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THE NEW LAWS OF EMPLOYERS' LIABILITY FOR ACCIDENTS IN ENGLAND AND FRANCE AND THEIR BEARING ON THE LAW OF THE PROVINCE OF QUEBEC.

It is a very important sign of the times that two of the chief industrial countries of Europe have lately been recasting the law of liability for accidents.

There is, I suppose, no more causal connection between the Workmen's Compensation Act 1897 and the "loi du 9 avril 1898" than if London and Paris were in different planets. But the problem to be solved was fundamentally the same in both countries, and if a closely similar solution has been found, there is at least a strong presumption that it is a solution which satisfies the popular sense of justice. Broadly speaking, both England and France have thrown overboard the traditional doctrine of the law, that a workman could never recover damages for injuries sustained through an accident, unless he could prove that the accident was caused by the fault of his employers.

The Roman law said *quae sine culpa accidunt a nullo præstantur* (*de reg. jur.* 23) and every modern system followed this general rule.

Under the new law the English workman must be compensated unless it is proved that the injury is attributable to his own "serious and wilful misconduct" s. 2, His Frenchbrother is only barred if he has "intentionally provoked the accident," s. 20; but the Court may diminish the damages if the accident was due to the "*faute inexcusable*" of the victim.

In this province the present law is stringent enough upon employers. Indeed, I venture to think that they

are often found liable only by giving to the code an interpretation which it was never intended to bear. But the law, as now administered, has two great defects. It is expensive and it is uncertain. Every judge has his own opinion as to the evidence necessary to establish fault. And both judges and juries give damages which vary so much that an employer who is threatened with an action can hardly calculate how much be ought to offer, if he is willing to compromise. A lawyer cannot advise his client with confidence. He cannot say "I am sure you are liable," but only "If the case is before such and such a judge you will be held liable" and as to the amount of damages—that it is quite impossible to predict. Moreover, it is notorious that damages are frequently laid at nineteen hundred and ninety-nine dollars to prevent appeal to the Supreme Court, because that tribunal is known to hold stricter views as to the evidence necessary to prove fault on the part of the employer. The new laws in Europe fix a definite scale of compensation according to which the particular sum can be determined in a very simple and inexpensive way. This will be an immense relief to the employer.

It is true that they make him liable in some cases where upon the old theory no compensation would be due. But the same result is generally reached here by doing great violence to the old theory without definitely rejecting it. And in the rare case in which it is held that there is no liability because there was no fault, the employer has to spend in the costs of establishing his non-liability a far larger sum than he would have to pay under the English "Workmen's Compensation Act." The main difference is that by the new law the injured workman always gets compensation. By the old law, at any rate here, the

lawyer always gets compensation. Occasionally, an employer by compensating the lawyers succeeds in proving that the injured man ought not to be compensated. I am assured by a judge of long experience that in his opinion employers would be no worse off if a law were passed here, something like the new law in England.

At the same time, to prevent misunderstanding, I desire to say that I have no intention of discussing with any fulness the expediency of new legislation in this Province. That depends upon social and economic considerations, as well as upon those which are purely legal. It is outside the scope of the present article. All that concerns us as lawyers is to study the alterations made in Europe by recent legislation.

In the present House of Commons in England the manufacturers are even more strongly represented than is usually the case. Mr. Chamberlain, who was the moving spirit in carrying the Bill through, is a large manufacturer, and is thoroughly familiar with the conditions of industry. If the manufacturers had regarded the measure as seriously inimical to their interests, a conservative government would hardly have introduced it, and if they had done so, a House of Lords, not suspected of tendencies to socialism, would have given it a short shrift.

Neither England nor France is the pioneer in this movement. Switzerland was the first country to declare that for accidents, in certain employments, the employer was to be liable without any proof of fault. (loi fédérale du 25 juin 1881.)

But the very elaborate German Act of 1884, (Unfallversicherungsgesetz, 1st Juli 1884,) has been the model upon which other countries have based their legislation. And neither England nor France, though their Acts are fourteen years later than the German,

have gone quite as far as Germany. Under the German Act, even gross fault does not bar the workman. He can recover full compensation unless he intentionally caused the accident. He can get two-thirds instead of one-half his annual earnings as in England, if he is totally incapacitated. Medical expenses, funeral expenses, and legal expenses in the action for compensation are all paid for him. And, most important of all, all employers to whom the law applies, are compelled to insure against their liability. And the act supplies an elaborated machinery for insurance societies in each district to be formed and managed under the supervision of a central authority—the Reichsversicherungsamt. Since then many countries in Europe have followed suit, but none, I think, going quite so far as Germany.

Austria passed a law in 1887, Norway in 1894, Finland in 1897, Italy and Denmark, as well as England and France in 1898.

They differ, naturally, in detail but all abandon the old theory that actual fault of the employer is the basis of liability.

The present unsatisfactory state of the law here is due to the fact that our courts are trying, without legislation, to reach the same conclusion. They are putting new wine into old bottles. It makes no difference to the employer whether we say as the French law now says :—

"You are liable without fault, merely as an employer" or say, as our courts do :—

"There must be fault, but seeing that you are an employer we presume you are in fault, or there would have been no accident."

Perhaps the courts do not put it quite so bluntly, but is not this the practical effect?

The new theory that accidents will happen and that

the "wounded soldier of industry" as he has been called, is not to be left to die by the road side, because, in his attention to his master's interests, he forgot for a moment to think of his own safety, has made astonishing progress in Europe during the last twenty years. (The new Acts in the different countries are printed with valuable introductions in the work of Dr. Zacher, Die Arbeiterversicherung im Auslande, Berlin, 1898. This book contains also full information as to the state of the law with regard to old age pensions, and insurance societies for workmen incapacitatedby sickness.)

If the countries of Europe, divided as they are from each other by immemorial prejudice, conspire to legislate in the same sense, it is surely a fact which upon this continent deserves to be noticed. It would be safe to say that no legislation of greater importance has been passed during this generation. It affects the security and happiness of millions of working-men and working-women, and of other millions of old parents, of widows and of young children whose bread-winner has been removed from them by a fatal accident. I propose to consider briefly, the causes which have brought about so important a change in the law, and, as to England and France particularly, to examine the law prior to the new Acts. I will conclude by explaining in outline the character of the new legislation.

As to the causes, they were much the same in England and France. Disregarding minor differences, the evolution of society has been upon the same general lines in all the great manufacturing and commercial countries. All alike have become vast noisy workshops, full of whizzing wheels, of smoke, of strange chemical smells, and glaring electric lights. We live in an industrial age. The old law both in England and France

grew up in different surroundings when people travelled in stage-coaches, and read law by candle-light.

" La grande industrie " was not born, and its dangers were not and could not be provided for. It is a gentlemanly and dignified old law with a great deal about seigneurs and vassals, about domestic servants and horses, and about the blacksmith or the carpenter whose services may be called in, but very little about the large workshop, and, of necessity, nothing about the dynamo or the locomotive.

Before the days of steam, and electricity, and dynamite, and lyddite, the workman could, as a general rule, protect himself by the exercise of ordinary care. His tools were few and simple. None of them moved except when he handled them, and no one was in a hurry. It is, therefore, not to be wondered at that the law gave him no claim for damages unless some fault, at least of omission, could be clearly brought down to the employer. Under modern conditions millions of workmen pass their lives in continual danger. They have to deal at close quarters with complicated machines, to handle terrible explosives, to run the risk of coming in contact with " live wires " and, in a word, to face a thousand perils. Even the strictest care cannot always save them. A boiler may burst or some other accident occur, the precise cause of which can never be discovered. Hundreds of lives have been lost by this terrible " accident anonyme," as it has been well called. In many kinds of employment the workman knows that he is exposed to mysterious and sudden danger.

He has to take the risk. It is inherent in the nature of the occupation. The master may have the best and newest plant. He may spare no expense and no vigilance in adopting every means for protecting his men. The workman may be

always on the watch. But all this cannot prevent the accident. Is it fair that the workman should bear this "risque professionel?" His employer may not be negligent, but at any rate, the work is being carried on for his profit. It is idle to say that the workman is paid at a higher rate, because his work is dangerous. The iron law of supply and demand compels him to take such wages as he can get in the state of the market.

Accident Anonyme.

Now, first, what was the legal position of the workman injured in an *accident anonyme* before the new legislation? By the common law of England it was quite settled that the workman who could not prove negligence on the part of the employer had no claim. A servant takes the ordinary risks of the employment. Cockburn, C.J., put it thus in a leading case: "Morally speaking those who employ men on dangerous work without doing all in their power to obviate the danger, are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But, looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury," (Woodley v. Metrop. District Railway, 1877, L. R. 2 Ex. D. at p. 389; and see Thomas v. Quartermaine, 1887, L. R. (18 Q.B.D.) at p. 697.

The same doctrine has lately been again affirmed in France by the Cour de Cassation. An engineer on a steamer was killed by the explosion of a boiler.

Examination by experts failed to discover any fault in the construction of the boiler. The precise cause of the accident remained a mystery. It was held there was no liability. (Cass. 28 fév. 1897, S. 1898, 1-65.) This was, of course, before the passing of the new law.

This also seems to be the law of this Province. In several cases it has been held by the Supreme Court, that where the actual cause of the accident is purely a matter of speculation the employer is not liable. (Montreal Rolling Mills Co. v. Corcoran 1897, 26 S. C. R. 595; Canada Paint Co., v. Trainor, 1898, 28 S. C. R. 352; Dominion Cartridge Co. v. Cairns, ib. 361; Canadian Coloured Cotton Mills Co. v. Kervin, 1899, 29 S. C. R. 478.) But some judges continue to take a less strict view, and to presume the existence of fault.

But, surely, if the owner's liability is legally based on fault, and fault only, it seems difficult to say that the general rule *actori incumbit probatio* can be relaxed. If a plaintiff who sues on a contract must prove his case, one who bases his claim on the fault of the defendant must convince the Court that the facts point to the existence of some fault. Now, if this be good law, it is important to have some idea of the proportion of accidents which are "anonymes" and in which damages if the rule is strictly applied, cannot be recovered.

Before the system of compulsory insurance, which is now in force in Germany, was introduced, the government caused careful statistics for one year to be compiled.

The Reichsversicherungsamt published these figures for 1887. Out of 15,970 serious accidents, involving incapacity for work for at least three months, there were :

3156	due to fault of employer.....	or	19	p. c.
4094	" " victim.....	or	25	"
711	" " both.....	or	4	"
524	" " fellow workman or third party.....	or	3	"
6931	due to risks which were incident to the employment and in fact, unavoidable...	or	43	"
554	due to unknown cause.....	or	3	"

If these figures represent at all fairly the proportions in other countries, — and I see no reason why there should be any difference — they show that under the old rules of law the employer is only liable in about one-fourth of all the cases of serious injury.

Calculations made in Belgium confirm them.

M. Harzé estimates there, that out of a hundred accidents to workmen, seventy give no claim to legal reparation, if the law requiring actual fault is strictly applied. (see Stocquart, " Contrat de Travail, " p. 101). In Switzerland it was reckoned that only from 12 to 20 per cent. of accidents were due to fault of the employer. I do not doubt that, as the law is administered in this Province, the master is here held responsible in very many of the cases classed in Germany as unavoidable accidents. This result is reached by allowing " fault " to be presumed from circumstances. As judges differ widely with regard to their liberality in admitting such presumptions, an element of uncertainty is thus introduced.

Defect in Machinery or Appliances

There is, however, a large class of cases in which either direct evidence or " weighty, precise and consistent presumptions arising from the facts "—to employ the language used in the Supreme Court of

Canada, in " Montreal Rolling Mills Co. v. Corcoran " —enable the precise cause of the accident to be determined. Supposing, as often happens, that the accident is proved to be due to a defect in the machinery used. Is this in itself enough to make the employer liable ? There are many cases in which his liability may be clear. His machinery may be shown to be of an antiquated and dangerous type, or the particular machine, originally good, may have been worn out, or it has been allowed to be used without reasonable inspection from time to time, and repairs, obviously needed, have not been made. Now, in cases of this kind, there has of late years been a pronounced tendency on the part of judges in England to hold employers liable in circumstances in which they would formerly have escaped. Even the language of Cockburn, C. J., which I quoted from the well-known case of " Woodley," would hardly be used now without some qualification. What that learned judge spoke of rather as a moral duty than one which the law would enforce, viz : to do all that can be done in reason to protect the safety of workmen, has now come to be looked upon as an implied term of the contract. A master whose boilers are worn out will not be heard to say that the workman took the risk as part of the terms of his engagement. It may still be good English law (apart from the new Statute) to say that the workman takes the ordinary risks of the employment. But by " ordinary risks " judges now understand such risks as are practically inevitable, such risks as even a vigilant and prudent employer cannot prevent. A very recent case in the English Court of Appeal is a good illustration of this change of judicial attitude. A tramway entered an engineering workshop, but was elevated eleven feet above the ground. The workmen in the course of their

employment had occasionally to go up to the tramway or to come down from it to the floor of the works. No ladder was provided, but an iron bar was fixed in the wall by which they helped themselves up or down. A workman in attempting to clamber down fell backward into a truck and was killed. It was held that the employer was liable, on the ground that reasonably safe means of descent from the tramway ought to have been provided. The language of Lord Herschell in Smith v. Baker (1891, App. Ca. at p. 362) was quoted with approval. "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." (Williams v. Birmingham Battery Co. 1899, 2 Q. B. 338). But when proper appliances are provided and proper care is taken to keep them in order the master is not liable in England (except under the new Act) unless the workman proves that the master knew the appliances had become unsafe, and that he—the workman—was ignorant of the danger. In other words, the law requires proof that the defect in the machine was one which the master ought to have discovered.

This case of *Williams* is the high-watermark reached by the common law.

In France liability in respect of defects in machinery has been carried a stage further. In a case decided 16th June 1896, the facts were these. A boiler on a ship exploded and killed an engineer. Experts reported that they had found the cause. It was a defect in a joining of the boiler. The Cour de Cassation held that the lower court had been justified in finding the employer liable in damages. (S. 1897, 1. 17). Here there was no negligence in any ordinary sense of the

term. The defect in the boiler was occult. It was not shown that any inspection would have revealed it. Accordingly the judgment was not based on the article of the Code Napoléon corresponding to our article 1053, but on article 1384 which corresponds to our 1054. The master was held liable not for his own fault or the fault of any person, but for the fault of a thing i. e., of a thing which he had under his care. Upon this theory an employer who places a machine or a tool under the control of a workman is held to have guaranteed that it shall not injure him owing to some defect in its construction, and no proof that it was, so far as he knew, the best that money could buy, will exonerate him. I will refer to this new ground of liability later on. But the subsequent case shews that the precise " vice de construction " must be proved. It will not be presumed that because a boiler bursts it must have been defective. (Cass. 28 févr. 1897; Sirey, 1898, I. 65) By the method of judicial interpretation the highest Court in France had arrived at this very curious result. A master was liable if it could be shewn that an accident happened through some fault even latent in the construction of his machine. But he was not liable when it was impossible to say what it was that caused the machine to go wrong. This may have been a sound construction of the Code, but it is very hard to justify it upon grounds of common sense. In both cases, the workman was an innocent victim, and in both the master was absolutely free from blame. The new law is surely more logical in applying the same rule to both cases. N. L. It remains to notice two other defences, in addition to want of proof of negligence, which were admitted by the common law in England. These are : 1. Common employment or " fellow-workman " and 2. Contributory negligence.

Common Employment

1. The first is a particular case of the general rule that a workman has contracted to take the ordinary risks incident to the work. One of these risks is that he may be injured by the negligence of a fellow-workman. If so, it was a firmly established rule of law in England that he had no redress except against the fellow workman. In a leading case, Lord Cairns said : " In the event of his (i. e. the employer's) not personally superintending and directing the work, he is bound to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master " (Wilson v. Merry, L. R., 1 Sc. App. at p. 332). His liability for the negligence of the fellow-servant is in fact similar to that for a defective boiler. He must be reasonably careful in selecting both, and must take reasonable care to see that they work properly. But he does not guarantee either. Boilers will occasionally burst from mysterious causes, and servants will be careless. If injury results this is not the fault of the master. It seems rather curious that a master should be liable for an injury done to a stranger who is present on some lawful errand in his works; but not liable to one of his own workmen who is hurt by the carelessness of his fellow. But such was the law in England. It led to many fine distinctions as to who was a fellow-workman, when there were sub-contracts or several contractors engaged on the same work. Many of these difficulties were cleared up by the judgment of the House of Lords in " Johnson v. Lindsay," 1891, A.C. 371. The harshness of the law upon this point was

mitigated in certain cases by the Employers' Liability Act of 1880. Under that Act, speaking roughly, the injured workman could not be met with the defence of "fellow-workman" if the fellow-workman whose negligence caused the injury was a foreman or other superior in charge of the work, or was in a position of authority over the injured man and ordered him to do the act which led to the accident. If, however, the negligent workman was of the same grade as the victim and not in any position to give orders the common law still barred recovery. A closely similar Act was passed in Ontario, (R. S. O., 1897, ch. 160).

The new Act of 1897, in the cases to which it applies, sweeps away this defence of common employment. In France, the fact that the injury was caused by the fault of a fellow-workman of the victim does not excuse the master.

There is one case mentioned by Sourdat (vol. 2, s. 911) in which the "Cour Royale de Toulouse," admitted the defence precisely upon the grounds on which it is supported in England. But the judgment was quashed for the reason that art. 1384 (our art. 1054) makes no such distinction, but declares generally that every person is responsible for the damage caused by the fault of persons under his control. This view is now sustained by a uniform jurisprudence. (See Pothier, Oblig., No. 121; Sourdat, "Traité de la Responsabilité," 2, s. 911; Larombière, art. 1384, (9).

In this province there seems to have been some hesitation, before codification, as to whether the English or the French rule was to be followed. In two cases noticed by Mr. Sharpe I see the English doctrine was applied. But it seems now to be established that the plea of fellow-workman is not good. (Bélanger v. Riopel, M. L. R., 3 S. C. 258, Court of

Review; Queen v. Filion 1894, 24 S. C. R. 482; Robinson v. C. P. R. Ry, 1887, 14 S. C. R. at p. 114.)

Contributory Negligence.

2. The second defence of the English common law, to which I wish to refer, is the familiar plea of contributory negligence. It was a doctrine of the Roman law, (Grueber, Lex Aquilia, p. 228.)

This defence has in modern times occasioned a great deal of legal metaphysics as to "proximate cause," "principal and determining cause," "cause directly contributing to the accident" "*causa causans*" and so on. The principle itself is not very obscure, though it has often been presented in a very obscure way. I will make an attempt to state it in few words.

1. The plea of contributory negligence does not arise when the accident occured solely through the negligence of the employer or of the victim.

2. There must be two distinct faults or negligences, one on the part of the employer or of some one for whom he is responsible, and the other on the part of the victim.

3. Without the combination of both faults the accident would not have happened.

4. If the two causes operated at the same moment, or in other words, if the accident was due to the simultaneous negligence of both parties, neither of them can recover damages.

5. If the two causes were not simultaneous in their action, but if one was prior to the other, the question is which of them was the last in time, or in other words the proximate cause of the accident.

6. If the last or proximate cause was the negligence of the plaintiff himself he cannot recover. He is said to be barred by contributory negligence. On the

other hand if the last or proximate cause was the negligence of the defendant, he is liable. The prior negligence of the plaintiff is then disregarded. It is not contributory.

The doctrine may be stated also in this form :

1. If the accident was caused by the simultaneous negligence of both parties there is no liability.

2. If, in spite of the prior negligence of the defendant, the accident would not have happened unless the plaintiff had afterwards been negligent, there is no liability.

3. The defendant, on the other hand is liable, if in spite of the prior negligence of the plaintiff, he could have prevented the accident by exercising reasonable care.

Every one is bound to take reasonable care of his own safety, and reasonable care of the safety of his neighbours. He must even be reasonably careful in dealing with people whose own conduct is careless. A plaintiff is not allowed to say "I know that I was careless, and that my carelessness was the proximate cause of the accident, but still the defendant was first to blame."

But a defendant is not allowed to say "admitting that my negligence was the proximate cause of the accident, yet the plaintiff was first to blame." In the former case the common law says "your own carelessness directly caused the accident, so you cannot recover." In the latter it says, "it was the defendant's carelessness which after all was the proximate cause and he is not excused by the carelessness of the plaintiff, which would have caused no injury if he had been keeping a bright look out."

The doctrine is frequently misunderstood. It never involves the weighing of one fault against another, to judge which is the greater, heavier or principal

fault. The question is whose was the fault which was the proximate or immediate cause of the accident.

E. g. in the well-known old case of Butterfield v. Forrester 1809, 11 East, 60, the defendant, who had been repairing his house, had carelessly left a pole barring part of the road. The plaintiff, riding fast in the evening, ran into the pole, and was thrown, and injured. It was held that he could not recover, as in spite of the defendant's negligence, he might with ordinary caution have avoided the pole. In many cases it has been held that a man who proceeds to cross a crowded street or "*a fortiori*," a railway line, without looking to see that the road is clear, cannot recover damages, if he is run over, though the vehicle may have been carelessly driven, or the driver may have failed to ring a bell or sound a whistle. (See e. g, Dublin R. v. Slattery, 1878, 3 App. Ca. 1155). Contributory negligence is, however, a plea much more often stated than sustained. By English practice the question of whether there was contributory negligence is left to the jury, and juries are, in general, inclined to help a plaintiff, in such cases, over a few legal obstacles.

I am not concerned to justify the equity of the rule as to contributory negligence. There is a great deal to be said for the proposition that a man is not entitled to create a danger, and that if he does so and harm results he must be liable. But the English law distinguishes between causing a danger and causing an injury. (See Metropolitan Ry., v. Jackson 3 App. Ca., 193 ; Dublin Ry., v. Slattery, 1878, 3 App, Ca., 1166 ; Davy v. London & S. W. Ry. Co., 1883, 12 Q. B. D., 76).

Of course the doctrine must be understood and applied with due reason and regard to the particular circumstances.

The law only expects a man to exhibit ordinary care in getting out of the way of a threatened calamity. If my negligence is so great that another, not unreasonably, loses his head and does something which it would have been wiser not to do, and so is hurt, I am not permitted to say : " People must not give way to panic, if you had shewn perfect ' sang-froid ' you would not have been injured." So, if a horse runs away from some defect in the reins, or the driver, and a passenger jumps out, and breaks his leg, he may recover if upon the facts it seems that his fright was not out of all proportion to the danger. Lord Ellenborough said : " If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences. " (Jones v. Boyce, 1816, 1 Starkie, 493).

Or, if a bale of wool is falling from a window, and I take a step which, instead of clearing it, brings me under the bale, I am not barred, for absolute control of one's nerves, is not to be looked for at such a moment. (Woolley v. Scovell, 3 Manning & Ryland, 105).

Further a child is only expected to think as a child, and will not be disentitled to recover because an older person might have got out of the way of the danger. An employer must take special care of employees whose youth is likely to make them thoughtless, (Bartonshill Coal Co. v. McGuire, 3 Macqueen, 311). In a recent case, the Court of Appeal, in England, held that a girl of *seventeen*, which Lord Esher describes as a "tender age," was not barred by contributory negligence when she had neglected to put on a mask provided for the employers in a soda-water manufactory and was injured by a bottle which burst. (Crocker v. Banks, 4 Times, L. R., 324).

But apart from such specialties the common law in England, and also in America, holds that a plaintiff

cannot recover if the proximate cause of the accident was his own carelessness. The leading case now is The Bernina, 1888, 13 App. Ca., 1. The Employers'' Liability Act of 1880, did not alter the law upon this point.

Faute commune.

The expression " contributory negligence " is not a happy one. It suggests, what is the fact, that two faults contribute to cause the accident. But it does not suggest, what is more important, that the English law in such cases pays regard only to one of the two faults, viz the later. " Contributory negligence," in fact, always means " negligence, on the part of the plaintiff, which was the proximate cause of the accident and therefore bars his right to recover." When the accident is due to the simultaneous negligence of both,—as when A. crosses the track without looking up and down the line, and B. fails to ring the bell,—the negligence of A. and the negligence of B. are equally proximate causes of the accident. By English law the two faults cancel each other, there is no liability, and it is natural enough to say that if either A. or B. brought an action he could be met by the defence of " contributory negligence." But when the two faults are not concurrent, the moment it is established that the negligence of the plaintiff was " contributory " then the earlier negligence of the defendant is thrown entirely out of consideration. It was not the proximate cause.

I have never been able to understand the justice of this. In many cases it seems to me, by sustaining a plea of contributory negligence equity is sacrificed to a false show of logic. The very name " contributory " shows that two faults were involved. Why then are we to take account of one, and to disregard the other ?

The negligence of the defendant was as truly "contributory" in common sense if not in law, as was that of the plaintiff. If A. is lying drunk on the road, and B. carelessly drives over him A's negligence is not "contributory" because there would have been no accident if B. had not been subsequently negligent. This is the law, and B. must pay damages. But why does not the English law allow B. to say "my careless driving would have led to no accident if you had been free from blame."

Or if I wrongfully put an obstruction across the highway, as in *Butterfield* v. *Forrester* why should I get off scot-free because by taking care the plaintiff might have avoided it. I am certainly to blame, and but for my fault there would have been no accident. Why then should I bear no part of the loss ?

A jury in these cases is inclined to take the law into its own hands and to reduce the damages. But the direction of the judge may be too strong for them. In law whenever the jury find that there was contributory negligence, the plaintiff cannot recover any damages. The distinction between the English and the French law upon this point is well brought out in the language of Pollock, C. B. "A person who is guilty of negligence, and thereby produces mischief to another, has no right to say : 'Part of that mischief would not have arisen if you yourself had not been guilty of some negligence.' I think that where the negligence of the party injured did not, in any degree, contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action, and certainly I am not aware that, according to any decision which has ever occurred, the jury are to take the consequences and divide them in proportion accordiug to the negligence of the one or the other party." (*Greenland* v. *Chaplin*, 1850, 5 Ex. 243).

In Scotland the English rule is followed, and a recent case illustrates its injustice. A guest in a hotel, during the night opened a door which he mistook for the door of a lavatory. It opened into the elevator, and he fell and was injured. The jury thought there was negligence on the plaintiff's part in stepping forward in the dark, and there was no doubt that this negligence was the proximate cause of the accident. But they thought the hotel keeper had also been negligent in not having the door into the elevator more carefully guarded and distinguished. They brought in a verdict "Find for the plaintiff, but in respect of there being contributory negligence on the part of the plaintiff, assess the damages at £300." It was held that there must be a new trial on the ground that the jury were not entitled after finding contributory negligence proved to give any damages to the plaintiff. (*Florence* v. *Mann*, 1890, Court of Session Cases, 4th Series, vol. 18, p. 247). I do not doubt that the law was correctly applied, but I cannot help thinking that the verdict, though bad in law, was both just and sensible.

In regard to contributory negligence the French law, takes a more lenient view. It is now generally admitted by French Courts that where both plaintiff and defendant are shown to have been in fault, — where there is *faute commune* the Court must try to apportion the damages. The plaintiff ought not to get full damages, seeing he was partly to blame, but he ought to get some damages seeing he was not wholly to blame. (Cass., 10th Nov. 1884, D. 85, 1. 433 ; Cass. 29th March 1886, D. 87, 1. 480, Sourdat, 1. s. 662 ; Baudry-Lacantinerie, "Précis," 2. s. 1348.) The question as to whose fault was the proximate cause has not here the same importance as in the English theory. The Court considers rather which is the

principal cause, or whose negligence is the greater, and adjusts the damages accordingly. If the parties seem to have been about equally to blame the loss is divided. In many French Courts the practice has become common to give the plaintiff in such cases half the damages to which he would otherwise have been entitled. " He has suffered to the extent of $1000, but he was himself to blame, give him $500." If, however, his fault was very gross and that of the defendant very slight, damages may be refused altogether, (Larombière, art. 1382, No. 29).

The rule of dividing the loss in such a way if possible as that each of the two negligent parties shall pay for that part of it which is due to his fault is applied in English law to the liability of two shipowners whose vessels come into collision by the fault of both. Sir F. Pollock says it is " a rule of thumb " (Torts. 2nd ed., p. 412), and so it may be. But, I confess, I prefer it to the rule of making one fault cancel another. In the *Bernina*, (13 App. Ca. 1) Lindley, L. J., declared, he could not see why the admiralty principle as to injuries to ships, might not with equal justice be applied to cases of injuries to persons.

In this Province the French rule as to *faute commune* entitling the Court to divide the damages was spoken of with approval by Dorion, C. J., in C. P. R. Co. v. Cadieux, 1887, M. L. R.. 3 Q. B. 315. That learned judge said, however, that up to that time it had not been adopted in the Province of Quebec. Since then it has been applied in several cases (Clement v. Rousseau, R. J. Q., 1 C. S. 263 ; Carbonneau v. Lainé, R. J. Q., 5 C. S. 343 ; Lapierre v. Donnelly, M. L. R., 7 S. C. 197). I am not in a position to say whether it is now regarded as settled law.

So far as I can discover the point has not yet been

fully discussed in the Supreme Court. The difference between the French view and the English was founded upon in the very recent case of Roberts v. Hawkins, (1898, 29 S. C. R. 218). But in the result the Court found that there was in that case no negligence on the part of the defendants to which the negligence of the plaintiff might have been contributory. The accident was caused solely by the plaintiff's own fault.

Recent French Jurisprudence.

I have now stated, as fairly as I can in the space at my disposal, the English law prior to 1898, and I have indicated two important points, viz. : the defences of "fellow-workman" and "contributory negligence," as to both of which the French law was more favourable to the workman. I now wish to notice briefly a somewhat curious development of the French law of quite recent date. As the hardship of allowing the *risque professionnel* to fall on the workman came to press more and more upon the popular conscience it began to be suggested by ingenious lawyers that possibly the Civil Code was more humane than had hitherto been thought. Was it clear that the workman must prove that his employer had been in fault? Might not the law presume fault without proof? or might there not be discovered in the code some other provision under which the employer might be found liable, though his freedom from fault was as clear as the noon-day sun?

It is proverbial in England that "hard cases make bad law." Now, speaking with all respect for those who differ, I think that a better illustration of the proverb could hardly be found than in the recent attempts made in France and Belgium to circumvent the code upon the question of employers' liability.

Given a poor workman, a rich employer, (perhaps a large railway company), an ingenious advocate, and a humane judge anxious to give a reparation which he feels that natural justice demands, and, as all lawyers will see, a good deal may be done with a code. In Belgium, the *question ouvrière* has been for years very acute, and it is, therefore, not surprising that the main attack upon the old law has been directed from that quarter.

The articles 1382, 1386 of the Code Civil Belge are identical with those of the Code Napoléon, and, with one or two differences immaterial for the present purpose, identical also with our articles 1053, 1055. One of the chief advocates of the new view was M. Sainctelette, a former minister of state in Belgium. (Sainctelette, *De la responsabilité et de la garantie, Paris et Bruxelles*, 1884, see esp. pp. 129 seq.) Other supporters are Laurent (vol. 20, No. 639) and Marc Sauzet, *Revue critique de législation et de jurisprudence*, 1883.

The arguments take two forms :

1. Retaining the theory of all the old writers, and of the jurisprudence, that the liability of the employer rests on delict or quasi-delict, it is urged that, if an accident occurs, there is a presumption that the master is in fault, and he is liable in damages unless he proves that the accident was due to an unavoidable cause. The ordinary rules of evidence are to be inverted to meet the "hard case" of the workman, and the onus is to be thrown on the defendant. The argument is supported by the provisions of the Code, that one is responsible for the things which he has under his care—*sous sa garde*,—and by the analogy of the liability, incurred by the owner of an animal which hurts anyone, or of a building which falls and causes loss to a third person.

M. Sainctelette himself presented this contention before the *Cour de Cassation de Belgique*, but did not succeed in convincing the court. They held that the owner of an animal was liable not as owner but as negligent. That this was so in the case of the owner of the building was shewn by the fact that he was only liable when the ruin happened from want of repairs, or from original defect in its construction. (*Journal des Tribunaux*, 1889, p. 441).

2. The soundness of the old law is challenged upon an entirely different ground. Leaving out of sight altogether the question of negligence — *faute délictuelle* — may not the master be held liable for breach of contract — *faute contractuelle* ?

This seems still more adventurous. It is seriously maintained that in every contract of employment there is an implied term that the employer shall return the workman safe and sound to the bosom of his family. If he does not fulfil this implied obligation he is in breach of contract. This view has been adopted in Luxembourg by the *Cour Supérieure*. (S. 1885, 4, 25).

That Court has held that under the contract the employer guarantees the workman against accidents from machinery. *Il doit répondre de sa machine vis-à-vis de ses ouvriers.* The master must pay for the *accident anonyme.* He can only escape by proving that the accident was due either to the fault of the workman or to *force majeure.* And *force majeure* is not *cas fortuit. Force majeure* must be something quite unconnected with the machine or the work, not part of the *risque professionnel.* E. g. if the workman is swallowed up by an earthquake, or devoured by a bear, the employer is not held to have contracted to take such a risk for it is not incident to the work. The French Courts, at least the Cour de Cassation, and the Courts of Appeal, in spite of many attacks and

of a torrent of arguments from the commentators, stood firm in applying the old doctrine that there was no liability unless the master was in fault and unless the workman proved it. Mons. Esmein in two admirable notes to the cases in S. 1897, 1.17 and S. 1898, 1.65, sums up the rules adhered to by the *Cour de Cassation*, thus:

" *Faute du patron, responsabilité du patron.*

" *Faute de l'ouvrier, pas de responsabilité du patron.*

" *Accident anonyme, i. e. — si l'ouvrier ne peut prouver* " *aucune faute définie du patron,—pas de responsabilité* " *du patron.*"

The furthest point they reached, was in the case already cited where they held the employer liable as for fault where the workman could point to a definite *vice de construction* of a machine as the cause of the accident. The argument that the responsability for the fault of a thing under a man's charge — *sous sa garde*—applies to a machine used in carrying on a work, would be more specious if any support could be found for it in the old law. Unfortunately this is not the case.

Attentive reading of the articles of the Code, in the light of such writers as Bourjon, (liv. 6, tit. 3, chs. 6 and 7) and Domat, (liv. 2, tit. 8, ss. 2 and 3) makes any such contention very difficult. A ground of obligation so vastly important could hardly have escaped the notice of Pothier. Yet there is nothing in his work to lend any countenance to it. Moreover, there is absolutely no ground to suppose that the codifiers meant to introduce any new law. Mons. Esmein argues, and his argument convinces me, that the old law never contemplated a man being held liable for a pure accident. Liability in the case of the vicious animal or the ruinous building is natural enough. The owner of an animal can restrain it, or if this is

impossible, he can kill it. He has no right to allow it to cause danger or damage to his neighbour. As to the house the owner has himself to blame if it falls from want of repairs. Defect of construction is more difficult, but even here the owner of a house has generally some warning, and some opportunity of preventing the house tumbling about his own and his neighbour's ears. At most these are exceptional cases founded on ancient practice, and on the Roman law. It is surely a rather violent use of analogy to apply the same rule to an employer's liability for a machine, carefully bought, and carefully tended, which suddenly bursts from a defect which no vigilance could have prevented. In one year in Germany 6,931 accidents to workmen occurred from causes which were inevitable. Is it reasonable to extend to them the principle applied by the Code to the rare case of the ruinous house?

After years of discussion the best authorities in France remained unconvinced that the Code could stand the strain to which it was being subjected and public opinion was satisfied that it was safer and better to proceed by way of legislation. The history of the new law and the numerous vicissitudes through which it passed in its various stages, are given briefly, but clearly, in Sirey, *Lois Annotées*, 1899, (pp. 761, seq.) Of the actual working of the old law in France I cannot speak from experience. Judging from the literature it seems to have been bad enough. Expensive and uncertain, it was a night-mare to the employer, without being, by any means, a sure protection to the workman. As regards the English system I can speak from some years of observation. It always seemed to me to combine, in a marvellous degree, the maximum of cost with the minimum of gain to anyone except the lawyers. Their interest is, of course, important, but

it is hardly the primary interest to consider. Now, in England, the employer was not spared. Whether he won or lost, he had heavy costs to pay. His recourse against the plaintiff when he won was, naturally, worthless. As the Scotch proverb says: "You cannot take the breeks from a Highlander" and you cannot get £2000 of costs from a poor workman. Very often an employer, knowing this, compromised a threatened action, though he believed he had a good legal defence. In other cases employers who were insured against claims were compelled for the sake of preserving their recourse against the insurance company to dispute claims which they would otherwise have admitted to be just.

On the other hand, the workman had to face a long and uncertain litigation and in the very numerous cases where there was some fault on his part he was not entitled to recover. Even when he succeeded in breaking down every defence he often found that a large part of the damages recovered went into the pocket of his lawyer as extrajudicial expenses. In recovering a sum of perhaps £300 an expense of from £1,000 to £2,000 was often incurred. The employer has to pay —let us say—£2,300, the workman perhaps gets £200, and £2,100 is swallowed up in lawyers' fees, and other expenses. Such a system of remedy in accident-cases was, I really think, hardly worth transplanting to the American Continent, and that a country like the United States, where democracy is said to be triumphant, should remain contented with it altogether baffles my comprehension.

New English Act.

I now proceed to consider the new legislation. The new Act in England came into operation on 1st July,

1898. It is cited as the Workmen's Compensation Act, 1897 (60 and 61 Vict. c. 37.) Though passed on the 6th August, 1897, its commencement was postponed until the 1st July following, in order to give time to employers to effect insurances, and make such other arrangements as might seem necessary.

1. The act is not universal. It is limited to certain trades. It applies to railwaymen, factory hands, miners, quarrymen, men employed in "engineering work" and, with some limitations, to men employed in building operations. "Factory," however, is a wide word; it means any premises where for the purpose of gain a manufacturing process is carried on with the assistance of steam, water, or other mechanical power, and in addition, eighteen specified kinds of works, whether mechanical power is used or not. It is estimated that the Act applies to between six and seven millions of workers. It leaves out sailors, agricultural labourers, domestic servants and workers in many small handicrafts.

2. The workman can recover if the injury was caused by an accident arising out of and in the course of the employment. He has not to prove any fault of the employer or of the plant.

But he is barred if it is proved that the injury is attributable to his own "serious and wilful misconduct." As to this, it is to be noted (a) that the onus of proving the misconduct lies on the employer. (b) that it must be misconduct, not merely negligence, and (c) that it must be wilful. I suppose a man who went on to a roof to repair it when he was in a state of intoxication, or a man who struck a match in a gunpowder factory, contrary to the rules, would be regarded as guilty of such misconduct as is here intended. But the more common case of inattention or carelessness even of a gross character

would not be sufficient. Even so, the French law is more liberal and the German law goes further than any. In France, the workman can recover unless he has *intentionnellement provoqué l'accident*, which would be the act of a lunatic or a suicide. The Court may diminish the damages, but cannot altogether refuse to give damages in the case when the accident is due to the *faute inexcusable* of the workman, (art. 20). In Germany no question of the workman's fault arises. He can always recover the full amount unless he has purposely caused the accident. (den Betriebsunfall vorsätzlich herbeigeführt, s. 5, ss. 7).

3. Contracting out is only allowed by the Workmen's Compensation Act subject to very stringent conditions.

When there is a scheme of insurance in force, which, in the opinion of the Registrar of Friendly Societies is not less favourable to the workmen than the provisions of the Act, the employer may contract with the men that the scheme so approved of shall be substituted for the Act in their case. This was inserted because many companies and large employers had benefit-schemes in operation, and large funds invested. It makes the Registrar master of the situation, and secures to the workman that he cannot be deprived of the benefit of the Act unless he gets something at least as good in exchange.

4. If the employer has insured himself against his liability for accident-claims, and he afterwards becomes bankrupt, the workman has a first charge upon the sum payable by the insurers. This is a very important protection, as it can hardly be doubted that most employers, will now need to provide against their new liabilities by insurance.

The persons entitled to compensation are workmen of all grades, including overseers and clerks, or

in case of fatal accidents, their dependants. "Dependants," is used, however, in a rather restricted sense. It means such members of the workman's family specified in Lord Campbell's Act (Fatal Accidents Act, 1846), as were wholly or in part dependant on the earnings of the workman at his death. Pecuniary loss must be suffered, e. g. a father, whose son has been killed, has no claim, unless as a matter of fact, he was being supported wholly or partly by his son.

5. The compensation is in the form of a lump sum in case of death, or a weekly payment in case of total or partial incapacity for work. The sum payable in fatal cases can never exceed £300. It will generally be less, for it cannot exceed the workman's earnings for the previous three years. But if the earnings were less than £150, that sum can nevertheless be recovered. The dependants of a skilled workman whose wages were $20 a week, as they can never get more than $1500, will only get a sum equal to about the earnings for a year and a half.

When the accident causes total or partial incapacity, the compensation is a weekly payment not exceeding 50 per cent. of the workman's average earnings, and in no case more than one pound a week. The employer may, after six months, redeem the weekly payments by a lump sum fixed by arbitration. I note, in passing, that both the French and German laws are more liberal in the case of a workman permanently incapacitated for any work. In that very sad, but unfortunately, not very uncommon case, the French or German workman is entitled to an annuity equal to two-thirds of his former earnings.

6. Procedure. Failing agreement as to the liability to compensate, or the amount of compensation, the question is to be settled by arbitration. This means that if a committee representing the employer and the men

exists, (as is the case in some large works), the committee may decide, if the parties both agree to this course. Otherwise, they may choose an arbitrator, and, failing agreement, the county-court judge is to be arbitrator. In practice, the county-court judge will generally be the arbitrator, because he will have to do the work as part of his ordinary duties, whereas an arbitrator mutually chosen would have to be paid. The procedure is to be simple and summary, and there is no appeal on matters of fact.

Upon matter of law there is an appeal.

7. The remedies open to a workman before the Act are not taken away. He may still sue the employer at common law, but the master's liability is alternative and not additional. If the workman choose to proceed under the Act, and he recovers compensation, he cannot afterwards bring any other claim. In cases where the fault is clear and the loss great, it may still be an advantage for the workman to proceed at common law, for then he can recover damages to any amount which a sympathetic jury may give, instead of being limited to £300.

New French Law.

I now turn to the French law.

It is the outcome of twenty years discussion. Some statistics collected by the 4th Civil Chamber in Paris will give a better idea of the unsatisfactory working of the old law, than pages of description. They calculated that of 349 actions for compensation on account of accident between 1878 and 1881, only 152 resulted in favour of the plaintiff. Only 51 were decided within a year, 159 took between one and two years, 73 between two and three years, 36 more than three years. One action dragged over seven years.

The first proposal was the bill of Mons. Martin Nadaud, in 1880, to invert the burden of proof. The employer was to be liable unless he proved that the accident was due to the fault of the victim. This, however, never passed, and gradually opinion came round in favour of the theory of *risque professionnel*, i. e., that, apart from all considerations of fault, compensation for injuries should be, as it were, a first charge upon the profits of the employment.

1. The Act as finally passed, applies to all industrial employments, building, mining and the like, and every *exploitation* in which machinery driven by artificial power is used. It does not apply to sailors, but they are provided for by a separate law of 21 april 1898. All contracts against the Act are null.

2. Workmen to whom the Act applies have now no claim except under the Act. The Act does not apply in full to workmen whose annual earnings exceed 2,400 francs or $480. In computing the compensation due to them the excess above $480 is only reckoned at one-fourth of its actual amount: Thus, a workman who gets a salary of 4000 francs is for the purposes of the Act treated as getting only 2,800 i. e. 2,400 and one fourth of 1,600. But as to this it may be agreed that the workman's whole salary shall form the basis of calculation. Such an agreement is not null, as contrary to the Act.

3. The employer is liable for medical expenses, and for funeral expenses, but the last only up to 100 francs.

4. Gratuitous legal aid is given by the State (*assistance judiciaire*).

5. In case of fatal accident the compensation is not a lump sum as in England. It is a *rente viagère*.

The widow is entitled to 20 per cent. of the annual earnings of the husband. If she marries again she gets a lump sum of three years' annuity, and it then ceases.

Children legitimate or illegitimate get a *rente* up to to the age of 16.

One child gets 15 per cent., two get 25 per cent., three get 35 per cent. and for four or more 40 per cent. is payable.

A mother and four children will thus get altogether 60 per cent. of the father's earnings. And if the mother is dead the *rente* for the children is higher. They then get 20 per cent. each, but not more than 60 per cent. in all.

Failing widow and children, ascendants, or descendants more remote than children, are entitled each of them to 10 per cent. of the earnings of the victim, but so that not more than 30 per cent. shall be paid in all.

6. The family of a foreign workman have no claim to compensation if they were not living in French territory at the time of the accident.

The German law is the same. The English law upon this point is more generous, and makes no distinction between foreigners and British subjects. It is to be hoped that the exclusion of foreigners from a claim expressly based on grounds of justice and humanity will not long continue in force.

7. A workman totally and permanently incapacitated from work is to get a *rente* equal to two-thirds of his earnings.

In the case of partial and permanent incapacity he gets an annuity equal to half the reduction in his earnings.

In the case of temporary incapacity he gets half the amount of his earnings at the time of the accident.

I have already spoken as to the effect of fault in diminishing his claim.

8. The workman's claim in the case of permanent incapacity, and the claim of his representatives in fatal

cases is absolutely assured to him. If he cannot recover it from his employer, or from an insurance company in which his employer has insured, the annuity will be paid by the state. A special guarantee fund is established for this purpose, supported by a tax upon employers, and the state through the *caisse nationale* has a recourse against the particular employer who has failed to pay the annuities for which he was liable.

Space does not allow me to compare the two laws with each other more fully. It is evident that in two important points the French law is more favourable to the workman. In the first place the French workman is absolutely secure of getting his annuity. An English workman might be defeated of his compensation if the employer were bankrupt and uninsured. No doubt the larger employers at least will generally be insured. But this is not compulsory; and the state guarantee will give the French workman a security which his English brother has not.

Second, payment by *rente*, or annuity, is I think much better for the workman than payment by a lump sum. A poor family suddenly receiving a lump sum will be exposed to many risks, and it is to be feared that the sum recovered in too many cases will be managed in an improvident way. In such matters, however, it is *le premier pas qui coûte*. The establishment of the broad principle that workmen are to be indemnified for the risks arising out of their occupation, even though the employer was not to blame, is a step of infinite importance.

It is generally admitted that the English Act has not diminished litigation so much as was hoped. The number of disputed cases so far has been very great. That, however, arises merely from defective draughtmanship, It ought not to be impossible to indicate

in unambiguous terms to what employments the Act should apply. Many of the English cases turn upon this point. And the expression "serious and wilful misconduct" has caused much difficulty.

If we compare the state of matters in this Province, I think it will hardly be disputed that the law is just now in a somewhat unsettled and unsatisfactory condition. The opinions of the judges differ considerably as to what they will regard as sufficient evidence of fault. Some go further even than the *Cour de Cassation*, and do not require the workman to specify and prove any precise *vice de construction* when the accident is caused by machinery. It is enough that it was the master's machine. If it goes wrong, there must be some fault in it. Moreover, there is a conviction, no doubt justified by experience, that the Supreme Court takes a more rigorous view than the judges of the lower Court. Accordingly damages are frequently laid at nineteen hundred and ninety nine dollars to prevent the possibility of appeal.

Both as regards the proof of fault and of the amount of damages there is the greatest uncertainty. This is in itself a grave evil. An impression that the large or small amount awarded depends on the particular judge before whom the case is heard, is calculated to discredit the administration of justice. And such a tendency is certainly not lessened by knowing that careful provision has been made to prevent the case ever reaching the highest tribunal in the country. Now, unless the united voice of Europe is wrong, the workman's claim is founded in justice and equity even though fault is not shewn. If so, and if that opinion is now general in this country also, it would surely be better to amend the law than to torture the Code.

The experience of Germany has not been to show that the change is a heavy burden upon employers.

The sum for which they are liable is limited in amount, whereas judges, and still more, juries, frequently award extravagant sums.

It seems to me difficult to contend that a change in the statutory law by a moderate and well-drawn Act would increase in this province the burden resting upon the employers, Its main effect would be to give legislative sanction to a liability which is already enforced in practice. And there is no doubt it would clear up a great deal that is at present uncertain and confused.

There is a great saving in litigation, and the insurance companies enable employers to spread the risk in such a way that it is least burdensome. Moreover, employers, more than any other class, must know the dangers which surround the workman, and must be anxious to see him protected so far as possible.

F. P. WALTON.

LOI DES DOUZE TABLES.

SECOND CHEF DE LA LOI.—*Des paroles outrageantes proférées publiquement, et des Ecrits injurieux.*—Si quelqu'un en diffame un autre publiquement, soit par des paroles outrageantes, soit par quelque écrit scandaleux, qu'il subisse la bastonnade.

TROISIÈME CHEF DE LA LOI.—*D'un membre cassé.*—Si quelqu'un casse à un autre un membre, qu'il subisse la peine du talion, à moins qu'il ne fasse avec la partie offensée un accommodement.

QUATRIÈME CHEF DE LA LOI.—*D'un Os déplacé ou brisé.*—Que celui qui, par quelque coup violent, aura fait sauter la dent de quelqu'un hors de la gensive, paye une amende de trois cents as, si l'offensé est un homme libre ; ou de cent cinquante, si c'est un esclave.

QUESTION D'USUFRUIT

Le légataire en usufruit peut-il, sans le consentement du nu-propriétaire, accepter le remboursement des créances soumises à son droit et en donner une quittance valable ?

L'affirmative ne parait pas douteuse et nos tribunaux ont plusieurs fois décidé dans ce sens.

" Lorsque l'usufruit porte sur des créances ou des rentes, disent Aubry & Rau (vol. 2, p. 91), l'usufruitier est, en vertu de son droit d'administration, autorisé non seulement à en recevoir, mais encore à en poursuivre, le cas échéant, le remboursement ou le rachat.

" Il n'a pas même besoin, à cet effet, du concours du nu-propriétaire, qui n'est pas en général admis à contester la validité des paiements faits entre les mains de l'usufruitier, lors même que ce dernier serait devenu insolvable."

Cette opinion est partagée par Proudhon, Usufruit, Nos 1031 et suivants.—Demolombe, X, Nos 324 et suivants.—Laurent, VI, No 413.—Rolland de Villargues, Répertoire du Notariat, Vo. Usufruit, Nos 229 et suivants. Ainsi jugé dans les causes de : Kimber *vs* Judah, 14 mars 1885, par le juge Cimon, confirmé en revision, [2, M. L. R. S. C., p. 86]. — St-Aubin *vs* Lacombe, juge Cimon, février 1886, [2, M. L. R. S. C., p. 110].– Bérubé *vs* Morneau, juge Cimon, le 27 décembre 1887, confirmé par la Cour de Révision, le 20 avril 1888, [14, Q. L. R., p. 90].

Ce droit du légataire en usufriut parait incontestable aujourd'hui.

Mais ce légataire peut-il exercer ce droit avant d'avoir fait inventaire ?

L'article 463 du code oblige l'usufruitier de faire

faire inventaire des biens soumis à son usufruit avant de pouvoir en prendre possession, s'il n'en est dispensé par l'acte constitutif de l'usufruit. Les auteurs français, commentant cette dernière disposition, enseignent que l'usufruitier ne pourrait ainsi recevoir les créances qu'après avoir fait inventaire. Et la majorité de la Cour de Révision à Québec a décidé en décembre 1881, dans Abercromby *vs* Chabot [7, Q. L. R., p. 371], que l'usufruitier qui n'allègue pas avoir pris possession des biens soumis à son usufruit ou avoir fait inventaire ne peut par une action reclamer la créance dont il a l'usufruit.

Ainsi d'après cette doctrine et cette jurisprudence celui qui paye une dette à un usufruitier doit s'assurer que celui-ci a réellement pris possession des biens sujets à son droit, en faisant inventaire. Sans cela, ce paiement pourrait être contesté. Je revien-plus loin sur ce sujet.

Enfin l'article 464 du code civil, à peu près dans les mêmes termes que l'article 601 du code Napoléon, impose en outre à l'usufruitier l'obligation de donner caution de jouir en bon père de famille si l'acte constitutif ne l'en dispense. Cette disposition a-t-elle pour effet d'empêcher le légataire en usufruit de recevoir ses créances, non seulement avant d'avoir fait l'inventaire, mais encore avant d'avoir donné le cautionnement exigé par la loi ? On enseigne l'affirmative en France et quelques jurisconsultes soutiennent cette doctrine ici.

" Tant que l'usufruitier n'a pas satisfait à cette obligation de donner caution, le nu-propriétaire est, en principe, autorisé à refuser la délivrance des objets soumis à l'usufruit. La circonstance que ce dernier aurait laissé l'usufruitier entrer en possession sans exiger de caution, ne le rendrait pas non recevable à exiger ultérieurement l'accomplissement

de cette obligation." Aubry & Rau, (2 p. 474). Laurent, (6, No 520) dit également que le nu-propriétaire peut refuser la délivrance tant que l'usufruitier n'a pas donné caution. " Quand il s'agit de l'inventaire, dit-il, la loi veut que l'usufruitier n'entre en jouissance avant de l'avoir dressé. La loi ne dit pas la même chose quand elle parle de l'obligation de donner caution, mais les articles 602 et 603 (465 et 466 de notre code) prescrivent des mesures qui supposent que l'usufruitier ne peut se mettre en possession, lorsqu'il ne donne pas caution : les immeubles sont donnés à ferme et mis en sequestre et les meubles sont vendus." Demolombe (X. No 483), Proudhon (No 1049) s'expriment à peu près de la même manière.

Cette opinion doit-elle être admise dans notre droit ? Le légataire usufruitier est-il tenu de donner caution avant de pouvoir prendre possession des biens dont l'usufruit lui est légué ? Je ne crois pas.

En effet notre droit sur la saisine du légataire diffère de celui du code Napoléon. L'article 891 de notre code règle que le légataire, à quelque titre que ce soit, est par le décès du testateur saisi du droit à la chose léguée ou du droit d'obtenir le paiement et d'exercer les actions qui résultent de son legs, *sans être obligé d'obtenir la délivrance légale.* Ainsi le légataire quel qu'il soit, par conséquent le légataire usufruitier, est saisi de plein droit par le décès du testateur, et il ne lui est pas nécessaire de demander la délivrance de l'objet légué.

En droit français, au contraire, il n'est pas saisi. Le légataire universel doit demander la délivrance aux héritiers à réserve, (1004). Ce n'est que lorsqu'il n'y a pas d'héritiers réservataires que le légataire universel a la saisine, (1006). Le légataire à titre universel ou à titre particulier doit demander la délivrance aux héritiers à réserve, et s'il n'y en a

pas, aux légataires universels (1010 et 1014). Laurent (vol. 14, No 41) commentant l'article 1014, enseigne que "le légataire en usufruit n'a jamais la saisine puisqu'il ne peut être considéré que comme une légataire à titre particulier ou à titre universel, et qu'en conséquence, il lui faut toujours demander la délivrance des biens qui lui sont légués en usufruit, au *nu-propriétaire*, car c'est celui-ci qui aura la saisine."

Ainsi en France, puisque l'usufruitier doit donner cautionnement au nu-propriétaire, il est rationel que celui-ci puisse lui refuser la délivrance des biens avant d'avoir obtenu ce cautionnement. Mais cette formalité, en France comme ici, n'est exigée que dans l'intérêt du nu-propriétaire. Ce n'est pas une disposition d'ordre public. Aussi le nu propriétaire peut-il donner la possession des biens à l'usufruitier avant que celui-ci ait donné caution, et cette possession est valable à l'égard de tous, même des débiteurs qui paient les créances soumises à l'usufruit. Tous les auteurs s'accordent sur ce point.

Chez nous, au contraire, le légataire usufruitier est saisi de plein droit, absolument comme l'héritier. Il n'a aucune demande à faire au nu-propriétaire, et la saisine a pour effet de le mettre en possession des biens qui lui sont légués. Le mort saisit le vif. "Cela signifie, dit Dumoulin (sur article 318 de la Coutume de Paris) que la possession du défunt se continue après sa mort dans la personne de son héritier. La possession de l'héritier n'est donc pas une possession nouvelle, ni autre, elle est absolument et identiquement la possession telle que le défunt l'avait à l'instant de sa mort."

La saisine donne donc de plein droit la possession au légataire usufruitier. Cette possession n'est nullement soumise à la condition d'un cautionnement préalable. Il n'est pas au pouvoir du nu-propriétaire

d'empêcher cette possession, avant que le cautionnement soit donné. Tout ce que peut faire celui-ci, c'est d'enlever cette possession au légataire usufruitier s'il ne peut fournir de cautionnement dans les les cas prévus par les articles 465 et 466, mais ce légataire n'en aura pas moins été saisi dès l'instant du décès du testateur. La possession donnée par la loi à l'usufruitier est toute aussi étendue que celle donnée en France par le nu-propriétaire avant le cautionnement. Par conséquent elle doit produire le même effet.

Celui qui possède administre nécessairement. Acte de possession et acte d'administration sont des idées synonimes. Par conséquent le légataire usufruitier est saisi du droit d'obtenir le paiement des créances soumises à son usufruit et d'exercer les actions qui résultent de son legs. L'article 891 le dit bien formellement.

Voilà les effets légaux de cette saisine.

L'opinion des commentateurs ne peut être acceptée suivant moi, que dans le cas où l'usufruit résulte d'un acte autre que le testament et où les biens soumis à l'usufruit sont restés en la possession du nu-propriétaire.

J'irai plus loin, et j'ajouterai malgré toute la hardiesse de cette opinion, que l'inventaire requis par l'article 463 n'est pas nécessaire pour que l'usufruitier institué par testament prenne possession de son legs, car, comme je viens de le dire, ce légataire possède dès l'instant du décès du testateur. Cet article ne doit recevoir son application que dans les cas où l'usufruit ne résulte pas du testament, c'est-à-dire, lorsque la loi ne met pas l'usufruitier en possession.

Mais, dit-on, que faites-vous de l'article 463 qui exige l'inventaire pour la mise en possession de l'usufruitier quel qu'il soit, sans distinction ? A cela, je

réponds : que faites vous de l'article 891 qui est aussi très formel, et qui met le légataire en possession de ses biens, au moment du décès du testateur et ce sans aucune condition ? Vous ne pouvez pas concilier cet article 463 avec le principe de la saisine, autrement qu'en en limitant l'application à l'usufruitier que la loi n'a pas déjà mis en possession. Les codificateurs ont reproduit l'article 600 du code Napoléon sans tenir compte de la saisine qu'ils ont donnée de plein droit aux légataires.

J'admets que la majorité de la Cour de Révision n'a pas voulu accepter cette interprétation dans la cause de Abercromby *vs* Chabot. L'on s'est attaché à la lettre de l'article 463 sans tenir aucun compte de l'article 891. Dans cette clause, le juge en chef artuel, Sir L. N. Casaut qui différait d'opinion d'avec ses collègues, a donné des arguments qui sont restés sans réponse.

J'ai examiné attentivement le rapport des diverses causes citées ci-dessus, et dans aucune d'elles, la question du cautionnement préalable n'a été soulevée et aucun des juges n'a exprimé d'opinion sur ce point.

Québec, 28 décembre 1899.

L. P. SIROIS.

LOI DES DOUZE TABLES.

CINQUIÈME CHEF DE LA LOI.—*Du témoin qui refuse de rendre témoignage* —Si quelqu'un s'est trouvé présent à un acte, et a été prié de servir de témoin quand il le faudrait, ou que dans cet acte il ait fait les fonctions de libripens, et que par la suite, étant requis de rendre témoignage, il refuse de le faire, qu'il soit réputé infame, qu'il ne puisse plus être admis, dans aucune occasion, à rendre témoignage, et que d'un autre côté nul ne soit tenu de lui en rendre ce service.

PRATIQUE JUDICIAIRE.

Clermont v. *Boucher*.[1]

Action en dommages. — Répétition. — Injures. — Affirmation de la vérité des faits. — Réputation.

JUGÉ: 1o Que dans une action en répétition de deniers où il est allégué que le demandeur, esprit faible, aurait, sous le faux prétexte d'avoir volé le défendeur, été contraint par ce dernier, par menace et intimidation, de lui payer illégalement le montant réclamé, le défendeur peut plaider qu'en vérité le demandeur avait été pris en flagrant délit de vol;

2o Que dans une action pour dommages à la réputation, le défendeur peut plaider la mauvaise réputation du demandeur.

Le demandeur, curateur à un interdit, poursuivait:

1o En répétition de la somme de $225.00, alléguant que le défendeur aurait par menaces, par violence, par crainte et par intimidation, extorqué cette somme au dit interdit, sous le faux prétexte d'un vol que ce dernier n'avait pas commis;

2o Pour $1,000.00 de dommages, parce que le défendeur aurait injurié publiquement le dit interdit en le traitant de voleur.

A cette action le défendeur plaida entr'autres choses:

3o "Le dit Amable Clermont fut là et alors pris en flagrant delit de vol d'une poule appartenant au défendeur."

8o "D'ailleurs, ce que le défendeur a pu dire du dit Amable Clermont n'était pas de nature à lui causer des dommages vu la mauvaise réputation de dit Amable Clermont."

[1] C. S., *Montréal*, 12 *septembre* 1899, *Pagnuelo, J.—Leblanc & Brossard, avocats du demandeur.—Fortin & Laurendeau, avocats du défendeur.*

Le demandeur inscrivit en droit contre ces deux allégations, alléguant qu'elles ne relevaient pas de la contestation ; qu'il n'y avait pas de lien de droit entre elles et les conclusions prises.

Le défendeur cita les autorités suivantes :

Trudel v. *Viau*, 5 *M. L. R. Q. B. P.* 502 ; *Leduc* v. *Graham*, 5 *M. L. R. Q. B.* 511 ; *Graham* v. *McLeish*, 5 *M. L. R. Q. B.* 425.

La Cour a renvoyé cette inscription en droit par le jugement suivant :

"La Cour, ayant entendu les parties par leurs avocats sur l'inscription en droit du demandeur, et après avoir examiné la procédure et les pièces produites et délibéré :

"Attendu que le demandeur *ès qualité* réclame du défendeur le recouvrement d'une somme d'argent obtenue par le défendeur du nommé Amable Clermont, maintenant interdit pour démence, dans des circonstances qu'il décrit et qu'il déclare fausses, et aussi de dommages pour diffamation au sujet des mêmes faits, et que le défendeur nie les allégations du demandeur en tant qu'elles se rapportent aux faits reportés, et soutient qu'à cause de ces faits tels qu'il les rapporte, il n'a pas diffamé le dit Amable Clermont, ni obtenu de l'argent de lui par des moyens indus ;

"Considérant que le défendeur en maintenant la vérité des accusations portées contre le dit Amable Clermont ne fait que nier les allégations du demandeur, et qu'il ne pourrait se défendre valablement si on lui nie le droit d'en prouver la vérité, quoiqu'injurieuse au dit Amable Clermont.

"Renvoie la dite réponse en droit avec dépens."

Lefort v. *Boulanger*.[1]

Plaidoierie écrite. — Signification. — Endossement de la copie.

JUGÉ : 1o Qu'une pièce de procédure signifiée au procureur d'une des parties entre cinq heures et six heures du soir sera rejetée sur motion.

2o Qu'il n'est pas nécessaire de faire un endossement à une copie de la plaidoierie écrite.

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[1] C. C., *Valleyfield*, 13 *novembre* 1999, *Bélanger, J.—Brossoit & Brossoit, avocats du demandeur.—D. McAvoy, avocat du défendeur.*

Le défendeur fit signifier une motion comportant litispendance, aux avocats du demandeur entre cinq et six heures du soir.

Le demandeur par motion demanda le rejet de l'exception dilatoire pour les raisons suivantes, savoir :

1o. Parce que la dite exception n'a pas été signifiée aux avocats du demandeur entre 9 heures du matin et 5 heures du soir, conformément à la règle 28 des règles de pratique.

2o Parce que la copie signifiée ne portait aucun endos.

L'honorable juge a maintenu la motion des demandeurs et renvoyé l'exception dilatoire dans les termes qui suivent :

"La motion du défendeur n'ayant pas été signifiée dans les heures voulues, savoir entre 9 heures du matin et 5 heures du soir, conformément à la règle 28 des règles de pratique, est renvoyée avec dépens."

L'honorable juge a aussi décidé qu'il n'était pas nécessaire d'endosser la copie signifiée à la partie adverse.

Dion et al. v. *Gendron & Gendron, T. S.*[1]

Saisie-arrêt.— Société commerciale.— Amendement de la déclaration d'un tiers-saisi.

JUGÉ : Qu'il sera permis à un membre d'une société commerciale qui a fait, de bonne foi, sa déclaration comme tiers-saisi sans se conformer aux prescriptions de l'article 698 du C. p. c., d'amender sa déclaration pour y ajouter ce qu'exige cet article, en payant les frais encourrus par son défaut.

Le 6 septembre 1899, les demandeurs obtenaient jugement contre le défendeur pour la somme de $44.54.

Le 15 septembre un bref de saisie-arrêt après jugement était émané pour saisir entre les mains de la

[1] C. C., *Valleyfield*, 4 *novembre* 1899, *no* 2224, *Bélanger, J.— Brossoit & Brossoit, avocats du demandeur.—D. McAvoy, avocat des tiers-saisie.*

société Gendron & Théoret, dont le défendeur faisait partie.

Le 4 octobre 1899, Célestin Théoret, épicier de la ville de Salaberry de Valleyfield, l'un des membres de la société Gendron & Théoret, comparaissait devant le greffier et faisait la déclaration qui suit :

" Qu'au temps de la signification, à nous faite du " bref de saisie-arrêt émané en cette cause, la société " tiers-saisie, n'avait aucune somme d'argent, rentes, " revenus et effets mobiliers, entre ses mains, dus, ou " appartenant au défendeur, n'en a aucun maintenant " et ne prévoit pas qu'elle en aura dans l'avenir."

Le 9 octobre, les demandeurs inscrivaient pour jugement par défaut comme suit :

" Les tiers saisis, n'ayant pas fait leur déclaration, " conformément aux règles contenues en l'article 698 " du Code de procédure civile, les demandeurs ins- " crivent pour jugement contre les tiers-saisis par " défaut, comme s'ils avaient faits défaut de déclarer " pour le 16 octobre courant."

Le 13 octobre, le tiers-saisi Théoret, demandait par requête qu'il lui fut permis de compléter sa déclaration du 4 octobre, et alléguait :

" 1o Qu'il a déclaré de bonne foi que la société qu'il représentait ne devait rien à Gendron.

2o " Que de fait, il ne devait rien, qu'il *ignorait* l'article 698 et qu'il était prêt à se conformer au dit article 698.

" Pourquoi il conclut à ce que le liers-saisi ait droit de compléter sa dite déclaration le tout suivant l'issue du procès."

Cette requête était accompagné d'un affidavit du tiers-saisi disant : " J'ai fait la déclaration en la présente cause au meilleur de ma connaissance, et déclare que j'ignorais les formalités exigées par l'article 698 C. p. c."

Le 4 novembre, permission fut accordée au tiers-saisie de compléter sa déclaration, mais en payant les frais incourus par son défaut, l'ignorance de l'article 698 C. p. c. ne pouvant le dispenser de ce faire.

"Requête accordée."

Brien et al. v. *Lanctot.*[1]

Succession. — Argent comptant. — Action en partage. — Action de reddition de compte.

JUGÉ : Que bien qu'ordinairement les droits respectifs des différentes personnes intéressées dans une succession doivent être décidés par une action en partage, néanmoins lorsque les biens de cette succession ne consistent qu'en argent comptant, qui a été possédé et administré par l'un des héritiers, il y a lieu à une action en reddition de compte, sans recourir à l'action en partage.

Les faits de cette cause sont nombreux et compliqués, et le récit que nous en ferions ne rendrait pas le jugé plus clair.

Voici le jugement :

"The Court, having heard the parties upon the inscription *en droit* filed by the defendant against the plaintiffs' action and deliberated ;

"Considering that although in general the respective rights of the persons interested in a succession are to be determined by an action *en partage*, yet where such succession consists entirely of money which has been administered by one of the heirs, the action to account lies without action *en partage*. (See *Lefebvre* v. *Aubry*, 26 *Sup. Court*, 602.)

"Considering that in the present cause, although the succession in question appears to have originally consisted in part of moveable other than money, yet it is alleged that these have been converted into money, which fact may appear by the proof

"Doth order *preuve avant faire droit.*"

C. S., *Montréal*, 10 *novembre* 1899, *Archibald, J.—Taillon, Bonin & Morin, avocats des demandeurs.—Pelletier & Létourneau, avocats de la défenderesse.*

Paru ! ! Paru ! !

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