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THE EARLY JURIDICAL HISTORY OF FRANCE.

[Continued from p. 140.]

It is certain that a supreme jurisdiction over all persons, and all causes, was exercised by the Assemblies of the Champ de Mars, but the precise extent of that jurisdiction, which was originally vested in the subordinate Courts of the Crown, or of the feudal Lords or Seigneurs, cannot now be determined.(1) It appears, however, from the learned researches of a modern writer (Montesquieu), to have been a fundamental principle of the French Monarchy, that every person who held a military command in chief, was, of right, entitled to a civil jurisdiction over all whom he led to war.(2) Justice, therefore, was distributed by every feodal Seigneur to his vassals, within the limits of his Fief, whether he was a layman or an ecclesiastic, for he led them in person against the enemy, if he was a layman, and by his substitute (advocatus) if he happened to be an ecclesiastic,(3) and, upon the same principle, the Liberi or tenants of allodial estates who were led to war by the Dukes and Counts were subject to *their* jurisdiction (4). The rule of decision, however, in every court was the general Law of the state, and the King, being the acknowledged head of the Government, in all matters, civil and military, all proceedings were in his name.(5)

The Dukes, the Counts and the Seigneurs, in their respective jurisdictions, originally decided causes in person,(6) but they, afterwards, entrusted this part of their duty to others. The officer who was appointed for the purpose by a Seigneur, was sometimes called a *Seneschal*,(7) but most commonly a Bailiff which, in the language of those days, imported a guardian or protector of Justice, (1) and those who were named by the Dukes and Counts, were called Viscounts, Prevosts, Viguiers and Chastelans.(2) But in all their Jurisdictions, an usage, which derived its origin from the forests of Germany, was continued. Neither the Dukes, the Counts nor the Seigneurs, nor any of their officers decided alone. They assembled in their courts a kind of assize composed of their vassals, to the number of twelve,(3) who were, principally, the officers of their respective courts, and by those persons (who as vassals were the equals of the parties whose causes were there tried and thence called Peers) the judgment was pronounced according to the opinion of the majority, unless there was an equal division of voices, when, in criminal cases, it was given for the accused, and in cases of inheritance, in favor of the defendant, subject always to an appeal to arms, and an ultimate decision by judicial combat.(4)

The feudal system is well calculated for defence, but not for the support of order. In theory it is founded in subordination, but in practice it has been found universally to have diminished the power of the sovereign, while it increased that of the greater vassals. This was particularly the case in France, where the seigneurs, at a very early period of the monarchy began to usurp the rights which had till then been deemed the distinctions of Royalty, and with such advantage, in consequence of the weakness of the Kings of the second race, and the anarchy into which the Kingdom was thrown by the depredations of the Hungarians and Normans(5) during the ninth and tenth centuries, that the very dependants of the Crown, the Dukes, the Counts, and even the inferior officers of the State, were induced, by their example, to adopt the same conduct; they combined together, and about the period at which Hugh Capet, the first of the third race, took possession of the Throne, were completely successful. They made hereditary, in their

(1) Robertson's Charles V. 1st, p. 304.

(2) Montesquieu, lib. 30, cap. 18. Répert. 8 vo. vol. 25, p. 6. Loyseau des Seigneuries, cap. 1, Sect. 72 & 73.

(3) Montesquieu, liber 30, cap. 17, vol. 2, p. 377.

(4) Montesquieu, lib. 30, cap. Répert. vol. 6, p. 8, 8 vo. edit.

(5) Montesquieu, lib. 30, cap. 17.

(6) Dictionnaire de Jurisprudence, vol. 3, p. 18, col. 1.

(7) The title of Seneschal imported "an officer of the household." Viscounts were said to be "quasi comitum vicem gerentes;" Prevosts "quasi praepositi juredicendos;" Viguiers "quasi vicarii comitum;" and Chastelans "quasi castrorum custodes." Loyseau de l'abus de Justice des Villages, p. 6, quod vide.

(1) Encyc. Method. verbo "bailiff," vol. 1, p. 710. Dict. de Droit, verbo "bailiff." Loyseau de l'abus de Justice des Villages, p. 6, and Loyseau des Offices, p. 4, & p. 349.

(2) Loyseau de l'Abus de Justice des Villages, p. 6.

(3) Montesquieu, book 30, cap. 18, vol. 2, pp. 381 & 382.

(4) Montesquieu, book 28, cap. 23—27.

(5) Fleury, p. 47.

families, the lands, titles and offices, which, before, they had enjoyed for life only. They usurped the sovereignty of the soil, with civil and military authority over the inhabitants. They granted lands to their immediate tenants, who granted them over to others by subinfeudation, and, although they professed to hold their Fiefs from the Crown, they were, in fact, independent. Strong in power, they exercised, in their several territories, every Royal prerogative.—They coined money—fixed the standard of weights and measures—granted safeguards—entertained a military force—imposed taxes—and administered justice in their own names, and in Courts of their own creation, which decided ultimately in all cases, civil and criminal, not according to the written laws of the Kingdom, but according to the unwritten customs and usages of the District over which they respectively claimed and exercised Jurisdiction.(1.)

By these usurpations of the Seigneurs, the foundations of the ancient laws of France were gradually undermined. But the demolition of this venerable fabrick was greatly promoted by the profound ignorance which pervaded the kingdom during this period. Few persons, except ecclesiastics, could read, and, hence, the Theodosian Code—the Laws of the Barbarians, which had been reduced to writing, and the Capitulars sunk imperceptibly, but equally, into oblivion. The clergy also furthered its destruction by adopting, in their jurisdictions, the Canon Law which they had begun to compile, early in the ninth century, and the crown completed it by the publication of the ever-memorable Edict of *Pistes*, so-called from the City of Pistes, where it was promulgated in the year 864, by Charles the Bald, one of the weakest of the weak descendants of Charlemagne. By this Edict, in the mistaken policy of conciliation, the unwritten usages of each Seigneurie were ratified and declared to be law; a declaration which may be considered not only as the efficient cause of the final extinction of the ancient Law, but of the permanent establishment of that infinite variety of customs, which obtained in France until the late Revolution. (2)

The authority of the Crown of France, at its ultimate point of depression, about the close of the tenth century, was merely nominal, the Royal Jurisdiction being confined to the Royal Domaine, which comprehended no more than four cities, in which the King was obeyed as feudal Lord, and not as Sovereign; (1) on the other hand, the power of the Seigneurs at this epoch was enormous—their tyranny exorbitant. The whole country was laid waste by the wars which they waged against each other, and their own vassals were reduced to an actual state of slavery, under the denomination of *serfs* and *hommes de poite*, or under the pretended rights of personal service and *corvé*, were treated as if, in fact, they had been reduced to that wretched condition. (2). By this state of anarchy, those who were yet in the possession of allodial property were, in the first instance, induced to annex what they held to the jurisdiction of some Fief, and to subject themselves to feudal services, for the immediate safety of their persons and the defence of their estates, and so generally was this the case that it gave rise to the maxim "*Nulle terre sans Seigneur*," which at length became the universal Law of France. (3). But as the Seigneurs could not, in every instance, protect their dependants against the incursions of their neighbours, and as the feudal burthens were, themselves, insufferable, many vassals abandoned their Lords, by degrees, and sought protection in walled towns where they united and entered into armed associations for mutual defence. (4)

These associations, which began during the reign of "Louis le Gros," about the year 1109, and were called "*communes*," could not long remain without some government; regulations therefore were made, and usages adopted by each *commune* for the control of its subjects, and being asylums for all who were inclined to be peaceable, and barriers against the common enemy (the Seigneurs), the crown afforded them every assistance in its power—conceded to them the right of enacting laws for their own internal government, and enfranchised the inhabitants. (5)

The Seigneurs plainly saw that the institution of communes was adverse to their interest, yet they could not prevent the increase of such associations; they even found themselves com-

(1) Fleury, 51 & 52. Hargrave Notes on Coke's Littleton, p. 366*a*.

(2) Montesquieu, Lib. 28, cap. 4; vol. 2, p. 243.

(1) Robertson's Charles V, vol. 1, p. 366.

(2) Dictionnaire de Jurisprudence, vol. 3, pp. 16 & 17.

(3) Robertson's Charles V, vol. 1, p. 223. Dict. de Jurisp. vol. 3, p. 16: Fleury, p. 61; Robertson's Ibid., p. 16.

(4) Dict. de Jurisp. vol. 3, p. 17.

(5) Dict. de Jurisp. vol. 3, p. 17. Répert. vol. 13. Verbo "Commune."

pelled to have recourse to the same expedient to prevent their dependants from taking refuge in the royal cities which were incorporated : many of the towns, also, within their territories, were willing to purchase charters of liberty, and as most of the seigneurs had expended large sums in the holy wars, and were needy, they sold them as a means of present relief. From hence, in less than two centuries, most of the towns in France, from a state of dependance, became free corporations, and personal servitude was generally abolished. (1)

The effects of these establishments were very soon felt; they were found to afford a degree of security equal to that which was afforded by the seigneurs, who began to be of less importance when they ceased to be the protectors of the people. The *communes* themselves became attached to their sovereign, whom they considered as the author of their liberties, and they looked to the Crown as the common centre of union, necessary for the defence of the whole against their oppressors.(2) On the other hand, the sovereign considered them as instruments which might, with great advantage, be employed to increase the Royal Prerogative. To this end they endeavoured to raise them to importance, and, with consummate policy, called them to assist, by their Deputies, in the States General of the nation. Availing themselves also of their co-operation, under the idea of restraining the power of the Seigneurs, they laboured in the great design of restoring to France her ancient limits, and to the Crown its original Jurisdiction. From time to time, as opportunities occurred, they re-united the dismembered Provinces to the Royal Domain, and reduced them to immediate dependence by conquest, by escheats and by treaties,(3) they abolished private warfare, and judicial combats, and extended the administration of justice, under the royal authority, to all persons and to all causes (4) by steps of which the most effectual shall be more particularly noticed.

Before and during the reign of Charlemagne, Justices in Eyre of the Royal appointment, under the title of "*Missi Dominici*," visited, occasionally, the different Provinces, chiefly for the purpose of investigating the conduct of the Dukes and Counts in the several jurisdictions, civil and criminal, which they exercised under the authority of the Crown, which was sometimes greater, and sometimes less, as the Sovereign was more or less feared and respected.(1). Louis VI, about the year 1125, attempted to revive the office of the "Missi Dominici," under the title of *Juges des Exempts*,(2) but the seigneurs were in his time too powerful, and he was obliged to abandon his intention.(3) His successors had recourse to expedients less alarming. Among the first, certain cases in which the King was interested, or presumed to be interested, were declared to be "Pleas for the Crown," or *Cas Royaux*, which, according to feudal principles, (he being the Lord paramount) could not be decided by the officer of his vassal, and were, therefore cognizable in the Royal Courts exclusively. To this distinction the seigneurs of inferior note submitted, but it was scorned by the more powerful, who, relying upon their strength, continued to exercise jurisdiction over all cases. The attempt, however, even with respect to the latter, was productive of benefit; it turned the attention of the vassals to courts distinct from those of their oppressors, and taught them to view the sovereign as a protector, and this facilitated the subsequent introduction of Appeals, by which the decisions of the seigneurial courts were brought under the review of the Royal Judges, (4). Of these the Appeal "*de défaut de droit*," on account of the delay or refusal of justice, was the first. The feudal law had provided that if a Seigneur had not as many vassals as enabled him to try, by their peers, the parties who pleaded in his Court, or if he delayed, or refused to proceed to trial, the cause might be carried by appeal to the Court of the Superior Lord of whom the seigneur held, and be there tried. (5) The right of jurisdiction had been usurped by many inconsiderable seigneurs, who were often unable to hold Courts, for want of officers and vassals, and while trials by battle continued in use, there were times, and cases, even in the Courts of the greater Seigneurs, in

(1) Robertson's Charles V. vol. 1, pp. 33, 227 and 251.
(2) Robertson's Charles V. vol. 1, p. 34.
(3) This design was ultimately completed in 1735, by the re-union of the Provinces of Bar and Lorraine.—Vide Abrégé Chronologique des Grands Fiefs de la Couronne de France, Paris, 1759, and Hargrave's Note on Coke and Littleton, 366*b*.
(4) Loyseau des Seigneuries, cap. 5, sec 63. Delolme, p. 17. Robertsons's Charles V. vol. 1, pp. 36, 56.

(1) Répert. 8vo. vol. 40, p. 180, verbo "Missi Dominici." Du Cange, verbo "Dux," "Comites," et "Missi."
(2) Répert. verbo, "Missi Dominici," vol. II, p. 573.
(3) Hénault's Abrégé Chronologique, tome 2, p. 730.
(4) Robertson's Charles V., vol. 1, pp. 60, 61.
(5) Beaumanoir, cap. 62, p. 322. Esprit des Lois, Lib. 28, cap. 28.

which it was difficult to assemble the Peers, by reason of the danger to which they were exposed, their being liable to appeals, by either party, on account of false judgments, which necessarily led to the hazard of a personal combat, if they maintained their opinion. (1) In all such cases justice was delayed, and there were, therefore, frequent occasions for appeals of this description, from whence the practice became familiar, and served as an introduction to appeals on account of the "injustice" or "iniquity" of the sentence, which followed, and gradually increased, as the trial by combat declined, for that mode of trial being, in fact, an appeal to the Deity, and the issue of the battle, held to be a decision by his immediate interference, was incompatible with a new judgment of any kind. (2)

To facilitate Appeals, and the recourse of the subject to the Royal authority, Judges, under the title of "*Grand Baillis*," were appointed in all the cities of the Royal Domain, with an Appellate Jurisdiction over all causes, civil and criminal, heard in the Seigneurial and in the Royal (but inferior) Courts of Prevôté, (3) which was final, except in certain cases of importance, which they were required to transmit to the King, to be decided by himself in his Council, where they were ultimately determined. (4) The number of these jurisdictions, at their first creation, was inconsiderable, but in the reign of Phillip Augustus, about the year 1190, they were numerous. (5)

A regulation of greater importance succeeded the institution of the Grand Baillis. The King's Supreme Court of Justice, or Council, in which he presided, which, as in all other feudal Kingdoms, was originally ambulatory, following the person of the Monarch, and held only upon some of the great festivals, was rendered sedentary at Paris, and appointed to be kept open the greater part of the year, under the appellation of the "*Parlement de Paris.*" This was effected by an Ordinance of Phillip le Bel, passed in the year 1302, and emphatically entitled, "*Ordonnance pour le bien, l'utilité, et la réformation du Royaume.*"(1)

This Ordinance erected, also, a Sovereign Court of Assize at the city of Troyes, in Champagne, under the title of "Grand Jours," re-established the Parliament of Toulouse, a Court before held under the authority of the Counts of that Province, and confirmed a Court of Exchequer at Rouen, which had subsisted since the reunion of that City to the Crown of France, in the year 1200, and was originally created the Court of the Peers of France, by which John, King of England, was, by default, convicted, as a vassal of France, of the murder of his nephew Arthur.(2) Other Sovereign Courts of Parliament, making in all thirteen,(3) were afterwards erected in the several Provinces of the Empire.(4)

[To be continued.]

(1) Montesquieu, Lib. 28, cap. 27, vol. 2, p. 282 et seq. Robertson's Charles V., vol. 1, p. 306.

(2) Robertson's Charles V, vol. 1, p. 61.

(3) Dict. de Jurisp., vol. 3, p. 18. Dict. de Droit, verbo "Baillis" vol. 1, p. 166, col. 2nd.

(4) Encyc. Method. de Jurisp. verbo "Baillis," vol. 1, p. 710.

(5) Dict. de Jurisp. vol. 3, p. 18. Fontanon, Lib. 1, tit. 1, p. 179. Dict. de Droit, vol. 1, p. 168.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, March 24, 1882.

DORION, C. J., RAMSAY, TESSIER, CROSS, and BABY, J J.

HARRINGTON et al. (defts. *en gar.* in the court below), Appellants, and CORSE *es qual.* (plff. *en gar.* below), Respondent.

Hypothec on immoveable bequeathed—Particular legatee—C. C. 889.

The particular legatee of an immoveable hypothecated by the testator is bound to pay the hypothec, to the exoneration of the testator's general estate, unless it be otherwise ordered by the will; and the ordinary direction to the executor, to pay all the testator's just debts, is not such order.

The appeal was from a judgment of the Superior Court, Montreal, (Rainville, J.), maintaining the action *en garantie* of Corse *es qual.* The sole question was one of law, viz., whether the particular legatee is personally responsible for the payment of a hypothec on the immoveable bequeathed to him by the testator. By

(1) Conférence des Ordonnances, by Bouchel, p. 137.

(2) Dict. de Jurisp. vol. 3, p. 21 & 22. Ord. de Lovvre, Tom. 1, p. 366.

(3) Paris, Toulouse, Grenoble, Bordeaux, Dijon, Rouen, Aix, Rennes, Pau, Mely, Besançon, Douai, Nancy.—See Répert. vol. 44, p. 296, verbo "Parlement," and Dict. de Droit, verbo Parlement.

(4) Répert. 8vo. vol. 44, p. 296.

the judgment appealed from the particular legatee was held liable for such debt. The conclusion of the honorable judge in the Court below was as follows :—"Nous concluons donc que la seule interprétation raisonnable à donner à l'article 889 de notre Code, est que le légataire particulier, régle générale, est personnellement responsable de la dette hypothécaire qui frappe l'immeuble qui lui a été légué."

In appeal,

TESSIER, J., and CROSS, J., (dissenting) were of opinion to reverse the judgment, and to hold the universal legatee responsible for the hypothec on the immoveable bequeathed to the particular legatee.

DORION, C. J., RAMSAY, J., and BABY, J., constituting the majority of the Court, held that the particular legatee is bound to pay the hypothec on the immoveable bequeathed to him, and therefore the judgment of the Court below was correct. In the will was the ordinary provision that all the testator's just debts, funeral and testamentary expenses be paid by his executors as soon as possible after his death. The Court held that this was not such an order or direction as would exempt the particular legatee from paying the hypothec on the immoveable bequeathed to him, to the exoneration of the testator's general estate.

Judgment confirmed

Doutre & Joseph for Appellants.
Robertson & Fleet for Respondents.
S. Bethune, Q. C., Counsel.

COURT OF QUEEN'S BENCH.

MONTREAL, March 24, 1882.

DORION, C. J., RAMSAY, TESSIER, CROSS, and BABY, JJ.

BICKERDIKE (deft. below), Appellant, and MURRAY (plff. below), Respondent.

Freight—Bill of Lading—Animals lost on the voyage.

The appeal was from a judgment of the Superior Court, Montreal, (Johnson, J.) maintaining an action by the master of a steamship (the respondent) for freight, for the conveyance of cattle and sheep on his ship from Montreal to Glasgow. (See 3 Legal News, p. 47, for report of the judgment in the Superior Court. The appellants resisted the action, alleging that the live stock had been swept overboard, and that no freight was due. On the 11th September, 1878, the following letters were exchanged between Messrs. Robert Reford & Co., merchants, of Montreal, and the appellant, Mr. Bickerdike :—

"MONTREAL, 11th September, 1878.

"Messrs. ROBERT REFORD & Co.

"SIRS,—I hereby engage to ship per steamer Colina, to sail hence for Glasgow on or about the 25th Sept. inst., all the cattle and (or) sheep and (or) hogs which she can conveniently carry on her upper deck at the rate of four pounds sterling per space of two feet nine inches in width by the usual length (surface of deck), sheep to be estimated as twelve (12) and hogs as ten in number to that space in lieu of cattle—you to supply all fittings, and ship to supply water only, and not to be responsible for loss of cattle, sheep or hogs from any cause whatever.

"Yours truly,

ROBERT BICKERDIKE."

On the same day Robert Reford & Co. answered the said letter in the following terms :—

"MONTREAL, 11th Sept., 1878.

"ROBERT BICKERDIKE, Esq., (Montreal).

"SIR,—We hereby engage to take for you per steamer Colina, to sail hence for Glasgow on or about the 25th Sept. inst., all the cattle and (or) sheep and (or) hogs which she can conveniently carry on her upper deck, at the rate of four pounds sterling per space of two feet nine inches in width by usual length (surface of deck), sheep to be estimated as twelve (12) and hogs at ten (10) in number to that space in lieu of cattle—you to supply all fittings, and ship to supply water only, and not to be responsible for loss of cattle, sheep or hogs from any cause whatever.

Yours truly,

ROBERT REFORD & Co.

On the 27th September, an agreement having been made by Mr. Bickerdike with a Mr. Head, with the consent of Reford & Co., that Mr. Head should furnish the cattle, &c., for a portion of the space so chartered, the appellant Bickerdike placed on board the steamship 81 head of cattle and 118 sheep, and thereupon Reford & Co. delivered a bill of lading. Among the exceptions in this bill of lading is found "jettison;" and the document (which was in fine type) also contained the following clause :—"Freight on live stock payable on the number of animals embarked, without regard to and irrespective of the number landed; and the owners of the vessel are not to be responsible for accidents, injury or death arising from any cause whatsoever." The following clause also appeared at the end of the document :—"In accepting this bill of lading, the shipper or other agent of the owner of the property carried, expressly accepts

and agrees to all its stipulations, exceptions and conditions, whether written or printed." In the case of Head the shipment was 86 head of cattle and 100 pigs.

The vessel sailed about the 27th September, 1878, by the Straits of Belle Isle, and passed through the Straits on the Sunday following. On the afternoon of that day a gale of wind commenced from the northeast, with snow and sleet, and the following day a heavy sea was shipped, smashing a portion of the cattle pens and stalls, and washing overboard a portion of the cattle. When the stalls were broken up, the animals were swept together in a confused mass backwards and forwards, without there being any means of securing them. The gangways were subsequently opened and the cattle swept overboard into the sea. The gale continued several days, and on Thursday the steamer shipped a heavy sea, and the remaining stalls and pens were crushed to pieces. The cattle that remained on deck were tumbled together in a confused mass and swept from one side of the deck to the other. The animals could not be fed during the storm, and were starving; their fodder had been swept overboard; their hoofs were torn, their heads cut by the ropes by which they been tied, and the tails of many rubbed off. The working of the ship was impeded by the wreck, and as it was considered useless to try to save them, the gangways were opened and they were in part washed and in part pushed overboard, and the deck cleared.

To the action of the master the appellant pleaded first that the cattle had been thrown overboard under such circumstances as should give rise to a general contribution. The appellant also pleaded a general denegation.

The Court below held that the right arising from the jettison of the cattle did not deprive the master of his right to recover freight.

Kerr, Q.C., for the appellant, submitted, first, that the two letters set out above constituted a charter of the upper deck of the steamship, and was a binding contract between the owners of the vessel, represented by the ship's agents Messrs. Reford & Co., and Mr. Bickerdike; and that the contract for carriage and the bill of lading being both signed by Messrs. Reford & Co., the master of the vessel had no right to institute the action in the Court below under the contract and bill of lading. The master of the ship is merely the agent of the owners; he has no interest in the freight; it does not in any way belong to him; consequently, being a mandatory, he has no right to sue for it, except when he has signed the charter party or the bill of lading. Here the master did not sign, but Reford & Co., the agents of the ship-owners. The next point contended for by the appellant was that the letter exchanged constituted the contract between the parties. Now, the letter did not contain the stipulation found in the bill of lading, viz., that freight should be paid on the number of animals shipped, without regard to the number landed. It was submitted that the appellant was not bound by the unusual stipulations inserted in the bill of lading, and which were printed in very small type, and not pointed out to the shipper. Lastly, the animals had not been swept overboard, but were pushed into the sea, because they incommoded the seamen in working the vessel. It either was a case of jettison, which, under the general circumstances, should give rise to general contribution, or it was a wanton act on the part of the master. If it were a case of jettison the freight should be deducted from the general contribution by the respondent: and if the act was wanton no freight was due. The opinion of Lush, J., in *Crookes* v. *Allen* (49 L. J. Q. B., 202) was referred to:—"A bill of lading is not the contract, but only the evidence of the contract. It does not follow that a person who accepts the bill of lading which the shipowner hands him, necessarily and without regard to the circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them, or is not informed in the course of the shipment, that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms and to require a bill of lading which shall express those terms."

In the course of an extended argument, *Abbott, Q.C.*, for the respondent, contended that the master's right of action for freight was well established. It is not necessary that the bill of lading should be signed by the master; it may be signed by the agent, or by the clerk or the purser. They sign for the ship. In the next place the action for freight could not be opposed on the ground that the animals had not been carried to their destination, because the bill of

lading contained a special clause by which the freight was due on the number of animals shipped, without regard to the number landed. The authorities show that the shippers are bound by a special condition of this nature. The shippers accepted the bill of lading without objection as it stood, and raised money on the security of it at the Consolidated Bank. But even if this clause had not been contained in the bill of lading, under the common law the master was entitled to the freight under the circumstances of the case. Lastly, it was contended that the animals were so injured by the storm that they had become worthless before they were pushed overboard; it was simply anticipating by a few hours their death on shipboard. The loss occurred by the perils of the seas, and the owner had no right to contribution.

RAMSAY, J. This is an action brought by the master of a ship, for freight.

The first question raised is whether the action is properly brought in the name of the master. It is possible that this question might have given rise to some difficulty had it been pleaded, but it is evidently an afterthought. Defendant pleaded over and met the master, holder of the bill of lading, on the merits. I think, therefore, he is too late to raise the objection even if well founded.

The next point at issue between the parties is as to whether the contract is evidenced by the letters of the 11th September between the appellant and the agents, Messrs. Reford & Co. The appellant's contention is that the letters contain a contract complete in itself, and that the bill of lading is merely a receipt to establish the fact that a certain number of cattle and sheep had actually been received on board, and that every addition, not an absolute condition of the law, is valueless and does not bind the appellant. The argument of the respondent is, that the letters were only a general proposition, and that the usual bill of lading was understood to follow containing the ordinary clauses of a bill of lading, and that the bill of lading in question contained no clause that was unusual or incompatible with the letters of 11th of September.

Next comes a question of fact—was it a case of jettison giving rise to average, or was it merely the throwing of the useless remains of destroyed goods into the sea? Appellant has pleaded that it was jettison, that he has an action against the owners for contribution, and that, moreover, the cattle and sheep not being delivered at Glasgow, owing to this jettison, no freight was due, because the contract was not fulfilled. This plea gives rise to confused and even contradictory pretensions. It is one thing for defendant to say, "I have not to pay freight at all because my goods were not delivered according to contract;" and quite another, to say that the freight was compensated by contribution which has never been adjusted. It may not, however, be very important whether we can look at this last pretension or not. If we do, I think the balance of evidence shows that the cattle and sheep were not jettisoned in the conditions to give rise to contribution, even if the jettison of a deck load of this kind could give rise to average under the special exception of our Code. Jettison must be to lighten the ship, and for the common good, or it gives rise to no contribution. Abbott 1280, p. 499. C.C., Art. 2402. As to the justification of the captain for throwing the animals overboard, the weight of evidence seems to be in favor of the respondent; but if doubtful, the presumption is in favor of the captain. "*Quia pro non culpa capitanei præsumendum sit.*" Casaregis, Dis. XLV 31. Secondly, the exception of Art. 2557 is not pleaded; and thirdly, no usage is proved. But, on the other hand, if the deckload, jettisoned, is not to be paid for by contribution, freight is not due unless otherwise provided for. That is to say, it is the contribution that gives a fictitious delivery of the articles jettisoned. V. O. M., Liv. III, Tit. III, Art. XIII and commentary. The doctrine is fully recognized in Art. 2558 C.C.

We are therefore forced back on the former question—that is as to the contract. If the bill of lading be the evidence of the contract, there can be no doubt appellant must fail, for it expressly stipulates that the freight is earned whether the animals arrive or not. I cannot concur with the learned counsel for the respondent in the general proposition that notices on tickets or unsigned papers form part of a contract to limit the common law responsibility of the person giving the ticket, simply by their reception. There must be some proof of acquiescence. That this is our law is undoubted. C.C. 1676. It seems, however, that when there has been a signature by the shipper, without reserve, on a bill of lading it will be held sufficient proof of a deliberate contract. Our law being so precise on the subject, it becomes necessary to examine very critically the opinions of the learned Judges in the English

cases cited. It appears to me, however, that the opinion of the majority of the learned judges in appeal delivered in the cases of *Parker & Gabell* against the *South Eastern Railway Co.*, (L. R. Com. Pl. Div. 2, 416) does not differ very materially from our law. I may be permitted also to add that the policy of our law is wise. It seems to me in the last degree absurd to presume that a passenger going to the wicket at a railway station, or a cloak-room, for a ticket, is presumed to have examined the legal value of a notice in minute print limiting the legal responsibility of the carrier or proprietor of the cloak-room. I can easily understand that a person might not consent to take charge of the Koh-i-noor diamond for two pence, but if he does it, it seems to me, he ought to be held liable, and he cannot relieve himself of the risk by saying that the depositor is presumed to know that there was a notice on the back of his ticket limiting the risk to £10. Nor is this an extraordinary application of the principle in England, for the courts there have very recently condemned a railway company to enormous damages because a very skilful physician had had his head injured in a railway accident. The cloak-room man can see whether the garment you give him to keep is valuable or the reverse, but the railway company can hardly be expected to judge of the occult science of every person who asks for a sixpenny ticket. It should be observed that it is fallacious to insist that 2d. is an insufficient recompense for the care of one article of great value. The carrying or care-taking is a business, for which the price charged is an equivalent not for one case, but for many. The question, then, seems to me to be whether there is evidence to show that the attention was directed to the numerous stipulations on the back of the bill of lading. I am unable to see any such evidence in the record. It is true that appellant took the bill of lading and raised money upon it. But what else could he do, even if he had seen the notices? His animals were on board the vessel, and he must either go without this very necessary receipt for their existence, or take what was offered. Again, by the ordinary course of business, the bill of lading was his only means to get money. He might, of course, have refused the bill of lading, and have brought an action to get one in the terms of his contract. This can hardly, however, be suggested as a practical remedy, or one the appellant was bound to adopt, if otherwise in the right.

But what seems to me to be more debateable ground is, whether the added clauses of the bill of lading are really more than were fairly covered by the original letters, or at all events whether the condition as to freight of animals lost on the voyage is anything more than a stipulation, which is presumed if nothing be said.

On this point a good deal of authority has been cited, or rather I should say many authors have dealt with the subject, but I can hardly say they have added much clearness to the subject. The fact is the writers have followed one another's expressions slavishly. They all refer to the few lines in the Dig. (XIV. 2, 10), which are to this effect:—"If you have leased your ship to carry slaves, no indemnity shall be due you for the carriage of those who die in the ship. But Paulus asks what is the contract, whether the bargain is made for what is put on board or for what is carried over. And he decides that if there be no stipulation, it will be sufficient for the captain to show that they were put on board." It is impossible, I think, to reconcile the first sentence of this paragraph with the latter part. If the general rule be that freight for live animals not delivered is exactly the same as for every other kind of merchandise, it seems strange that in the absence of any special stipulation the presumption should be for the ship instead of against it. It is useless, as some of the modern writers seem to see, to say that the contract when express shall be the law of the parties. But none of them give any good reason why Paulus should have arrived at a conclusion which seems exceptional. Roccus says that there is a rule that "a doubtful contract must be construed against the shipper." Flanders, No. 524, note. But why should it be *doubtful*, if the law supplies the stipulation? The first part of 2. 10, purports to be from Labeo; but it is quite possible what Labeo said may have had a context which would alter its meaning, or the passage may have been deliberately altered to keep up an imaginary symmetry in the law, to be pulled right in practice by a contradiction. We have examples of such legislative operations in our own days. Reason or not, it seems to be universally admitted law that when there is no stipulation on the point, freight is due for animals that perish without the fault of the captain, or as the Dig. puts it, it is sufficient if the master shall prove the putting on board.

But if we go back to the letters as the basis of the contract, they seem to support the idea that this doctrine was dominant in the mind of the contracting parties. It was not even necessary that the captain should prove the putting on board. He had to account for those he took on board, that is all; but his freight was due for space not for animals. Again, there is a clause of non-warranty for loss of cattle both in the letter of offer and in the letter of acceptance. To what did that refer if not to freight? Under our law it could not be intended to cover negligence (1676 C.C.) The most it could do in this respect would be to shift the burthen of proof from the owner to the shipper.

Taking this view I am to confirm with costs, and this is the judgment of the Court.*

Judgment confirmed.

Kerr, Carter & McGibbon for Appellant.

Abbott, Tait & Abbotts for Respondents.

*A similar judgment was delivered in the case of *Head & Murray*, (3 L. N. 47.)