion. For the present purpose it must be assumed that the Defendants were in fact guilty of the negligence alleged against them in the Statement of Claim in the shape of the various wrongful acts or omissions particularised under paragraph 6, and the Defendants must show that even on that assumption the action must fail by reason of the exempting provisions of the ticket. On this assumption, the Plaintiff, while lawfully using the gangway, was injured by the tortious acts or omissions of the Defendants who were servants of the Company which had contracted with the Plaintiff to carry her as a passenger. If her contract with the Company had contained no exempting provisions, the Plaintiff would, as I understand the law, have had separate and distinct rights of action (a) against the Company for breach of contract or alternatively, in tort on the principle of "*respondeat superior*", and (b) against the Defendants as the persons actually guilty of the tortious acts or omissions which caused the damage. The plaintiff's right of action against the Company is clearly taken away by the exempting provisions of the contract, but I fail to see how that can have the effect of depriving her also of her separate and distinct right of action against the Defendants as the actual tortfeasors. There is certainly no express provision purporting so to deprive her, and in the absence of any express provision to that effect I see no justification for implying one. The exempting provisions in terms apply only to the liability of the Company, without any reference to the liability of servants of the Company for the consequences of their own tortious acts. Even if these provisions had contained words purporting to exclude the liability of the Company's servants, non constat that the Company's servants could successfully rely on that exclusion in proceedings brought against them by some party injured by their tortious conduct, for the Company's servants are not parties to the contract. But as it is, not only are the Company's servants not parties to the contract,

but the contract docs not even mention their liability. I find it quite impossible to accept the suggestion that the contract between the Company and the Plaintiff must be taken to have been entered into by the Company not only on its own behalf but also on behalf of all its servants. There is nothing whatefer in the terms of the contract to support this theory, and even if it were tenable I do not see how it would assist the Defendants, inasmuch as the only liability it excludes is the liability of the Company. Finally, I take it to be the law that a Defendant sued in tort who claims that the Plaintiff has by some contract with the Defendant deprived himself in advance of his right of action in respect of the wrong done him must show that the contract relied on does either expressly or by necessary implication clearly deprive the Plaintiff of such right. The contract here relied on to my mind falls far short of this test so far as the Plaintiff's right of action against the Defendants is concerned.

23. A good deal was said in the course of the argument before us about the absurdity of a stipulation relieving an employer of his liability for the negligence of his servant while leaving untouched the servant's liability for that some negligence. I do not follow this. If there is no exempting stipulation at all, then both master and servant are liable, and either can be sued at the option of the injured party. If there is a contract exempting the master but not the servant then the servant's liability remains as it was. The master may find this result inconvenient if he feels impelled either from motives of expediency or from a sense of moral obligation to indemnify the servant. But, if so, the answer is simple. He should have seen that the contract was so framed as to exempt his servant from liability as well as himself. To my mind it is far more absrud to impute to a passenger on a ship who has contracted with a shipowner for a given voyage in terms which exempt the shipowner from liability for his servants' negligence an intention thereby to deprive himself of all right to redress against the servants of the shipowner for any and every negligent act or omission which may be committed by such servants in the course of their duties, however gross the negligence and however grave the resulting damage to the passenger may be. Accordingly, if left free to do so by the authorities, I would dismiss the appeal.

24. The conclusion which I have thus provisionally reached accords with the decision of this Court in the case of ***Cosgrove v. Horsfall,*** 62 Times Law Reports, page 140. In that case the Plaintiff, Cosgrove, an omnibus driver employed by the London Passenger Transport Board, was provided by the Board with a free pass which allowed him to travel on the Board's omnibuses subject to the condition that, except when he was travelling on the Board's business, neither the Board nor their servants would be liable to him or his representatives "for loss of life injury or delay, or of damage to property however caused". While the Plaintiff was travelling otherwise than on the business of the Board on one of the Board's omnibuses it came into collision with another of the Board's omnibuses and the Plaintiff was injured, through the negligence of the driver of one of the omnibuses. The Plaintiff sued the two drivers in the County Court. The County Court Judge held that one of the two drivers, the Defendant Horsfall, was to blame for the accident and awarded the Plaintiff £20 damages against that Defendant, who appealed unsuccessfully to this Court, It is I think right to quote at some length from the Judgment of Lord Justice Du Parcq (as he then was) with which the other members of the Court (Lord Justice Scott and Lord Justice Morton, as he then was) expressed their concurrence. Lord Justice Du Parcq said this:

"The Plaintiff in this case has suffered injury and damage by reason of the negligence of the defendant Horsfall. Why, then, should he not recover damages against that Defendant? The only answer is that the plaintiff is bound by contract, or, alternatively, by a condition attached to a licence, not to hold the defendant liable. The Judge held that this defence could not avail the defendant Horsfall, since he was not a party to the contract and did not grant the licence or impose the condition. At first sight this decision seems to be plainly right, and to be founded on an elementary principle of our law. It has, however, been criticised on diverse grounds and with much ingenuity. In my opinion the attack on it wholly failed. It was said that, in making the contract, or imposing the condition, the London Passenger Transport Board wore acting as agents for Horsfall, so that he could take advantage of the conditions and rely on it. There was no evidence before the Judge on which he could have found that the board acted as agents for Horsfall, and, of course, he did not so find. It was not even proved that Horsfall was in the employment of the board when the pass, on which the condition is indorsed, was issued to the Plaintiff. If I assume that Horsfall was then in the board's employment it remains true that there is no evidence from which agency ought to be inferred. I agree with the Judge that Horsfall 'was not a party to and has no right by virtue of the licence or contract'. It was further argued for Horsfall that the plaintiff was bound to produce and rely on his pass in order to show that he was lawfully in the omnibus when he was injured, and that, having once produced it and relied on it, he must be held bound by all its terms, so that he could not ask the Court to hold any servant of the board liable in respect of his injury or damage. Thus, it was said, Horsfall must escape. We heard much of 'blowing hot and cold' and of 'approbating and reprobating' and it would seem that the latter expression is not yet as out-moded as in 1940 Lord Atkin supposed it would become: ***see United Australia Limited v. Barclays Bank, Limited*** *(57 The Times Law Reports 13, at page 21; 1941 Appeal Cases, 1, at page 32). In the end it appeared (if I rightly understood the argument) that the submission was founded on the equitable doctrine of election. In my opinion Horsfall cannot rely on any such doctrine here. In order to show that the driver of the omnibus was under a duty to the plaintiff to take reasonable care for his safety, all that the plaintiff had to prove was that at the time of the accident he was lawfully in the omnibus. It may be that it was necessary to produce the pass in order to show that he was in the omnibus with the consent of the board, and, no doubt, its production reveals the fact that after the accident had happened the plaintiff broke one of the conditions by which, as between the board and himself, he was bound. But this cannot retrospectively make him a trespasser, or invalidate his claim to have been a passenger with the consent of the board. There is, in my opinion, nothing in the point".*

25. I understand Lord Justice Du Parcq's reference to the Plaintiff's breach of one of the conditions by which as between the Board and himself he was bound to be directed to the fact that the condition there in question stipulated that neither the Board nor their servants should be liable, an element in the case then before the Court which has no counterpart here, as in the present case the exemption is in terms accorded only to the Company itself. ***Cosgrove v. Horsfall*** seems to me to be directly in point and, prima face, it must be our duty to follow that decision as a decision of this Court which is binding upon us, with the result that the present appeal must fail.

26. It was, however, strenuously argued on behalf of the Appellants that ***Cosgrove v. Horsfall*** is in conflict with the earlier decision of the House of Lords in the case of ***Elder Dempster & Co. Ltd. and Ors. v. Paterson, Zochonis & Co. Ltd.,*** 1924 Appeal Cases, 522, which apparently was not cited in ***Cosgrove v. Horsfall,*** and which is relied on for the Appellants as establishing the general proposition that where "A" contracts to render services to "B" on terms that "A" is not to be liable to "B" for damage caused by the negligence of "A's" servants or agents, and in the course of the performance of the contract "A's" servant or agent is guilty of negligence causing damage to "B", "A's" servant or agent is entitled to the same immunity from suit as is accorded to "A", his master or principal, by the exempting condition, and this notwithstanding that the negligence of the servant or agent is such as would clearly have entitled "B" to maintain an action against him in tort apart from the exempting condition. It would seem that the only limit to be placed on this sweeping proposition is that the negligence of the servant or agent must consist in something done or omitted by him in the course of the performance of the contract, a limit the precise scope of which is by no means easy of definition. If the case of ***Cosgrove v. Horsfall*** does indeed conflict with the ***Elder Dempster*** case, and if the ***Elder Dempster*** case does indeed establish the general proposition stated above, then it must be our duty to reject ***Cosgrove v. Horsfall*** as of no authority, to follow the ***Elder Dempster*** case, and accordingly to allow this appeal.

27. It is therefore necessary to examine the ***Elder Dempster*** case in some detail. The facts were somewhat complicated and unusual. The defendants, Elder Dempster & Co. Ltd., employed a number of ships in the West African trade, which included the carriage of palm oil in casks from West African ports to this country. They hired the use of the steamship "Grelwen" on time charter from her owners, the Defendants, Griffiths Lewis Steam Navigation Co. Ltd., in order to run her as one of their line of steamships engaged in this trade. The Plaintiff, Paterson Zochonis & Co. Ltd. were the owners of a quantity of casks of palm oil which were taken on board the "Grelwen" at two West African ports for carriage to Hull under tills of lading issued in the names of "The African Steamship Company and the British and African Steam Navigation Co. Managers Elder Dempster & Co". The bills of lading contained clauses which provided that "the shipowners hereinafter called the Company", should not be liable for loss or damage arising from a variety of happenings, which for the present purpose I need not particularise beyond saying that they had the effect of exempting "the Company" (i.e. by definition "the Shipowners") from liability for damage due to the negligent stowage of the goods by the servants or agents of "the Company". The bills were signed by the Master of the "Grelwen" as "agent of the Company". Large quantities of palm kernels in bags were stowed above the casks of oil, and as there were no tweendecks to take the weight of these bags, it bore directly upon the casks with the result that many of the casks were crushed and, in consequence, much of the oil escaped and was lost. It appears that ships regularly engaged in the West African trade were usually fitted with tweendecks for the very purpose of relieving any casks of palm oil carried from the weight of superincumbered cargo. In these circumstances, Paterson Zochonis . Co. Ltd. (whom I will call "the Shippers") sued Elder Dempster & Co. Ltd., the African Steamship Co., and the British - African Steam Navigation Co (whom I will call collectively *"the Charterers",* and also the Griffiths Lewis Steam Navigation Co. Ltd. (whom I will call "*the Grelwen's owners*") for damage in respect of the loss of the oil.

28. The claim was based, in effect, on two grounds, viz: (a) that the Defendants had been negligent in stowing the Plaintiffs' oil, and (b) that the ship was unseaworthy, in that it was structurally unfit for the carriage of the Plaintiffs' oil. Mr. Justice Rowlatt held that the ship was unseaworthy for the carriage of this cargo, and that none of the exceptions in the bills of lading covered a claim based on unseaworthiness, and gave Judgment for the Plaintiffs accordingly.

29. On appeal to the Court of Appeal (1923 1 King's Bench, page 420, the Court, by a majority (Lord Justice Bankes and Mr. Justice Eve , Lord Justice Scrutton dissenting) upheld Mr. Justice Rowlatt's decision. In his dissenting judgment Lord Justice Scrutton, after rejecting the shippers' claim so far as based on unseaworthiness, dealt with their contention that the loss was due to bad stowage. On this part of their case the shippers admitted that the charterers were protected from liability by the exceptions in the Bills of Lading, but contended that the "Grelwen's" owners were liable in tort on the ground that the master and crew were in the service of the "Grelwen's" owners as owners of the ship, that their conduct in putting an excessive weight on the palm oil barrels amounted to a tort for which the "Grelwen's" owners were liable as having been committed by their servants and that the "Grelwen's" owners, not being parties to the bills of lading, could not claim the benefit of the exceptions contained in them. In dealing with this contention Lord Justice Strutton at page 441 of the report, said: "To this counsel for the owner made reply that the owner in the case of a time charter like the present one was not in possession of the goods. This in my opinion is contrary to all the authorities, of which ***Omoa Coal Co. v. Huntley*** is a type. The real answer to the claim is in my view that the shipowner is not in possession as a bailee, but as the agent of a person, the charterer with whom the owner of the goods has made a contract defining his liability, and that the owner as servant or agent of the charterer can claim the same protection as the charterer. Were it otherwise there would be an easy way round the bill of lading in the case of every chartered ship; the owner of the goods would simply sue the owner of the ship and ignore the bill of lading exceptions, though he had

contracted with the charterer for carriage on those terms and the owner had only received the goods as agent for the charterer.

30. On appeal to the House of Lords, the House by a majority (Viscount Cave, Lord Dunedin, Lord Sumner and Lord Carson; Viscount Finlay dissenting) reversed the decision of the Court of Appeal, holding that the loss was due to bad stowage and not to unseaworthiness, and that the claim in tort against the *"Grelwen's"* owners failed because they were (as Lord Justice Scrutton had held) entitled to the benefit of the exception of liability-contained in the bills of lading. So far as this claim in tort as concerned, Viscount Finlay agreed with the rest of their Lordships, so that the decision may be said to have been unanimous as to the result on that part of the case, though there were differences of some importance in the reasoning by which they severally arrived at their conclusion. In 1924 Appeal Cases, page 533, Viscount Cave said: I do not think that this argument should prevail. It was stipulated in the bills of lading that "the shipowners" should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading; and it appears to me that this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and parties to the contract; but they took possession of the goods (as Lord Justice Scurtton says) on behalf of and as the agents of the charterers, and so can claim the same protection as their principals. Viscount Finlay at page 547 said:

"It appears to me that if the plaintiffs are to succeed it must be upon the bill of lading. The owners of the goods put them on board the 'Grelwen' to be carried on the terms of the bill of lading. It is said that the imposition of the weight of the kernels on the top of the palm oil barrels was a wrongful act, resulting in the destruction of the barrels and the loss of the oil, and that for this wrongful act, committed by their servants, the shipowners are liable, apart from contract altogether, so that the plaintiffs, in claiming from the shipowners, would not be hampered by the conditions of the bill of lading. This contention seems to me to overlook the fact that the act complained of was done in the course of the stowage under the bill of lading, and that the bill of lading provided that the owners are not to be liable for bad stowage. If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach, whatever the form of the action and whether owner or charterer be sued. It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect of all stowage, by suing the owner of the ship in tort. The Court of Appeal were, in my opinion, right in rejecting this contention, which would lead to results so extraordinary as those referred to by Lord Justice Scrutton in his judgment".

31. Lord Sumner (with whom Lord Dunedin concurred) said, at page 564: "*It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co's line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention*". Lord Carson expressed his concurrence in the judgments of Lord Cave and Lord Sumner.

32. It will be seen that Lord Cave based himself in part at all events on the view that the stipulation that "the shipowners" should not be liable for (to put it shortly) bad stowage was intended to be a stipulation on behalf of all the persons interested in the ship that is to say both the charterers and the "Grelwen's" owners; and while he added that the "Grelwen's" owners took possession of the goods (as Lord Justice Scrutton had said) on behalf of and as the agents of the charterers and so could claim the same protection as their principals, he prefaced this by the words "*It may be that the owners"* (i.e. the "Grelwen's" owners) "*were not directly parties to the contract*", which suggest that in his view the 'Grelwen's' owners by taking possession of the goods on the charterers behalf became indirectly parties to the contract and therefore entitled to the benfit of the exceptions contained in it.

33. Lord Finlay founded himself on the view that the shippers put the goods on board the "Grelwen" to be carried on the terms of the bills of lading; that the act complained of was done in the course of stowage under the bills of lading which provided against liability for bad stowage; and that there was no independent tort unconnected with the performance of the contract. Finally, Lord Sumner based his conclusion either upon the ground that the reception of the cargo amounted to a bailment on terms which included the exceptions stipulated in the bill of lading, or upon the ground that the captain of the "Grelwen" took possession of the cargo only as agent for the charterers, expressing a preference for the former view. To my mind these passages from their Lordships' speeches fall far short of establishing the general proposition contended for by the Defendants in the present case.

34. It is, to my mind, clear that the words "the Company will not be responsible" in the conditions of the Plaintiff's ticket cannot be extended so as to include the Defendants in the way in which Lord Cave thought the somewhat ambiguous expression "the shipowners" in the bills of lading should be construed as including the "Grelwen's" owners as persons interested in the ship. Again, it is to my mind clear that the Defendants cannot be said to have become parties to a contract with the Plaintiff in the terms of the Plaintiff's ticket upon the Plaintiff going on board the "Himalaya" as a passenger. Moreover, in the ***Elder Dempster*** case it was not sought to make the "Grelwen's" owners liable for any tortious act committed by them personally, but to make them vicariously liable for the negligence of the Master and crew on the principle of respondeat superior. It is by no means to be assumed that

the result would have been the same if one of the "Grelwen's" crew had been sued for a tortious act committed by him personally in the course of the stowage of the goods.

35. In the present case, the Plaintiff, just as the Plaintiff in ***Cosgrove v. Horsfall*** had only to prove that he was lawfully on the omnibus, can maintain her action merely by showing that she was a lawful user of the gangway whom the Defendants knew or ought to have known to be likely to use it; and this being so I think the negligence of which she complains has a sufficient independence from the contract to fall within Lord Finlay's reservation with respect to the case of an independent tort.

36. In sum, the facts in the ***Elder Dempster*** case were entirely different from those in the present case, not least in the respects that it was a case of the carriage of goods in a chartered vessel whereas this is a case of the carriage of a passenger in a vessel belonging to the carriers; and that it was a case where it was sought to make the owners of a chartered vessel vicariously responsible for the tortious acts of the Master and crew of that vessel when acting under the orders of the charterers, whereas this is a case where there is a direct claim in tort against the Master and Boatswain of a ship by a passenger travelling in the ship. The ***Elder Dempster*** case can well be explained by reference to its own facts without ascribing to their Lordships any intention to lay down any such general principle as the Defendants here contend for, nor do I think that their Lordships' language, carefully directed as it was to the particular facts of the case then before the House, can fairly be construed as doing so.

37. It is interesting to note that in the case of ***Mersey Shippin and Transport Co. Ltd. v. Rea Ltd.*** (21 Lloyds List page 375) Lord Justice Bankes and Lord Justice Scrutton sitting in a Divisional Court as additional judges of the King's Bench Division expressed divergent views as to the effect of the ***Elder Dempster*** case Lord Justice Bankes said at page 377:

"*But the Court there held that under the circumstances of the vessel being chartered to form one of the owners' regular line, the proper inference to draw was that the goods were shipped under conditions which could cover both charterer and shipowner*".

Lord Justice Scrutton said, at page 378:

"I think that the reasoning of the House of Lords in the ***Elder Dempster*** *case shows that, where there is a contract which contains an exemption clause, the servants or agents who act under that contract have the benefit of the exemption clause. They cannot be sued in tort as independent people, but they can claim the protection of the contract made with their employers on whose behalf they are acting. I think that is the result of the second point in the judgments of Lord Cave and of Lord Sumner, with whom Lord Dunedin concurs, in the* ***Elder Dempster*** *case*".

38. I prefer the view of Lord Justice Bankes to that of Lord Justice Scrutton which, if accepted, would go far to make good the Defendants' contention here. I should add that Lord Justice Scrutton seems to have misapprehended Lord Sumner's second point which, as I understand it, was that the Captain of the "Grelwen" should be regarded as acting as agent for the charterers and not as agent for the "Grelwen's" owners whom it was sought to make liable for the Captain's default.

39. For the reasons I have endeavoured to state I cannot accept the view that ***Cosgrove v. Horsfall*** is inconsistent with the ***Elder Dempster*** case, and I am accordingly of opinion that we must follow ***Cosgrove v. Horsfall*** as a decision of this Court directly in point. Many other cases of varying degrees of relevance were cited to us and to the learned Judge. I do not find it necessary to refer to these, for there is nothing in any of them which can be held to destroy the authority of ***Cosgrove v. Horsfall*** once that case is absolved of inconsistency with the ***Elder Dempster*** case. Accordingly, I would dismiss this appeal.

LORD JUSTICE MORRIS:

40. If the Plaintiff has suffered injury and damage by reason of the personal negligence or breach of duty of the Defendants or one of them it is said that the Defendants are absolved from liability because the Plaintiff contracted with their employers, the Peninsular and Oriental Steam Navigation Company, that the Company would in such contingency not be responsible. The Plaintiff did not however make a contract with the Company that the servants of the Company would not be responsible to the Plaintiff. Even had there been such a contract, then, unless the Company contracted as agents for their servants, the latter could not claim immunity for their personal torts if the decision of this Court in ***Cosgrove v. Horsfall*** (62 Times Law Reports, page 140) is of binding validity.

41. The point of law which has been set down for hearing is as to whether the terms of the ticket held by the Plaintiff afford a defence to the Defendants against the claim of the Plaintiff. On the ticket issued to the Plaintiff it was stated: "*Your attention is specially directed to the conditions of transportation on the covers containing this ticket*". It was also stated that; "*Passengers and their baggage are carried at passengers' entire risk*". This must, I think, have reference to and be deemed to be a summary of "*the conditions of transportation*" to which attention is specially directed. It is to such "conditions" that reference must be made in order to ascertain the terms on which a passenger is carried.

42. The condition which is relied upon by the Defendants begins with the words: "*The Company will not be responsible for and shall be exempt from all liability in respect of*". There is nothing which states that individual tortfeasors are to be free and exempt from liability. The immunity of the Company is secured by phraseology which is designed to cover every contingency. There is no parsimony in the use of words and the first sentence contains over three hundred of them. It would have been easy to include a few extra words in an attempt to give immunity to the

servants or agents of the Company: the absence of such words rather suggests that the scope and design of the condition have reference to securing the immunity of the Company.

43. From the multiform provisions of the protective condition it can be gleaned that: *"The Company will not be responsible for and shall be exempt from all liability in respect of any ... loss damage or injury whatsoever of or to the person of any passenger ... and whether such ... injury ... shall occur on land, on ship board or elsewhere ... and whether the same shall arise from ... or by accidents ... or any acts defaults or negligence of ... passengers ... of any kind under any circumstances whatsoever*".

44. If one passenger caused injury to another by a tortious act it could hardly be said that the words I have quoted give immunity to the former. There are, of course, in addition many words making the Company immune from the consequences of any negligence of the Company's servants or agents, and it is said that for any tort of a servant or agent for which the Company would apart from the condition be answerable in law a like measure of immunity may be asserted by the servant or agent as that which by contract has been conceded to the Company. The contention is advanced in various ways. It is said that "*in contracting with the Plaintiff upon the terms of the said ticket the Company acted in all material respects as the agent of its servants and agents (including the Defendants) and thereby exempted the Defendants from any liability*" such as is referred to in the Statement of Claim. The said agency is said to arise by implication of law. But I can see nothing to suggest that the Company acted as the agent of its servants. The Company did not purport to contract on their behalf and there is nothing which as a matter of law suggests that the Plaintiff made a contract with each and every servant of the Company or with those who were likely to sail on the ship on the projected voyage or indeed with any person who might later become a servant and join the ship or with any servant or agent whose conduct might in any way affect the Plaintiff.

45. Alternatively it is urged that the Plaintiff "*agreed to travel in all respects at her own risk*", and impliedly agreed with the Company's servants and agents that they should be under no liability to the Plaintiff in connection with any injury sustained by her as a passenger. But the agreement made by the Plaintiff was on the terms of the express conditions and it is to them that reference must be made. I can see nothing in them which makes any implication necessary and nothing to suggest that at some time or at various times and in some manner there came into existence a number of contracts between the Plaintiff and various servants or agents of the Defendants who either on the ship or elsewhere might by their conduct in any way affect the Plaintiff. This contention appears to me to be both vague and unreal.

46. The argument mainly pressed on behalf of the Defendants is that in reference to any acts or omissions occurring while servants or agents of the Company are acting as such servants or agents reliance may be placed upon the terms of the ticket and that the servants or agents are "entitled to the same protection as that afforded to the Company by the terms of the ticket.

47. There are clearly many circumstances which may be imagined in which it would be fair and reasonable that the servants or agents of the Company should be as immune as the Company. Equally there are many circumstances in which such a result would be unfair and unreasonable. Servants might claim civil protection against the consequences of wanton or wicked or criminal acts. But the issue must be resolved not by balancing considerations of convenience but by the application of principle.

48. If a servant of the Company seeks to protect himself from the consequences of a wrongful act he must show that he has made or can claim to be a party to a contract not objectionable on any grounds of public policy by which he is given immunity. In the present case the Defendants can point to no such contract.

49. It is submitted that the binding effect of *Cosgrove v. Horsfall* (supra) can be challenged because no consideration was given to the decision of the House of Lords in ***Elder Dempster & Company and others v. Paterson Zochonis & Company*** (1924 Appeal Cases, page 522). That was a somewhat special case and in my judgment the reasoning in the speeches in the House of Lords did not direct any different conclusion from that which was reached in ***Cosgrove v. Horsfall.*** The House of Lords case has been much mentioned in judicial utterances but it is from the authority of the pronouncements in the House of Lords that throughout guidance must be obtained. Lord Sumner was definitely of the opinion in that case that there was no bald bailment of the goods to the Griffiths Lewis Steam Navigation Company with unrestricted liability. The view of the matter which he preferred was that the obligations to be inferred from the reception by the Griffiths Lewis Company of cargo for carriage to the United Kingdom amounted to a bailment upon terms which included "*the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading*". Lord Dunedin found that the opinion of Lord Sumner expressed fully and conclusively the result at which he himself had arrived. Lord Carson also agreed with Lord Sumner and the fact that he also agreed with Lord Cave showed that he did not consider that there was serious divergence between the reasoning of Lord Cave and Lord Sumner. Lord Cave pointed out that it was stipulated in the bills of lading that "*the shipowners*" should not be liable for any damage arising from other goods by stowage or contact with the goods shipped under the bills of lading and he considered that "*this was intended to be a stipulation on behalf of all the persons interested in the ship, that is to say, charterers and owners alike*". Lord Cave added:

"It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Lord Justice Scrutton says) on behalf of and as agents of the charterers and so can claim the same protection as their principals".

50. It seems to me that if when Paterson, Zochonis & Company handed over the goods to the owners (Griffiths Lewis Steam Navigation Company) the latter had said to Paterson, Zochonis & Company: "*Whether we are to be deemed to be taking possession of these goods on behalf of and as the agents of the charterers or on some other footing we take it that both you and we intend that the stipulations in the bills of lading are to protect us as well as the charterers?*", the answer would unquestionably have been: "*Of course*".

51. In the circumstances existing at the time that the goods were placed on board there was occasion for an implied contract between those who delivered and those who received. I do not read the decision in the ***Elder Dempster*** case as laying it down that if A. makes a contract with B. by which he agrees not to hold B. answerable for the tort of his servant C, that C. is thereby automatically given immunity if he commits a tort against A.

52. Many situations may arise in which a term in a contract between A. and B. can come into play so as to affect C. I do not seek to enumerate these situations but merely to illustrate some of them. Thus there may be a separate contract between A. and C. which impliedly incorporates the term in the contract between A. and B. Also there may arise dealings between A. and C. which are in some way related to or connected with the contract between A. and B. so that the term existing in that contract forms one of the circumstances to be taken into account when defining the duty owed by C. to A. These are apart from cases where C. might be the unnamed principal of B. Further, there may be cases in which A. has expressly or impliedly authorised B, to make on A's behalf a new contract with C, which contains a term similar to that in the contract between A. and B. The case of ***Hall v. The North Eastern Railway Company*** (Law Reports, 10 Queen's Bench, page 437) may be regarded as an illustration of this. The Plaintiff made a contract with the North British Company by which as a drover accompanying sheep that were to be carried he was entitled to be carried at his own risk from Angerton to Newcastle N.E. The North British Company did not operate beyond Morpeth: at Morpeth the Plaintiff's carriage was attached to a train of the North Eastern Railway Company and after the train left Morpeth it was run into by another train of the North Eastern Company whose servants were negligent. Mr Justice Blackburn on those facts said (see page 441):

"When the Plaintiff went to the North British Company and took a ticket under which he was to be carried from Angerton to Newcastle he in effect agreed that the North British Company should secure that the North Eastern Company should carry him on from Morpeth to Newcastle: and when he engaged to travel at his own risk he engaged with the North British Company that they should agree with the North Eastern Company that he should be carried on to Newcastle exactly on the same terms as if the North British line extended to Newcastle. It is clear that this is the true construction of the ticket: 'In consideration of my being carried the whole way free of charge I agree that I shall be travelling the whole way at my own risk': and it seems to me that the Plaintiff did authorise the North British Company to contract for him with the North Eastern Company, and what he authorised was that he should travel at his own risk".

53. Many variations of facts may be imagined in which the question arises whether a party is affected by a term in a contract. A recent illustration may be found in ***Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd.,*** (1954, 2 Weekly Law Reports, page 1005) where Mr Justice Devlin (at page 1019) said: *"I think the inference irresistible that it was the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him*".

54. In cases where goods are handed over from one person to another then, unless some express contract defines the position, there is often the necessity upon a consideration of all the facts and circumstances to imply the basis or the terms which have effect. Each case must depend upon its own facts. But whether in relation to goods or generally in all situations immunity from the consequences of some action which would normally in the circumstances give rise to liability at the suit of another must, unless given by law, be secured by contract. Such contract may be express and it may become effective by the operation of the principles of agency: or it may be implied in particular circumstances: but a contract to which the party seeking immunity is a complete stranger will not avail.

55. For the reasons which I have indicated I do not consider that in the present case the Shipping Company was contracting as the agent of those whom it might employ and I see no reason to suppose that the Plaintiff intended to give immunity in wider terms or to a greater extent than is provided for in the words set out on her ticket. In my judgment, the terms of the ticket held by the Plaintiff do not afford a defence to the Defendants and I would decide the preliminary point of law accordingly.

LORD JUSTICE DENNING:

56. The appeal will be dismissed with costs.

MR A.A. MOCATTA, Q.C. and MR MICHAEL KERR (instructed by Messrs Ince & Co.) appeared on behalf of the Appellants (Defendants).
MR GODFRAY Le QUESNE (instructed by Messrs Neil Maclean & Co.) appeared on behalf of the Respondent (Plaintiff).