SUPERIOR COURT.

MONTREAL, January 31, 1880.

MURRAY v. BICKERDIKE.

MURRAY v. HEAD.

Freight—Liability of freighter where goods are jettisoned.—C. C. 2450.

JOHNSON, J. The plaintiff in these two cases is the master of the steamship "Colina," and he sues to recover the freight for a large number of horned cattle, sheep, and pigs laden on his ship by the defendants for conveyance from Montreal to Glasgow, and he alleges a tremendous list of exemptions from liability stipulated in the bills of lading, which were not furnished till afterwards. The pleadings and evidence are the same in both cases; and the plaintiff puts his case on the ground that the exemptions in the contract entitle him to freight, delivery or no delivery; and undoubtedly they do upon the face of the bill of lading; even though he alleges the fact of the loss of the cattle during a great storm at sea, by *force majeure*. The plea of the defendant in my opinion raises merely one point. It says the plaintiff did not perform his part of the contract, which was to deliver the cattle safely at the port of destination; that in fact, they were not delivered; but were jettisoned in mid ocean, which, it further says, not only deprived the plaintiff of a right to the freight; but gave the defendant a right to contribution on a general average. I say this seems to me to raise only one point. The defendant plainly says:—"You threw my cattle into the sea, and I have a right of contribution which I can urge against the owners." There is no express denial of the averments as to the excepted risks, or anything else in the declaration. Those facts are therefore admitted, and must have their effect, unless the defendant on his part can allege and show something to avoid the conclusion otherwise arising from them. What is it, then, that he says? He merely says the cattle were thrown overboard, and he has acquired thereby a right of contribution on a general average.

It is, therefore, quite immaterial and useless to enquire whether they were properly or unnecessarily jettisoned. The defendant himself tells us he has a right to contribution arising from the fact of the jettison. Therefore he must pay freight. Nothing is plainer on general principles than the liability of the freighter under such circumstances; and the reason cannot be given better than in the words of Pothier:—"Il y a quelques cas," says Pothier (Charter party, sec. 3, art. IV.) "où le fret est du en entier, quoique les marchandises n'aient pu parvenir à leur destination. Le premier cas est celui auquel elles ont été jetées à la mer pour le salut commun. L'affréteur à qui ces marchandises appartiennent, devant être en ce cas indemnisé de la perte des dites marchandises par tous les intéressés à la conservation du navire, il en doit le fret. S'il n'est pas juste que le jet ayant été fait pour le salut commun, il porte seul la perte de ces marchandises, par la meme raison, il n'est pas juste que le locateur du vaisseau en perde le fret." Our own Code reproduces this rule at art. 2450.

Then it was said in argument that the master could not bring the action in his own name, when the bill of lading has been signed by another. This point is not presented by the pleadings, and I do not decide it. But the plaintiff's allegation is that the master made this contract through his agents. That may be true or not; but it is nowhere expressly denied, as the law requires before it need be proved. There is a general protestation and a general denial, but that is all. The law says that every fact *that is not expressly denied* (not denied in the general mass, but by itself), is held to be admitted. The judgment will therefore be for the plaintiff for the amount demanded; but as the contribution is of course not asked here against the master, but only averred, and it was mentioned by Mr. Kerr that it was asked in another case, any rights the defendant may have to a *pro rata* reduction will be reserved to him. The judgment is the same in both cases.

Abbott, Tait, Wotherspoon & Abbott for plaintiffs.

Kerr & Carter for defendant.

CROSS v. ALLAN et al.

Insurance—Insurers suing owners of vessel in name of freighter for value of goods lost by negligence—Subrogation—Perils of the Sea.

JOHNSON, J. The last case (*Murray* v. *Bickerdike*) was by the master against the freighter to get paid for the freight. Here is one by the freighter against the owners to get the value of