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Contracts—Third Party Beneficiary Rule

To the Editor:

In the September 1982 issue of the *Canadian Bar Review*[1] there appears a Comment by Mr. C.M. Arymowicz which I found most enlightening. I would like to discuss one or two aspects of the comment dealing with *Grand Trunk Railway Company Ltd* v. *Robinson*[2], which Mr. Arymowicz suggests has been "lost" or at least misconceived as being about a contract made by an agent. It is my submission that Mr. Arymowicz has failed to fully appreciate that the Privy Council in that case was dealing with a contract of carriage of a quasi-legislative nature, that is a contract the terms of which are authorized by statute or valid regulations made thereunder.

As pointed out by the Privy Council in *Ludditt et al.* v. *Ginger Coote Airways Limited*[3], where a specific contract between a common carrier and a passenger is one which is authorized by statute or valid regulations made thereunder, a court cannot declare the contract to be unreasonable, invalid or illegal; and in such a case the contract, with its incidents either expressed or attached by law, becomes the only measure of the duties between the parties. The case *Grand Trunk Railway Company Ltd* v. *Robinson* is cited as authority. Reference can also be made to *W.R. Johnson Company Ltd et al.* v. *Inter-City Forwarders Ltd et al.*[4] The *Ocean Accident and Guarantee Corporation Ltd* v. *Air Canada*,[5] *Brochu* v. *Air Canada*[6] and most recently *Lotepro Engineering and Construction Ltd* v. *Air Canada and Canadian National Railway Company*.[7]

The conditions of the contract of carriage in the *Robinson* case were held to be binding upon Robinson even though he was not himself a contracting party, not so much because he was bound to the contract made by his agent Parker, but rather because the contract of carriage was in a

[1] (1982), 60 Can. Bar Rev. 467.

[2] [1915] A.C. 740.

[3] [1947] 2 W.W.R. 591.

[4] (1946), 60 C.R.T.C. 143, at p. 145.

[5] [1975] Q.B. 173 (Que.).

[6] Oct. 1979, Quebec Prov. Ct, unreported.

[7] [1982] 2 W.W.R. 630.

form authorized by the Board of Railway Commissioners for Canada. In this regard Viscount Haldane states as follows:[8]

> In 1904 the Board approved a form of livestock special contract, and the order approving it was duly published. The appellants adopted this form, and, so far as appears, have complied with the conditions prescribed for its use. It is out of a contract in the approved form that the present question arises.

In respect to such a contract, Viscount Haldane states:[9]

> If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the Plaintiff cannot by any device of form get more than the contract allows him.

The quotation from the decision of Viscount Haldane cited by Mr. Arymowicz[10] must be read in this context. While Robinson's rights flowed from the contract itself, his rights and the corresponding duties of the railway company were determined not so much by anything either Robinson or Parker did in the restricted privity of contract sense, but rather because Robinson having approbated the contract by travelling under it could not afterwards reprobate it by claiming a right inconsistent with it. Such a contract with its incidents either expressed or attached by law is in a sense a contract of adhesion, that is if you want the goods or services at all you have to accept all of the terms and conditions on a take it or leave it basis. As pointed out by Mr. Justice Rowbotham in *Lotepro Engineering and Construction Ltd* v. *Air Canada and Canadian National Railway Company,*[11] the acceptance by the shipper of a contract of carriage of a quasi-legislative nature implies acceptance of its terms and conditions, whether or not actual notice of such terms and conditions is given to him. The terms and conditions of the contract comprise the overall and entire measure of rights and duties between the parties. In this regard it is also useful to recall the views of Mr. Justice Jules Deschênes of the Quebec Court of Appeal in *The Ocean Accident and Guarantee Corporation Ltd* v. *Air Canada*, as follows:[12]

> In fact, one must stop indulging in illusion and wanting to apply principles to mass air transportation, which in former days might have appeared reasonable, but which today only apply to the privileged domain of individual travel. In modern times, let us take things at their face value: it is pure fiction to continue to speak of air transportation "contract" allowing free negotiation of the conditions which must govern the travel of the passenger. Generally speaking, the only choice left to the passenger is to accept or refuse to travel subject to conditions established by others; subsequently, the air transportation contract thus becomes a binding agreement."

Also, I must respectfully disagree with the statement of Mr. Arymowicz that:[13] "when the railway company entered relationship with

[8] *Supra*, footnote 2, at p. 744.

[9] *Ibid.*, at p. 747.

[10] *Op. cit.*, footnote 1, at p. 474.

[11] *Supra*, footnote 7.

[12] *Supra*, footnote 5, at p. xxx.

[13] *Op. cit.*, footnote 1, at p. 473.

Robinson, it did not assume the obligations of a common carrier and then rely on the document to exclude a portion of these obligations.'' It is clear from reading the reasons for judgment of Viscount Haldane in *Robinson* that the railway company in that case was carrying Robinson as a common carrier with limited liability and not as a private carrier.[14]

Mr. Arymowicz wrongly gives the reader the impression that there is something special about a special contract in the sense that a common carrier is no longer a common carrier if he endeavors to limit his liability by a ''special contract''.[15] There is nothing special about a special contract. Any contract entered into by the carrier and a customer whereby the carrier endeavors to limit his common law liability in one or more respects is a special contract. As pointed out in *Consolidated Plate Glass (Western) Ltd* v. *Manitoba Cartage and Storage Ltd*, quoting from *Halsbury*:[16]

> A common carrier is not bound to carry as a common carrier. He may enter into contracts to carry as a private carrier. He may also limit his liability in one or more aspects without ceasing to be a common carrier and liable as such in other respects. Whether he is carrying as a private carrier or a common carrier with limited liability, depends upon whether or not the contract of carriage is such as to obliterate or destroy his character as a common carrier.

There is no indication from the decision of the Privy Council in *Robinson* that the court considered the contract of carriage to have been such as to obliterate or destroy the character of the railway company as a common carrier. On the contrary, the court in very clear terms held that the railway company was entitled to limit its liability by contract even in the case of negligence. The special contract entered into with Robinson did not, as Mr. Arymowicz suggests, displace the railway company's common law oglibations. These common law obligations were limited by the special contract, as permitted by the Railway Act.

Perhaps Mr. Arymowicz should recall the following statement found in *Halsbury*:[17]

> As at the present time practically all carriage is regulated by contract, it might be difficult to discover anyone operating purely as a common carrier who does not limit, by a special contract, the heavy liabilities imposed under the common law.

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[14] In this regard see the discussion of Viscount Haldane as to the position of the common carrier in Canada in respect to its ability to limit its liability by special contract, *supra*, footnote 2, at p. 744.

[15] *Op. cit.*, footnote 1, at p. 473.

[16] (1960), 20 D.L.R. (2d) 779, at p. 782.

[17] Laws of England (4th ed., 1981), Vol. 5, para. 301.

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