pany in the car used for that purpose upon the defendants' railway, and there remained in the charge of the express messenger, where they were when a collision occurred between the train on which they were and another train of the defendants, as a result of which a fire took place and the goods were destroyed. The defendants admitted that the collision was caused by the negligence of their servants; and for the damages thus caused this action is brought.

GARROW, J.A.:—The cause of action is one arising, if at all, ex delicto, because the plaintiff had no contract with the defendants. And it is not the ordinary cause of action against a common carrier for not carrying safely—which may be in tort as well as upon the contract—because the goods were not received by the defendants in that character, but under their general agreement with the express company, which contains the exemption from liability clause to which I have referred. That such an action will lie seems beyond question. Here, if the loss had occurred through any negligence on the part of the express company or their servants, the defendants would not have been liable. What they are, in my opinion, liable for is their own separate, or, as it is in some of the cases called, "active," negligence in bringing about the collision.

The only real defence to the plaintiff's claim is made upon two grounds: (1) that the defendants are entitled as against the plaintiff to the exemption from liability stipulated for in their agreement with the express company under which they received and were carrying the goods; and (2) that in any event they are entitled to the benefit of the limitation of liability to $50 provided for in the plaintiff's contract with the express company, which amount the defendants paid into Court without admitting liability.

There is, however, in my opinion, this fatal objection to the success of both defences that to the first agreement the plaintiff is a stranger, and to the second the defendants are in the same position. In addition the exemptions claimed would not extend to include an act of collateral or "active" negligence . . . such as the collision. Such indemnity or exemption clauses are, quite properly, construed strictly, and, if intended to exclude claims for negligence, that should be clearly expressed. See *Price* v. *Union Lighterage Co.*, 20 Times L.R. 177. . . . But, if the agreement between the plaintiff and the express company has any application, I agree with the construction placed by RIDDELL, J., upon the obscurely expressed clause relied on, "that the