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LIABILITY OF CARRIERS.

Railway Companies that carry certain classes of passengers on free passes, usually stipulate that those using a pass shall have no claim upon the Company for injuries which they may receive on the road. In a case decided recently by the Supreme Court of the United States, *Stevens* v. *The Grand Trunk Railway Company*, the effect of such a stipulation was discussed. The action was brought by Stevens to recover damages for injuries received whilst a passenger in the Company's cars. The plaintiff, being the owner of a patented car-coupling, was negotiating with the Grand Trunk Company at Portland, Maine, for its adoption and use by the Company; and was requested by the latter to go to Montreal to see the Superintendent of the Car department in relation to the matter, the Company offering to pay his expenses. Stevens consented to do this; and, in pursuance of the arrangement, was furnished with a pass over the defendant's line from Portland to Montreal. On the back was the following printed endorsement:

"The person accepting this free ticket, in consideration thereof assumes all risk of all accidents, and expressly agrees that the Company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using the ticket. If presented by any other person than the individual named therein, the conductor will take up this ticket and collect fare."

During the trip from Portland to Montreal, the car in which Stevens was riding ran off the track, and was precipitated down an embankment, and the plaintiff was much injured thereby. The direct cause of the accident, it was proved, was that at the place where it occurred, and for some considerable distance in each direction, the bolts had been broken off the fish-plates which held the ends of the rails together, so that many of the plates had fallen off on each side, leaving the rails without lateral support, and causing the track to spread. The Company relied for its defence upon the fact that the plaintiff was travelling under the pass with the condition endorsed thereon, which, it was contended, exempted the Company from liability. As to this pass, the plaintiff testified that he put it in his pocket without looking at it, and the jury found specially that he did not read the endorsement previous to the accident, and did not know what was endorsed upon it. He had been a railroad conductor, however, and had seen many free passes, some of which had a similar endorsement.

The Judge of first instance regarded the case as one of carriage for hire, and not as gratuitous carriage, as the Company agreed to pay the plaintiff's expenses to Montreal. The Supreme Court concurred in this view. Judge Bradley remarked: "The transportation of the plaintiff in the defendant's cars, though not paid for by him in money, was not a matter of charity nor of gratuity in any sense. It was by virtue of an agreement, in which the mutual interest of the parties was consulted. It was part of the consideration for which the plaintiff consented to take the journey to Montreal. His expenses in making that journey were to be paid by the defendant, and of these the expense of his transportation was a part. The giving him a free pass did not alter the nature of the transportation."

Taking this view, the Court did not find it necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger. But Judge Bradley intimated pretty strongly that this would not have altered the case. "We do not mean to imply, however," he said, "that we should have come to a different conclusion, had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case; and it is often asked with apparent confidence, 'May not men make their own contracts, or in other words, may not a man do what he will with his own?' The question, at first sight, seems a simple one; but there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service;

the conditions on which that public service shall be performed by private enterprise are not yet entirely settled." The opinion of the Court, therefore, seemed to incline strongly to the rule that where there has been negligence on the part of the carrier, no stipulation will shield him.

FRAUDS IN BANKRUPTCY.

A recent issue of THE LEGAL NEWS contained among the notes of decisions no fewer than three cases of fraud under the Insolvent Act, disposed of by the Superior Court at Montreal in a single day. Marvellous are the variety and ingenuity of this class of frauds, and nothing but a very firm mode of dealing with them on the part of the Courts will check them. The law itself does not provide sufficient means of reaching and punishing offenders. We find a very similar state of things existing in the United States, and there, as in Canada, the result is an outcry against the law under which the frauds complained of are practised. The *Albany Law Journal* refers to a case before Judge Wallace, in which the Judge strongly animadverted upon a kind of transaction common enough in bankruptcy matters, and regretted the inability of the Court to interfere with it. A bankrupt firm, apprehending insolvency, began paying favored creditors and themselves out of the partnership assets. Then, being unable to compromise with their creditors, they made an assignment to a friend, and shortly after procured a petition in bankruptcy to be filed against them, and then took proceedings for a composition. The bankrupts all the time kept possession of the firm property under one pretext or another. The attorney who managed the proceedings for the bankrupts represented most of the creditors, and no step was taken to protect the latter. Judge Wallace remarked: "It shocks the moral sense to assist this dishonest scheme by judicial action," and he regretted "that the bankrupt law permits just such schemes as this." Our contemporary thereon observes: "We are glad to record this judicial protest against the bankrupt law, and hope it will encourage those striving in Congress to procure its repeal."

BREACH OF PROMISE SUITS.

Some years ago, in a somewhat celebrated case at Montreal, *Grange* v. *Benning*, in which damages were sought to be recovered for breach of promise of marriage, the counsel for the defence, Mr. Girouard, raised the point that such actions offended against public morality and should not be sanctioned by the law. We notice that in England it is proposed at the present time to abolish by legislation such actions, and the *Law Times* remarks that the movement "will recommend itself to the common sense of mankind." Although the intention of the law in allowing suits for breach of promise is good, one can hardly read the reports of the cases as they appear in the English papers, without perceiving that these actions frequently serve designing women as the means of extorting money, and that those who most readily resort to them are too often of the number who least deserve the protection which the law was intended to afford.

INJURIES RESULTING IN DEATH.

Since the remarks at page 110 were written, the Court of Appeals at Quebec has decided the case of *The Grand Trunk Railway Company & Ruel*, noted in the present issue, in which the same principle was applied.

THE PARLIAMENTS OF FRANCE.

[Continued from page 114.]

No uniform law prevailed throughout France. A man passed from one system of jurisprudence to another, as he journeyed from province to province—from Normandy to Brittany, from Provence to Dauphine. The territorial jurisdiction of the Parliament of Paris, though large, was by no means over the largest part of the kingdom. Courts, similar in constitution and power to that of Paris, were subsequently established in various parts of France, until there were thirteen separate parliaments, besides several superior courts possessing similar powers. Each parliament was supreme within its own territory. That of Paris was superior only in age, dignity, and influence; but no appeal lay to it from the co-ordinate bodies.

The systems of law administered by them varied widely. In some provinces, the *droit écrit* prevailed, and the civil law furnished the basis for judicial rules. Other provinces were *pays de coutumes*, where a customary law had grown up, and was administered by the courts. Even in the districts where the *droit écrit* prevailed, some differences in legal rules necessarily became established in the various Parliaments.

Certain edicts, political and financial, were of force throughout the kingdom; but private liabilities, a man's rights and his responsibilities, and the mode of enforcing them, might vary as he passed from one village to another. He could breakfast at Nismes without fear of the terrors of the law, only to find himself, when he reached Arles for dinner, subject to its direst penalties. The French Revolution and its influence were needed to establish a uniform law for Frenchmen of every rank and every locality.

Parliament, in its earlier days, was a body in a condition of continual growth. When it first began to fill the place of the feudal courts, the king assigned persons to sit for a session, and their powers ended with the term for which they were appointed. By 1319, we find it provided that members of the court should receive their wages for life. As late as 1467, however, we find an edict of Louis XI. forbidding the removal of Judges, except for cause; and entire freedom from arbitrary removal was probably not established earlier than that.

The ordinance of 1307 provided that the Parliament itself should choose fit men to fill vacancies as they occurred. But the power of appointment was, for the most part, exercised by the king; and this edict was forgotten or disregarded. His right of choice was at times limited to a number of persons nominated by the Parliament. But, when such places came to be sold, the king's power of appointment was exercised without restraint. That pecuniary questions are the origin of most revolutions is a familiar truth. The French Revolution is no exception, and the silent changes in the French government prior to that great upheaval were equally the results of the same fruitful cause. Pecuniary embarrassment was the chronic condition of the French kings, and no young profligate relieves present wants by ruinous post-obits more recklessly than did the French monarchs seek immediate relief at the cost of future burdens. The sale of offices was a source of revenue to which royalty early turned its attention, and the mine was worked to the most ruinous extent. The offices of the members of Parliament afforded a tempting bait. The places were of great dignity, and often of great profit. Under Louis XII., the sale of judicial dignities—often practised before, but never systematically—seems to have become a regular part of the budget. The disastrous reign of Francis I. brought him to the most lamentable financial straits. Among other expedients, he organised a new chamber of Parliament, and created two presidents and eighteen counsellors to administer its affairs. Two thousand scudi were paid for appointments to each of these places. Marino Cavalli tells us that in this reign the judicial offices were bought at prices ranging from three thousand to twenty thousand francs; and that, as the sale was open, there was nothing disgraceful in selling them for as large a sum as could be obtained. The places thus purchased were held for life.

Financial needs led to endeavours to impose a further tax on the income of the office. Such efforts met with the resistance from the members of the Parliament that might be expected from men who felt, with Judge Barnard, of New York, that they had paid for their places, and no further favors could be asked. A measure was found to reconcile such an impost with judicial feelings. In the reign of Henry IV., a tax was devised, which, from its originator, was called the *Paulette*. By the payment of an annual sum, the office of any member of Parliament might become hereditary; and, if not sold by him during his life-time, upon his death it passed to his heirs, to be disposed of by them with his horses and carriages, his houses and lands. One of the sons ordinarily took the place; but it was often sold. Prices naturally increased. In the reign of Louis XIV., the price of one of these offices was a moderate fortune. The office of president *à mortier* of the Parliament of Paris was sold for five hundred thousand francs; that of a counsellor brought one hundred and fifty thousand; and that of the *procureur-général* seven hundred thousand francs. This institution remained in

force until 1789. Legal traditions, and the sale of judicial offices, had before tended to make the members of Parliament a separate class, belonging exclusively to the wealthy portion of the community. The *Paulette* made them an hereditary aristocracy. The right to exercise judicial functions descended from father to son almost as regularly as a seat in the House of Lords among the English nobility. A seat in Parliament entitled the holder to the rank of nobility, inheritable to the second generation. The hereditary possession of wealth and office rendered the *noblesse de la robe* second only in rank to the more ancient aristocracy. Between the two, a distance was preserved. The sons of French magistrates, unlike the heirs of English judges who have been elevated to the peerage, were not regarded as forming part of the ancient nobility. That body, of all aristocracies, except perhaps the Spanish, the most narrow, the most selfish, and the most weak carefully guarded its imaginary sanctity from any infusion of new blood. Its purity was purchased at the expense of its power, except for purposes of political plunder, until it passed away unhonoured and unwept at the first breath of the French Revolution. The judicial aristocracy shared, however, in all the odious privileges of the nobility: in exemption from most forms of taxation; in the right of the chase; in the right to plunder their tenants; in the sole right to places of emolument; and to the rank of officers in the army. Questions as important as those of precedence sometimes caused grave trouble. The Parliament of Aix and the Court of Accounts had a long feud on account of precedence in processions and in church. The Parliament, on one occasion, being safely within and ready for its devotions, the railing of the choir of the church was closed just as the Court of Accounts was about to enter. One of the counsellors of the latter thereupon climbed the railing, and threatened the president of the Parliament with a gun. The president concealed himself behind the stalls. After service, he mounted his chair to return home; but the members of the Court of Accounts pursued him with stones, until he took to his feet, and fled through the mud, enveloped in all the majesty of his judicial robes. The two bodies finally agreed to attend church no more together; and the hot-headed counsellors of the Court of Accounts were condemned to penance, and to assist at high mass seated in inferior stalls, while one of the number knelt penitently before the altar, candle in hand, for the sins of his fellows.

The influence of the change in the mode of appointment upon the judicial force itself remains to be seen. It was by no means as injurious as might have been anticipated. That incompetent men often occupied judicial positions was to be expected. La Bruyère complains that youths hardly out of school passed from the birch to the ermine. A pamphlet of the eighteenth century, purporting to be the will of the Duchess of Polignac, gives to all the members of Parliament who have neither beard nor sense "and that is, unfortunately, the greater number, the *Corpus Juris* and the *Royal Ordinances*, upon the condition that they will not pass upon the life, honor, or fortune of their fellow citizens until they can answer questions put them on the contents of these books." But, on the other hand, a spirit of independence, of traditionary pride, grew up in these bodies, which tended to make them fearless administrators of the powers intrusted to them.

So acute an observer as Montesquieu defends the *Paulette*, and says,—

"Cette vénalité est bonne dans les états monarchiques, parce qu'elle fait faire, comme métier de famille, ce qu'on ne voudrait pas entreprendre pour la vertu; elle destine chacun à son devoir, et rend les ordres de l'état plus permanents. Dans une monarchie où, quand les charges ne se vendraient pas par un règlement public, l'indulgence et l'avidité des courtisans les vendraient tout de même, le hasard donnera de meilleurs sujets que le choix du prince."

Almost as much can be said for hereditary judges as for hereditary legislators. The history of the English House of Lords shows that the latter have not always proved inferior to those who have obtained offices by the favor of kings or people.

The information gathered by the superintendents for Colbert, in 1663, contains many curious comments on the members of the various courts.

The wars of the Fronde were not long past, and the character and habits of the judges were apparently deemed worthy of special investigation. The comments are generally unfavorable.

We are informed that M. Lamoignon, of the Parliament of Paris, under the affectation of great probity and integrity, concealed a profound ambition. President de Blancmenil was melancholy, *bizarre*, had a bad temper, had some sense, but was always at cross-purposes. De Breteuil was governed by women, and especially by one La Gaillones. Le Meneust, president of the Parliament of Brittany, on the other hand, was a *dévôt*, governed by his wife, and very feeble indeed. Periot Percour, of the Chamber of Inquiries, loved gambling, dancing,—all things but law. Marot was rich, having forty thousand livres of rent. Descartes was a brother "of the Descartes who writes." All the members of the *Tournelle* of Brittany were given over to pleasure and debauchery, and had neither inclination nor ability for their work. Donneville was an honest man; but his wife ruled him. Daligre, first president of the Parliament of Bourdeaux, "would be a fair man if he could only keep awake." Pinon's strong point was, that he was an admirable judge of the opera. Jacquelot, like Dr. Martin Luther in the ballad, loved wine, women, and song.

If the reports of these superintendents are not biassed, they present a lamentable view of the morals and manners of most of the magistrates in the reign of Louis XIV. The protest of some, that their reports were free from prejudice, excites a strong suspicion to the contrary, though doubtless there were plenty of the members of the Parliament who were fertile subjects for comment. The character of the judges was undoubtedly lower from the long influence of the *Paulette;* the wars of the Fronde had a further injurious effect; and it is probable that, in many of the courts remote from Paris, the intellectual force of the judiciary was at a low ebb. The wealth and places of members were assured. Except the neighboring lord, who was generally in Paris, the members of Parliament were from youth the greatest dignitaries in some provincial city. The life tended to intellectual lethargy. The judges of Paris dealt with important matters, and the intense life of the city kept them from a slow process of mental embalming; but in the provinces the minds of the judges were usually in a condition of mild and gentle decay.

When justice was administered by the seigneur or bishop, judicial functions were gratuitous: the gifts of grateful or of anxious suitors furnished their only compensation. As these duties came to be performed by judges who devoted their entire time to the work, it became necessary that they should have some fixed pay. In 1400, we find that the first president received one thousand livres per year. This would be equivalent to about fourteen hundred dollars of our money, and in purchasing power would be much more. The other presidents received five hundred livres; and the counsellors had but five sols for each day of service, or say about forty cents in our money. The judges received also fees from suitors, which were called by the suggestive and appropriate name of "sweetmeats." These were fixed by the president in proportion to the labor rendered. Originally of miscellaneous character, they naturally tended to become payable in money. Sometimes they were yet more precious than gold. We find, in 1597, a president, either pious or facetious, allowing to a councillor, who had examined a petition of certain religious societies, three pater-nosters to be said for him by each society.

The pay of the judges seems to have been very moderate until a rather late period, and even then it was not equal to that of the English judges.

A counsellor of the Parliament, at the close of the sixteenth century, says that the magistrates preserved an honorable poverty, and needed private wealth to maintain their dignity. The increase of their pay was demanded even in popular ballads and pamphlets. Besides the low pay, the financial necessities of the kings rendered even that uncertain, and the court was paid in a coin that was constantly debased. Down to the seventeenth century, we find frequent complaints of the non-payment of salaries; and the court frequently passed resolutions, that, if not speedily paid, it would cease its labors, and, on some occasions, it actually closed its doors *faute de paiement.*

Under Louis XIV., the pay of the first president had risen to twelve thousand livres; that of the other presidents, to six thousand livres. Two thousand and two thousand five hundred livres were paid the counsellors. The item of fees doubtless grew to large proportions with the increase of litigation. The enormous prices

paid for judicial offices must have been largely based on the expectation of substantial returns.

In the earlier days endeavors were made to to fix the rewards of counsel as well as of the judges. Dire indeed, in the early days were the penalties of extortion. The Council of Rheims, in 1148, thought the matter required the warning voice of the church, and enacted that advocates who took more than the taxed allowance should be deprived of Christian burial. The pecuniary results of legal labor are rarely devoid of interest to the practitioner. An ordinance of Philip the Hardy, in 1274, regulates the *honorarium* of advocates as it is regulated at the present day,—according to the merit of the counsel, the importance of the case, and the ability of the client. The illustration is used that a lawyer who rides with one horse cannot expect as much as one who drives with two, or with three or more; which is but a familiar instance of the talent being given to him who already has many. The same ordinance required a lawyer to swear that he would defend no cause unless he believed it just. English common sense saved English lawyers from such a mischievous requirement, even in the earliest days.

The highest pay allowed in a case was thirty livres—a sum, however, which would be equivalent in purchasing power to several hundred dollars at the present day. The advocates were bidden to state the facts clearly in their arguments, and to use no bad words or names. No advocate was to dare to discuss again what his associates had dwelt upon; neither should he repeat what he had once said, which is a rule unfortunately not in force in these days. To prevent overcharges, an ordinance of 1571 required every advocate to put on his brief what amount he received for his pay; but it excited so much opposition that it had to be revoked.

The fee-bills of solicitors were taxed by the court. If a bill of costs in a case in 1351 be a fair sample of the costs imposed on the defeated party at that day, the laments of litigants over the expense of justice rested on a most solid foundation. The suit was brought by the Gaite Brothers against Johan and Matthieu Gaite and the other heirs of Jacques and Matthieu Gaite. The heirs were condemned to pay the expenses of the brothers to be taxed by the Court, with execution against each of them. The bill is regarded by the learned editor of the *Bulletin de la Société de l'Histoire de France* as incomplete. It comprises, however, forty-three items of varied and ominous appearance. The clerk who went to serve the process claimed four solidi for his expenses; two solidi for the seal, and five for his time. But, as he belonged apparently to the family, the charge for his time was disallowed. No less than nine times are the expenses and fees of officers and solicitors charged for attendance at hearings or trials of the case. Two advocates are also charged for each of these days, at thirty solidi per day. The taxing judge reduces these charges very materially, as he allows the advocates only the scanty pittance of four solidi, or about a dollar, for each time, until the case was brought into Parliament. For obtaining these orders, thirty and twenty solidi are allowed, respectively. The case does not seem to have been argued there. The party comes to Paris to attend his case, and charges his expenses for himself, valet, and two horses, while there detained, at fifteen solidi per day. This item is allowed, but at a much reduced figure. The expense of living was not large compared with our own day. The cost of keeping the horses is charged at three solidi per day for each horse; but this item is entirely disallowed. Seventy solidi were paid the taxing officer, which shows the exorbitant amount of court charges. These are the expenses incurred before the case was tried or argued in Parliament. The fees there for counsel and sweetmeats for judges would largely have swelled the bill.

(*To be concluded in next issue.*)

AGENCY—DUTIES OF PARTICULAR CLASSES OF AGENTS.

The duties of an agent may be varied and modified by contract, but it is none the less convenient to show briefly the application of the general rules which define the duties of agents in general to particular classes of agents.

An auctioneer is bound:

(*a*) To use reasonable skill and diligence in his business. In Denew *v.* Deverell, 3 Camp. 451, the plaintiff, an auctioneer, had neglected to insert a usual clause in particulars of sale, by reason of which omission the sale was fruitless. The plaintiff accordingly failed to recover

commission, although the particulars were shown to the defendant. "I pay an auctioneer," said Lord Ellenborough, "as I do any other professional man, for the exercise of skill on my behalf which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession for recompense; although from a misplaced confidence I followed his advice without remonstrance or suspicion."

(*b*) To sell to third parties, *i. e.*, not to purchase himself. This disability to purchase may continue after the date of the auction. Thus, the Court of Exchequer held in Oliver *v.* Court, 8 Price, 127, Dan. 301, that an auctioneer employed to sell cannot be permitted on equitable principles to purchase the property himself; and that if the person so employed has also been in other respects connected with the interests of the vendor, as, for instance, by having been concerned in valuing the property, and purchases the estate next day by private contract, the property not having been sold at the auction, the purchase will be set aside. In this case the purchase was set aside after the lapse of more than twelve years. In ordinary cases, however, the disqualification to purchase does not continue after the auctioneer has descended from the rostrum: Ib.

(*c*) To sell only for ready money unless otherwise authorised: Williams *v.* Millington, H. Bl., 81.

(*d*) To keep the deposit until completion of contract: Edwards *v.* Holding, 5 Taunt., 815; Gray *v.* Gutteridge, 1 M. & R., 614. An auctioneer is a stakeholder: Burroughs *v.* Skinner, 5 Burr., 2639.

(*e*) To disclose name of his principal: Peake 120; Franklyn *v.* Lamond, 4 C. B., 635.

(*f*) To sell in person, *i. e.*, not to delegate his authority: Cockram *v.* Irlam, 2 M. & S., 301; Coles *v.* Trecothick, 9 Ves., 251.

(*g*) To account to his employer, but not for interest: Harrington *v.* Hoggart, 1 B. & Ad., 577; unless it was his duty to make investment: 8 Ves., 72.

(*h*) To keep the goods entrusted to him with the same care that a prudent man would exercise: See Coggs *v.* Bernard, 3 Ld. Raym., 917.

In case of fire, robbery, or other damage, due to *vis major* or accident, he is not liable, provided he has been guilty of no default: See Davis *v.* Garrett, 6 Bing. 723; Caffrey *v.* Darbey, 6 Ves., 496.

(*i*) Lastly, with respect to his duty at sales. An auctioneer should obtain the best price, and not sell for a less price or in a different manner from that specified in his instructions; or, if no instructions are given, from that justified by usage; but if obedience to his instructions would involve a fraud on a third person, he must not obey them, since no contract can oblige a man to make himself the instrument of fraud: Guerreiro *v.* Peile, 3 B. & A., 616; and see Bateman's Law of Auctions, 161.

As to bill brokers or agents employed in negotiating bills of exchange.

Such an agent is bound without delay:

1. To endeavor to procure acceptance.

2. On refusal, to protest for non-acceptance when necessary.

3. To advise the remittitur of the receipt, acceptance, or protesting; and

4. To advise any third person who is concerned: Beawes, 431; Paley by Lloyd, 5.

As to mercantile agents:

The following is given merely as a brief summary of the duties, inasmuch as they are more fully treated elsewhere.

Where the agent's instructions are express he must obey them in substance, except where they are illegal, in which case performance itself would be wrong: Holman *v.* Johnson, Cowp., 341; *Ex parte* Mather, 3 Ves., 373.

Where the instructions are general he must follow the usage and custom, provided that course would not be injurious to his principal, or in the absence of such usage, act to the best of his judgment, and *bona fide:* Comber *v.* Anderson, 1 Camp., 523; Lambert *v.* Heath, 15 M. & W., 486.

With respect to the duty to insure the goods of the principal, the rule is thus stated by Mr. Justice Buller: "It is now settled as clear law, that there are three instances in which an order to insure must be obeyed:

"'First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands, when and in what manner he pleases.

"'The second class of cases is where the

merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them is such that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing.

"'Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, on the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction: Smith *v.* Lascelles, 2 T. R., 187.'"

With respect to the other duties of mercantile agents, viz., the duty to account, to keep their principal's money distinct from their own, to act in good faith, to use diligence and the like, nothing further need be said here.

The master of a ship is bound:

(*a*) To give all his time to his employment: Thomson *v.* Havelock, 1 Camp., 527; Maclach, Mer. Ship. 172.

(*b*) To accept no interest in conflict with his duty. Hence he may not make profits in the course of his agency: Ib. But if there is no agreement to the contrary he may claim "primage accustomed," when inserted in the charter party: Best *v.* Saunders, M. & M., 208; Scott *v.* Miller, 3 Bin. N. C., 811.

The ship's husband is bound:

(*a*) To select tradesmen and appoint officers without partiality: Card *v.* Hope, 2 B. & C., 661; Darby *v.* Baines, 9 Ha., 372; Abbott, Shipping, 79.

(*b*) To see that the ship is properly repaired, equipped and manned: Abbott, Ib.

(*c*) To procure freights or charter-parties: Ib.

(*d*) To preserve the ship's papers: Ib.

(*e*) To make the necessary entries: Ib.

(*f*) To adjust freight and averages: Ib.

(*g*) To disburse and receive moneys, and keep and make up the accounts as between all parties interested: Ib.; Sims *v.* Brittain, 4 B. & Ad., 375.

(*h*) To act in person.

(*i*) To account.

If he refuses or delays to do so, he will be liable to pay interest on the money in his hands: Pearce *v.* Greene, 1 J. & W., 135, 139.

His duties are thus summarized in Bell's "Principles of the Law of Scotland," p. 449: "1. To arrange everything for the outfit and repair of the ship—stores, repairs, furnishings: to enter into contracts for affreightment; to superintend the papers of the ship. 2. His powers do not extend to the borrowing of money; but he may grant bills for furnishing stores, repairs, and the necessary engagements, which will bind the owners, although he may have received money wherewith to pay. 3. He may receive the freight, but is not entitled to take bills instead of it, giving up the lien by which it is secured. 4. He has no power to insure for the owner's interest without special authority. 5. He cannot give authority to a law agent that will bind his owners for expenses of a law suit. 6. He cannot delegate his authority.

As to solicitors:

A solicitor who accepts a retainer to do any business as solicitor, contracts to carry on the business to its termination, provided the client supplies him with reasonable funds: Whitehead *v.* Lord, 7 Ea., 691, viz: such funds as enable the solicitor to proceed with the cause by meeting the expenses as they arise: Haslop *v.* Metcalf, 1 Jur., 816.

His duty is:

(*a*) To exercise reasonable skill and diligence in his profession.

The measure of damages recoverable in consequence of a breach of duty by a solicitor, is the loss or damage to which the client has been subjected directly by reason of the solicitor's default or neglect.

In Stannard *v.* Ullithorne, 10 Bing., 491, A, the assignee of a lease, employed B as an attorney to peruse, on his behalf, the draft of an assignment. B allowed A to execute an unqualified covenant that the lease was valid (an unusual covenant) without informing him of the consequences. B was accordingly held liable for such damages as A had suffered.

It is exceedingly difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bound, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa*, mentioned in some of the cases, for which he

is undoubtedly responsible: Per Chief Justice Tindal, Godefroy *v.* Dalton, 6 Bing., 467.

Solicitors who undertake to act for a client are presumed to know the duties imposed upon them by act of Parliament and rules of court, as well as by the ordinary practice and routine of professional duty, and will be liable to their clients for want of such knowledge, but they are not liable for mistakes upon difficult points of law, unless they undertake to act upon their own opinion: Kemp *v.* Burt, 1 Nev. & M., 262; Pitt *v.* Zalden, 4 Burr., 2,060; Hart *v.* Frame, 6 Cl. & F., 193; Stevenson *v.* Rowland, 2 D. & C., 119. Except in those cases where there is a legal presumption that a solicitor has the requisite knowledge, he may free himself from responsibility by following the advice of counsel: Godefroy *v.* Jay, 7 Bing., 413; Bracey *v.* Carter, 12 Ad. & E., 373.

Solicitors have been held guilty of actionable negligence:

Where proceedings were taken in a court that had no jurisdiction, which fact was patent: Williams *v.* Gibbs, 5 Ad. & E., 208, or before the necessary preliminaries had been observed, Hunter *v.* Caldwell, 10 Q. B., 69; in suffering judgment to go by default, Godefroy *v.* Jay, sup.; in failing to deliver brief to counsel in time, Lowry *v.* Guildford, 5 C. & P., 234; in failing to be present at a trial with the witnesses, Hawkins *v.* Harwood, 4 Ex. 503, Reece *v.* Rigby, 4 B. & Ald., 203; where the client's papers have been lost, Reeve *v.* Palmer, 5 C. B., N. S., 91; or mislaid, Wilmoth *v.* Elkington, 1 N. & N., 749.

(b) To observe the utmost good faith and fidelity towards his client. Hence it is his duty to avoid the acceptance of interests conflicting with those of his client, and to advise his client with a due regard to the latter's interest:

(c) To preserve an inviolable secrecy with respect to the communications of his client, made to him whilst acting as his solicitor, whether the communications relate to an action existing or in progress at the time they are made: Cromack *v.* Heathcote, 4 Moo., 367; Clark *v.* Clark, 1 M. & Rob., 3. Provided the communications do not make the solicitor a party to a fraud, Gartside *v.* Outram, 26 L. J., 114 Ch., and it is received in the ordinary scope of his professional employment, either from a client, or on his account, or for his benefit in the transactions of his business; or if he commits to paper, in the course of his employment on the client's behalf, matters which he knew only through his professional relation to the client, he is bound to withhold them, and will not be compelled to disclose the information or to produce the papers in any court, either as party or witness, unless the evidence required of him relates only to collateral matters: Doe *v.* Andrews, Cowp., 845; and see per Lord Brougham, Greenough *v.* Gaskell, 1 My. & K. 98.

The privilege of secresy, on the ground of professional confidence, extends to business communications between solicitor and client, and solicitor's agent, client's agent and solicitor, and between solicitor and his agent. The practitioner's mouth is shut forever. The protection does not terminate with the death of one of the parties to it; if the solicitor becomes an interested party or ceases to practice, it may be enforced by injunction: Hare on Discovery, 2d ed., p. 163; as to the extent of the privilege see Fenner *v.* South Coast Railway Company, L. Rep. 7 Q. B., 770; Simpson *v.* Brown, and Hampson *v.* Hampson, 26 L. J., 612 Ch.; as to its duration see Chomondley *v.* Clinton, 10 Ves., 268.—*W. Evans in London Law Times.*

REPORTS AND NOTES OF CASES.

COURT OF QUEEN'S BENCH.

Quebec, March 8, 1878.

Present: Dorion, C. J., Monk, Tessier, and Cross, JJ.

The Grand Trunk Railway Company, Appellant; and Ruel et al., Respondents.

Damages—Injuries resulting in Death.

Action by relatives for death caused by carelessness of appellant. The action was brought by the parents of deceased, and by his brother and sister. The appellant demurred on the ground that no such action would lie. The demurrer was maintained as to the collateral relatives, and dismissed as to others. The defendant moved for leave to appeal on the ground that if the action were bad as to one plaintiff it was bad as to all. It was certainly the rule in England.

The Court held that whether or not the rule was the same with us as it is in England, it would not apply in this particular case. The action was allowed to certain relations by a special statute; only one action could be instituted, and it was the duty of the Court, in awarding damages, by the judgment to distribute the shares coming to each person. It was, therefore, evidently immaterial whether the brother and sister were in the case or not. It could not alter the conclusions of the action.

Leave to appeal was refused.

SIMARD, Appellant, and FRASER, Respondent.

Petition to appeal—Omission to file petition within proper delay.

Motion on the part of appellant, defendant in the Circuit Court, to be allowed to file his petition in appeal six months after the proper time. It appears that the appellant's attorney sent the record to another attorney in Quebec, intending he should file it for the term of September, 1877. The Quebec correspondent did not know what to do with it, and kept it in his possession over the December term, and up to the present time.

The Court held that the failure to produce the appeal was not that of the public officer, but of the appellant's attorney, and that leave could not under the circumstances be granted.

BICKELL, Appellant; and RICHARD, Respondent.

Service—Amendment of Bailiff's Return on Verbal Testimony.

The respondent having become *adjudicataire* of an immoveable property at Sheriff's sale, giving his designation as "Menuisier de la Paroisse de St. Roch de Québec," and having failed to pay the purchase money, a petition for *folle enchère* was presented against him. The Bailiff, in his return, certified that he had served the petition at Richard's domicile, at the place called Stadacona, speaking to a reasonable person of the family. An exception *à la forme* being filed by Richard, and proof made that Stadacona was a Village in the Parish of St. Roch de Québec, the Superior Court, on motion, allowed the return to be amended by adding the words "in the Parish of St. Roch de Québec," and ordered an answer to the merits, which was not produced. The amendment was made, notice of it given, and the costs paid.

The Superior Court held that the return could not be added to by verbal testimony, and that the Petitioner could not without further proceedings avail himself of the benefit of the amendment.

Held, in appeal, overruling the judgment of the Superior Court, that the return was complete by the amendment. When the case was heard the Petitioner was entitled to the benefit of the amendment; the service and return as amended were sufficient, and the *folle enchère* was ordered.

SUPERIOR COURT.

Montreal, Jan. 18, 1878.

DORION, J.

SPROUL v. CORRIVEAU.

Practice—Motion for Security for Costs.

A motion for security for costs cannot be made after the four days from the return of the writ of summons, even although notice of such motion has been given within the four days.

Motion rejected.

Bethune & Bethune for plaintiff.

Loranger & Co. for defendant.

VOLIGNY v. CORBEILLE, and CORBEILLE, Opposant.

Requête Civile—Affidavit—Amendment.

An affidavit to a petition for *requête civile* cannot be amended, but the petition itself may be amended, no affidavit being necessary to support such petition.

Archambault & Co. for plaintiff.

Delorimier & Co. for petitioner.

Montreal, Feb. 28th, 1878.

MACKAY, J.

BOOTH v. BASTIEN et al., and BASTIEN, Opposant.

Appeal—Security to be given in order to stay Execution.

Held, the issue and service of a writ of appeal does not stay execution, unless security is given; and, therefore, an opposition founded on the issue and service of a writ of appeal, without security, was rejected on motion.

Motion granted.

Bethune & Bethune for plaintiff.

Trudel & Co. for opposants.

Montreal, March 11, 1878.

TORRANCE, J.

BOURGOIN et al., v. THE MONTREAL, OTTAWA & OCCIDENTAL RAILWAY; and Hon. A. R. ANGERS, *Pro Regina*, intervening.

Inscription for Enquête and Hearing—Conflict of Options—C. C. P. 243.

Held, that a party inscribing for *enquête* and hearing at the same time will be sustained in his option under C. C. P. 243, although the other side has on the same day inscribed for *enquête* in the ordinary way.

J. Doutre, Q. C., for plaintiffs.

E. L. de Bellefeuille for defendants.

CIRCUIT COURT.

Montreal, March 4, 1878.

MACKAY, J.

PATENAUDE v. GUERTIN, and GUERTIN, Opposant.

Execution—Reduction of amount.

If execution issues for more than the amount due under a judgment, the defendant is entitled by opposition to ask that the execution be reduced to the sum really due, and he is not obliged to tender with his opposition such balance nor to deposit it in Court. The costs of such opposition must be borne by the plaintiff. (Vide *Fournier* v. *Russell*, 10 L. C. R. 367.)

Mousseau & Co. for plaintiff.

J. G. D'Amour for opposant.

COMMUNICATIONS.

QUEBEC JURISPRUDENCE.

To the Editor of THE LEGAL NEWS:

Sir,—A week or two ago I ventured a few remarks under the above somewhat comprehensive heading, and, having an hour to spare, would like, with your permission, to extend them a little further.

I ventured then to assert that there was a greater degree of uncertainty about the decisions of our courts in this Province than there was any valid reason for—greater than is to be found in the courts of many other countries, and much greater than is conducive either to the interests of justice or the standing of the profession in the Province.

And when I make this assertion, I do so I think with a pretty clear consciousness of the difficulties which surround the question. I do so at least with a perfect consciousness that law, in common with all other purely metaphysical sciences, can never attain to that degree of certainty which will entitle it to rank as an "exact science;" that the multitude of questions which it involves must always be subject to a certain amount of "change;" that principles which are regarded as "settled" by one generation may be reversed by the next, as we find to be the case in other sciences, both physical and metaphysical—both practical and speculative.

In pathology, for instance, plants and flowers which are now known to be decidedly antiseptic in their influence on the atmosphere, and therefore a valuable auxiliary in the treatment of disease, and are recommended and used by the faculty as such, were not long since universally banished from the sick room as detrimental to the health of the patient.

And chemistry, although elevated by the labours of *Lavoisier* and others almost to the rank of an exact science, is still subject to a certain amount of "change" in many important particulars.

But, notwithstanding this, I am forced to believe that the jurisprudence of this Province, with proper treatment, might and should be brought to a greater degree of exactness in its application than it at present possesses. It would not at least be too much, I think, to assert that though one generation, basing its conclusions on additional experience, may reasonably be led to reverse a principle of law or practice which by a former one was regarded as settled, there ought to be, in a department of science of such immensely practical everyday importance as that of the law, a sufficient degree of certainty to permit of the same question being decided in the same way at least two weeks or even two months following.

But you have a case in which a question of practice, for instance, arises, concerning which you are in doubt. You consult the code, but the code throws no light on the subject. You look at the decisions of the past, but scarcely any two of them can be found which are in harmony with each other. You confer with your brother advocate, who, it may be, possesses a larger experience, and he tells you that

some of the judges "hold" this and others "hold" that; that Judge Smith some time ago—last month or last year—decided it in such a way, while Judge Jones last week decided it in quite an opposite sense.

Lest it be thought that I am speaking of non-realities, or at least exaggerating the truth, I will give one instance (though I am convinced a dozen such cases will readily suggest themselves to any practitioner of experience), the question of venue on a promissory note, made in one district and payable in another—made we will say in the country and payable in Montreal. Now, this question alone is a question of vast practical importance to the commercial community in this city, who have notes and bills of this kind coming due every day. We will take a case of this kind.

A merchant has a note which he is unable to collect himself, and which he feels compelled, in order to secure himself, "to hand to his lawyer for collection." But in the place where the note was made he has no legal agent, knows no one to whom he can entrust it. It may be that the maker is fortunate enough to live in a place where there are no lawyers, and indeed, for many reasons the only satisfactory course may be to sue on it here.

It is payable in Montreal, and reason and common sense would suggest that there is the place where the right of action on it arises. And, besides, it was decided in such a case by Judge Smith or Judge Jones, at such a time, that it might be so proceeded on, and he brings action here accordingly.

The action is returned, the defendant appears and files an exception to the venue, the case is fixed for hearing, all the costs of a case on the merits are incurred, with the exception of those occasioned by the adduction of evidence, the question is taken *en délibéré*, and after some days, it may be some weeks, by which time the plaintiff is pretty sick of the whole thing, the judge with many learned arguments and with that comforting reservation *sauf à se pourvoir*, dismisses the action with costs.

Can any good and sufficient reason be given for this? There may be, but I must confess that in my ignorance I cannot imagine what it is. It seems to me that nothing would be easier than for the Judges, who should be and are the real law-makers as well as the law administrators of the country, to settle questions like this after they have arisen half a dozen times we will say, and a fair opportunity been afforded of doing so. One reason why they do not appears to lie in the unscientific way a great many of the Judges of our Courts have in dealing with the various questions of law and practice which come before them for their decision, treating every question on its own individual merits, without consideration of others of a similar character, and without aiming to establish the principle which regulates the whole; just as though a naturalist were to attempt to define the nature and characteristics of an entire genus from the consideration of a single specimen. The office of the judiciary appears to me to consist as much in building up the law as in administering it; in supplying what is lacking in it, as well as in applying that which it already possesses—a part of their functions which the Bench here in a great measure appears to overlook. The Roman Prætor, as we know, announced, on his accession to office, the rules and principles which he intended to administer during the term for which he was appointed, and these being added to and adopted by his successors, came at last to form a body of law fixed and certain which is to-day a most important element in the *corpus juris*.

This system, though impracticable at the present day, I cite for the purpose of pointing out the importance that was attached to the decisions of the magistrates even at that early period, and notwithstanding the many sources of what is now known as *positive law* which then existed, and the importance, moreover, which was evidently attached by the early jurists to that element of certainty and reliability, the absence of which, I submit, is sometimes so painfully apparent in our own jurisprudence.

S.

Montreal, March 12.

Sir Fitzroy Kelly, Chief Baron of the Exchequer, is seriously unwell, and has gone to Brighton to recruit his health. The Chief Baron has attained the ripe age of 82, and his retirement at an early day from the toils of office is considered probable.