THE

Workmen's Compensation Act

1909

OF THE PROVINCE OF QUEBEC

WITH A

COMMENTARY

BY

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PREFACE

The Workmen's Compensation Act of this Province which came into force on the 1st January, 1910, has been in contemplation for some years.

The principle of the Act has been accepted in so many countries that its adoption here can occasion no surprise.

In its form the Act is an almost unique example of legislation modelled upon a recent French statute.

Our Act has modified in some details the French law on which it is based, and it has not adopted certain parts of it, such as those relating to procedure and to the security for payment of the compensation, but most of the articles in our statute are a close copy of those in the French enactment, and the policy of the two Acts is the same.

The French Act came into force on July 1, 1899. In the ten years since then it has been elucidated by a great number of decisions, and these decisions upon language identical, or nearly so, with that of our Act will be of the highest value as an aid to the interpretation of our own statute.

The main purpose of the present work is to give in brief compass the results arrived at by the French courts and the views expressed by the French commentators.

The English Workmen's Compensation Act stands in a different position.

It likewise gives effect to the new principle of professional risk.

But it differs widely from our law both in substance and in form. There are, nevertheless, certain points,—such as the meaning of the term "accident," and the facts in which an accident is to be considered as happening "in the course of the work,"—upon which the English cases afford many useful illustrations.

It has therefore appeared desirable to select from the numerous English and Scottish cases those which are especially applicable to us.

I have purposely kept this work within a small compass in the hope that it may be found useful by employers of labour as well as by the legal profession.

F. P. WALTON,
McGill University.

April 15, 1910.

NOTE ON THE BIBLIOGRAPHY

There is already a large literature on the subject of Workmen's Compensation.

This work is based mainly upon the cases, French and English, but I have also derived much assistance from the following text-books: —

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Cabouat, Jules. Traité des Accidents du Travail, 2 vols. Paris 1901, and 1907;

Dorville, A. Loi du 9 avril, 1898, in Revue Trimestrielle de Droit Civil, 1902, pp. 244, 446, 950;

Baudry-Lacantinerie et Wahl. Louage, 2nd ed., v. 2, Nos. 1736 *seq.*

Other useful French books are Mourral, A. and Berthiot, A., Accidents du Travail, 2nd ed. Paris, 1906; Forgue, E. and Jeanbrau, E., Guide pratique du Médecin dans les Accidents du Travail, Paris, 1905.

ENGLISH: —Beven, Thomas, On Employers' Liability, 4th ed., London, 1909; Ruegg, A. H., Employers' Liability, 7th ed. London, 1907.

GERMAN: —The German cases have been extensively utilized by M. Sachet. A useful edition of the German Act, with short notes, is von Woedtke, Gewerbe-Unfallversicherungsgesetz, Berlin, 1900.

On the medical side of the question a valuable work is Kaufmann, C., Handbuch der Unfallmedizin, Stuttgart, 1907, of which the first volume describes an enormous number of the kinds of injuries which result from industrial accidents.

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WORKMEN'S COMPENSATION ACT, PROVINCE OF QUEBEC, 1909

CHAPTER I.

TEXT OF THE ACT

9 Edward VII., chapter 66.

An Act respecting the responsibility for accidents suffered by workmen in the course of their work, and the compensation for injuries resulting therefrom

[*Assented to 29th May*, 1909].

His Majesty, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:

SECTION I.

COMPENSATION.

Accidents to certain workmen, &c., to involve certain compensation.

1. Accidents happening by reason of or in the course of their work, to workmen, apprentices and employees engaged in the work of building; or in factories, manufactories or workshops; or in stone, wood or coal yards; or in any transportation business by land or by water; or in loading or unloading; or in any gas or electrical business;

or in any business having for its object the building, repairing, or maintenance of railways or tramways, waterworks, drains, sewers, dams, wharves, elevators, or bridges; or in mines, or quarries; or in any industrial enterprise, in which explosives are manufactured or prepared, or in which machinery is used, moved by power other than that of men or of animals, shall entitle the person injured or his representatives to compensation ascertained in accordance with the following provisions.

Agricultural industries, &c., not included.

This act shall not apply to agricultural industries nor to navigation by means of sails.

Compensation.

2. In cases to which article 1 of this act applies, the person injured is entitled:

For Absolute and Permanent Incapacity.

a. In case of absolute and permanent incapacity, to a rent equal to fifty per cent. of his yearly wages, reckoning from the day the accident took place, or from that upon which by agreement of the parties or by final judgment it is established that the incapacity has shown itself to be permanent;

For Permanent and Partial Incapacity.

b. In case of permanent and partial incapacity, to a rent equal to half the sum by which his wages have been reduced in consequence of the accident;

For Temporary Incapacity.

c. For temporary incapacity, to compensation equal to one half the daily wages received at the time of the accident, if the inability to work has lasted more than seven days, and beginning on the eighth day.

Maximum of Capital of Rents.

The capital of the rents, shall not, however, in any case except in the case mentioned in article 5, exceed two thousand dollars.

Compensation in case of death.

3. When the accident causes death, the compensation shall consist of a sum equal to four times the average yearly wages of the deceased at the time of the accident, and shall in no case, except in the case mentioned in article 5, be less than one thousand dollars or more than two thousand dollars.

Funeral Expenses, &c.

There shall further be paid a sum of not more than twenty-five dollars for medical and funeral expenses, unless the deceased was a member of an association bound to provide, and which does provide therefor.

Compensation how Payable.

The compensation shall be payable as follows:

To surviving consort.

a. To the surviving consort not divorced nor separated from bed and board at the time of the death, provided the accident took place after the marriage.

To Children.

b. To the legitimate children or illegitimate children acknowledged before the accident, to assist them to provide for themselves until they reach the full age of sixteen years.

To Ascendants.

c. To ascendants of whom the deceased was the only support at the time of the accident.

Apportionment of Compensation.

If the parties do not agree upon the apportionment of the compensation, it shall be apportioned by the proper court.

Proviso.

Nevertheless every sum paid under article 2 of this act in respect of the same accident shall be deducted from the total compensation.

When Foreign Workmen, &c., entitled to Compensation.

4. A foreign workman or his representatives shall not be entitled to the compensation provided by this act, unless at the time of the accident he or they reside in Canada, or if he or they cease to reside there while the rent is being paid; but if he or they cannot take advantage of this act the common law remedy shall exist in his or their favour.

No Compensation in Certain Case.

5. No compensation shall be granted if the accident was brought about intentionally by the person injured.

Increase or Reduction of Compensation.

The court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if it is due to the inexcusable fault of the employer.

Compensation if wages exceed $600.00. When Act does not apply.

6. If the yearly wages of the workman exceed six hundred dollars, no more than this sum shall be taken into account. The surplus up to one thousand dollars shall give a right only to one fourth of the compensation aforesaid. This act does not apply in cases where the yearly wages exceed one thousand dollars.

Apprentices.

7. Apprentices are assimilated to the workmen in the business who are paid the lowest wages.

Wages upon which rent based.

8. The wages upon which the rent is based, shall be, in the case of a workman engaged in the business during the twelve months next before the accident, the actual remuneration allowed him during such time, whether in money or in kind.

Basis if Workman Employed less than 12 months.

In the case of workmen employed less than twelve months before the accident, such wages shall be the actual remuneration which they have received since they were employed

in the business, plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months.

Basis where Work not Continuous.

If the work is not continuous the year's wages shall be calculated both according to the remuneration received while the work went on, and according to the workman's earnings during the rest of the year.

When Compensation Payable, &c.

9. As soon as the permanent incapacity to work is ascertained, or, in case of death of the person injured, within one month from the date of the agreement between the employer and the parties interested, or, if there be no agreement, within one month from the date of the final judgment condemning him to pay the same, the employer shall pay the amount of the compensation to the person injured or his representatives, or, as the case may be, and, at the option of the person injured or of his representatives, shall pay the capital of the rent to an insurance company designated for that purpose by order in council.

Rents Payable Quarterly.

10. The rents payable under this act, shall be paid quarterly.

Compensation for Temporary Incapacity.

The compensation in case of temporary incapacity is payable at the same time as the wages of the other employees, and at intervals in no case to exceed sixteen days.

Conditions upon which Insurance Companies may pay rents, &c.

11. The Lieutenant Governor in Council may prescribe the conditions upon which the insurance companies applying by petition to be authorized to pay the said rents in virtue of this act, shall be authorized so to do; but no company that has not made a deposit with the Government of Canada or of this Province, in conformity with the laws

of Canada or of this Province, of an amount deemed sufficient to ensure the performance of its obligations, shall be so authorized.

Compensation not Alienable, &c.

12. All compensation to which this act applies, shall be unalienable and exempt from seizure, but the employer may deduct from the amount of the indemnity any sum due to him by the workman.

Compensation at Charge of Employer, &c.

13. The compensation prescribed by the preceding articles shall be entirely at the charge of the employer, and the employer shall not, for this purpose, deduct any part of the employee's wages, even with the consent of the latter.

SECTION II.

LIABILITY FOR ACCIDENTS.

Recourse against Third Persons.

14. The person injured or his representatives, shall continue to have, in addition to the recourse given by this act, the right to claim compensation under the common law from the persons responsible for the accident other than the employer, his servants or agents.

Effect of Compensation from Third Persons, &c.

The compensation so awarded to them shall, to the extent thereof, discharge the employer from his liability; and the action against third persons responsible for the accident, may be taken by the employer at his own risk, in place of the person injured or his representatives, if he or they refuse to take such action after having been put in default so to do.

Employer only Liable under this Act.

15. The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this act, for injuries resulting from accidents caused by or in the

course of the work of such person, in the cases to which this act applies, only for the compensation prescribed by this act.

Moneys paid by Insurance Companies, &c., how applied.

16. All moneys paid by any insurance company or mutual benefit society, shall be applied, to the extent thereof, on account of the sums and rents payable in virtue of this act, if the employer proves that he has assumed the assessments or premiums demanded therefor. But the employer's liability shall continue if the company or society neglects to pay or becomes unable to pay the compensation for which it is liable.

Certain Workmen not Subject to Act.

17. Workmen who usually work alone shall not be subject to this act from the fact of their casually working with one or more other workmen.

Medical Examination of Person Injured, &c.

18. The person injured shall be bound, if the employer requires him so to do, in writing, to submit to an examination by a praticing (sic) physician chosen and paid by the employer, and if he refuses to submit to such examination or opposes the same in any way, his right to compensation as well as any remedy to enforce the same shall be suspended until the examination takes place. The person injured, shall, in such case, always be entitled to demand that the examination shall take place in the presence of a physician chosen by him.

Agreements Contrary to Act Null.

19. Every agreement contrary to the provisions of this act shall be absolutely null.

SECTION III.

SECURITY.

Privilege for Medical Expenses, &c.

20. The claim of the person injured or of his representatives, for medical and funeral expenses, as well as for compensation allowed for temporary incapacity to work, shall be secured by privilege on the moveable and immoveable property of the employer, ranking concurrently with the claim mentioned in paragraph 9 of article 1994 of the Civil Code.

Privilege in Case of Death, &c.

Payment of compensation for permanent incapacity to work, or in respect of an accident followed by death, shall so long as the compensation has not been paid, or so long as the sum necessary to procure the required rent has not been paid to an insurance company or otherwise paid in virtue of this act, be secured by a privilege upon moveable property of the same nature and rank, and by a privilege upon immoveable property ranking after other privileges, and after hypothecs.

SECTION IV.

PROCEDURE.

Courts having Jurisdiction.

21. The Superior Court and the Circuit Court shall have jurisdiction of every action or contestation in virtue of this act, in accordance with the jurisdiction given to them respectively, by the Code of Civil Procedure.

Appeals, &c.

22. Review and appeal of or from judgments susceptible thereof, shall be taken within fifteen days from the rendering of such judgments, and if not so taken the right thereto shall lapse. Such appeals shall have precedence.

Provisional Allowance.

23. The court or judge may, upon petition, at any stage of the case, whether before judgment or while an appeal is pending, grant a provisional daily allowance to the person injured or to his representatives.

No Trial by Jury.

24. There shall [be] no trial by jury in any action taken in virtue of this act, but the proceedings shall be summary, and shall be subject to the provisions of the Code of Civil Procedure respecting such matters.

Prescription of Actions.

25. The action to recover any compensation to which this act applies shall, as against all persons, be subject to a prescription of one year.

Revision of amount of Compensation.

26. A demand to revise the amount of the compensation, based on the alleged aggravation or diminution of the disability of the person injured, may be taken during the four years next after the date of the agreement of the parties as to such compensation, or next after that of the final judgment. Such demand shall be in the form of an action at law.

Petition for Leave to Sue, &c.

27. Before having recourse to the provisions of this act, the workman must be authorized thereto by a judge of the Superior Court upon petition served upon the employer. The judge shall grant such petition without the hearing of evidence or the taking of affidavits, but may before granting the same use such means as he may think useful to bring about an understanding between the parties. If they agree, he may render judgment in accordance with such agreement, upon the petition, and such judgment shall have the same effect as a final judgment of a competent court.

Coming into Force.

28. This act shall come into force on the first day of January, 1910, and shall not apply to pending cases nor to accidents which happened before it came into force.

CHAPTER II.

The History and Principle of the New Law and its Application in Other Countries.

Workmen's Compensation Act (1909). (9 Edw. 7, c. 66, Quebec.)

1. Report of Commission.

This Act is based upon the report of a Commission appointed by the Government of the Province of Quebec under the Act 7 Edw. VII., c. 5 (1907). The Commissioners were Mr. Arthur Globensky, K.C., Chairman, and Messrs. Charles B. Gordon and Georges Marois, with Mr. Léon Garneau, as Secretary.

The Commissioners presented their report on the 5th December, 1908. They heard representatives of a number of Boards of Trade and Manufacturers' Associations, as well as those of Labour Unions and of Accident Insurance Companies.

Very few of the witnesses appeared to be satisfied with the law as it stood before this Act. The employers complained that they were held liable for the least error committed by any of their employees, and that the law fixed no maximum limit of their liability. They also alleged that trials by jury were prejudicial to them, because the jurors allowed themselves to be guided by sentimental considerations instead of impartially weighing the evidence. They complained further, that they were exposed to vexatious lawsuits for amounts altogether out of proportion with the damage suffered, and that, even when they succeeded in having these actions dismissed, they still had to pay their own costs, which were generally very high.

The workmen, on their part, contended that the law as it stood, was unfair to them in obliging them to prove the fault of the employer, or of those for whom he was responsible, especially as in many cases the only available evidence was that of their fellow-workmen, who were thus called to testify against their employer. They also maintained that statistics showed that in nearly fifty cases out of a hundred, accidents were due to fortuitous causes, to superior force, or to undeterminable causes, and that in all such accidents the law allowed the workmen no indemnity. They further complained that their limited resources did not allow them to follow the employer through the numerous appeals from one court to another, and that it often happened that a final judgment was not arrived at before several years after the institution of the action.

2. The Law before the Act.

It will be convenient to state in outline the main rules of the law applied in such cases before the present enactment.

3. Fault had to be Proved.

The plaintiff had to prove that there had been fault on the part of the employer, or of some one for whom he was responsible, and that this fault caused the injury. The rule was thus formulated in a leading case:—There can be no responsibility on the part of an employer for injuries sustained by an employee in the course of his employment unless there be "direct evidence, or weighty, precise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to to be charged with responsibility." (1)

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(1) Montreal Rolling Mills v. Corcoran, 1896, 26 S. C. R., 595; Matthews v. Bouchard, 1898, 28 S. C. R. 580; Canada Coloured Cotton Mills Co. v. Kervin, 1899, 29 S. C. R. 478.

The nature of the proof required was largely a question of circumstances, and there might be cases, such as explosions, in which it was impossible to shew precisely what happened, but facts must be proved from which the jury or the trial judge might reasonably infer that the accident was due to the fault of the defendant. (1)

The jury was not entitled to find the employer liable upon a mere guess. Where the injury might have been caused by his fault, but this was only one of several possible explanations of the accident and there was no evidence entitled the jury to select this one, the case failed. (2) There was, however, some authority for the proposition that in one important class of cases the employer was presumed to be in fault.

4. Presumption of Fault Arising from the Employer having under his Care the Thing which Caused the Damage.

According to the latest decision of the Court of King's Bench the rule above stated was subject to an exception, when it was proved that the accident was caused by a thing, *e.g.*, a machine, which was under the care of the employer, or was being used in his business by those for whom he was responsible. In that case there was a presumption of fault against him, and he was liable, unless he could prove that it was impossible for him to prevent the accident. In the Supreme Court this judgment was affirmed, but there was an equal division of opinion upon the legal question as to whether in such cases there was a presumption of fault. The question is one of much difficulty and the arguments and authorities on both sides are fully given in the judgments delivered in the Supreme Court. (3)

The great importance of this decision is that in a class of cases, of very common occurrence, where an accident

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(1) McArthur v. Dominion Cartridge Co. (1905) A. C. 72; Cie. de Chemin de Fer Pacifique v. Riccio, 1908, 18 K. B. 337.

(2) See Beal v. Mich. Cent. R. W. Co. 1909, 19 O. L. R. 502.

(3) Shawinigan Carbide Co. v. Doucet, 1909, 42 S. C. R. 281, 18 K. B. 271.

has happened caused by an explosion, or by some defect in a machine, and the originating cause of the accident cannot be determined, the liability will fall on the employer. For, in the majority of such cases, he will not be able to relieve himself by proving that the accident happened from a cause beyond his control.

In France the jurisprudence is now pretty well settled in this sense, and this judgment is an attempt to bring the decisions of our courts into line with it. It is, however, contrary to many earlier decisions of our courts, and, until the question goes to the Privy Council it will remain doubtful whether the interpretation now put upon Article 1054 of the Civil Code is the sound one. Assuming that this case was properly decided, it is clear that the new legislation will not increase the liability of employers so much as might be supposed.

5. The Employer's Duty, before the Act, to Protect his Workmen.

Although, subject to what has just been said, under paragraph 4, the employer was not liable by the old law without proof of fault, the tendency of judges, and still more that of juries, was to hold him liable where the negligence proved was very slight. And he was responsible not only for his own fault but for that of all his workmen. Our law does not recognize the defence that the injury was caused by the negligence of a fellow-workman of the person injured. (1)

The degree of care expected of an employer was thus stated by Hall, J., in a recent case:—"In each case the employer must exercise that degree and kind of care which a *bon père de famille* would exhibit towards his own children, exposing them sometimes to hard labour and

(1) C. P. R. v. Robinson, 1887, 14 S. C. R. at p. 114; M. L. R. 2 Q. B. 25; The Queen v. Filion, 1895, 24 S. C. R. 482; The King v. Armstrong, 1908, 40 S. C. R. 229, 11 Ex. R., 119.

unavoidable risks, but surrounding them with all the protection which human foresight can naturally suggest." (1)

And Trenholme, J., referring to recent cases, said:—"All these cases lay down the rule that the employer is bound to make the surroundings of his employee both as to the tasks he gives him and as to the locality in which he works, as safe as practicable, and where he fails to do so, he is responsible for the injuries resulting therefrom to his employee. The employer is bound to know when a machine in his factory is dangerous; the workman is not supposed to have the same knowledge. The employer by reason of his superior skill must know to what danger a machine exposes his employees, and he should provide such needs as are necessary to protect his employee." (2)

And in the case of young or inexperienced workmen the employer's duty of protection was proportionately increased. (3)

The employer was liable in damages for injuries to employees caused by the use of defective tools or instruments. And he was further bound to see that none but trained workmen were made to work at or operate dangerous machinery, or at least that the inexperienced were only allowed to do so under the supervision of skilled foremen. (4)

It was not the imperative duty of every employer to have the newest and best appliances. But when old-fashioned appliances were used, which were less safe than more modern ones, this was an element of negligence, and threw upon the employer the duty of extra care. With the best appliances and the most careful supervision accidents will happen, but if an employer chose to use ramshackle machinery, or neglected to take natural measures of pre-

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(1) Montreal Steam Laundry v. Demers, 1896, 5 Q. B. at p. 194.

(2) Wire Cable Co. v. McAllindon, 1907, 16 K. B. 273, 284, McCarthy v. Thomas Davidson Manufacturing Co., 1899, 18 S. C. 272.

(3) *Ibid.*

(4) Allis-Chalmers-Bullock, Ltd. v. Bolduc, 1908 18 K. B. 332.

caution, he could not escape by pleading that the workman accepted the risk. Such a risk was not necessarily incident to the employment. (1)

Nor was it a good answer to plead that the precautions which might have prevented the accident were not customary in the particular trade, or that their cost would have considerably increased the cost of production. Human life was not to be placed in the scales and weighed against costs. (2)

And where young and inexperienced workmen were employed on dangerous work it was not enough for the employer to warn them, he was bound to exercise a constant supervision and see that his warning and his instructions as to how to avoid the danger were carried out.(3)

The length to which juries would sometimes go in finding liability established is well illustrated by a recent case. The workman, a man of twenty-two years of age, had been warned by the foreman not to touch a machine, but in spite of this prohibition did so and received an injury. The fact that the foreman was aware that his order had been disobeyed, and had not taken the means to enforce obedience to it, was held enough to render the employer liable. The verdict, awarding reduced damages, was sustained by the Court of Appeal on the ground that the jury were entitled to judge as to the questions of fact, and that, although the verdict might not commend itself to the Court, it was nevertheless one which twelve reasonable men were entitled to find. (4)

6. Plaintiff's own Fault Sole Cause of Accident.

When the sole cause of the accident was the impru-

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(1) Quebec & Lake St. John Rv. Co. v. Lemay, 1905, 14 K. B. 35; Canada Woollen Mills v. Traplin, 1004, 35 S. C. R. 424; Canada Foundry Co. v. Mitchell, 1904, 35 S. C. R. 452.

(2) Durant v. Asbestos & Asbestic Co., 1898, 19 S. C. 39, 30. S. C. R., 285; Aix, 10 jan., 1877, Sirev 77. 2. 336.

(3) Union Card & Paper Co. v. Hickman, 1907, 17 K. B. 163.

(4) Baker v. Canadian Rubber Co., 1909, 18, K. B. 481.

dence of the plaintiff himself he was not entitled to recover damages for the injury which he had suffered. (1)

Where the person injured was in control of the situation, and it was part of his duty to see that any defect in the equipment was remedied, he could not recover for an injury which was the direct result of his own want of supervision. But in order to escape liability upon this ground the employer had the onus of proving that it was part of the plaintiff's duty to see that the appliances were in a safe condition. (2)

7. Common Fault.

By the civil law of the Province it is not and was not before the Act of 1909, a complete defence to shew that but for the imprudence of the plaintiff the injury would not have happened.

The principle of the English law, according to which contributory negligence takes away the right of action, is not recognized with us. (3)

When it is established that there was fault on the part of the defendant, and that this was part of the cause of the injury, there is liability, but only in the proportion in which that fault contributed. It may be shewn that the plaintiff was also imprudent, and in that case he must bear his proportionate share of the loss. The proportion varies according to the degree in which the respective parties were to blame.

As already explained, it must not appear that either the fault of the plaintiff or the fault of the defendant was the sole cause, for in the former case the action would fail, and in the latter the defendant would be liable for all

(1) Burland v. Lee, 1898, 28 S. C. R. 348; Tooke v. Bergeron, 1897, 27 S. C. R. 567; Quebec & Levis Ferry Co. v. Jess, 1905, 35 S. C. R. 693.

(2) Davidson v. Stuart, 1903, 34 S. C. R. 215; Quebec Ry. v. Fortin, 1908, 40, S. C. R., 181.

(3) See, for the rule in England, Thomas v. Quartermaine, 1887, 18 Q. B. D. 685; Radley v. L. & N. W. Ry., Co., 1876, L. R. 1, App. Ca. 754.

the damages. In the case we are now considering the parties must have been both to blame.

There was *faute commune* and therefore the damages are divided proportionately to the respective faults.

This principle is thoroughly established in France. (1)

And it has been applied in our courts in a large number of cases, and may be regarded as a settled rule, though so far the point has not come up for decision by the Privy Council. (2)

Where the person injured was a child, difficult questions of fact arise as to whether the child possessed sufficient intelligence to be guilty of fault. (3)

In the most recent cases of this kind it has been suggested that the act of a young child, if it in part caused the accident, ought to be regarded as a fortuitous event. In this view it would be unnecessary to examine minutely as to the degree of intelligence possessed by the child, because whether the child was more or less responsible, the result would be the same.

The fault of the defendant, having been only a part of the cause of the accident, he ought, according to this theory, to bear only the loss proportionate to his fault. (4)

8. The Civil Law of Quebec was before the Act more Favourable to Workmen than the Common Law of England.

It will be seen from the above rapid survey, that in important respects, our civil law was decidedly more favourable to workmen injured in the course of their employment

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(1) Aubry et Rau, 4th ed., v. 4, s. 446, p. 755; Baudry-Lacantinerie et Barde, Obligations, v. 3, n. 2881; Cass., 7 août, 1895, D. 96. 1. 81.

(2) Price v. Roy, 1899, 29 S. C. R., 494; C. P. R. v. Boisseau, 1902, 32 S. C. R., 424; Nichols Chemical Co., of Canada, 1909, 42 S. C. R., 402. Cie de Chemin de Fer, Can. du Pac. v. Toupin, 1909, 18 K. B., 557.

(3) See Beauchamp v. Cloran, 1866, 11 L. C. J., 287; Delage v. Delisle, 1901, 10 K. B., 481. Cf. Winnipeg El. R. W. Co. v. Wald, 1908, 41 S. C. R., 431.

(4) Champagne v. Cie. des Chars Urbains, 1909, 35 S. C. 507 (Lafontaine, J.)

than was the common law of England. The great hardship of the common law in the later period of its growth was the doctrine of common employment. By this doctrine, the workman was denied any compensation for an injury caused by the negligence of a fellow-servant engaged in the common employment, unless it could be shewn that the employer had been negligent in the choice of the careless servant.

The doctrine was not a part of the old law, and it was carried so far by learned judges as to become highly unpopular. It was admirably described by Mr. Birrell in a speech in the House of Commons in these terms:—"The doctrine of common employment was only invented in 1837, Lord Abinger planted it; Baron Alderson watered it, and the devil gave it increase. Working men who had never heard of one another, nor had the faintest relation with one another, were held to be in common employment, and if one was injured by the negligence of the other there was no title to compensation. A platelayer, going home after his day's work, was refused damages when he jumped on to a train and was injured by the gross carelessness of the engine-driver, on account of supposed common employment." (Times, May 18, 1897. See Coldrick v. Partridge, Jones & Co. [1910] A. C. 77 [H. L.]).

9. Employers' Liability Act in England.

The dissatisfaction in England with the rule of common employment, as it was applied by the courts, led to the Employers' Liability Act, 1880 (43 and 44 Vict., c. 42).

The object of this Act was to remove the defence of common employment in the class of actions to which the Act refers.

Speaking broadly, the effect of this legislation was to allow a workman who had been injured to claim compensation from the employer when the injury was caused (1) by a defect in the equipment, (2) by the negligence of a person who had a duty of superintendence, (3) by the negligence of a person to whose orders the workman at

the time of the injury was bound to conform and did conform, where the injury resulted from his having so conformed, (4) by obedience to the rules or by-laws of the employer, or (5) by the negligence of a person in the service of the employer who had the charge of any signal, points, locomotive engine or train.

That the common law had ceased to satisfy the sense of justice upon this point is sufficiently shewn by the fact that the Employers' Liability Act during the last ten years has run through the British Empire, having been adopted, in some cases, with modifications and improvements, in most of the British Dominions in which the principles of English law prevail.

10. Copied in other Countries.

The British Employers' Liability Act has been copied in New South Wales (61 Vict., No. 28), Queensland (50 Vict. No. 24), Victoria (50 Vict., No. 894, amended 1890, No. 1087, and 1891, No. 1219), New Zealand (46 Vict. No. 20), Ontario (R. S. O., c. 160, amended 62 Vict. (2) c. 18), New Brunswick (Consolidated Statutes, 1903, c. 146, amended by 8 Edw. VII., c. 31), Nova Scotia (Revised Statutes, c. 179), Manitoba (Revised Statutes, c. 178).

In some cases, *e.g.*, Queensland, New Zealand and Newfoundland, the adoption of the Employers' Liability Act has been merely a stage on the way to the acceptance of the more modern theory of professional risk. The Acts giving effect to this last principle will be referred to later.

In the United States of America, also, Acts, modelled on the Employers' Liability Act, have been passed in a considerable number of States. (1)

In Massachusetts, where the Act is a close copy of the British Act, it has been laid down by the courts as a rule of interpretation, that the English decisions, in which

(1) See the Acts given at length in Labatt, Master & Servant, 1904, v. 2, ss. 639, *seq.*

the Employers' Liability Act has been interpreted, are to be followed. (1)

The Employers' Liability Act, 1880, fixed a maximum amount of compensation, which was to be equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade and the same kind of employment. The Act, however, did not take away the liability of the employer at common law for his personal negligence. Where the workman had sustained serious injury, and it was possible for him to prove that this had been caused by the negligence of the employer in the superintendence of his works or otherwise, it was more advantageous for the workman to bring the action at common law, because there was then no statutory limit to the amount of damages which might be recovered.

11. Contributory Negligence.

Under the common law, next to the defence of common employment, so long as that defence was available, the defence of contributory negligence was the most common cause of the failure of the action by an injured workman. The plaintiff might succeed in proving some negligence on the part of the employer which caused danger, but if it appeared that, in spite of the danger, the accident would not have happened if the plaintiff had exercised reasonable care, the action failed. The question came to be whether it was the fault of the plaintiff or that of the defendant which was the proximate or effective cause of the injury. If the result was to shew that this effective cause was the fault of the plaintiff, he was not allowed to recover any damages at all. (2)

In our law, on the other hand, a much more lenient view has been taken by applying the French rule of merely reducing the damages, when the injury was caused partly

(1) Ryalls v. Mechanics Mills, 150 Mass., 190.

(2) See Pollock on Torts, 8th ed., p. 463; Beven on Employers' Liability, 3rd ed., p. 149.

by the fault of the plaintiff. This somewhat rough and ready method of dividing the damages is, under the English system, applied only in courts of Admiralty, in collision cases, where both ships are found to have been in fault. (1)

12. Tendency of Recent Cases in Quebec.

The two defences of common employment and contributory negligence were in England great obstacles in the path of the injured workman.

In the Province of Quebec, as we have seen, neither of these defences was admissible.

Common employment was no defence, because by our law, the employer was responsible for the fault of his workmen of all grades as much as for his own fault. (2)

And the fault of the plaintiff contributing to the accident was not a complete defence, though it might lead to a reduction of damages.

The injured workman, by the law of this Province, was accordingly in a position decidedly more favourable than that of his English brother, even after the Employers' Liability Act in England had to a great extent removed the defence of common employment.

Moreover, it is matter of common knowledge in this Province that juries were easily moved by considerations of sentiment, were willing to award damages on a liberal scale, and were but little embarrassed by the want of evidence of fault on the part of the employer.

In a vague way juries have realized that there was something unsatisfactory in the state of the law. They have been willing to find fault proved on insufficient evidence, because they have felt that the question of fault or no fault had very little to do with the substantial justice of the case. They have not been satisfied to allow an innocent workman, who had sustained a serious injury,

(1) Marsden on Collisions at Sea, 5th ed., p. 116.
(2) C. C., 1054.

to go without compensation merely because it was difficult to find any precise fault on the part of the employer.

This attitude on the part of juries has not been prompted by any desire to punish employers, but by the consciousness that even in the best regulated employments accidents will happen, and that the risk of such accidents ought not to fall entirely upon those who are least able to bear it. There has been for some years a general consciousness that things were upon the wrong basis, and that we were trying, in an indirect way, by straining the principles of the old law, to reach results which could only be obtained legitimately by legislation.

13. Acceptance of Theory of Professional Risk.

The Workmen's Compensation Act 1909, is a frank acceptance of the new principle of "professional risk."

The theory of professional risk has been the subject of much discussion during the last five and twenty years in almost all the countries of Europe, and, as will be shewn presently, has now been accepted in most of these countries.

It rests upon the simple idea that every workman is entitled to compensation for injury caused to him by an accident in the course of his work, quite apart from the consideration whether the accident was caused by fault on the part of the employer.

Experience has shewn that, in the conditions of modern industry, a large number of accidents to workmen inevitably occur, and, upon this theory, the cost of making compensation for them—so far as it is possible to compensate such losses in money—ought to be a charge upon the industry, just as much as the cost of the machinery or the fuel.

Legislation which embodies this principle is naturally stigmatised by its opponents as socialism. But the answer to this criticism may be given in the words of Mr. Chamberlain:—"The Poor-law is socialism. The Education Act is socialism. The greater part of municipal work is

socialism, and every kindly act of legislation by which the community has sought to discharge its responsibilities and its obligations to the poor is socialism, but it is none the worse for that." (Speech at Warrington, on September 8, 1885).

The practical considerations which have induced the legislatures of so many countries to accept a principle that is at the first blush so startling, may be stated in few words.

The evolution of society has been upon the same general lines in all the great manufacturing and commercial centres. All alike have become vast noisy workshops, full of whizzing wheels, of live wires, and of dangerous chemicals and explosives.

Before the days of steam, and electricity, and dynamite, 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 old law gave the workman no claim for damages unless some fault, at least of omission, could be clearly brought home to the employer. But the situation has completely changed. 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," in a word, to face a thousand perils. Even the strictest care cannot 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 professional risk? His employer may not be negligent, but, at anyrate, 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.

And, as a matter of fact, it is quite untrue to say that wages bear any proportion to the risk of the work. This argument was well met in the French chamber of deputies, by M. Félix Faure, who said:—"Can you compare, from the point of view of risk, the trade of a roofer who earns 7 fr. 50 with that of a baker who earns 10 fr.; the trade of a carter who earns 8 fr. with that of a tinsmith who earns 9? Or can you establish a comparison between the risk run by a quarryman who practises a trade essentially dangerous, and earns 4 fr. 50, with the risk run by a carpenter who earns 9 fr. As you see, the most dangerous trade is paid at the lowest rate, and why? Because it is the less dangerous trade which takes the longest time to learn." (Cited by M. Cabouat, v. 1, n. 104).

Moreover, even a good workman cannot always be thinking of his own safety, and the more absorbed he is in his work the more possible it is for him to run into danger. Physical fatigue is a frequent cause of want of attention to safety. It has been estimated that after six hours of uninterrupted work, the risk of accidents from the momentary inattention of the workman is three times as great as at the beginning of the day.

14. Proportion of Accidents which are Virtually Inevitable.

In most of the countries where the principle of professional risk has been adopted, much reliance has been placed upon the statistics prepared for the German Government in 1887. A careful analysis of 15,970 serious accidents, which caused in each case incapacity for work for more than thirteen weeks, yielded the following results:—

3,156 accidents due to the fault of the employer, or 19.76 per cent.
4,094 accidents caused by the victim, or 25.64 per cent.
711 accidents caused by common fault, or 4.45 per cent.
524 accidents caused by the fault of fellow-workmen, or third parties, or 3.28 per cent.
6,931 accidents caused by dangers inherent in the work, i.e., practically inevitable, or 43.40 per cent.
554 accidents due to unknown causes, or 3.47 per cent. (1)

The supervision of factories and workshops is much stricter in Germany than in this country, and it is, therefore, safe to assume that, if in Germany, out of every hundred accidents, forty-three were such as no care on the part of the employer could have prevented, the proportion here will be at least as large.

15. Not Intended to Penalize Employers.

The theory which puts the risk of such accidents upon the shoulders of the employer is wholly misunderstood, if it is regarded as punishing him where he has committed no fault. As M. Félix Faure expressed it, the new law puts the burden, not upon the employer personally, but upon the industry. The employer is made liable in the first instance, because all the charges of the business fall upon him to begin with, though they are paid ultimately to a great extent by the consumer.

"It is impossible to say that this risk will fall personally upon the employer except as forming part of the general cost of production, in the same way, for instance, as insurance against fire." (2)

16. Mr. Asquith's Definition of Professional Risk.

Sir Mathew White Ridley, the Home Secretary in Lord Salisbury's Administration in 1897, in introducing

(1) These figures may be found in Cabouat, v. 1, n. 13, where other interesting statistics of accidents are given.

(2) Félix Faure in the Chamber of Deputies, Séance of 17th May, 1888, cited in Cabouat, v. 1, n. 113.

the Bill which became the Workmen's Compensation Act of that year, adopted as a sound statement of the principle of professional risk a formula, used by Mr. Asquith in 1893, as Home Secretary in the preceding Liberal administration:—"When a person, on his own responsibility and for his own profit, sets in motion agencies which create risks for others, he ought to be civilly responsible for the consequences of what he does."

17. Mr. Chamberlain's Advocacy of the Principle.

The acceptance of the theory of professional risk by the Imperial Parliament of 1897, was largely due to the zeal and energy of Mr. Chamberlain, and his speech on the second reading of the Bill is an able defence of the new principle. Mr. Chamberlain's experience as a large manufacturer, thoroughly familiar with the industrial life of the country, gave, of course, additional weight to his advocacy of this question Mr. Chamberlain said:—"My experience is that good employers do not grudge compensation to workmen injured in their service, but they do grudge compensation which goes into the pockets of the lawyers.....I say the Bill is an honest attempt to deal with a great evil—with what I have ventured to call a great scandal—namely, that industrious, honourable workmen who come into trouble through no fault of their own in the course of their employment, and as the inevitable and consequential risk of that employment, should be turned into the street and thrown upon the rates, without anything in the nature of legal compensation. That has always seemed to me to be neither more nor less than a scandal. I believe we shall achieve a great object if we relieve this class of the community, than whom I am convinced no class is more deserving, and, I believe, none is more ready to recognize this duty than the good employer. There may be bad employers, but I am certain these are an infinitesimal minority, and good employers are not at all unwilling, so far as my experience goes, to put their

hands in their pockets and go a little further than hitherto, provided they could secure this object, and provided they know that all they contribute will go directly to the relief of what I may call undeserved distress."..... The Bill was, Mr. Chamberlain proceeded "based upon the principle of relieving the workman and not of punishing the employer. We are dealing with the whole of the accidents which occur in the course of employment, and nobody has ever pretended that the accidents for which the employer is morally liable have ever amounted to more than a mere fraction of the whole.....We are now doing for all workmen engaged in these trades what good and generous employers have been doing for those over whom they have had control." And, in the course of the same debate, Mr. Asquith said:—"There ought to be some provision enabling a workman who is injured, through no fault of his own and through no fault of his employer, to receive, I will not say compensation, for compensation in these cases is an inadequate and often an ironical term; but to receive at any rate, some solatium for the injury he has suffered in his operations as a soldier in the army of industry." (The Times, May 4, and May 19, 1897.)

18. The Principle of Professional Risk in other Countries.

FRANCE.

The principle of professional risk was first adopted by the French legislature in the *loi du 9 avril*, 1898, on which our Act is mainly based. That *loi* applied to a group of industries pretty much the same as those enumerated in article one of our Act. By the *loi du 13 juin* 1899, its operation was extended to agricultural accidents, caused by the use of machines moved by power other than that of men or of animals.

By the *loi du 12 avril*, 1906, it was further extended to all "commercial enterprises."

Bills have been proposed to extend it still further to lumbering operations (*exploitations forestières*). (1).

And attempts have been made to extend its application to industrial diseases (*maladies professionnelles*) as well as to accidents, but so far these attempts have not been successful. (2)

GREAT BRITAIN AND IRELAND.

The Workmen's Compensation Act, 1897 (60 and 61 Vict., c. 37), accepted the theory of professional risk for certain industrial employments.

But the Workmen's Compensation Act, 1906 (6 Edw. vii., c. 58), sweeps away the exceptions and limitations of the earlier Act, and applies the new principle to workmen in any employment, industrial or otherwise, and whether engaged in manual or clerical work, unless in the latter case they are paid more than £250 a year. Including, as it does, domestic servants, hotel waiters, shop assistants, and clerks in offices, provided the remuneration of these last does not exceed £250 a year, the new Act in England is of very wide application. It gives compensation, not only for accidents but also for certain enumerated diseases, classed as industrial diseases, viz., anthrax, poisoning by lead, mercury, phosphorous or arsenic, or their sequelae, and ankylostomiasis, a disease to which miners are sometimes exposed. (Sched. 3).

Under the English Act, where the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, the workman has an option to take proceed-

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(1) See Revue Trimestrielle, 1909, p. 435; Sachet, v. 2, p. 476.

(2) See Revue Trimestrielle, 1907, p. 859. The *motifs* annexed to the *Proposition de Loi* submitted by M. J. L. Breton, 13 juillet, 1906; and the Report on this Bill by the Commission d'Assurance et de Prévoyance Sociales, presented 22 mars, 1907, and published as a Government publication, 1909. (No. 888, Chambre des Députés, contain much valuable information. I am indebted for these documents to the courtesy of M. J. de Loynes, consul général de France.)

ings at common law, or to claim compensation under the Act. (1)

The Act differs from ours in regard to the effect of fault on the part of the workman. Under the English Act, if it is proved that the injury to a workman is attributable to his serious and wilful misconduct, he is not entitled to compensation unless the injury results in death or serious and permanent disablement. (s. 2, (c)). There is no provision, as in our Act, for a reduction of damages on the ground of fault.

OTHER EUROPEAN COUNTRIES.

The principle of professional risk in industrial employments has been accepted in the following countries, though in some of them it is limited to certain of these employments.

Germany (Law of 6th July, 1884, revised and amended by several acts, and consolidated by the Act of 30th June, 1900).

Austria (Law of 28th December, 1887, amended by various Acts of which the last is July 12 1902),

Hungary (Law of 9th April, 1907).

Norway (Law of 23rd July, 1894).

Denmark (Law of 7th January, 1898, amended May 15, 1903).

Luxemburg (Law of 5th April, 1902).

Italy (Law of 17th March, 1898; amended June 29, 1903; promulgated in codified form, January 31, 1904).

Belgium (Law of 24th December, 1903).

Switzerland (Law of 5th October, 1899).

Spain (Law of 30th January, 1900).

Holland (Law of 2nd January, 1901, amended by other Acts of which the last is July 24, 1903).

Sweden (Law of July 5, 1901, amended June 3, 1904).

Greece (Law of 21st February, 1901).

Finland (Law of 1st January, 1898).

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(1) S. 1, subs. (2) b. See Beven, p. 415.

Russia (Law of 2nd June, 1903).

Most of these countries have combined with the theory of professional risk, the principle of compulsory insurance by employers. (1).

BRITISH DOMINIONS, NOT INCLUDING CANADA.

The principle of professional risk has been adopted in the following portions of the British Empire: —

Queensland (1905, No. 26). (2)
Western Australia (1901, No. 5). (3)
South Australia (1900, No. 739). (4)
New Zealand (1900, No. 43). (5)
Cape of Good Hope (1905 No. 40). (6)
Transvaol (1907, No. 36). (7)
Newfoundland (1907, No. 5). (8)

CANADA.

British Columbia (2 Edw. vii., c. 74), accepts professional risk in certain industries on the lines of the English Act of 1897.

Alberta (1908, c. 12), has now an Act on the lines of the English Act of 1897.

Quebec (9 Edw. vii., c. 66, 1909).

Most of the other provinces of Canada have Acts on the lines of the English Employers' Liability Act. These have been referred to above. (9)

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(1) The best account of these laws is to be found in Bulletin, No. 74 of the Bureau of Labor, Washington (January, 1908). See also, Sachet, v. 1, nos. 26, *seq.* Zacher, Die Arbeiterversicherung, im Auslande, Berlin, 1898, and the Report of the Commission appointed by the Government of Quebec.

(2) Legislation of the Empire, "1898 to 1907" (Butterworth, London, 1909), v. 1, p. 536.

(3) *Ibid.*, v. 2, p. 183.

(4) *Ibid.*, v. 2, p. 12.

(5) *Ibid.*, v. 2, p. 235.

(6) *Ibid.*, v. 2, p. 329.

(7) *Ibid.*, 1, 2, p. 474.

(8) *Ibid.*, v. 1, p. 385.

(9) *Supra*, p. 19.

UNITED STATES.

In the United States the principle of professional risk has as yet made but little progress. The only State which has adopted the principle appears to be Maryland, by an enactment which came into force 1st July, 1902. This Act is limited to mines, transportation and municipal works, and applies only to accidents which occasion death within a year. The representatives of the deceased receive a uniform compensation of $1,000 secured by State insurance. Half the premiums may be kept back from the wages. (1)

The Annual Report of the Bureau of Labor Statistics of the State of New York for the year 1899, after explaining the provisions of the British Workmen's Compensation Act of 1897, concludes as follows:—"It thus appears that England is on the way to 'industrial peace' in so far as concerns the compensation of industrial accidents, while the United States occupies the unenviable position assigned to England at the International Congress of Accidents in Milan in 1894 as being 'of all industrial countries the one in which legislation on liability for accidents is least favourable to workmen.'" (p. 673). The question is one which is now under discussion in a great number of States.

(1) See Sachet, v. 1, n. 33 *quater*; Labatt, Master and Servant, v. 2, s. 766; Chicago, etc. Ry. Co. v. Zernecke, 183, U. S. 582.

CHAPTER III.

19. Commentary on the New Act.

Enough has been said to show that the new Act of the Province of Quebec gives effect to a principle which has now been accepted by a great part of the civilized world.

20. Onus of Proof.

The Act makes no change in the general rule that the plaintiff must prove his case.

He no longer has to prove fault, but he has to prove all the facts essential to his success under the Act, viz., that his incapacity was caused by an accident happening to him as a workman in one of the special industries enumerated, and that it happened to him by reason of or in the course of his work. (1)

If he claims that a malady from which he suffers is traumatic in its origin, it is for him to prove that it was caused by an accident, and an accident of an industrial character. (2) If he claims to have the amount of the compensation increased on the ground of the aggravation of the disability, it is for him to prove that the aggravation is to be attributed to the original cause, viz., the acci-

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(1) Cass., 4 mai, 1905, D., 1906. 1. 173. P. F., 1908. 1. 346; Cass., 7 nov., 1905, D., 1908. 1. 60; Cass., 26 juillet, 1905, P. F. 1908. 1. 414. Contrast Cass., 6 juillet, 1903, S., 1905. 1. 268. In England, Bender v. Owners of S. S. Zent (1909), 2 K. B. 41; Marshall v. Owners of S. S. Wild Rose (1909), 2 K. B. 46. See Low or Jackson v. General Steam Fishing Co., (1909), A. C. 523 (H. L.) Wakelin v. L. & S. W. Ry., 1886, 12 A. C., 41.

(2) Cass., 19 févr., 1908, D., 1908. 1. 241; Grenoble, 31 janv., 1908. D., 1909. 2. 158.

dent. (3) If the facts proved are equally consistent with the existence or non-existence of the essential conditions, the action fails.

Upon this question, that the new legislation has not changed the general rule of the law that the plaintiff must establish all the facts necessary to his case, there is abundant authority both in France and in England.

Upon the principle of professional risk employers are without fault, but they are assuredly not liable for accidents which are not proved to have any connection with the employment.

The cases upon this head will be considered in discussing the questions of what an accident is, and when it happens by reason of or in the course of the work.

21. Persons and Industries to which the Act Applies.

Article 1 of the Act is as follows:—"Accidents happening by reason of or in the course of their work, to workmen, apprentices and employees engaged in the work of building; or in factories, manufactories or workshops; or in stone, wood or coal yards; or in any transportation business by land or by water; or in loading, or unloading; or in any gas or electrical business; or in any business having for its object the building, repairing, or maintenance of railways or tramways, water-works, drains, sewers, dams, wharves, elevators, or bridges; or in mines, or quarries; or in any industrial enterprise, in which explosives are manufactured or prepared, or in which machinery is used, moved by power other than that of men or of animals, shall entitle the person injured or his representatives to compensation ascertained in accordance with the following provisions."

22. Not to Agriculture or Sailing Ships.

"This Act shall not apply to agricultural industries nor to navigation by means of sails."

(1) Ib.; Req., 25 mars, 1908, D., 1908. 1. 385.

The questions what is meant by an accident, and when it happens by reason of or in the course of the work, will be discussed later. It is convenient first to explain what classes of persons are protected by the Act and what are the industries to which it applies.

The article follows, in the main, the corresponding article of the French Act of 1898, but has introduced a number of important modifications.

23. Differences between our Article and the Corresponding Article of the French Act.

Our Act adds the word "apprentices" and the word "workshops." It has "stone, wood or coal yards" where the French Act has the single word *chantiers*. Our Act adds the words "in any gas or electrical business; or in any business having for its object the building, repairing, or maintenance of railways or tramways, water-works, drains, sewers, dams, wharves, elevators, or bridges." On the other hand it omits the words *magasins publics*, a term which in France denotes certain government stores and bonded warehouses, as well as certain other buildings which are under government control. (Sachet, v. 1, n. 109).

Our Act uses the term "industrial enterprise" or, in the French version, *exploitation industrielle*, in place of the words in the French Act *exploitation ou partie d'exploitation*.

24. Persons Protected.

In order to benefit by the Act the person injured must be connected with the defendant by a valid contract of employment express or implied. (1). A man who is merely being allowed to try his hand, in order to see if he is fit for the work, is not a "workman." (2) The contract of apprenticeship is a species of contract of employment. Our article has added the word "apprentices" for greater

(1) See Cass., 14 mars, 1904. D., 1904. 1. 553; Cass., 2 déc., 1901. D., 1901. 1. 403.

(2) Paris, 16 juin, 1908. Sir. Bull. des Somm., 1909. 2. 27.

clearness, but in France also an apprentice is regarded as a workman and comes under the protection of the Act. (See art. 8).

If the fact of employment is denied, the burden of proving it will fall upon the workman.

The Act does not apply to any workmen or employees whose yearly wages exceed $1,000.

The term "employees" is clearly meant to include clerks or other persons, in the service of the employer, whose work is not of a manual character. But the Act does not apply to employees not engaged within the premises in which the work is carried on. A clerk in the office of a mine or of a factory may have to go about within the premises, and he is, therefore, exposed to the industrial risk. If he is blown up by an explosion, this fact is in itself satisfactory evidence that he was exposed to risks to which clerks in an ordinary business office are not subject. But it would be absurd to suppose that if an industrial company has an office away from its works, or employs agents, such as commercial travellers, whose business lies outside, its clerks or travellers, who are exposed to no industrial risk, should be protected by the Act. This conclusion does not seem to have been disputed in France. (1) It is otherwise when a workman is sent outside in the course of the work of the industry. (2)

The distinction between commercial "outworkers," if the expression may be allowed, to whom the Act does not apply, and industrial "outworkers" to whom it does apply, is a somewhat fine one, but it appears to be sound.

In a recent French case an employee in a dye-works had been sent out on a bicycle to shew to customers who had sent skins to be dyed, samples of the results obtained. In the course of the expedition he met with an injury. It was held that this was an industrial accident. He was

(1) Cabouat, v. 1, n. 292; Mourral et Berthiot, Accidents du Travail, 2nd ed., n. 61.

(2) *Infra*, p. 71.

not selling the wares, but was assisting in the carrying on of the industry. (1)

Some French writers insist that before an "employee" can be admitted to the benefit of the Act two conditions must be satisfied, (1) that he met with the accident on the premises, or, if outside them, when he was engaged in some operation which was industrial as opposed to commercial in its nature, and (2) that the accident itself should be of an industrial character. According to them, if a clerk in a works were to cut himself with a penknife, in the course of his work, this would not be an accident to which the Act applies, because this, although connected with his work as a clerk, is in no way related to the industry carried on in the works. (2)

I agree with those writers who think that it is impossible to read this distinction into the Act.

In a recent French case where a gatekeeper at a factory had injured his thumb, by an accident not caused by any part of the machinery of the works, it was held that the Act applied. (3)

The Act does not apply to workmen who work in their own homes, for they are not under the supervision of the employer. (4)

There would seem to be room for the argument that the Act does not apply to workmen such as, *e.g.*, carpenters, plumbers, or others unless they are working in an unfinished building, when they would be "engaged in the work of building" or are in workshops. All persons who have to move about in an unfinished building are exposed to a certain amount of danger, and it is natural that they should enjoy the protection of the Act. But workmen

(1) Cass., 11 mai, 1904, P. F., 1906. 1. 18.

(2) Cabouat, v. 1, n. 293, where see authorities cited for the opposite view.

(3) Trib. civ., de Lyon, 29 janv., 1909, D., 1909. 5. 39.

(4) Circulaire du Garde des sceaux du 10 juin, 1899; Cabouat v. 1, n. 276; Avis du Comité Consultatif des Assurances du 30 juin, 1901, D., 1901. 4. 83; Baudry-Lacantinerie et Wahl; Louage, 3rd ed., n. 1782.

who are executing repairs or other work in buildings already completed are exposed to no industrial risk and usually work without any supervision by the employer.

But in France the view taken has always been that workmen who belonged to a business which is covered by the Act enjoy its protection when they are engaged on any work for the employer, whether on or off the premises. (1)

Upon this principle it is held in France that a workman who is carrying the products of the industry outside the premises is protected by the law. (2) Such workmen occupied outside are subject to supervision whether it is actually exercised or not.

25. Who is an "Employer"?

The person who engages and pays the workman is the employer. But he must be an employer of labour in the ordinary sense of that expression, not a person who is merely getting work done for himself. He must be carrying on one of the protected industries. (3) The Act applies to an employer though he may have only a single workman or even a single apprentice. (4) But a workman, who for a temporary purpose, calls in other workmen to help him does not thereby become an employer subject to the Act. (s. 17). This accidental collaboration is not enough to constitute him an employer, a term which implies durable relations of supervision on one side and subordination on the other. (5)

Article 17 of our Act is borrowed textually from the French Act, except that our Act says "one or more other workmen" where the French Act reads *d'un ou des plu-*

(1) Sachet, v. 1, n. 315 bis; Cabouat, v. 1, n. 153; Circulaire du Garde des sceaux, du 10 juin, 1899, see Cabouat, v. 1, n. 143.

(2) Cass., 13 févr., 1906, Gaz. Pal., 1906. 1. 289; Cass., 11 mai, 1904, P. F. 1906. 1. 18; Sachet, v. 1, n. 315, bis.

(3) Cass., 8 janv., 1907, D., 1909. 1. 423; 2 Civ. 29 déc., 1908. D., 1909. 1. 510. Sachet, v. 1, nos. 229, 231.

(4) Cass., 5 juillet, 1904, D., 1904. 1. 553.

(5) Circ. du Garde des sceaux, du 10 juin, 1899; Cabouat, v. 1, n. 276.

sieurs de leurs camarades. The French article was introduced by an amendment in the Senate and the mover of the amendment gave this illustration of his meaning. "Most of you live in the country. If you have to make some repairs on a farm-building or roof you send for the village carpenter and shew him the work. He replies 'I cannot do it alone, there will be things too heavy for me to move, I will go and fetch one or two comrades to help me.' He finds men to help him, and of necessity, it is he who directs them, because it is he who has undertaken the work and controls the execution of it. You have to deal only with him. He is an employer if you will, but an accidental employer. You pay him alone and he directs his workmen." (1) But it is otherwise when a workman employs other workmen to help him in doing a piece of work which will occupy them permanently for a considerable time, such as several months. This is not the casual assistance which the article contemplates, and such a workman is an "employer" in the sense of the Act. (2) Nor is an owner of property who calls in workmen to do some building for him, under his direction, an employer in the sense of the Act. He is not a builder and the workmen are not "engaged in the work of building."

The French version *dans l'industrie du bâtiment* brings out the sense more clearly. In the French *loi* the words are the same and they have been interpreted in this sense in two cases decided by the *Court de Cassation.* (3)

An employer who puts a workman temporarily at the disposal of another employer does not thereby cease to be liable for compensation if the workman meets with an accident. The employer who borrows the services of the workman is an agent or *préposé* of the other employer, and is therefore not liable either under the Act or at common law unless for his personal negligence. (4)

(1) Sachet, v. 1, n. 251.
(2) Trib. civ. de Jonzac, 27 nov., 1907, D., 1908. 2. 224.
(3) Cass., 8 janv., 1907, D., 1909. 1. 423; Cass., 21 déc., 1903, D., 1904, 1, 73. See Sachet, v. 1, nos. 227, 231.
(4) Chambres Réunies, 8 janv., 1908, D., 1908. 1. 185.

The question whether a public authority, such as the government or a municipal corporation, can be an employer will be discussed later. (1)

26. Workman.

The Act makes no distinction as regards the age, sex, or nationality of a workman.

According to the general rule of interpretation laid down by R. S. Q., Art. 5775, No. 9, the term "workman" includes "workwoman."

The relation of employer and workman implies the existence of two conditions, (1) that the workman shall have been freely chosen by the employer, and (2) that the employer is entitled to control him in the carrying out of the work. Where these conditions are satisfied the person who is in the position of subordination is a "workman," and if he is employed in one of the protected industries mentioned in Article one, he will be entitled to the benefit of the Act. (2)

The grade which he may occupy is immaterial if he is subject to the control of the employer. (3)

Nor it is material that the workman is paid by the piece, if he does his work under the supervision of the employer. (4)

A man who is not engaged in manual labour, however, is not strictly speaking a "workman," but for the present purpose the distinction is immaterial as he will be covered by the term "employee." But it must not be forgotten that the Act applies only to workmen occupied in certain industries. In England where the Workmen's Compensation Act, 1906, has a much wider application than our Act, the meaning of the term "Workman" as defined in that Act is very comprehensive. It has recently been

(1) *Infra*, p. 49.

(2) Circ. du Garde des sceaux, du 10 juin, 1899; Cabouat, v. 1, n. 278; Sachet, v. 1, n. 170; Toulouse, 3 déc., 1900, D., 1901, 2, 155.

(3) Lefebvre v. Nichols Chemical Co., 1909, 35 S. C., 515 (C. R.)

(4) Reg., 30 déc., 1908, Sir Bulletin des Sommaires, 1909, 1, 9.

held to include a professional football player who was under a yearly agreement with a club. (1) The scheme of our Act is much more restricted and under it, it is not enough for the claimants to prove that he is a "workman." He must also prove that he was accupied in one of the protected industries.

27. Indepedent Contractor.

A professional man or a man of skill who undertakes to do certain work for another, according to the rules of his profession or craft, without making himself subject to the orders of the other as to the manner in which the work is to be executed, is not a workman but is an independent contractor. (2)

28. Workman Unpaid or Relative of Employer.

A person may be a workman though he receives no remuneration in money if he is receiving remuneration in kind. (See Art. 18). The existence of a family relationship between the two parties in no way prevents one of them being the workman of the other, thus a son may be the workman of a father. But in such cases it will be a question of fact whether the position was really that of employer and workman. This will depend on the consideration of the regularity of the work done, the character of the remuneration, and the other circumstances. But it is generally agreed that a wife cannot be the workwoman of her husband, or the husband the workman of his wife unless they have been divorced or separated from bed and board. The community of interest between the consorts and their duties to one another are incompatible with the subordination of a workman to his employer. (3)

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(1) Walter v. Crystal Palace Football Club, (1910), 1 K. B., 87, (C. A.)

(2) Harold v. Mayor, etc., of Montreal, 1867, 11 L. C. J., 169, 182 (C. A.); Gagnon v. Saraguay Electric Light Co., 1909, 36 S. C. 227 (C. R.); Sachet, v. 1, n. 193.

(3) Trib. de Vienne, 8 août, 1908, Sir. Bulletin des Sommaires, 1909, 2, 2; Sachet, v. 1, n. 195. The English Act has an express declaration that "workmen" does not include a member of the employer's family dwelling in his house, (s. 13.)

29. Foreign Workman.

The Act does not apply to a foreign workman unless at the time of the accident he resided in Canada. A workman, *e.g.*, living across the border, in the United States, but coming into Canada to do his work, would not be protected by the Act. Residence is not defined, and, apparently, a workman whose place of abode was in Canada would be protected though he had come to that country only for a short time. It is certain that in saying that he must "reside in Canada" the Act cannot mean that the workman must be domiciled in Canada. (1)

Moreover if a foreign workman who has become entitled to a rent under this Act, while he was residing in Canada, ceases to reside there while the rent is being paid, the rent ceases to be payable.

When a foreign workman residing in Canada is killed, and his representatives do not reside in Canada, the Act does not apply. The Act also provides that if they cease to reside there while the rent is being paid they shall not be entitled. This must mean when "the capital of the rent" has been paid by the employer to an insurance company in the manner to be afterwards explained, for this is the only case in which a "rent" is paid in compensation for an accident causing death.

Where a foreign workman or his representatives are not entitled to the compensation provided by the Act, or if he or they cease to be so entitled by becoming non-resident in Canada, the common law remedy is open. And, although the article is very far from clear, the intention appears to be to suspend prescription of the common law remedy during the payment of the rent.

30. Workman having no Representatives Entitled to Compensation under the Act.

If a workman who is killed by an accident leaves, (1) no surviving consort, or a surviving consort divorced or

(1) See Wadsworth v. McCord, 1887, 12, S. C. R., 478.

separated from bed and board at the time of the death, and (2) no legitimate children or illegitimate children acknowledged before the accident who are below the age of sixteen, and (3) no ascendants of whom he was the only support at the time of the accident, the Act does not apply. (Art. 3.)

This is one of the most singular provisions of the Act.

If the father of the deceased was a drunken reprobate who from sheer vice was entirely dependent upon his son, the father has a claim to compensation. On the other hand, if an old father being honest and industrious, and anxious not to be a burden upon his children, is able partially to provide for his wants, and has been assisted by the deceased, there is, apparently, no claim for compensation.

And the same is true when the ascendant has a little money of his own which helps to support him, but is not enough for him to live upon.

If two sons contribute to the support of an ascendant who is unable to do anything for himself and one of these sons is killed, the Act does not apply, but if there had only been one son compensation would be due.

The legislature has deliberately altered the expression used in the French Act [art. 3 (c)], which is *chacun des ascendants et descendants qui étaient à sa charge*, and has substituted therefor the words "of whom the deceased was the only support" or in the French version *dont le défunt était l'unique soutien.*

In France it is held that an ascendant was *à la charge* of the deceased when he was unable, by reason of age or the state of his health entirely to provide for his own subsistence, and the deceased had helped to support him. (1)

But in our Act the words "only support" are quite unambiguous. It would appear, however, that under our Act, an ascendant who was not supported entirely by the deceased is not deprived of his action at common law if

(1) Cass., 29 oct., 1901, D., 1902. 1. 383; Sachet, v. 1, n. 490; Cabouat, v. 1, n. 412.

he can prove that he has suffered pecuniary prejudice by the death of the deceased. For article 15 takes away the common law action only from the "representatives mentioned in article 3." The only ascendants mentioned in article 3 are those of whom the deceased was the only support.

The corresponding article of the French Act (art. 7) uses the expression *la victime ou ses représentants* without limiting representatives to those previously enumerated. It is held in France, upon the interpretation of these words, that the common law right of action on the part of the representatives of the deceased against the employer is entirely taken away, and the statutory right to compensation is limited to those representatives enumerated in the Act. (1)

But it hardly seems, for the reason given, that our article will bear this construction.

31. Industries to which the Act Applies.

The condition in the last paragraph of the article requiring the use of machinery "moved by power other than that of men or of animals" applies only to industrial enterprises and not to the whole article. Any doubt there might be upon this point is cleared up by reference to the French version of our Act, in which the clause after "quarries" begins *et, en outre dans toute exploitation industrielle.*

The group of industries enumerated in the article consists of enterprises of manufacture, transportation, construction and mining, in all of which workmen are exposed to a special industrial risk. It does not comprise any business which is merely commercial.

The addition in our Act of the word "workshops," which does not occur in the French Act, removes a source of some difficulty, but in France it has been long settled

(1) Cabouat, v. 1, n. 392; Sachet, v. 1, n. 754.
(2) Supra, p.

that the *loi du 9 avril*, 1898, applied to *ateliers*, provided they were of an industrial character.

32. Industrial not Commercial.

In our article, as in that of the French Act, the governing idea is to extend the protection of the Act to occupations which are industrial and to exclude it from those which are commercial. It becomes therefore necessary to explain the sense of the term "industrial."

There is an important difference between the language of our article and that of the French Act. The French Act, after the enumeration of industrial employments, concludes with *et, en outre, dans toute exploitation ou partie d'exploitation dans laquelle sont fabriquées ou mises en œuvre des matières explosives, ou dans laquelle il est fait usage d'une machine mue par une force autre que celle de l'homme ou des animaux.* In interpreting the French article it has been held that the first part of the article covers all operations which are truly industrial, while the second part, referring to the *exploitation*, brings in commercial enterprises subject to the conditions mentioned, viz., that explosives are manufactured or employed in them, or machinery used moved by power, other than that of men or of animals. (1)

But in our article the addition of the term "industrial" to the enterprises named in the last part of the article, shews clearly that the intention of the Legislature was to limit the application of the whole article to industry, and to exclude altogether commercial undertakings.

It is inconceivable that our Legislature, having the French Act and the interpretations put upon it by the courts under consideration, should have substituted for *exploitation* the term *exploitation industrielle*, unless they had intended to introduce a distinction between our law and the French.

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(1) Cass., 27 oct., 1903, 4 janv., 1904, D., 1904. 1. 73; Cass. crim., 20 juin, 1902, S., 1904. 1. 472; Sachet, v. 1, n. 59; Cabouat, v. 1, n. 220.

It must be taken therefore as the first rule of construction of our article 1, that it has no application except to industrial enterprises, including under that term the works of building, transportation, construction, and mining, etc., which are therein enumerated.

The decisions of the French courts as to what operations are industrial and what are commercial, are numerous and not always consistent with one another. The principle of the distinction is that, in an industrial operation, there is always a transformation of a raw material in order to fit it for the use of man, whereas, in a commercial operation, there is merely an exchange of commodities.

The addition in our Act of the word "workshops" makes it clear, however, that in our law the Act applies to repairing shops, where strictly speaking there is no "industrial transformation," and to such establishments as those of bakers, tailors, corsetmakers, dressmakers, and the like, in regard to which there has been much difference of opinion in France. (1)

Such occupations as those of druggists and saloon-keepers, who merely mix materials supplied to them, would seem to be commercial rather than industrial, and this rule would apply *a fortiori* to hotel-keepers. (2)

33. Work of Building.

This does not mean that any man who is doing building work is protected. He must be in the employment of a builder or an employer such as a carpenter or plumber who undertakes part of the construction of a building. The French version is clearer than the English. The workmen covered are those who are *occupés dans l'industrie du bâtiment.*

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(1) Cass., 10 avr., 1905, D., 1906. 1. 173; 6 juillet, 1905, D., 1907. 1. 85. Cons. d'Etat, 23 avr., 1902, D., 1902. 3. 49; and 28 févr., 1902. D., 1902. 3. 17; Poitiers, 21 janv., 1901, D., 1903. 2. 419; Bourges, 4 juin, 1901, D., 1903. 2. 307. See Avis du Comité Consulatif, D., 1900. 4. 18. and 1900, 4. 71. Dijon, 13 juin, 1900, D. 1901. 2. 253; Sachet.

(2) Sachet, v. 1, n. 69.

So if an owner of property calls in workmen to do some building for him under his direction they are not his workmen in the sense of the Act, because he is not a builder. (1)

34. Lumbering Operations.

It is a question of some difficulty whether the Act applies to workmen engaged in lumber camps.

The first question is whether such camps are included under the term "woodyards." If this question had to be answered without reference to the French version of our Act it would present no difficulty, as the term "woodyard" in English is altogether inappropriate to denote a lumber camp and is never used in that sense. The French version, however, uses the term *chantiers de bois* which in popular language might well denote a lumber camp. It would appear that the term *chantiers de bois*, being an appropriate expression for woodyards in the English sense of a yard where wood is prepared for various uses ought to be restricted to that meaning. The English term "woodyard" cannot by any fair interpretation be extended to mean a lumber camp.

The further question remains, whether a lumber camp is an industrial enterprise, so that the workmen therein engaged will come under the protection of the Act if explosives are made use of industrially, or machinery employed which is moved by "power other than that of men or of animals."

The prevailing view in France is that lumbering operations—*exploitations forestières*—are not regarded as industrial enterprises. (2)

The cutting down of the trees and sawing the timber into logs does not effect an industrial transformation. The logs are merely the raw material of industry and not an industrial product. (3) That this opinion is generally

(1) Cass., 8 janv., 1907, D., 1909. 1. 423; Cass. 21 déc., 1903, Civ. 29 déc., 1908, D., 1909. 1. 510; Sachet, v. 1. n. 227, 231.

(2) Cass., 19 avr., 1904, P. F., 1906. 1. 18; Sachet, v. 1, n. 127.

(3) Cass., 8 févr., 1904, D., 1905. 1. 468.

accepted in France sufficiently appears from the fact that a proposal to extend the law to such operations was voted by the *Chambre des Députés*, 15 *fevrier*, 1909. The first article of the *projet de loi* was *la législation sur la responsabilité des accidents du travail est étendue aux entreprises de coupes forestières de plus de trois hectares.* (1)

In applying the French interpretations to our law it is, however, important to bear in mind the different conditions of the two countries. In France forestry is primarily a part of agriculture, and may naturally be regarded as accessory thereto, whereas in the Province of Quebec it is mainly carried on by persons who are not owners of the soil.

In France it is the view of some writers that where this is the case lumbering operations ought to be regarded as having an industrial character. (2)

This at any rate is considered to be the case when the logs are cut up into planks in the forest. This effects a genuine industrial transformation, for the logs have a commercial value before the operation of sawing them into planks has been performed, and their conversion into planks causes them to fall into a different commercial category. (3)

It appears to me that this operation is fairly covered by the term "industrial enterprise."

35. Industrial Enterprise as Accessory to other Business.

It is clear that a commercial undertaking, which is, as such, not covered by the Act, may have, as accessory to it, an industrial enterprise, the workmen in which will be protected. Thus it has been held in France, that though the business of a wholesale wine merchant is not industrial, a cooperage attached to it is industrial. (4)

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(1) See Sachet, v. 2, p. 476.
(2) Cabouat, v. 1, n. 225.
(3) Sachet, v. 1, n. 922.
(4) Dijon, 13 juin, 1900, D., 1901, 2, 253.

36. Transportation Business.

These words denote the business of a carrier of passengers or goods. They do not cover the case of an ordinary shopkeeper who sends out goods to his customers. (1)

If the business is primarily one of distribution rather than of commerce it will be covered, (2)

"Transportation business" refers to those who carry on the actual work of transportation by animals, vehicles, railway cars, or steamships. The term does not cover persons who do not themselves own or operate the means of transportation, but act as agents for those who are engaged in a transportation business. (3)

Cattle dealers are not engaged in a transportation business unless they undertake the transport of cattle for others. (4)

37. "Loading or Unloading," etc.

The words "loading or unloading; or in any gas or electrical business; or in any business having for its object the building, repairing, or maintenance of railways, or tramways, water-works, drains, sewers, dams, wharves, elevators, or bridges; or in mines, or in quarries;" do not call for much remark.

"Loading or unloading" means *businesses* of loading or unloading, as is clear from the French version, *entreprises de transport par terre ou par eau, de chargement ou de déchargement.* It will apply to the loading of cars, or vehicles, as well as of ships, and probably to furniture removing, but not to such loading or unloading as is not carried on as a business, but is merely accessory to a commercial undertaking.

The work of constructing or repairing roads and streets ,apart from drains, sewers or bridges, is not covered.

(1) Poitiers, 21 janv., 1901, D., 1903. 2. 419.
(2) *Ibid.*
(3) Lyon, 17 nov., 1904, P. F., 1906. 2. 134.
(4) See D., 1900. 4. 71.

38. Works Constructed or Maintained by Public Authorities.

The Act seems to apply to works of the classes above enumerated, though they may belong to the Government of the Dominion or the Province, or to a local authority, such as a municipal corporation.

The word "business" primarily suggests an undertaking carried on for profit, and would naturally include such undertakings as railways, owned and operated by government, or works for the production or distribution of light, heat, or power, when such works are owned by a municipality. (1)

There is more room for doubt whether the article applies to undertakings operated by public authorities without any view to profit. In France the prevailing view is in the affirmative, but there is a recent decision of the Court of Grenoble in the opposite sense. (2)

Moreover, the authorities in favour of the affirmative view support it partly by arguments which are not applicable under our Act.

Article 32 of the French Act expressly excludes workshops belonging to the Marine and this is held to imply the inclusion of the workmen in other national workshops. (3)

It is not so clear in our law as in the French that a city or other public authority which employs men, *e.g.*, to build drains in its streets, can be said to be carrying on a business having for its object the building of drains.

I am inclined to think, however, that this is the intention of the Act. The word *entreprise* in the French version does not suggest the idea of a private venture so much as does the English word "business."

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(1) Baudry-Lacantinerie et Wahl, Louage, v. 2, n. 765; See note to S. 98. 1. 389.

(2) 9 nov., 1906, S. 1907. 2. 169.

(3) Cass. 27 oct., 1903, Sir. Bulletin des Sommaires, 1909. 1, 100, Crim. 20 juillet, 1907, D., 1909. 1. 361; Sachet, v. 1, n. 174; Cabouat, v. 1, n. 244.

Moreover, with the exception of railways, tramways and elevators, the class of works enumerated comprises such as are very frequently constructed by public authorities. And such works as drains, sewers, and water-works, even if constructed by private contractors for a public authority, are generally maintained thereafter by the public authority itself.

If the intention of the Act had been to exclude so large a class of workmen as those employed by public authorities in the construction or maintenance of the works enumerated in this paragraph, we should have expected the exclusion to be made by express terms.

The maintenance of such works by public authorities, if not covered by these words, will not fall under the expression "industrial enterprise." It is impossible to regard such an operation as the cleaning out of a drain as an industrial enterprise. (1)

39. Use of Explosives, or Machinery Used by Power.

The Act applies to any "industrial enterprise," in the sense in which that expression has been explained above, in which explosives are manufactured or "prepared."

In the French version the words are *dans laquelle sont fabriquées ou mises en œuvre des matières explosives.* The expression "prepared" or *mises en œuvre* requires explanation. The term *mises en œuvre* is copied from the French Act in which it was designedly used instead of such a word as 'employed" or "made use of" for a reason explained in a report presented to the Senate. (2)

Gas and acetylene may be considered as explosive substances. They are used for the lighting of workshops and other places, but the mere use of such substances for purposes of lighting ought not to bring a place under the application of the Act which otherwise would fall

(1) Trib. Civ. de Boulogne-sur-Mer, 26 juin, 1908, D., 1909. 5. 29. Req., 12 déc., 1904, D., 1905. 1. 480.

(2) Cabouat, v. 1, n. 236; Sachet, v. 1, n. 114.

outside its scope. It is only when explosives are used as such for the industrial purpose that their use carries with it the extension of the Act to the enterprise. The explosives are in that case only said to be *mises en œuvre*. They are used as explosives, and not as agents which have the unfortunate property of exploding when this is not intended by those who use them. The English word "prepared" covers the case where the explosives require to be mixed with other substances to fit them for use, and it must be understood in the light of the French expression *mises en œuvre* of which the meaning is clear by reference to the French law.

The condition in regard to the use of machinery seems to need no explanation, but, both in regard to it, and to the use of explosives, there are two points left doubtful; (1) Is the right to compensation limited to the case of accidents caused by the explosives or the machinery respectively, and (2) if the explosives or machinery are used in one part of the works, does the protection extend to workmen in other parts?

The first question must be answered in the negative, as the limitation is not found in the statute and cannot be implied. This view is also taken in France. (1)

In regard to the second point, the French Act has *toute exploitation ou partie d'exploitation* where our Act has "industrial enterprise." The addition in the French Act of the words *partie d'exploitation* makes it easier there to hold that the protection only applies to that part of the works in which the explosives or the machinery are made use of. In spite of this difference I am inclined to think that where there is a distinct limitation of the special risk to one part of the works, it is not intended to extend the protection of the Act to other parts in which no danger is caused to the workmen from the use of explosives or machinery. (2)

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(1) Sachet, v. 1, n. 115; Cabouat, v. 1, n. 235.

(2) Cabouat; Sachet, ll. cc

40. What is an "Accident."

The meaning of this term, which is not defined in our Act or in the French or English Acts, has been much discussed in the courts, and it is satisfactory to find that the Courts of France and of England have come independently to the same conclusions.

In an official circular issued by M. le Garde des sceaux it is defined as *une lésion corporelle venant de l'action soudaine d'une cause exterieure.* (1)

An *accident du travail* has been more fully defined as an injury (*atteinte*) to the human body, arising from the sudden and violent action of an external force. It includes every lesion of the organism apparent or unapparent, internal or external, profound or superficial; thus insanity, resulting from a shock to the emotions, may be an accident.

Accident is distinguished from disease in having always an external cause, which cause always manifests itself in a sudden or violent manner; whereas, disease, on the other hand, frequently has an internal cause, and frequently also, a slow and continuous evolution.

Consequently there is an accident, in the sense of the Act not only in the case of death, or of external or internal wounds, but also in the case of physical lesions having a character of suddenness. (2)

So peritonitis, caused by a strain in lifting a heavy weight is caused by accident, (3) and a rupture caused in a similar way, or by a violent blow, have been held to be accidents. (4)

Upon the same grounds in England the House of Lords has held that the word "accident" is used in the popular and ordinary sense, and means "a mishap or untoward event not expected or designed."

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(1) See Lyon, 26 mars, 1907, S. 1908. 2. 142, motifs.
(2) Dalloz, Dictionnaire Pratique de Droit, (Paris, 1909), vo. Accident du Travail, n. 40.
(3) Lyon, 7 juin, 1900, D., 1901. 2. 12.
(4) Trib. civ. de Nancy, 21 mai. 1900, and Trib. civ. de St. Gaudens, 11 avr., 1900, D., 1901. 2. 12; Req., 27 mai, 1908, D., 1909. 5. 30.

In the case under consideration a workman employed to turn the wheel of a machine, by an act of over-exertion had ruptured himself. It was held that he had suffered an injury by accident (1)

It had previously been held by the Court of Appeal that such an injury was not an accident. There was a lack of the fortuitous or unexpected element. The man was doing his ordinary work in his ordinary way.

The argument was that there must be something of an accidental character operating from outside which caused the injury. The House of Lords did not accept this.

A physiological injury if unforeseen and unintentional is as much an accident as a broken leg.

Lord Robertson said, "No one out of a Law Court would ever hesitate to say that this man met with an accident."

The fortuitous element, if that element is implied in the term "accident," lay in the miscalculation of the resisting forces of the wheel and the man's body.

41. Disease Contrasted with Accident.

Diseases, even though produced or aggravated by the work, are not accidents.

But a sudden intoxication by lead poisoning or some analogous sudden invasion would seem to be covered. (See Dall. Dict. l. c.)

And in regard to such diseases as lumbago, sciatica, rupture, etc., it is a question of fact in the particular case whether their origin was traumatic and caused in the course of the employment, or was due to other causes.

Rupture caused by strain (*hernie de force*) is none the less an accident because it presupposes a certain natural malformation. But rupture which is congenital or the

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(1) Fenton v. Thorley, (1903), A. C. 443. See Hughes v. Clover, Clayton & Co., (1909), 2 K. B. 798, and *infra*, p.

result of a morbid degeneracy (*hernie congenitale hernie de faiblesse*) is not an accident. (Dall. Dict. de Droit, l. c.)

The distinction between disease and accident is difficult to draw, and that which has been made by the courts both in France and in England does not depend upon any scientific theory. The question for the court is whether the injury was caused by accident, using that term in its popular sense.

Where an external injury brings on a disease, as, *e.g.*, if a wound from a rusty nail causes tetanus, if a blow on the head brings on septic pneumonia, or a scratch causes erysipelas, there can be no doubt, that the injury would be correctly described as resulting from accident. (1)

But when there is no external wound or force applied to the body, and the only accident is that the workman contracts an infection the question becomes one of difficulty.

The courts in the two countries have, quite independently, arrived at the same result.

42. Sudden Infection from Something Used in the Work.

In France the distinction has been made between professional or industrial diseases in general, to which one cannot assign an origin and a fixed date, and which are only the consequence of the habitual exercise of a certain industry, and cases, such as infection from skins, or, as they have been called, accidental pathological infections, which, although contracted in the course of an employment, have their origin and their cause in a determinate fact, not falling within the normal conditions of the exercise of this industry. (2)

And where a glassworker contracted syphilis from blowing a glass tube contaminated by a fellow workman,

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(1) See Brintons, Ld. v. Turvey, (1905) A. C., 230.

(2) Cass., 3 nov., 1903, D., 1907. 1. 87; Cass., 23 juillet, 1902, D., 1903. 1. 274. See Dall. Dict. Prat. de Droit, vo. Acc. du Travail, n. 41; Grenoble, 25 janv., 1907, S. 1908. 2. 141; Toulouse, 5 mai, 1909, S. 1909. 2. 254, (anthrax).

it was held that this was an accident, having the necessary characteristic of suddenness and being connected with the work. (1)

On precisely the same grounds the House of Lords has held that where a workman contracted anthrax in handling wool this was an accident.

There is here the sudden and unexpected element. It is an accident that the bacillus is present. It is an accident that it strikes the workman at a spot where there is some abrasion of the skin which permits its entrance into the system. (2)

43. Accident Due to the Forces of Nature.

As a general rule an accident due to the forces of nature is not an industrial accident, even though it happens to a workman during his work, unless it is proved that the work contributed to set these forces in movement, or that it aggravated their effects.

So, the death of a workman caused by sunstroke is not an industrial accident, when he was working with others equally exposed to the sun's rays, and none of the others was attacked, unless it is shewn that he was put to harder work than the rest, or that the employer neglected to take precautions indicated by usage or prudence (particularly in prescribing a special cap for this kind of work), so that the sunstroke, which the workman suffered can only be attributed to a particular want of resistance in his organism. (3)

But when a mason had to work in extremely hot weather against a wall which reflected the sun's rays and met with a sunstroke, it was held this was an industrial accident. (4)

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(1) Lyon, 26 mars, 1907, S., 1908. 2. 142.

(2) Brintons, Ld. v. Turvey, (1905), A. C., 230.

(3) Cass., 8 juin, 1904, D., 1906. 1. 107.

(4) Trib. civ. de Lyon, 26 déc., 1907, D., 1909. 2. 133. See Lyon, 7 août, 1902, S., 1902. 2. 202; Sachet, v. 1, n. 299.

On the other hand, when a tramway employee was killed by a sunstroke, the Court of Grenoble held that his widow was not entitled to compensation, because, admitting that the accident was during his employment, it had not been proved that the sunstroke had been occasioned or favoured by the unfavourable conditions under which he worked, or that he had performed his duties under abnormal and exceptionally difficult circumstances, which had had the effect of aggravating for him the action of the sun's rays, by exposing him to a trial beyond his strength. (1)

In an English case, where a coal trimmer, working in a stoke hole and exposed to great heat died from a heat-stroke, this was held to be an "accident." (2)

So, no doubt, if a steeple-jack were blown down by a high wind, or if a man working on a high or exposed place were struck by lightning, this would be covered by the Act. (3)

And, if a workman were so struck while employed in some work in which there was a special risk of lightning from the presence, for example, of powerful electric currents in the works, the accidents might be held to have the industrial character.

It would be due to the forces of nature, but the employment exposed the workman to a greater risk than ordinary of suffering from these forces.

So if a man is working at the mouth of a well and is struck by lightning and falls into the well, and is injured or killed by the fall, his death is caused by an industrial accident, because it was his employment which brought him into the position where the fall was dangerous. (4)

Upon the same principle it has been held in England, that when a workman is seized with an epileptic fit and

(1) Grenoble, 25 avr., 1906, D., 1907. 2. 106.

(2) Ismay, Imrie & Co. v. Williamson (1908) A. C., 437 (H. L.)

(3) See Trib. de Paix de Villeurbanne, 26 janv., 1906, D., 1906. 5. 22.

(4) Paris, 11 janv., 1902, D., 1906. 2. 24.

falls into an excavation, or into any dangerous place, his proximity to which is due to the employment, this is an industrial accident. (1)

44. When is the Injury Caused by the Accident.

The liability to an accident of a certain kind may vary according to the state of health or the idiopathic condition of the workman.

An old man is more liable to meet with an accident than a young one, a short-sighted man than one with normal vision, and so on.

Certain kinds of rupture, according to some medical authorities, happen only to persons who are predisposed to such an injury. (2)

But every man brings some disability with him, and the law looks only at the proximate cause of the injury, and does not go back along the train of circumstances, and trace the accident to some remote source.

It is settled law in France, that, in considering whether the injury was caused by accident, the fact is irrelevant that the previous state of health of the victim made the accident more likely to happen. (3)

The English decisions are to the same effect.

A workman who in the course of his work is standing by an open hatchway, and being seized with an epileptic fit, falls into the hold, and is killed, is killed by the fall.

His presence at the place where a fall would be dangerous is due to his employment.

His death is caused by an accident, and it is an accident arising out of the employment. (4)

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(1) Porton v. Central (Unemployed) Body for London (1909), 1 K. B., 173.

(2) See Trib. Civ. de Nancy, 21 mai, 1900, D., 1901. 2. 12.

(3) Cass. 24 oct., 1904, S., 1907, 1. 356; Montpellier, 3 nov., 1905, S., 1907. 2. 99; Cass., 18 juillet, 1905, D., 1908. 1. 241; See note to S. 1902. 4. 9; Rev. Trim., 1909, p. 437; Sachet, Les Accidents du Travail, v. 1, n. 445.

(4) Wicks v. Dowell & Co. (1905), 2 K. B. 225 (C.A.)

A workman in tightening a nut with a spanner, suddenly fell down dead.

The post-morten examination shewed that the man was suffering from a very large aneurism of the aorta, that he died from rupture of the aorta, and that the rupture might have been brought about by very slight exertion. The judge found that the rupture was caused by a strain arising out of his employment. The English Court of Appeal held that this was an industrial accident. (1)

The French cases illustrate the same principle.

In one case a man had a cancerous growth which was in an inactive state. A blow received in his work started the growth into activity and hastened its evolution, causing death. It was held that the death was caused by the accident. (2)

45. Onus of Proving that the Injury was Caused by Accident.

It has already been explained that the plaintiff still has the onus of proving all the facts material to his case. (3) Accordingly when it is disputed that the injury, in respect of which he claims compensation is the result of an industrial accident, the onus lies upon him of proving this fact. (4) In many such cases direct evidence is not to be expected, but the court is entitled to infer that the injury was caused by an accident happening in the course of the employment when there are weighty, precise and consistent presumptions leading to this conclusion. (5)

Thus, when a workman is suffering from an infectious disease, the question may be whether he contracted it in the course of his employment or not, and it will rarely

(1) Hughes v. Clover, Clayton & Co. (1909), 2 K. B. 798.

(2) Bordeaux, 31 oct., 1906, S. 1908. 2. 153.

(3) *Supra*, p. 32.

(4) Civ., 19 févr., 1908, D., 1908. 1. 241; Grenoble, 31 janv., 1908, D., 1909. 2. 158.

(5) See Montreal Rolling Mills v. Corcoran, 1896, 26 S. C. R. 595; McArthur v. Dominion Cartridge Co. (1905), A. C. 72.

be possible to prove the precise moment of the infection. Nevertheless facts may be proved from which the court may infer that the infection occurred during the work, and was of a kind properly to be regarded as an accident. Where, for example, a tanner is discovered to be suffering from anthrax and it is proved that, allowing for the normal period of incubation of the disease, the workman must have been at his work about the time when the infection occurred, that the disease is hardly ever contracted except in tanning, and that there existed in the tannery such defective conditions, and that there had been such neglect of precautionary measures as might have led to the infection, the court may find that the workman has sufficiently proved his case. (1)

Or when a rupture shews itself after the workman has been at work, and it is proved that there was no appearance of rupture before that time, and that the workman had been in the habit of doing heavy work without wearing a truss, the court may find it proved that the rupture is due to accident in the course of the work. (2)

On the other hand, when the result of the evidence is to leave it quite uncertain whether a malady from which a workman is suffering is traumatic in its origin, and can be traced to some injury sustained by him in the course of his work, or whether it is due to some pathological cause, compensation cannot be awarded. When either of two causes may, with equal plausibility, be looked upon as that which has produced the injury, the court is not entitled to make a guess and to adopt without proof one hypothesis rather than another. (3)

In a French case, where a workman subsequently to an accident, was attacked by locomotor ataxy the question was whether this was caused by the accident or originated

(1) Toulouse, 5 mai, 1909, S., 1909. 2. 254.
(2) Req., 27 mai, 1908, D., 1909. 5. 30.
(3) Guardian Fire & Life Ass. Co. v. Quebec Ry. Light & Power Co., 1906, 37 S. C. R. 676; Union Ass. Co. v. Quebec Ry. Light & Power Co., 1904, 28 S. C. 289 (C. R.); Beal v. Mich. Cent. Ry. Co., 1909, 19 O. L. R. 502.

independently of it. The origin of the disease appears to be obscure, and, after hearing the evidence of medical experts, the court came to the conclusion that, in the present state of medical science, it was impossible to prove the connection between the accident and the locomotor ataxy. (1) In another case a man while at work suffered a "settling" (*effondrement*) of the spinal column. The medical evidence was to the effect that this was due to Pott's disease. There had been no extra strain and it might have happened if he had not been at work. It was held that it had not been proved that the injury was due to accident. (2)

46. Accident Causing Nervous Shock.

An accident may cause death, or incapacity for work, temporary, or permanent, although there has not been any external lesion. It is quite possible for a man to die, or to become insane, merely from a severe shock to the nervous system, and if the accident which caused the shock was in the course of the work compensation will be payable.

In a French case a woman, whose business it was to open the gate at a railway crossing, had just opened the gate, when an automobile caused her so violent a shock, by passing close to her at a rapid pace, that she fell dead. It was proved that she was in an advanced state of pregnancy, and was, moreover, suffering from a slight lesion of the heart. It was held that her death was caused by accident in the sense of the Act. (3)

A workman in the course of his employment is present at an industrial accident, such as the explosion of a boiler which causes him no visible injury, but affects his nervous system to such an extent that he becomes insane. In such

(1) Grenoble, 31 janv., 1908, D., 1909. 2. 158.

(2) Req., 19 févr., 1908, D., 1908. 1. 244.

(3) Bordeaux, 23 avr., 1907, S., 1908. 2. 45; Rev. Trim., 1908, p. 13; see Montreal Street Ry. Co. v. Walker, 1903, 13 K. B., 324; see in England, Ruegg, 7th edit., p. 263.

a case, as M. Sachet says, there is a physical injury, caused by the accident, which is just as real as the fracture of a bone, though not perceptible in the same way. (1)

47. Suicide Caused by Injury.

The suicide of a workman may be an industrial accident, when it is the direct consequence of cerebral disturbance and pain experienced by the workman and caused by the injury. (2)

But the voluntary suicide of a workman who is sane, or who is insane, but has not become so by the employment, cannot be an industrial accident. (3)

48. Injury Having Unusual Consequences.

Where disease or death results from an injury it is immaterial that it was a consequence which was neither natural nor probable. In estimating damages for breach of contract, it is reasonable that the defendant should pay only for the damages which might have been foreseen, or, in other words, such as were the natural and probable consequences of his breach. See C. C. 1074.

In cases of damages for fault, our law allows all loss which is the immediate and direct consequence of the wrong. (4)

But in questions under this Act we have only to consider whether the accident caused the death, or, under the English Act, whether death resulted from the injury.

So where a wound was followed by erysipelas which caused death, it was held, in England, that death resulted from the injury though the erysipelas was not a probable or natural consequence. (5)

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(1) Sachet, v. 1. n. 265, and n. 479 ter. See Eaves v. Blaenclydach Coll. Co., 1909, 2 K. B. 73.

(2) Cass., 25 oct., 1905, S., 1908. 1. 347. See Trib. Civ. de la Seine, 17 mars, 1900, D., 1901. 2. 12.

(3) *Ib.*

(4) See Pandectes Françaises, vo. Responsabilité Civile, n. 1917.

(5) Dunham v. Clare (1902), 2 K. B., 292.

In another English case a stone fell on the leg of a workman while he was at work, and injured him. He had great difficulty in reaching home and took a long time to do so. It was a cold evening and he contracted a chill which brought on pneumonia. He became subject to bronchitis and chronic asthma, although he had never suffered from anything of the kind before the accident, and was permanently incapacitated for work. The county court judge held that he was not entitled to compensation because the illness was not a natural result of the injury. The Court of Appeal reversed the judgment on the ground that the county court judge had misdirected himself in point of law. The test to be applied was not whether the disease was a natural and probable result of the injury, but whether it was in fact a result of it. (1)

The liability, in cases under the act, is not limited to those consequences which flow directly and immediately from the accident, if they are caused by it.

49. Death Caused by Surgical Operation.

An injury causes death, if death results from an operation which was a reasonable step to obviate the consequences of the accident.

In an English case under the Workmen's Compensation Act, 1906, a surgeon recommended a workman, whose hand had been lacerated, to have skin grafted on it instead of having the hand amputated.

In administrating the anaesthetic the man died.

The county court judge held that the employer was not liable, on the ground that the operation was a bold experiment, and that, in the circumstances, the administration of the anaesthetic constituted a *novus actus interveniens*. But the Court of Appeal reversed this judgment on the ground that the operation was a reasonable one. (2)

In France the decisions on this point are conflicting.

(1) Ystradowen Coll. Co. v. Griffiths (1909), 2 K. B. 533.
(2) Shirt v. Calico Printers' Assn. (1909), 2 K. B. 51.

In one case, where there was fault on the part of the surgeon in performing the operation, the Court of Paris held that the employer was liable to the workman, and that the aggravation caused by the surgeon's fault must be considered as a direct consequence of the accident. (1)

But in another case, the Court of Nimes held, that, seeing that the workman had the right to choose the surgeon, he could not hold the employer liable for the fault of a surgeon whom he had himself chosen, and accepted. This seems to be fallacious. The employer is liable for the injury which renders the operation necessary, and he ought to be liable, if instead of ameliorating it, it renders it worse. (2)

50. Duty to Submit Medical Treatment.

As a general rule it is the duty of the injured workman to submit to medical treatment and to follow medical advice. And if the consequence of his neglect to do so is an aggravation of the injury, the compensation ought to be calculated as if this aggravation had not been produced. If an injury which would have caused the workman to be incapacitated for two months, if properly treated, is converted into a permanent incapacity by the obstinacy of the workman, it would be unjust to make the employer pay for this. (3)

51. When Workman is Injured, must he Submit to an Operation if the Doctors Recommend it.

If the medical opinion is that an operation would remove the incapacity and the workman refuses to submit to it, is the continuance of the incapacity due to the original accident or to the workman's unreasonable refusal to take a step which any reasonable man would take?

In England this has been considered in several cases.

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(1) Paris, 30 déc., 1902, cited by M. Lesoudier; Rev. Trim., 1904, p. 291.
(2) Nimes, 23 juillet, 1902, ib.; Sachet, v. 1, n. 458.
(3) Sachet, v. 1, n. 460; Grenoble, 27 oct., 1908, S., 1909, 1. 43 and
(2) Nimes, 23 juillet, 1902, ib.; Sachet, v. 1, n. 458.

It is held that the question is whether the refusal to submit to the operation was in the circumstances reasonable. If the operation is a serious one, and the workman's own doctor, whose honesty and competency are not impeached, advises him against it, he is not unreasonable in refusing, though other doctors may say the operation is one which might properly have been performed. (1)

In France the earlier cases were more favourable to the workman.

In a number of cases it was held that the workman could not be compelled to submit to an operation even of a relatively simple nature, seeing that the operation might be unskilfully performed, and, even if this were not the case, might entail dangerous complications. (2)

But later decisions approach nearer to the same sense as the English, viz., that it is a question of reasonableness. (3) But in France it seems clear that when an operation presents only a chance of success and involves danger to life, or great suffering, the workman is entirely free to refuse to submit to it. (4)

And, in particular, if the refusal was not due to the genuine free will of the victim, but was caused by his weak and nervous condition induced by the shock of the accident, by the pain which he had suffered and by his dread of the anaesthetic, it will not be allowed to prejudice the claim to compensation. (5)

Some French authorities maintain, that, seeing there is a slight but incalculable danger incident to the use of

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(1) Tutton v. Owners of S. S. Majestic (1909), 2 K. B. 54 (C. A).

(2) Trib. Vannes, 9 août, 1900, D., 1901. 2. 307; and cases cited by M. Ch. Lesoudier, in art. de l'Obligation au Traitement Médical, Rev. Trim., 1904, p. 289.

(3) Douai, 10 avr., 1905, and Grenoble, 13 avr., 1905, S., 1905. 2. 192.

(4) Cabouat, v. 2, n. 634; Sachet, v. 1, n. 460 bis. Revue Trimestrielle, 1904, p. 285, art. by M. Ch. Lesoudier; Grenoble, 27 oct., 1908, S., 1909. 2. 43 and note.

(5) Grenoble, 27 oct., 1908, S., 1909. 2. 43.

anaesthetics, a workman is always free to refuse to submit to an operation for which their use is necessary. (1)

The English rule appears to be more reasonable. If the operation is one to which a sensible man would submit if no question of compensation were involved, there is no hardship in saying that the workman is bound to choose between undergoing the operation and suffering the loss, or a reduction in the amount of the compensation. But in any case it is clear that if the employer claims a reduction of the compensation on the ground of the workman's refusal to submit to an operation, it is for the employer to show that the operation would have diminished the injury.

This had been decided in England. A seaman on board ship having injured his finger by an accident in the course of his work refused to undergo a slight operation proposed by the ship's doctor. After his discharge the finger had to be amputated. The trial judge found that he had acted unreasonably in refusing to undergo the operation, but having regard to the conflict of medical evidence was unable to come to any conclusion upon the question whether the operation would have saved the finger. The Court of Appeal held that the employer had failed to discharge the onus which lay upon him of proving that the loss of the finger was due not to the accident, but to the refusal to submit to the operation. Compensation was therefore payable. (2)

52. When has Workman Recovered?

The workman has not recovered until he has regained his full earning capacity. In many cases an accident causes nervous disturbance which may last longer than the muscular injury.

The man may be still unable to work on account of the nervous shock.

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(1) Sachet, 5th ed., v. 1, n. 460; Lesoudier, Ch., in Rev. Trim., 1904, p. 288; Cabouat, v. 2, n. 634.

(2) Marshall v. Orient Steam Nav. Co. (1909), W. N. 225.

It is difficult for a judge to distinguish between such a case and a case where the workman is shamming.

But if he finds that the man cannot work owing to the nervous consequences of the accident, compensation continues to be payable. (1)

53. "Accidents by Reason of or in the Course of their Work."

There is a difference of some importance between the language of our Act and that of the English one upon this point.

In the French version of our law it is *Les accidents survenus par le fait du travail, ou à l'occasion du travail.*

These words are identical with those in the French *loi du 9 avril*, 1898.

During the process of legislation in France this phrase passed through several modifications before arriving at its present form. (2)

Before the last stage the phrase had run *dans leur travail et à l'occasion du travail.*

The disjunctive "or" was substituted for the conjunctive "and," no doubt to make it clear that the workman does not need to prove that the accident was both by reason of and in the course of the work. Either alternative is sufficient.

In England, on the other hand, the accident must be one "arising out *and* in the course of the employment." (3)

The difference between the two laws is, however, much less than might at first sight appear.

If the words, "in the course of their work" or, as it

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(1) Eaves v. Blaenclydach Coll. Co., (1909), 2 K. B. 73 (C. A.); Cf. Grenoble, 27 oct., 1908, S., 1909. 2. 43, where refusal to submit to an operation was treated as due to nervous weakness and not voluntary.

(2) The various changes are given in the note to Cass., 17 févr., 1902, D., 1902, 1, 273.

(3) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1 (1). See, as to these being two distinct requirements, Pomfret v. L. & Y. Ry. (1903), 2 K. B., 718.

is in the French version, *à l'occasion du travail*, were interpreted to mean that every accident to a workman during working hours was an industrial accident, for which he was entitled to compensation, there would be, undoubtedly, a profound difference between the French law and the English. But the French courts have never interpreted these words in this way.

54. Must be Some Causal Connection between the Work and the Accident.

On the other hand it has uniformly been held that an accident does not happen *à l'occasion du travail*,—and our expression "in the course of their work" is meant to be identical in meaning,—unless the accident was in some way related to the work. It must be an industrial accident, an accident which happens to the injured person as a workman and not merely as a man. In other words, the professional risk which is covered by the Act, must be a risk to which the injured person is exposed by reason of the industry.

It must not be an accident caused by some fact which is "foreign to the work"—*fait étranger au travail*. (1)

It is the professional risk and not the human risk which the employer takes. (2)

A recent English case, in which the facts were somewhat singular, is a good illustration of the rule that an accident is not in the course of the work unless it has some connection with the employment.

A lady's maid was sewing in a lighted room and a cockchafer flew in at the window. In trying to keep it from her face the maid raised her hand suddenly, and struck her eye, thereby causing severe injury. It was held by the Court of Appeal that the Act did not apply. The

(1) Cass., 23 déc., 1903, and 29 févr., 1904, S., 1907. 1. 29. See M. A. Dorville in Rev. Trim., 1902, p. 250.

(2) See Baudry-Lacantinerie et Wahl, Louage, 2nd ed., v. 2, n. 1838; Cabouat, Les Accidents du Travail, v. 1, p. 191; Sachet, v. 1, nos. 306, 438.

accident did not arise from a risk incidental to the employment. (1)

The risk was what may be called a human and not an industrial risk. It is submitted that the same result would have been reached if the case had arisen under our law. Although the accident was during the work it was not connected with it in any way.

It must appear not only that the accident happened during working hours and in the place of employment, but it must also bear a manifest relation to the work. (2)

For this reason expressions used in English cases must be used with great caution. There is by no means so much difference between the two laws upon this matter as might be supposed from some expressions used in the cases.

In many cases English judges have said that a particular accident had happened in the course of the employment, but had not arisen out of the employment, and as the English Act required both conditions to be fulfilled there was no claim to compensation. (3)

But it by no means follows that in the same facts the French courts would have held that the accident happened *à l'occasion du travail*, or that our courts should hold that it happened "in the course of the work."

The English judges mean in these cases, frequently, by "in the course of the work" merely "during the time of work." But the French Courts undoubtedly require more than this before they hold that the accident is one to which the Act applies.

Thus in England, in one case the facts were these: — an engineer on a steamship which was in port, went on deck at night, saying he was going for a breath of fresh air. His body was found next morning in the harbour,

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(1) Craske v. Wigan (1909), 2 K. B. 635.

(2) Cass., 7 nov., 1905, D., 1908. 1. 60.

(3) See, e. g., Marshall v. Owners of S. S. Wild Rose (1909), 2 K. B. 46, 49, per Fletcher Moulton, L. J.; Fitzgerald v. W. G. Clarke & Son (1908), 2 K. B. 796.

close to a part of the vessel where the men usually sat during recreation.

It was held that his dependants were not entitled to compensation, and it was observed by Cozens-Hardy, M.R. and Fletcher Moulton, L.J., that the accident happened in course of the employment, but had not been proved to have arisen out of it. (1)

But in France also it has been held in a number of cases, that the mere fact that a sailor is drowned, while engaged on board ship, raises no presumption that his death was by an accident, 'in the course of his work,"—*à l'occasion du travail.*

In one case the body of the master of a barge was found in the harbour where his vessel was lying, and there was no evidence as to how it had got there. It was held that his widow had not discharged the onus of shewing the relation between the accident and the work. (2)

The first authoritative explanation by the Court of Cassation of the words under discussion was in deciding a group of cases which are reported together in 1902. (3)

In those cases the following points were decided, most of which will be noticed more fully later.

1. The professional risk is inherent, not only in the work assigned to each workman, but also in the total equipment employed in the enterprise to create a determinate product, and the obligation of the employer to ensure the safety of his workmen only ceases at the point where his authority comes to an end. (4)

55. Accident in the Place of Work and during Working Hours, Caused by Equipment or by Fellow Workman.

2. Consequently an accident happens "by reason of the work" when it is caused by the machinery, or by the forces

(1) Marshall v. Owners of S. S. Wild Rose, (1909), 2 K. B., 46; Cf. Bender v. Owners of S. S. Zent, (1909), 2 K. B. 41.

(2) Cass., 4 mai, 1905, D., 1906. 1. 173. Cf. Cass., 26 juillet, 1905. Pand-franç., 1908, 1. 414; D., 1906. 1. 295.

(3) Cass., 17 févr., 1902, D., 1902. 1. 273.

(4) The rule has been expressed in these terms by the Court of Cassation in later cases. See Cass., 8 juillet, 1903, D., 1903. 1. 510.

which operate this, and happens in a place where, and at a time when the workman was subject to the direction of the employer.

Applying these principles the Court held that the Act applied to a workman injured in the workshop by a machine, during a short interruption of work, and as he was returning to his place after borrowing a cigarette paper from a fellow-workman; that it applied to a workman, injured by a projectile thrown by a fellow-workman, not at him, but at a third workman; but that it did not apply to an accident after the close of the day's work, and outside the place of the employment.

Nor if a workman provokes a quarrel with another and is injured, can this be regarded as an accident by reason of the work though it is during working hours and in the workshop, unless the quarrel was related to the work. (1)

56. The Place of the Work.

In deciding whether the accident is one which happened by reason of or in the course of the work an important element for consideration will be if the accident happened in the place assigned to the work.

It is only in quite exceptional cases, such as that of the workman carrying some danger with him out of the workshop, or that of his being attacked outside on account of a strike or some other matter connected with the work, that an accident outside the working place will be regarded as an industrial accident.

But the working place must be understood in a reasonable sense.

It includes not only the workshop or place in which the workman has to move about in performing his work, but also all places within the industrial establishment to which the workman is obliged or is expected to resort in connection with his work, such as lavatories, places where

(1) Paris, 24 juillet, 1903, D., 1905. 2. 478, *infra*, p.

the workmen are allowed to take their meals, or to rest during customary interruptions of work, and so on. (1)

The liability of the employer during such interruptions of work will be explained later.

It is further clear that a workman who is sent outside the works on his employer's business, and, in discharging his duties outside, meets with an accident, is in the course of his work.

Many classes of workmen, such as, *e.g.*, carters, or builders, perform their work, not in the employer's workshop, but outside, and for them the working place is that in which they are so engaged in the employer's service.

And it is immaterial that the workman who is working outside is being paid by the piece, if he is subject to the supervision of the employer while he is at work. (2)

And the same principle applies to any workman who is sent out by his employer. (3)

In a French case where a workman was sent out on a bicycle to do an errand for his employer and was run down by another cyclist, it was held that this was an accident in course of the work. (4)

And so when a workman was at work in the street and was hit in the eye by a top thrown by a child, it was held that the Act applied. (5)

57. Accident Caused by Machinery or by the Negligence of a Fellow-Workman.

Where the accident is caused by any defect in the machinery or equipment, as, *e.g.*, by the bursting of a boiler, or where it is due to the incautious act of the workman in approaching too near to a machine, or in handling,

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(1) Cass., 2 mars, 1903, D., 1903. 1. 273 and note.

(2) Req., 30 déc., 1908, Sir Bulletin des Sommaires, 1909. 1. 9.

(3) Cass., 4 juillet, 1905, P. F., 1908, 1, 13, note; Cabouat, v. 1, nos. 153, 154. Sachet, v. 1, nos. 338 *seq.*

(4) Trib. Civ. de Blois, 11 nov., 1908, D., 1909. 5. 8.

(5) Cass., 28 mars, 1905, D., 1908. 1. 218.

in the course of his work, any dangerous instrument or substance, the Act will clearly apply.

These are precisely the risks specially incidental to industrial employment.

And the same is true, in general, of accidents caused by the negligence of a fellow-workman of the victim.

It is not necessary to shew that the negligence of the fellow-workman was in the course of his work.

According to the French jurisprudence the fact that the accident caused by the negligence of a fellow-workman happened at the place of the work and during working hours is sufficient to make it an industrial accident. Two grounds may be given for this. In the first place the enforced contact with a number of fellow-employees, some of whom are sure to be careless, makes industrial employments specially dangerous, and in the second place, a workman whose attention is occupied by his work has not the same opportunity as others of keeping a watch on things going on around him.

So, in a number of French cases, where a workman had been shot by the imprudence of a fellow-workman in handling firearms, it has been held that the Act applied. (1)

58. Workman Playing with Machinery.

An accident caused by the workman playing with the machinery as, for example, inserting a coin or a piece of indiarubber into a rolling-mill and, in so doing, getting his hand drawn into the machine is an industrial accident according to the view of the *Cour de Cassation*. The workman may have been guilty of inexcusable fault, but the accident is one to which the Act applies, because it happens during working hours, in the place of the work, where the workman is under the supervision of the employer, and it is caused by the machinery. (2)

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(1) Paris, 14 nov., 1902, D., 1905. 2. 47; Douai, 7 août, 1900; Nancy, 9 mai, 1900, D., 1901. 2. 85.

(2) Cass., 8 juillet, 1903, D., 1903. 1. 510; Sachet, v. 1, n. 414.

In several cases French Courts of Appeal had come to an opposite conclusion. (1)

The cases where the accident has been caused by horse-play, or by the wilful tort of a fellow-workman will be spoken of later.

59. Workman within Premises, but not at Place of his Work.

Somewhat delicate questions arise when the workman is within the premises of the employer in the course of going to his work or returning from it, but is not at the place where his own work is performed.

The general rule here is that he is within the statutory protection while within the premises, if he is taking the way to or from his work which is contemplated by the terms of his employment.

This is covered by the professional risk. The employer's duty is to keep the premises safe for workmen who have to use them in this way.

When he is leaving work, it is, in the language of Cozens-Hardy, M.R., an implied term of his employment, "that he should, when his day's work was over, without loitering and with all reasonable speed, leave the premises by the accustomed and permitted route." (2)

The same applies when he is within the premises and is coming to his work.

If an accident happens to him under these conditions it is an industrial accident. (3)

So where a workman had to make his way through a woodyard strewn with obstacles, amidst building materials placed in unstable positions, and was injured, it was held that this was an industrial accident. (4)

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(1) Paris, 30 mars, 1901, D., 1902. 2. 405; Douai, 13 mai, 1901, D., 1902. 2. 405.

(2) Gane v. Norton Hill Colliery Co. (1909), 2 K. B. 539. 544.

(3) Ib. Cass., 2 mars, 1903, D., 1903. 1. 273.

(4) Besançon, 24 oct., 1900, D., 1901. 2. 276.

Or where a navvy was injured as he was going through the works to take his train. (1)

And in the last case it was held that it was immaterial that the navvy had given up his work and was not returning the next day.

It was, however, in that case a part of the contract of employment that he should be conveyed to and from his work by train.

But a workman is not protected, if, in going to or from his work on the premises, he is taking a route which is not usual or permitted, as when a brickmaker is trying to pass through a tunnel destined for drying bricks, and not intended for passengers. (2)

In a Scots case a workman was employed in decorating a church. One morning being unable to open the door of the building, he climbed over a spiked railing and got in by a window. In climbing the railing he spiked his foot. Death resulted from the accident. It was held that the accident did not arise out of and in the course of his employment. (3)

60. Accident not in Place of Work.

As a general rule an accident not occurring at the place of employment, or at some place where the workman is sent in the course of the work, will not be an industrial accident.

But this is not an absolute rule.

There may be cases where the risk is one arising out of the work, and originating on the employer's premises, though the effect is produced outside.

Thus, where a workman, with the permission of the employer, carried with him some dangerous substance, such as explosive caps, which he was to use on the following

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(1) Trib. Civ. de la Seine, 24 août, 1900, D., 1901, 2, 276.
(2) Cass., 2 mars, 1903, D., 1903, 1, 273.
(3) Gibson v. Wilson, 1901, 3 F. 661.

day, and they exploded in his house and injured him, it was held that this was an industrial accident. (1)

The same principle would apply if a stick of dynamite had been accidentally left in his pocket, or if he were murdered in the street by strikers. (2)

61. The Time of the Work.

An accident not during working hours will not be, as a general rule, one which happens in the course of the work. But this rule is not absolute.

62. Interruptions during Working Hours.

It is settled both in France and in England, that the mere fact that at the moment of the accident the man was not working, does not shew that the accident was not in the course of his work, if he was on the employer's premises.

During the intervals for meals, if the men are permitted to take their meals on the premises, the employment is not interrupted. The nexus between the workman and the employer has not been dissolved.

So where a man sat down by the side of a wall within the employer's premises and the wall fell upon him, it was held that this was an industrial accident. (3)

And the same was held where a man was cooking a chop in a shanty on the premises and the accident occurred. (4)

And where a carter who was taking his lunch in the stable was bitten by the stable cat. (5)

Or, in a French case, where a workman was taking a meal in a place permitted to be used for that purpose and the ceiling fell down. (6)

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(1) Cass., 24 juin, 1905, S., 1908. 1. 348.
(2) See Sachet, v. 1, nos. 354, 355; Cabouat, v. 1, n. 154.
(3) Blovelt v. Sawyer (1904), 1 K. B., 271.
(4) Morris v. Mayor of Lambeth, 22 Times L. R. 22.
(5) Rowland v. Wright (1909), 1 K. B., 963 (C. A.)
(6) Nimes, 10 août, 1900, D., 1901. 2. 130.

The same principle applies when the workman breaks off work for a short interval for rest, or to satisfy a call of nature so long as he remains on the premises of the employer. (1)

In a French case a man who had stepped across to borrow a cigarette from a fellow-workman and was injured by a machine as he was returning to his post was held to be still protected. (2)

It is otherwise when the workman, during the interruption of his work, goes to a part of the works where he has no business, and there meets with an accident. (3)

Thus in an English case, a workman climbed on to a hot-water tank to eat his supper, and on returning, fell into the tank. The workmen were not allowed to go on the tank, and it was held that this was not an industrial accident. (4)

The same result was reached where an engine-driver left his engine when it was at rest, and crossed a siding to receive from a friend a book unconnected with his duties. On returning, he was knocked down by a waggon that was being shunted and was killed.

The House of Lords, affirming the judgment of the Court of Appeal held that he was not in the course of the employment.

He was, in the words of Lord Loreburn, L.C., "where he was not entitled to be, and was not working but pleasing himself." (5)

Whereas in a Scots case, where an engine-driver stepped across the lines to speak to a higher official, and then went further from his engine, over other lines for his

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(1) Sachet, v. 1, n. 347; Cass., 26 juillet, 1905; Pand-Franç. Pér., 1908. 1. 414.

(2) Cass., 7 févr., 1902, D., 1902. 1. 273; Trib. Civ. de Laon, 12 mars, 1900, D., 1902. 2. 404.

(3) Dijon, 11 mai, 1903, D., 1904. 2. 292.

(4) Brice v. Edward Lloyd, Ld. (1909), 2 K. B. 804 (C. A.)

(5) Reed v. G. W. Ry. Co. (1909), A. C. 31. See also the Scots case, Callaghan v. Maxwell, 1900, 2 F. 240.

own purposes, and entered into casual conversation with a friend, and on his way back to his engine was knocked down and killed, it was held that the accident was one "arising out of and in course of his employment." (1)

It does not appear to be possible to reconcile the judgment of the House of Lords in the case of Reed, with that of the *Cour de Cassation* in the case of the workman returning to his work after stepping over to borrow a cigarette from a friend, (2) except upon the theory that when an accident is caused by the machinery, it happens by reason of the work, and it is not necessary by the French law to shew also that it happened in the course of tne employment.

63. Workman Leaving Premises for Purposes of his own.

As a general rule, when, during the interruption of work, the workman leaves the employer's premises to obtain refreshment, or for any other purpose of his own, he is not in the course of the work.

So in England it has been held that when a sailor whose ship was in port, went ashore for some purpose of his own, such as to buy clothes, and met with an accident before he had got back to the ship, the accident did not happen in the course of the employment.

And the result is the same, although the accident happened when the workman was trying to get on board. (3) But when once he has got back to his ship the deviation is at an end, and if he falls down an open hatch on the deck, this will be in the course of the employment. (4)

In the former of these cases Fletcher Moulton, L.J., dissented, on the ground that the employment of a sailor was not like that of an ordinary workman, which ended at night and began again in the morning.

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(1) Goodlet v. Caled Ry. Co., 1902, 4 F. 986.
(2) Cass., 7 févr., 1902, D., 1902. 1. 273.
(3) Moore v. Manchester Liners (1909), 1 K. B. 417.
(4) Robertson v. Allan Bros., 1908, 98 L. T., 821.

It was a continuous employment for the voyage, and did not cease when the ship was in port. It was within the contemplation of the employer that the sailor should go ashore for necessary supplies, and such visits are incidents of the employment.

But, with great respect, this seems to throw upon the shipowner an unreasonable burden, and one which the Act does not intend. It is impossible without violence to language, to say that sailors, when ashore for their own ends, are in the course of their work.

The following French case rests upon still clearer grounds.

A workman had interrupted his work to satisfy a call of nature, and for that purpose had gone to a wood-yard not belonging to his employer. In returning over some railway tracks he was killed by a train. It was held the Act did not apply, it not being alleged that he was obliged to go across the line for this purpose. (1)

And, in a Scots case, the men had, by the tacit permission of the employer, broken off work to go for refreshment outside the employer's premises. In returning, while two workmen were indulging in horseplay, one of them fell in such a position as to be in great danger. The plaintiff, a third workman, rushed up to drag him away, and in so doing was badly injured. It was held, that the accident being outside the premises, and not arising out of the work, was not covered by the Act. (2)

64. Temporary Absences from the Premises may be within the Contemplation of the Employer.

When the workman leaves the premises for his own purposes he is no longer in the course of the work, unless it is contemplated that he should have to absent himself for brief periods of refreshment during his hours of duty.

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(1) Cass., 1 août, 1906, D., 1908. 1. 218; Pand-Franç., Pér., 1908. 1. 414 and note.

(2) Mullen v. D. Y. Stewart & Co. (1908), S. C. 991, 16 S. L. T. 172.

This is a question of circumstances.

Where a man is on duty for a long period, such as twenty-five hours, it may be proved or appear that he was expected to go away for refreshment, without this being considered as an interruption of the employment. (1)

And even when the absence has been such that during its continuance the workman was outside the protection of the Act he will recover that protection as soon as he has returned to the place of his work.

In an English case, a ship's steward went ashore on his own business, returned to his ship by a skid—a prohibited means of approach—and, on stepping from this skid to the deck of the ship, fell through an open hatchway. It was held that he was protected. (2)

In a recent case in which there was much division of judicial opinion, a watchman was on duty for twenty-five hours. He went away from the premises for a short period for refreshment, and returned to a quay where he had a right to be for the purposes of his duty. In descending a ladder from this quay to a vessel, which it was part of his duty to watch, he fell into the water and was drowned.

The House of Lords held by a majority, that the accident was in the course of the employment. (3)

But unless there are exceptional circumstances which prevent the absence from the place of work from being considered as an interruption of the employment an accident which happens before the workman has got back to the place of his work is not an industrial accident. (4)

65. Accident after Working Hours.

After working hours when the workman has finished his day's work and has left the premises, he is no longer

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(1) See Low or Jackson v. General Steam Fishing Co. (1909), A. C. 523 (H. L.)

(2) Robertson v. Allen Bros. & Co., 1908, 98 L. T. 821; Butterworth's Workmen's Compensation Cases, N. S. v. 1, p. 172.

(3) Low or Jackson v. General Steam Fishing Co. (1909), A. C. 523.

(4) Moore v. Manchester Liners, Ld. (1909), 1 K. B. 417.

exposed to the industrial risk. If he meets with an accident it is as a man and not as a workman. And this will be so, even though the accident is on the employer's premises, if the workman is staying there after hours, not for any purpose connected with the employment, but for his own convenience.

So when a workman was playing with some of his comrades in a factory after the day's work was over, and met with an accident, it was held he had no claim to compensation. (1)

Some of the cases turn on rather fine distinctions.

A workman had been sent by his employer to work in a private house in a neighbouring town. When he had finished the work the workman went to the post-office to send word to his employer that the work was finished. In going to the post-office he met with an accident. It was held that this did not happen in the course of the work. (2)

But probably if it had been proved that the workman had been ordered by the employer to do this, or that it was the usual practice, the result would have been different.

66. Journey to and from Work.

The general rule is that a workman who meets with an accident outside the premises of the employer, while on his way to his work, or on his way back from it, is not protected by the Act.

He is not in the course of his work.

His work has not begun or else it has terminated, and the accident happens to him, not as a workman but as a man. (3)

The liability of the employer, when the workman is inside the premises, though not at the place where he works, has been explained in discussing what is meant by the place of work.

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(1) Req., 28 mars, 1905, P. F., 1908. 1. 13.

(2) Cass., 4 juillet, 1905, P. F., 1908. 1. 13.

(3) Cass., 25 févr., 1902, S., 1904. 1. 181; Cabouat, v. 1, p. 193; Sachet, v. 1, n. 322; Beven, p. 380.

But so long as he is on the employer's premises, and is coming in, or going out by the ordinary route, or by one which the workmen are allowed to use, he is in the course of the employment. (1)

And it may be an implied or express term of the contract of service that the employer shall provide transit for the workman to and from his work.

If this is the contract, an accident which happens to the workman on the journey happens to him by reason of the work. (2)

Thus where it was part of the contract with a navvy that the employer should carry him gratuitously to and from his work, an accident which happened to him on his way to the train was held to be in the course of the employment. In such a case the employment begins when the workman enters the train in the morning, and ceases when he leaves it in the evening. (3)

And this would be so even when the workman is not coming back, but has given up his work and has been discharged.

For until he has been carried home he is still in the course of the employment. (4)

67. "Larking" or Horseplay Causing Injury.

The prevailing view in France is that when a workman is injured by horseplay on the part of a fellow-workman in which he has not participated, or which he has not provoked, this is an accident in the "course of the work." The enforced proximity of the workers makes the risk of such an accident a professional risk.

There has been some hesitation in the jurisprudence

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(1) Gane v. Norton Hill Colliery Co. (1909), 2 K. B., 539; Trib. Civ. de la Seine, 24 août, 1900, D., 1901. 2. 277.

(2) Trib. Civ. de la Seine, 24 août, 1900, D., 1901, 2 277; Grenoble, 27 mai, 1904., D., 1905. 2. 34.

(3) Cremins v. Guest, Keen & Nettlefolds, Ld. (1908), 1 K. B. 463.

(4) Trib. Civ. de la Seine, ut sup.

but this view has been taken by the *Cour de Cassation* and is approved of by most of the French writers. (1)

In England it has been held not to be an accident arising out of and in the course of the employment. It was as entirely outside the scope of the employment of the one to do the act which caused the injury, as it was outside the scope of the employment of the other to be exposed to such an injury.

An accident caused by the tortious act of a fellow-servant having no relation whatever to the employment, cannot be said to arise out of the employment. (2)

This was so held in a case where two boys were "larking" and one of them threw a piece of iron at the other which missed him, but hit a third boy.

But in a French case where the facts were indistinguishable from this, an opposite result was reached, on the grounds that the accident was at the place and time of the work, and was due to the act of a fellow-workman, who was brought into contact with the victim by the occupation. (3)

In a French case a workman was at his work, and a fellow-workman, passing by, snatched off his cap by way of a joke. The workman, running to recover it, fell, and sustained internal injuries, which caused his death. The *Cour de Cassation* held this was an industrial accident.

It was the employment which put the two workmen in contact and was the occasion of the "larking." (4)

Whereas in an English case, some workmen who were indulging in horseplay attached the hook of a hoist to the collar of a fellow-workman, by which he was lifted from the ground and injured. It was held that this was not an

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(1) Cass., 23 avr., 1902, D., 1902. 1. 273. Contra, group of cases under D., 1902. 2. 404. See Sachet, v. 1, n. 421.

(2) Armitage v. L. & Y. Ry. (1902), 2 K. B. 178 (C. A.)

(3) Cass., 23 avr., 1902, D., 1902. 1. 273.

(4) Cass., 8 juillet, 1903, D., 1903. 1. 510.

accident "arising out of and in the course of the employment." (1)

And a Scots case is in the same sense.

In that case, two workmen who were engaged in horseplay in the workshop jostled against a third workman, and caused him to fall and break his leg. The majority of the Court held this was not an accident arising out of the employment. The Act singles out certain employments as specially hazardous. This was not an accident in any way incidental to the special employment. It might just as easily happen in any kind of work. It could not be said to be one of the hazards attached to the business. (2)

In France it would seem that an opposite result would have been reached.

Where the accident is caused by the machinery or the equipment this is sufficient to make it an industrial accident.

And it is in accordance with observation, that, when workmen are brought together in considerable numbers, there is a risk that some among them will be addicted to horseplay or practical joking, which in a workshop may be attended with danger. (3)

An accident so caused may not satisfy the terms of the English Act, which requires that it shall be one, both "arising out of" *and* "in the course of the employment."

But under our Act, which has borrowed the language of the French law, the accident needs only to be "by reason of, *or* in the course of the work." And such an accident may well be held to happen "by reason of" the work although not "in the course of" it. (4)

Even under the English Act injury caused by rough

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(1) Fitzgerald v. W. G. Clarke & Son (1908), 2 K. B. 796.

(2) Falconer v. Glasgow Engineering Co., 1901, 3 F. 564. See Beven on Employers' Liability, 4th ed., p. 390.

(3) See Paris, 14 nov., 1902, D., 1906. 1. 102.

(4) See Cass., 8 juillet, 1903, D., 1903. 1. 510; Cass., 28 mars, 1905, D., 1908. 1. 218. Cass., 23 avr., 1902, D., 1902. 1. 277; Cf. Cass., 24 nov., 1903, D., 1904. 1. 73 and the note.

conduct which is in some way connected with the work, entitles the injured workman to compensation.

In another Scots case a workman, A., was using a brush to which another workman, B., was entitled. A's hand was injured by the act of B. in roughly snatching the brush from him. This was held to be covered by the Act. (1)

68. Wilful Tort of Fellow-Workman.

An attack made by a fellow-workman will not be regarded as an industrial accident if it has not any relation to the work and does not arise out of any dispute connected therewith.

If a workman who had refused to take part in a strike were to be assaulted by the strikers this would clearly be an industrial accident.

And the same would be the case if a watchman in a factory were killed at his post by a fellow-workman who wanted to commit a theft there. (2)

It is clear that an attack on workmen may be an industrial risk in certain circumstances.

In one case a cashier was paying wages. A dispute arose between him and a workman in regard to wages due to the workman. The workman assaulted and injured the cashier. This was held to be an industrial accident. (3)

An injury received in a quarrel between two workmen originating in reproaches and warnings addressed by one of them to the other in regard to want of care of a machine is an industrial accident. (4)

But when the quarrel between two workmen is unconnected with the employment it is much more difficult to find that an injury caused thereby is an industrial accident.

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(1) McIntyre v. Rodgers & Co., 1904, 6 F. 176.

(2) See Paris, 7 avr., 1905 in note to S. 1908. 1. 347, and note to Cass. 23 avr. 1902, S. 1904. 1. 182.

(3) Dijon, 30 mars, 1903, D., 1904. 2. 166.

(4) Trib. civ. de Vienne, 27 f-vr., 1902, D., 1902. 2. 408.

On the one hand it may be said that the risk of such an injury is not peculiar in any way to the protected employments.

On the other hand it is urged that the enforced contact of a number of workmen in a restricted area is sure to lead to friction between some of them.

The French jurisprudence has been much divided upon the question. (1)

The sound distinction would seem to be that when the injured workman was himself engaged in a quarrel, or was attacked for some cause quite unconnected with the employment, this would not be an industrial accident.

Where, however, he is injured in a quarrel between fellow-workmen, in which he is taking no part, this may well be said to be a kind of risk to which industrial employment especially exposes him. (2)

69. Wrongful Act of Third Party.

As a general rule an injury caused to a workman during his employment by the wrongful act of a stranger will not be an industrial accident.

But it will be so if it is shewn to be in some way connected with the work, or when it appears that there is a special risk of such injuries in the particular employment.

For example, if a man in a workshop is struck by a shot fired at a bird by a person in the street, this is not an industrial accident.

Nor would it be so if the shot were fired at the workman by an enemy, unless the enmity between them was connected with the employment.

But in certain occupations there may be special risks of suffering from tortious acts.

Where it is proved that boys are in the habit of dropping stones from bridges upon passing trains, the risk

(1) See Cass., 23 avr., 1902, S., 1904. 1. 182. and the note.
(2) Sachet, v. 1, n. 425

of being injured by such mischievous conduct is one which may reasonably be regarded as incidental to the employment of an engine-driver, though it might not be incidental to other employments. (1)

70. Workman Helping a Fellow-Workman in the same Employment.

There are many cases in which a workman who lends a hand to help a fellow-workman will be considered as doing something in the course of his work, though it is outside the scope of his ordinary duties. Where he is doing something to promote his employer's interests, and more especially when his action has been called for because an emergency has arisen, he will, as a general rule, be held to be in the course of his work.

It is the duty of all workmen, when danger threatens, to do their best to prevent an accident.

If a horse runs away in a dock or a yard, and a workman who has nothing to do with the management of the horse runs forward to stop it and is injured, the accident would probably be regarded as having been suffered in the course of his work.

And even when no danger is threatened, but one workman calls upon another to help him in some operation which he cannot perform alone, an accident sustained in rendering such assistance might well be looked upon as in the course of his work, if the injured man was doing a kind of act which in the circumstances was reasonable.

It might be otherwise if the operation was a specially dangerous one or required a kind of skill which the helper did not possess. (2)

And when no interest of the employer is to be served, and no necessity has arisen for the intervention, a workman who steps outside the scope of his duties in order to

(1) Challis v. L. & S. W. Ry. Co. (1905) 2 K. B. 154 (C. A.)

(2) See Sachet, v. 1, nos. 365, 372.

do something to oblige a comrade, is not in the course of his work and is acting at his own risk.

In a Scots case, a roadman in the employment of a road authority arranged with an engine man in the service of the same employer, who had charge of a steam-roller, to attend to the boiler fire in the morning, in order to save the engine man from having to come early enough to get up steam before the day's work.

The roadman's employment was in no way concerned with the steam-roller, and the employer had no knowledge of the arrangement between the two men. In stepping down from the roller the roadman was injured.

It was held that the accident was not in the course of his work. (1)

A French decision rests on similar grounds.

A father and son were in the same employment. The son had gone in the place of his father, and without the knowledge of the employer, to grease the wheels of a machine in motion.

This was a dangerous operation, and, in performing it, he met with an accident. It was held this was not in the course of the work. (2)

The principle is that the employer is not liable unless the circumstances are such that it is reasonable to suppose that he would have given his consent to the rendering of the assistance if he had been asked to do so.

71. Workman Helping Someone in the Service of a Different Employer.

An accident to a workman, who is lending a hand to help another workman in the service of a different employer, is not, as a general rule, regarded as happening in the course of his work. (3)

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(1) McAllan v. Perthshire County Council, 1906, 8 F. 783.

(2) Dijon, 25 nov., 1901, D., 1901, 2, 372. See Sachet, v. 1, n. 372.

(3) Bordeaux, 19 mars, 1903, D., 1906, 2, 59.

For example, an accident happens to a man who is working at a sidewalk and helps a carter to get a barrel of wine out of a cart and into a house. (1)

Or to a carter who helps the workmen of another employer to lift a car on to the rails. (2)

Or to a railway pointsman who lends a hand at unloading barrels of wine for a consignee, at whose risk and cost the unloading is, under the contract of carriage, to be performed. (3)

These accidents were held not to be in the course of the work.

But this is largely a question of circumstances.

Where the evidence shews that it was a recognized practice for the workmen of different employers to help each other, an accident sustained in lending such aid may be held to be within the protection.

This was so held where a carter at a railway station was helping the railway servants to stir a waggon from its position. (4)

And where one carter was helping another to push his cart up a steep hill, where it was customary for those using the road to help each other in this way the Act was held to apply. (5)

And in another French case a carter was asked by a person whom he met on the road to take charge of a dog, and in jumping down from his cart to tie the dog up, became entangled in the reins and broke his leg.

The Court held that this was not in the course of the employment, but the Court of Cassation quashed this decision. (6)

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(1) Grenoble, 15 nov., 1901, D., 1902. 2. 406.

(2) Trib. civ. de la Seine, 26 juin, 1901, D., 1902. 2. 408.

(3) Cass., 24 nov., 1903, D., 1904. 1. 78.

(4) Req., 11 juin, 1907, D., 1908. 1. 60.

(5) Req., 7 nov., 1907, D., 1908. 1. 60 cf. also Cass., 4 août, 1903, D., 1903. 1. 511.

(6) Cass., 4 août, 1903, D., 1903. 1. 510.

The distinction between this case and those previously cited, in which an opposite conclusion was reached, appears to be that here the accident was caused by the cart belonging to the employer, whereas in the other cases it was not connected with any of the equipment of the enterprise. (1)

It is on this point to be compared with the cases of workmen playing with machinery and being injured in so doing.

When such a helping hand has been given with the express or tacit consent of his employer, the workman who is injured has a right of action under the Act against his employer, but none against the employer in whose work he was for the moment assisting.

The Workmen's Compensation Act implies, necessarily, the existence of a contract between the employer who is liable and the victim of the accident. (2)

72. Workman doing Something for the Benefit of the Employer as an Individual.

The purpose of the Act is to ensure compensation to workmen injured in certain employments of a specially dangerous nature. The risk guaranteed is the industrial risk. The Act, therefore, does not apply when a workman is doing something for his employer which has no connection with the industry. When the workman is doing something in the line of his ordinary work for his employer during working hours, and at the place of his work, he will be protected by the Act though the service is for the employer as an individual. But when he is doing something outside the place of the work for the employer personally, the Act will not apply. So an industrial workman who is temporarily occupied in doing some domestic work for his employer, or in working on the

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(1) See the note to Cass., 24 nov., 1903, D., 1904. 1. 73.

(2) Cass., 14 mars, 1904, D., 1904. 1. 553. (3e & 4e. espèces); Chambres Réunies, 8 janv., 1908, D., 1908. 1. 185.

employer's farm or garden, is not in the course of his work in the sense of the Act. (1)

Such would be the case if a carter, employed in one of the protected industries, met with an accident while he was driving his employer or his family on some private excursion, or if a workman belonging to the industry were injured in doing work in the employer's private house away from the works, or in conducting a boat in which the employer or the employer's family were going for an excursion.

The German Act has now been amended to meet these cases, and contains the following provision:—"the insurance extends to domestic or other services which persons insured have been incidentally called upon to perform by the employer or his representative." (s. 3.).

Where the service in which the workman is temporarily employed can be regarded as partly for the benefit of the industry, and partly for that of the employer, an accident during its performance would no doubt be covered by the Act.

73. Acts of Self-Devotion to Save Life or Property.

It is among the implied duties of all workmen to do what they can to preserve their fellows from danger and to protect the property of their employer.

It can hardly be doubted that if a manufactory took fire, a workman within it who met with his death in trying to give warning to others or to save their lives, would be held to have been killed by an accident in the course of his work.

It would be otherwise if a workman went into the danger for his own private ends, as where a workman entered a burning building to recover his clothes. (2)

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(1) Caen, 31 oct., 1900, S., 1901. 2. 211. D., 1902. 2. 68. Sachet v. 1. n. 385.

(2) Dijon, 9 mai, 1900, D., 1901. 2. 133.

So in a German case, cited by M. Sachet, a workman who was suffocated in a privy in trying to rescue some fellow-workmen from the same fate was held to be protected by the Act. (1)

The same was held in a Scots case, where a dock-labourer, on being informed that one of his fellow-workmen was lying unconscious in the hold, owing to inhaling noxious gas, offered to attempt a rescue and lost his life. He acted without instructions from his employer who had gone away for rescue appliances. (2)

There may, naturally, be circumstances in which an act of devotion would not be in the course of the work, as in another Scots case when the act was done outside the premises as the men were on their way to go to work. In such a case the act must be looked upon as that of an individual and not as that of a workman. (3)

The same rule applies, when, in an emergency, a workman does something with the object of saving his employer's property.

So a workman who tries to stop a runaway horse belonging to his employer would be in the course of his employment. This has been expressly held in England and in Scotland. (4)

It does not appear, however, that an act done to save the property of a fellow-workman is in the course of the work, at any rate when the danger run is out of proportion to the end to be achieved.

But in a German case of which M. Sachet approves, a boatman who jumped into a river to recover the hat of a fellow-workman and was drowned, was held to have died by an accident in the course of the work. (5)

(1) Sachet v. 1. n. 373.

(2) London & Edingurgh Shipping Co. v. Brown, 1905, 7 F. 488.

(3) Mullen v. D. Y. Stewart & Co. (1908), S. C. 991, 16 S.L.T. 172.

(4) Rees v. Thomas (1899), 1 Q. B. 1015; Devine v. Cal. Ry. Co., 1899, 1 F. 1105.

(5) Sachet, v. 1, n. 374.

In my opinion this goes decidedly too far.

No doubt there are cases where an impulsive act, not unnatural in the circumstances, will be regarded as not truly voluntary, and when the object of such an act is to do something for the benefit of the employer, an accident in doing it will be in the course of the work.

In an action of damages at common law the facts were these:—a mechanic who had charge of a machine saw a rope falling into it which might have caused serious damage. He leaned forward to grasp the rope, lost his balance and was killed. A jury found the employer liable, though it is far from easy to find any evidence of fault. And the verdict was allowed to stand. (1)

If the case had been one under the new statute there would have been no difficulty in holding that the accident was in the course of the work.

74. Proof that Accident Happened by Reason of or in the Course of the Work.

In accordance with the general rules of evidence the relation of the accident to the work may be proved without the direct evidence of any person who saw the accident. There may be such weighty, precise, and consistent presumptions arising from the facts proved, that the court is entitled to draw the inference that the injured man was in the course of his work at the time of the accident. (2)

But there must be facts proved which justify the inference. It must not be a mere guess or the choice of one among several hypotheses equally possible. (3)

There is no difference in regard to this matter between the rules of the French and of the English law. The cases turn upon delicate considerations of facts.

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(1) Royal Paper Mills v. Cameron, 1907, 39 S. C. R. 365; 31 S. C. 273 (C. R.)

(2) See Montreal Rolling Mills v. Corcoran, 1896, 26 S. C. R. 595; Sachet, v. 1, n. 443.

(3) See Beal v. Mich. Cent. R. W. Co., 1909, 19 O. L. R. 502; Wakelin v. L. & S. W. R. 1886, 12 App. Ca. 41.

In a French case a workman who had come to his work at the proper time, had put on his working clothes, and had gone down with his lamp into a sewer in which he had to work, was afterwards found dead in the sewer. It was proved that a bridge serving as a crossing from one bank to another of the sewer was broken, and the Court felt entitled to hold that it was a reasonable inference that the breaking of the bridge had been the cause of his death. (1)

On the other hand in several cases where a sailor has been found drowned near to his ship, and there is no evidence as to how he got into the water, or what he was doing at the time, the courts both in France and England have held that the onus of proof had not been satisfied and that the sailor's representatives were not entitled to compensation. (2)

M. Sachet doubts whether the courts have not been too rigorous in this matter, but it seems to me that the decisions are entirely in accordance with the rules of evidence.

In the French case referred to above, the newly broken bridge was a fact from which the inference that its fall precipitated the workman into the sewer was a most reasonable conclusion. In such cases where the balance of probabilities is very even it takes little to turn the scale.

In holding in an English case, that in the circumstances, it could not be inferred that the accident happened in the course of the work, Farwell, L. J., said:—"There seems to be no presumption in favour of one view rather than of another, and that is precisely the position that was dealt with by the House of Lords in Wakelin v. L. & S. W. Ry. Co., 12 App. Ca. 41. (3)

(1) Cass., 6 juillet, 1903, S., 1905. 1. 268.

(2) Cass., 4 mai, 1905, D. 1906. 1. 173. Marshall v. Owners of S. S. Wild Rose (1909), 2 K. B. 46; Bender v. Owners of S. S. Zent (1909), 2 K. B. 41.

(3) Bender v. Owners of S. S. Zent, and cases in previous note; McDonald v. Owners of S. S. Banana (1908), 2 K. B. 926, 930. (C. A.)

The French law is the same. (1)

M. Sachet urges that if the body of a workman is found in the place of his employment, the situation of the body may afford sufficient presumption that he was killed by an *accident du travail*.

This is supported by a number of German cases.

In one a driver was found dead, with his skull fractured, at the foot of the ladder leading from a stable to a barn, and in another case, the body of a lighthouse keeper, who had gone up at night, for an unknown reason, to the upper gallery, was found at the foot of the lighthouse.

In a third case a workman was found dead in a part of the works which was exposed to a high temperature and the escape of poisonous gases. (2) In all these cases it was held there was enough evidence to justify the finding that the accident was in the course of the work.

It is a question whether the presumptions are sufficiently weighty, precise and consistent.

The question whether the accident was in course of the work is one of fact, unless the trial judge has come to a conclusion upon it upon some ground of law, as, *e.g.*, upon the construction of a statute, or because he thought the case was governed by a previous decision. Where he has treated it as a question of fact, and found it as a fact, his finding will not be disturbed by a court of appeal, if there was evidence upon which a reasonable man could reach that conclusion.

In a recent case in the House of Lords the Lord Chancellor said:—"The only question in this case is whether or not there was evidence upon which a reasonable man could find that the accident which caused the death of the

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(1) Cass., 27 avr., 1903, D., 1904. 1. 116; Sachet, v. 1, n. 436.

(2) Ib. n. 443.

deceased arose out of and in the course of the employment." (1)

75. Accident Brought about Intentionally.

Article 5 enacts "No compensation shall be granted if the accident was brought about intentionally by the person injured."

This provision is taken from Article 19 of the French Act without material change, and the same expression *intentionellement provoqué* is used in the French version of our Act as in the section of the French Act on which it is based.

The purpose of the Act is to ensure compensation to a workman injured by an industrial accident. This term covers accidents due to fatality or to the fault of the fellow-workman, provided that in each case the accident happened by reason of, or in the course of the work in the sense in which that term has been explained above. And it covers also an accident due to the inexcusable fault of the victim himself, though in that case the compensation may be reduced. But there is a wide difference between intention and fault, and a workman, who is injured by an accident which he has brought about intentionally, does not suffer because he was exposed to an industrial risk, but from his own wrongful and intentional act. (2)

Taken in connection with the provision as to inexcusable fault, which will be explained presently, it is clear that this paragraph refers only to the case where there has been a spontaneous and deliberate determination on the part of the workman to bring about the accident.

It is not enough that he intended to do the act which caused the accident, but he must also have intended that this result should follow.

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(1) Low or Jackson v. General Steam Fishing Co., Ltd., 1909, A. C. 523. See esp. at p. 546, per Lord Shaw of Dunfermline and cf. Gane v. Norton Hill Coll. Co. 1909, 2 K. B. 543, 546.

(2) See Cabouat, v. 1, n. 180; Rev. Trim. 1902, p. 446; Sachet v. 2, n. 1381.

An act done hastily, in a moment of emergency, however ill-judged it may have been, will not be a bar to the recovery of compensation, and an act, even grossly careless, cannot amount to more than inexcusable fault, and falls short of what is meant by this paragraph.

The paragraph applies to such cases as those where a workman commits suicide or mutilates himself, in order to create a claim to compensation under the Act, or where a workman causes an accident, to revenge himself on his employer or on a fellow-workman, and, in so doing, injures himself.

Where the paragraph applies, it is a bar to the claim at the instance of the representatives of the victim as well as at his own instance. So in a French case, where a railway guard had committed suicide by throwing himself in front of a train, it was held that his widow had no claim. (1)

But as we have seen above when the suicide of a workman is the direct consequence of cerebral disturbance due to an industrial accident, it will not be held to be intentional, and this paragraph will not apply. (2)

The onus of proof that the workman intentionally brought about the accident rests upon the employer.

The general rule that a man who does an act is presumed to have intended to bring about the natural and probable consequences of the act applies only to a limited extent in the construction of this paragraph. (3) For otherwise every case of inexcusable fault would be regarded as one in which the accident was brought about intentionally. A man who throws himself before a moving train will be presumed to have intended to cause his own death, but a man who attempts to clean a machine,

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(1) Trib. de la Seine, 17 mars, 1900, D., 1901. 2. 12.

(2) Cass., 25 oct., 1905, S., 1908. 1. 347; Req., 18 janv., 1870, D., 72. 1. 54, 55; Sachet, v. 2, n. 1385, supra, p. 61.

(3) See, as to the rule, R. v. Harvey, 1823, 2 B. & C., 257, 264, 26 R. R. at p. 343, per Bayley, J.; Pollock on Torts, 7th ed., p. 33.

while it is in motion, may be in some circumstances doing an act of inexcusable negligence, but he will not be presumed to have intended to injure himself, though this consequence may be a natural and probable one.

The paragraph refers only to claims by the person injured or his representatives.

A workman who is injured by the intentional act of a fellow-workman or of a third party will have a claim for compensation against his employer, if the accident happened by reason of or in the course of his work. (1)

76. Inexcusable Fault, (a) of Workman, (b) of Employer.

Article 5 enacts "The court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if it is due to the inexcusable fault of the employer."

This article differs in two points from article 20 of the French *loi* upon which it is based.

The French enactment allows the court to increase the compensation, if the accident was due to the inexcusable fault of "those whom the employer has substituted for himself in the direction," as well as when it was due to the inexcusable fault of the employer himself, and the French Act imposes a limitation which will be explained presently upon the amount to which the compensation may be increased.

77. English Law Different.

In regard to this matter the English law differs widely from ours. By section 1, sub-section 2 (c) of the Workmen's Compensation Act, 1906:—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

(1) Supra, p. 81.

It is not a question there of reduction of the compensation on account of the fault of the victim, but of the complete denial of compensation unless the injury results in death or serious and permanent disablement. And when this is the result of the injury, the workman is entitled to full compensation whatever the degree of his fault.

Moreover the term "serious and wilful misconduct" is not the same as "inexcusable fault," and the decisions as to what amounts to the one will be but a very uncertain guide as to the meaning of the other. The construction placed by the courts upon the particular words of one statute are of little assistance in interpreting a different expression in another statute.

At the same time it may be worth observing that "inexcusable fault" has been uniformly interpreted in France, as will be shewn presently, to imply wilfulness, and in most of the English cases where serious and wilful misconduct has been proved it is probable that a French court would have held that the fault was inexcusable. (1)

78. Onus of Proof of Inexcusable Fault.

It is clear that according to the general law of evidence the onus of proving the inexcusable fault lies upon the party whose interest it is to make that proof. It is for the employer to prove the inexcusable fault of the workman, if he wants to get the compensation reduced, and for the workman to prove the inexcusable fault of the employer, if he seeks to have it increased. (2)

Upon this point the English law is the same.

In a Scots case where a surfaceman had been killed by a train, the employer maintained that the man had gone

(1) The leading English case on "serious and wilful misconduct" is now Johnson v. Marshall Sons & Co. (1906), A. C. 409. See also Bist v. London & South Western Ry Co. (1907), A. C. 209.

(2) Rouen, 28 févr., 1900, D., 1900. 2. 107.

to sleep upon the track and that this was serious and wilful misconduct. The evidence made this explanation of the accident very plausible, but it was held that it had not been proved and that the employer had not discharged the onus which lay upon him. (1)

79. Inexcusable Fault of Workman.

According to the tradition of the old French law there were three degrees of fault which were characterized as "gross fault"—*faute lourde*, "slight fault"—*faute légère*, and "very slight" fault—*faute très légère*, respectively.

Whether a person was responsible only for gross fault, or was responsible for fault of the second degree, *i.e.*, for ordinary negligence, or lastly, was responsible even for the slightest degree of fault, was a question the answer to which depended upon the nature of the contract between the parties.

This somewhat artificial theory was supposed to be based upon the Roman law, but modern writers have shewn that the texts of the Roman law do not support it. (2)

It is not necessary to discuss this question here, and I mention it merely because there has been much discussion as to whether the term "inexcusable fault" employed in our Act is intended to be synonymous with the "gross fault" —*faute lourde*—of the old French law.

The paragraph of article 5 now under discussion enacts:—"The court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if it is due to the inexcusable fault of the employer."

It is argued that the term "inexcusable fault" which our Act has copied from the French model (art. 20) is not intended to add a fourth kind of fault to the three which are already known to the law.

(1) Laidlaw v. Glasgow & South Western Ry. Co., 1900, 2 F. 708.

(2) See Windscheid, Lehrbuch des Pandectenrechts, 8th ed., v. 1, s. 101; Girard, Manuel El. de Droit Romain, 4th ed., p. 650; Larombière, Obligations, art. 1137, n. 1.

Gross fault was explained in the Roman and in the old French law as the degree of fault which is shewn by a man who does not understand what everybody understands, and does not exercise the degree of care of even the least attentive of men, as *e.g.*, if one does not take account and provide against ordinary natural events of common occurrence. (1)

In the modern French law the most important case in which weight has been laid upon the definition of "gross fault"—*faute lourde*—is in regard to claims under policies of insurance. It has been held that ordinary negligence on the part of the assured does not prevent his recovery under the policy, but that his gross negligence is a bar to the claim. (2) Our Civil Code makes the same distinction when it provides, "The insurer is liable for losses caused by the insured otherwise than by fraud or gross negligence." (art. 2578).

It is maintained that the same principle must apply to this Act, which is a sort of legal insurance against industrial accidents.

The theory that "inexcusable fault" must be taken to be equivalent to the "gross fault" of the old law is supported by one or two French decisions and by writers of great merit.

But it is now pretty well settled by the French cases that inexcusable fault means more than gross negligence. (3)

The question is not one of much practical interest, because the court will have to decide in each particular case whether the fault was or was not excusable.

80. Weight Attached to Finding as to Inexcusable Fault.

If the trial judge finds the fault was inexcusable,

(1) Dig. 50. 16. 213. 2; Guyot, Rép. vo. Faute.

(2) Cass., 15 mars, 1876, S. 76. 1. 337. D. 76. 1. 449; Cass., 18 avr., 1882, D. 83. 1. 260.

(3) Cass., 21 janv., 1903, S., 1906. 1. 329. where see list of cases in note.

a court of appeal will, on general principles, be slow to interfere with such a finding. (1)

But, at the same time it must be remembered that the definition of inexcusable fault is a question of law, and if the trial judge has formulated a definition, and has based his judgment upon the ground that the facts proved do not amount to inexcusable fault in the sense of the definition, a court of appeal will be free to reverse his decision if they do not agree with his definition. It is sufficient for them to hold that he has applied a wrong test, or, as it has been expressed in English cases, that he has misdirected himself in point of law. (2) Nor will a court of appeal attach quite the same weight to the finding of the trial judge if his judgment is based, not on facts which he finds to have been proved by the witnesses, but on inferences which he has drawn from these facts. (3) A court of appeal will always give great weight to the conclusion of a judge who saw the witnesses, and had the best opportunity of forming an opinion from their demeanour as to their credibility and intelligence.

But, notwithstanding the presumption in favour of the finding of the trial judge as to the facts proved, it is not an absolute presumption. When there has been a conflict of testimony a court of appeal is not relieved of its duty of independent appreciation of the evidence, and if clearly satisfied that the trial judge has reached an erroneous conclusion the judgment must be reversed. (4)

(1) Cass., 21 janv., 1903, D. 1903. 1. 105. S., 1906. 1. 329. See Village of Granby v. Grénard, 1900, 31 S. C. R. 14; Cie. de Chemin de Fer Pacifique v. Riccio, 1908, 18 K. B. 337; George v. Glasgow Coal Co. (1909), A. C. 123 (H. L.)

(2) Roper v. Greenwood, 83 L. T. R. 471; Ferguson v. Green, (1901) 1 Q. B. 25; Ystradowen Coll. Co. v. Griffiths (1909), 2 K. B., 533; 1 Q. B. 23, 29. Low or Jackson v. General Steam Fishing Co., Ltd. (1909), A. C. 523, esp. at p. 546, per Lord Shaw of Dunfermline; Beven, p. 404.

(3) See an Ontario case, Beal v. Mich. Cent. R. W. Co., 1909, 19, O. L. R. 502.

(4) Commrs. du Havre de Montréal v. Montreal Grain Elevating Co. 1907, 17 K. B. 385; Canadian Asbestos Co. v. Girard, 1905, 36 S. C. R. 13.

81. Term Gross Fault or Faute Lourde Purposely Avoided.

It seems to me plain that the legislature purposely employed the new term "inexcusable fault," in preference to using the familiar expression "gross negligence"—*faute lourde*—in order that the court should not be embarrassed by definitions of *faute lourde*, or by previous decisions as to its meaning.

82. Definitions of Inexcusable Fault.

The Court of Cassation has avoided giving a definition, but there have been a good many attempts by various authorities judicial and otherwise. A number of them are collected by a writer in a French legal periodical, some of them taken from reports not generally accessible here. (1)

"Inexcusable fault" according to the Court of Grenoble means gross fault aggravated by the element of intention, not indeed to cause the accident,—which would constitute criminal fault—but to do the act which has caused the accident. (Grenoble, 25 mai, 1901).

"It is," said the Court of Montpellier, "an act which violently shocks common sense and displays in its author the most absolute contempt of the rules of prudence." (Montpellier, 31 juillet, 1900)

"It supposes a culpable recklessness, a deplorable indifference to the most elementary duties, a manifest contempt for human life, a sort of industrial offence deliberately planned." (Trib. civ. Nantes, and other cases in same sense cited by M. Dorville).

A more recent definition by the Court of Pau is as follows :—"It is a fault which, though free from criminal intention, reveals in its author the will to omit or to act in the knowledge of certain danger, and which no consideration can explain or justify." (2)

And the Chambre des Requêtes approved of a declara-

(1) M. A. Dorville, in Revue Trimestrielle, 1902, p. 448.

(2) Pau., 27 mars, 1903, D., 1904. 2. 358.

tion by the Court of Lyons that where there was *faute lourde, sciemment commise sans nécessité ni utilité* all the elements of inexcusable fault were present. (1)

It may be worth while to add one or two definitions by the authors. M. Louis Sarrut says:—"Without proposing any rigorous definition, one may say that an inexcusable fault implies an act or an omission of exceptional gravity, done with full knowledge of the danger, in contempt of imperative instructions or formal prohibitions, but subject to this restriction, in respect to the fault of the workman, that he must not have had the intention to provoke the accident, in which case he would have lost all right to compensation." (2)

M. Cabouat says inexcusable fault must (1) be committed in the course of the work, and (2) must imply a fault, whether by way of act, or omission, of which the danger must be plain to the workman or the employer respectively by the very fact of his professional experience. And the same writer accepts an explanation of *faute lourde* as equally applicable to "inexcusable fault," viz., that it "supposes the perfect knowledge of the danger, and at the same time the neglect of precautions which would easily prevent it; and that it consists in not seeing and anticipating what any body would have seen and anticipated. (3)

M. Sachet, in what is perhaps the most complete analysis of what amounts to "inexcusable fault" on the part of a workman, says that a fault may be active or passive, that is to say, may consist in doing an act which is forbidden or in omitting to do an act which is enjoined. An act which causes an accident is an inexcusable fault when, being dangerous and known to be so, it has been voluntarily performed by the person injured, without any order or express authorization, and without any necessity

(1) Req., 2 août, 1904, D., 1906, 1, 108.
(2) In note to Cass., 21 janv., 1903, D. 1903, 1, 105.
(3) Cabouat, v. 1, n. 202, 203.

or utility. Inexcusable fault by way of omission consists in the voluntary failure on the part of the victim to perform some act falling within the scope of his duties, at a time when this omission was dangerous and known to be so, and when the omission was neither necessary nor useful, and had not been either ordered or expressly authorized.

"Inexcusable fault" whether active or passive, implies, according to M. Sachet, three essential elements, (1) the will to act or to not to act; (2) the knowledge of the danger which may result from the action or inaction; and (3) the absence of excuse or justification, that is to say, neither order nor authorization, nor necessity nor utility. (1)

From these various definitions and explanations it will be clear that the term "inexcusable fault" must be understood as involving what may be called a sin against light. There must be a knowledge of the danger and a deliberate taking of the risk of causing the accident. It follows that there are many kinds of negligence which cannot be regarded as inexcusable.

83. Act of Slight Negligence.

An act of simple negligence not of a gross character is not inexcusable fault, more especially if it is in doing something in the employer's interest. (2)

84. Obedience to Orders.

A workman, who has met with an accident in doing something which he was ordered to do in the course of his work by the employer, or by some person to whom the employer had delegated his authority over the workman, cannot be found guilty of inexcusable fault for obeying the orders. (3)

(1) Sachet, v. 2, nos. 1406, 1407.

(2) Rouen, 15 août, 1903, D., 1904, 2, 293; Trib. civ. Roanne, 10 juillet, 1906, D. 1906, 5, 53.

(3) Trib. civ. de Lorient, D., 1901, 2, 89. See Woodley v. Metropolitan District Ry. Co., 2 Ex. D. 388; Thomas v. Quartermaine, 18, Q. B. D., 696; Smith v. Baker (1891) A. C. 325; Wild v. Waygood (1892) 1, Q. B. 783.

A workman who is ordered to perform an operation obviously dangerous was not considered, before the Act, to have agreed to do it at his own risk, unless this intention on his part had been clearly manifested. If the position appeared to be that he had undertaken the risk, not because he wished to do so but from the fear of losing his employment if he refused, he was not barred from recovering damages. (1)

And even when volunteers were called upon to undertake a particularly dangerous piece of work, it did not necessarily follow that a volunteer was held to have renounced all claims against the employer, if he met with an accident. It was very much a question of circumstances, if precautions were omitted which might reasonably have been taken, if it appeared that the risk was taken rather from the fear of displeasing the employer than from deliberate choice, or if the volunteer, from youth or want of experience, was not in a position to make a just estimate of the danger, damages might be recovered.

In some such cases it might appear that there was negligence on the part of the workman as well as on that of the employer, in which cases, by our practice, the damages were reduced. In one case a bridge was in imminent danger of being carried away by a flood. A foreman ordered some men to go on to one of the piers and load it with stones. While they were so doing the bridge was carried away, and one of the workmen was drowned. The employer was held liable but the damages were reduced. (2)

But although obedience to orders, might in special circumstances be regarded as fault on the part of the workman, it is hardly conceivable that it should be treated as inexcusable fault.

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(1) Thomas v. Quartermaine, ut sup.; Smith v. Baker ut sup. See Beven on Negligence, 3rd ed., p. 632.

(2) Price v. Roy, 1899, 29, S. C. R., 491, 8 Q. B., 170.

85. Act in Moment of Forgetfulness.

An act or omission in a moment of distraction or forgetfulness may be negligence but cannot be inexcusable fault, for even careful people are not always on the alert, and such an act lacks the element of wilfulness which is one of the essentials of inexcusable fault.

86. Act in Sudden Emergency.

Upon still clearer grounds, an act done in a moment of panic or on a sudden emergency will not be regarded as inexcusable fault, for although it is desirable to keep one's head in such circumstances it is not always possible. (1)

Nor can the fault of a workman be considered as inexcusable if he has acted on a sudden and natural impulse to do something in his employer's interest. There is not in such an act the deliberate act of will essential to inexcusable fault, and a rash act done from excess of zeal in the employer's service carries its excuse with it. (2)

In an English case a boy working with a screw-cutting machine saw an uncut screw which had fallen from its place and, in instinctively trying to pick it up, he was injured by a circular saw. It was held that this was not "serious and wilful misconduct." The element of wilfulness did not enter at all into what he did. (3)

And in a case here before the Workmen's Compensation Act it was held that a workman had not been negligent when, being in charge of machinery, into which a rope

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(1) Grenoble, 27 mai, 1904, D., 1905, 2, 84; Macdonald v. Thibaudeau, 1893, 8 Q. B. 440, C. A. Town of Prescott v. Connell, 1893, 24 S. C. R., 147, 20 Ont. A. R. 49; Wallingford v. Ottawa Electric R. W. Co., 1907, 14, Ont. L. R., 454; Laidlaw v. Sage, 1899, 158, N. Y. 73.

(2) Douai, 25 juin, 1900, cited by M. Dorville, Rev. Trim., 1902, p. 449.

(3) Reeks v. Kynoch, Ltd., 1901, 18 T. L. R. 34; Beven, p. 408, Cf. Whitehead v. Reader, 1901, 2 K. B., 48.

was falling, he had on the impulse of the moment leaned forward to grasp the rope and been killed. (1)

87. Act of Self-Devotion.

If such an act is not fault at all, *a fortiori* it is not inexcusable fault. No doubt, also an act of self-devotion, such as trying to save a fellow-workman from serious danger could never be inexcusable fault, but there might be circumstances in which such an act would not be in course of the work, as *e.g.*, when it was outside the premises as the men were on the way to their work. (2)

88. Breach of Statute or Regulations.

It by no means follows that an act or omission which by a statute exposes the offender to a penalty, or even to a criminal prosecution, amounts to inexcusable fault. For the legislature in many cases regards certain acts or omissions as penal, whether the offender has committed the offence intentionally or not. (3) For example, under our criminal code it is an offence for a person by any unlawful act, or by doing negligently or omitting to do any act which it is a duty to do, to cause grievous bodily injury to any other person (R. S. C., c. 146, s. 284).

The element of wilfulness essential to "inexcusable fault" is not here required.

89. Disobedience to Orders.

It is still clearer that the breach of a regulation of the works, or disobedience to the orders of the employer or his representative is not necessarily an inexcusable fault. It will be an important element for consideration but the act of disobedience may be excused. A good deal will depend on whether the rule was one which was rigorously

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(1) Royal Paper Mills Co. v. Cameron, 1907, 39, S. C. R., 365, 31 S. C. 273 (C. R.) See cases in 29 Cyc. 521.

(2) See a Scots case, Mullen v. D. Y. Stewart & Co. (1908), S. C., 991, 16 S. L. T., 172; supra, p. 78.

(3) See Sachet v. 2, n. 1417.

enforced. If breaches of it were frequent, and had been tolerated by the employer, this will go far to shew that the act in question was not inexcusable. And the breach of regulations or disobedience to orders may be excused on the ground of being merely "a thoughtless act on the spur of the moment," to use the expression of Lord Loreburn, L.C., or an act done out of zeal in the employer's service. (1) Whether a breach of a rule is *prima facie* evidence of serious and wilful misconduct has been said to be a question purely of fact. And the same would be true as to inexcusable fault. (2)

When a workman meets with an accident in committing a breach of regulations, his fault may be excusable if he was doing the act in the interest of his employer, and to save time, though it might be inexcusable if it were done merely for his own convenience. (3)

Thus where a maximum rate of speed is prescribed, an engineer who exceeds the lawful rate, though he might incur criminal responsibility, might nevertheless be held excusable in a question under this Act, if he could justify his breach of the law, by shewing that what he did was in the interest of his employer. But his fault would be inexcusable within the meaning of the Act, if he broke the law merely to gratify his personal desire to get home as soon as possible. (4)

90. Drunkenness.

If a workman meets with an accident while he is intoxicated, the question will naturally arise whether the intoxication is inexcusable fault.

The view taken by some French writers is that when

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(1) Amiens, 20 mars, 1900, S., 1902. 2. 45. and see note to S., 1906. 1. 329; see Johnson v. Marshall Sons & Co. (1906), A. C. 409; Rouen, 13 août, 1903, D., 1904. 2. 293; Trib. civ. Roanne, 10 juillet, 1906, D., 1906. 5. 53.

(2) George v. Glasgow Coal Co. (1909), A. C. 123 (H. L.).

(3) Sachet, v. 2, n. 1418.

(4) Cass., 21 janv., 1903, S., 1906. 1. 329.

the drunkenness of a workman is the direct cause of the accident he has no claim at all under the Act, because the accident does not happen by reason of or in the course of his work. The drunkenness is in this view regarded as a cause foreign to and unconnected with the employment. (1)

But the prevailing view in France is that it was not the intention of the Act to exclude the workman in such a case from all right to compensation, but that the drunkenness might be inexcusable fault. (2)

As a matter of law it cannot be laid down as an absolute rule that drunkenness is inexcusable fault. The *nuances* of drunkenness are infinite and the circumstances under which a workman may become intoxicated are extremely various. It is easy enough to imagine cases in which the intoxication of the workman would not be inexcusable. If an employer gave a dinner to his workmen in the course of which one of them became somewhat intoxicated, and this workman afterwards met with an accident in the course of his work, the employer would hardly succeed in establishing that the drunkenness was inexcusable fault. If a workman, by way of a joke, poured gin instead of water into the glass of a fellow-workman and caused him to become intoxicated, this intoxication might well be regarded as excusable. Moreover in many cases there may have been negligence on the part of the employer or his representative in allowing a workman to go on with his work while he was intoxicated. In such a case it would be difficult for the employer to maintain that the compensation ought to be reduced by reason of the drunkenness of the workman. (3) The question appears to be one of fact depending upon the degree of the intoxication, the danger of the work in which the workman was engaged, the knowledge of the employer of the

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(1) See Cabouat, v. 1, n. 208.
(2) Cabouat, l. c.; Sachet, v. 2, n. 1425.
(3) Sachet, v. 2, n. 1427.

workman's condition, and the other circumstances of the particular case.

In many cases it will rightly be held that where a a workman goes to his work in a state of intoxication, or during its course intoxicates himself, an accident directly caused by drunkenness is due to his inexcusable fault. (1)

On similar grounds it has been held in Scotland, that an injury directly caused by the drunkenness of the workman was attributable to his "serious and wilful misconduct.' In that case a workman in a shipyard had come to his work in a state of intoxication, and had been ordered by the foreman to go home. He was working on a ship in the course of construction, and to go home had to descend the ship's side by a ladder. In so doing he fell and injured himself. (2)

But the employer has the onus of proving the drunkenness and that it was the direct cause of the accident. In a French case where it was proved that a workman was slightly intoxicated at the time when he sustained an accident by a fall, it was held, notwithstanding, that the employer had failed to prove that the drunkenness was the cause of the accident. (3)

91. Examples of Inexcusable Fault of Workman.

The following are illustrations of inexcusable fault taken from the French cases: —

An engine-driver who deliberately runs past a signal to stop. (4)

A workman who without the order of his employer, and without any imperious necessity, executes a work dangerous in itself, when he knows the danger and might have prevented it. (5)

(1) See Paris, 24 nov., 1900, D., 1901. 2. 60; Nancy, 20 déc., 1900, D., 1902. 2. 23. Lille, 18 fév., 1900, D., 1902. 2. 29.

(2) M'Groarty v. John Brown & Co., Ltd., 1906, 8 F. 809.

(3) Nancy, 20 déc., 1900, D., 1902. 2. 23.

(4) Montpellier, 3 mai, 1901, under Civ. 27 oct., 1903, D., 1904. 1. 73.

(5) Trib. civ. de Lorient, 5 juin, 1900, D., 1901. 2. 84.

A workman who crosses a railroad track in the face of an approaching train in spite of being warned of the danger. (1)

A workman who in spite of warning crosses a railroad track at a station where a subway is provided. (2)

A railway servant, who, contrary to a rule, not perhaps very rigorously enforced, gets into a car, standing in a siding in order to eat and sleep there, and, when he feels the car moving, hastily jumps off without looking out for danger and is injured. (3)

A carter who sits on his cart in a position in which he cannot control his horses and thus exposes himself to the risk of being jolted out. (4)

A workman who uses his hands to perform a dangerous operation, for which an instrument is provided. (5)

92. Examples of Fault not Inexcusable.

A workman who in a carriage accident loses his self-possession and acts injudiciously. (6)

A workman who is injured in trying to close the door of a grain elevator out of which grain is escaping, though closing the door is not part of his regular duty. (7)

A workman who tries to adjust the belt of a machine in motion. (8)

The cases turn entirely on the particular facts, and in the last illustration, for example, everything would depend on the necessity for prompt action, the regulations on the matter, and whether they were enforced, the experience of the workman, the rapidity of the motion of the machine, the amount of the danger involved, and so forth.

(1) Req., 2 août, 1904, D., 1906. 1. 108.
(2) Trib. civ. de la Seine, 24 août, 1900, D., 1901. 2. 276.
(3) Rouen, 28 févr., 1900, D., 1900. 2. 181.
(4) Trib. civ. de Narbonne, 13 fév., 1900, D., 1901. 2. 84.
(5) Trib. civ. Beauvais, 11 janv., 1900, D., 1900. 2. 85-87.
(6) Grenoble, 27 mai, 1904, D., 1905. 2. 83.
(7) Rouen, 13 août, 1903, D., 1904. 2. 293.
(8) Trib. civ. Roanne, 10 juillet, 1906, D., 1906. 5. 53.

93. Inexcusable Fault of Employer.

By article 5 the court may increase the compensation if the accident is due to the inexcusable fault of the employer.

The corresponding article of the French law (art. 20) says of the employer or of those whom he has substituted for himself in the management—*du patron ou de ceux qu'il s'est substitués dans la direction.* In the original draft of the French law the expression had been *le patron ou ses préposés.* This would have made the employer liable to pay increased compensation when the accident had happened by the inexcusable fault of an ordinary fellow-workman of the victim. During the debates it was successfully urged that this was to impose upon the employer an unreasonable burden, and in place of the word *préposés* the rather curious phrase given above was substituted. It is evidently meant to exclude a mere workman, but to cover any person to whom the employer has delegated a duty of charge or oversight. It appears to comprise not only persons in general control of the works, but those who have control merely of the operation during the performance of which the accident happens. Thus the Court of Cassation has held that the engineer and conductor of a train were persons whom the employer had substituted for himself in the sense intended. They had charge of the train and while they were conducting it the employer could not exercise any control. (1)

It is possible, as is suggested by an annotator of that case, that this decision goes too far, but it is not necessary for us to consider the question, because in our Act these words are deliberately omitted. It seems to me clear that our legislature, having the French Act before them, by omitting these words, clearly shewed their intention to limit the liability of the employer for an increased compensation to the case of his personal inexcusable fault.

(1) Cass., 21 janv., 1903, S., 1906, 1, 329.

The explanation already given of what amounts to inexcusable fault on the part of a workman applies in great measure to the case of the employer.

As in the case of the workman so in that of the employer, the fault will not be inexcusable unless there is in it the element of wilfulness. There must be a gross and wilful neglect on the part of the employer to perform his duty of protecting the safety of the workmen.

The ignorance of the employer that there was any special danger incident to the work, or that there were means by which it might be rendered less hazardous, may be enough to prevent his fault from being inexcusable, unless the court is of opinion that, in the circumstances, the employer was bound to know the things of which he pleads ignorance. (1)

When the workman, who is injured, was in control of the situation and might have taken precautions to prevent the accident, he will not succeed in contending that it was due to the inexcusable fault of the employer. (2)

Where the work is not of a particularly hazardous character if done by an experienced man who is aware of its risks, a workman of this class who meets with an accident would hardly succeed in proving that the employer was guilty of inexcusable fault for not having adopted precautions which were not usual in that kind of work. (3)

So it has been held in France that it was not inexcusable fault on the part of the employer to follow the usual practice of allowing waggons to be stopped by a workman thrusting wooden sprigs between the spokes of the wheels, although waggons fitted with brakes might have been stopped with less risk. (4)

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(1) Trib. Civ. Nantes, 27 nov., 1899, D., 1900. 2. 81.

(2) Amiens, 20 mars, 1900, D., 1900. 2. 268; see Davidson v. Stuart, 1903, 34 S.C.R. 215; Fawcett v. Can. Pac. Ry. 1902, 32 S. C. R., 721; Quebec Ry. v. Fortin, 1908, 40 S. C. R., 181.

(3) Amiens, 20 mars, 1900, ut sup.

(4) Nancy, 19 déc., 1905, D., 1906. 5. 21.

As in the case of the workman, so in that of the employer, a breach of a statutory requirement is not necessarily inexcusable fault, even though the employer has been convicted and a penalty imposed. Where the accident was of a serious nature, such as caused perhaps the loss of a number of lives, the imposition of a light penalty would in itself go far to shew that the fault of the employer was not of a gross kind. (1)

The Factories' Act (R. S. Q. 3019) lays down a large number of statutory requirements and makes the neglect of any of them penal. But whether such neglect in any particular case would amount to inexcusable fault depends on whether in the circumstances there was any reasonable excuse for not complying with the law. But an employer who deliberately and unnecessarily exposes his workmen to risks, against which he might protect them is guilty of inexcusable fault. (2)

An employer who, knowing that his machinery is in a dangerous condition, or that a rope on which safety depends is shewing signs of breaking, or that a building threatens to fall down and takes no steps to prevent the danger may very well be regarded as guilty of inexcusable fault. When the danger is great and the employer neglects to take precautions, the fact that such precautions are unusual and expensive would not prevent his fault from being inexcusable. (3)

It may be inexcusable fault on the part of an employer to allow a young or inexperienced workman to perform a dangerous operation. And an employer who recklessly endangers the lives or limbs of his workmen by placing them under the charge of an incompetent foreman, or

(1) Bordeaux, 24 juin, 1902, D., 1902. 2. 481; Grenoble, 27 oct. 1908, Sir. Bulletin des Sommaires, 1909. 2. 1.

(2) See Chambry, 13 août, 1902, S., 1906. 2. 9; Douai, 24 déc., 1900, S., 1901. 2. 221. D. See McCarthy v. Thomas Davidson Mnfg. Co., 18 S. C., 273.

(3) Douai ut sup. See McCarthy v. Thomas Davidson Manfg. Co., 18 S. C. 273.

otherwise fails to discharge his duty of taking reasonable care in the selection of his workmen, with a view to the safety of the whole body, might be shewn to have committed inexcusable fault. Similar questions arise, as those in regard to the personal liability of a ship owner whose liability for the negligence of the master and crew has been excluded by a bill of lading. Notwithstanding the exception, he will be liable if he employs, *e.g.*, as master of the ship, a person known to be of drunken habits, or not possessing reasonable knowledge, and a collision is the result of the drunkenness or ignorance of the captain. (1)

The reckless endangering of the lives of his workmen by want of care in the choice of those who are to direct them, or work with them, may amount to inexcusable fault.

An example of personal fault of the employer held to be inexcusable is afforded by a French case, where an employer lighted the fuse of a dynamite cartridge while it was still in the hands of the workman whose duty it was to set it off. (2)

94. Effect of Inexcusable Fault of Victim.

If the accident is due to the inexcusable fault of the workman the court may reduce the compensation. Inexcusable fault is a ground of reduction, but it does not entitle the court to refuse compensation altogether. (3)

Inexcusable fault of the deceased does not affect the right of the relatives to claim not more than twenty-five dollars for medical and funeral expenses in the case of fatal accident, but it is only when the accident has caused death that this additional claim for such expenses arises.

Under our Act the reduction of the compensation on the ground of the inexcusable fault of the workman applies

(1) See Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co., 1883, 10 Q. B. D., 532.

(2) Riom, 4 avr., 1900, D., 1901. 2. 178.

(3) Cass., 31 juill., 1906, P. F. 1908. 1. 14.

to the compensation for temporary incapacity as well as to that for death or permanent incapacity. This is not so under the French Act, which makes a distinction between the pension or rent payable in the case of death or permanent incapacity, and the indemnity for temporary incapacity, and provides for reduction only of the "pension." (1)

Under our Act it is clear that the term compensation is applied indifferently to the sum payable for death, permanent incapacity, or temporary incapacity, respectively. (arts. 3, 9, 10.)

95. Effect of Inexcusable Fault of Employer.

In this case the court may increase the compensation. The French Act contains a limitation, namely, that the compensation, even if increased, can in no case exceed the annual wages of the workman in the case of absolute and permanent incapacity, or the amount of the reduction of wages in the case of permanent and partial incapacity. No such provision is made by our law, but it is probably implied in these two cases from the use of the term "compensation" or *indemnité*, as it is in the French version. The principle of the Act is to divide the risk between the workman and the employer. Where there is no inexcusable fault, half the loss falls upon the workman and half upon the employer. Where the employer has been guilty of inexcusable fault, a greater share of the loss or even the whole of it, according to circumstances, may be thrown upon him, but it does not appear to be intended that he should ever pay an amount greater than the loss suffered by the workman. For in such a case the amount paid would no longer be merely compensation, but, so far as it exceeded the loss sustained, would be a penalty. These considerations apply also under the French law to the case of compensation for death, because under that law the

(1) Art. 20; Sachet, v. 2, n. 1428.

compensation in the case of death is in the form of an annual payment to the persons entitled. If this annual payment were to exceed the yearly wages of the deceased it would amount in this case also, *quoad* this excess, to a penalty. But in our law, where the compensation takes the form of the payment of a lump sum, the result is different. It is not possible to say that a sum, equal to four times the yearly wages of the deceased and in no case exceeding two thousand dollars, is regarded as being a complete indemnity, and indeed section 3 expressly contemplates its being increased on the ground of the inexcusable fault of the employer. No limit is placed upon this increase, where it is permissible by the Act. Upon general principles, however, the sum awarded cannot even in this case exceed the limits of compensation and be converted into a penalty. The basis of calculation will be the same as that in actions brought under C. C. 1056, for damages occasioned by the death of a relative, except that in this case the court will not be embarrassed by the argument that the right of action is borrowed from Lord Campbell's Act, and is subject to the limitations laid down by the English courts in interpreting that Act.

In actions under C. C. 1056 there has been much controversy as to whether any claim can be made for loss of the services of the deceased, or for the grief caused to the plaintiff by the death—*solatium doloris.*

In a recent case in the Supreme Court, where the action was for damages suffered by the widow and children, Anglin, J., said the jury were justified in taking into account the loss of the husband's services at home, of his care and protection of his wife and family, and of his assistance in husbanding the family resources. (1)

In that case also the question whether there was any claim for *solatium* was spoken of as one which might require reconsideration. The Supreme Court in a previous

(1) Can. Pac. Ry. v. Lachance, 1909, 42 S. C. R., 205, 209.

case had held that under this article of the Code no such claim existed, and the courts of the Province, though with regret, have conceived themselves to be bound by that decision. (1)

The whole difficulty, however, arose merely from the history of article 1056 of the Civil Code, which will in no way enter into the discussion in claims under the present Act. It is submitted that in such claims where the inexcusable fault of the employer is alleged, the plaintiff may claim compensation according to the general principle of the French law. If this is so, the damages might include some compensation for the mental suffering caused by the death, although such damages cannot be estimated in a very precise manner. Most of the French writers take this view and the French jurisprudence, though somewhat hesitating, is generally in the same sense. (2) But there are some courts which still adhere to the opposite view. (3)

It is worth observing that in refusing damages for mental grief and suffering, caused by the death of a relative, the English law is singular. Such damages are allowed by the law of Scotland, (4) by the German Code,

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(1) C. P. R. v. Robinson, 1887, 14 S. C. R., 105, M. L. R., 2 Q. B., 25; Quebec Ry. Light & Power Co. v. Poitras, 1904, 14 K. B., 429.

(2) Dall Rép. v. Resp. n. 27, nos. 156, seq. n. 236; Supp. eod. vo. nos. 278, seq.; Pand. Franç. vo. Resp. n. 708; Laurent, v. 20, n. 525; Sourdat, v. 1, n. 33; Huc. v. 8, n. 420; Rev. Trim. 1906, p. 156, and p. 391; 1905, p. 335, and p. 405; 1907, p. 805; Cf. Voet, 9. 2. 11; Baudry-Lacantinerie et Barde, Obl. 3rd ed. v. 4, nos. 2871, seq. with the bibliography in note 7, on p. 559; contra Caen., 28 févr., 1908, D., 1908. 2. 297. and note criticising; Pand. Franç. vo. Oblig. n. 1684; Larombière, Oblig. arts. 1328-1383, n. 36; Trib. Seine, 9 janv., 1908, S., 1908. 2. 220; Trib. Comm. de St. Etienne, 26 avr., 1901, S., 1904. 2. 116; Grenoble, 18 nov., 1905, D., 1905. 2. 479; Trib. Seine, 1 mai, 1901, D., 1903. 2. 415; Aix. 14 juin, 1870, D., 72. 2. 97; see Can. Pac. Ry. v. Robinson, 1887, 14 S. C. R., 105, M. L. R., 2 Q. B., 25; Phillips v. Montreal General Hospital, 1908, 33 S. C. 483 (Davidson, J.); authorities cited in Jeannotte v. Couillard, 1894, 3 Q. B. 461; Robinson v. C. P. R., 2 Q. B., at p. 37, per Dorion, C. J.

(3) Caen, 28 févr., 1908, D., 1908. 2. 297.

(4) Dow v. Brown, 1844, 6, D. 534; Glegg on Reparation, 2nd ed., p. 79.

(1) and by many other modern codes, such as the Swiss Federal Code of Obligations, (2) and the Japanese Code. (3)

96. Amount of the Compensation.

The Act treats of this subject under two heads, (1) compensation payable to an injured workman, and (2), compensation payable to the relatives of a workman who has been killed by an industrial accident. Article 2, which deals with the first of these heads follows the corresponding article of the French law, article 3, pretty closely, but differs from it upon three points. In the case of absolute and permanent incapacity the French law allows the workman two-thirds of his yearly wages, whereas our Act gives him one-half of them, and in the case of temporary incapacity, the right to compensation under the French law begins on the fifth day instead of on the eighth. In the third place, our Act in the concluding paragraph of this article, contains a limitation to a maximum sum of "the capital of the rents," a provision to which there is nothing corresponding in the French law. As in the French law, so in ours, the compensation in the case of permanent incapacity, whether absolute or partial, takes the form of an annual rent or pension, which continues during the life of the injured workman, though its amount is subject to revision, and in the case of temporary incapacity, to temporary compensation, spoken of in the English version of our Act as "compensation" and in the French version as *indemnité*.

The basis upon which the rents or temporary compensation respectively, is to be calculated, is to be found in the wages previously earned by the workman.

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(1) Article 847.

(2) Code, Féd. Obl. Suisse, arts. 52-53.

(3) Japanese Code arts. 710-711. See Baudry-Lacantinerie et Barde, 3rd ed. v. 4, n. 2872.

97. Absolute and Permanent Incapacity.

In this case by article 2 (*a*) the compensation to the workman is fixed at "a rent equal to fifty per cent. of his yearly wages, reckoning from the day the accident took place, or from that upon which by agreement of the parties or by final judgment it is established that the incapacity has shown itself to be permanent."

The provision fixing the date from which the rent ought to be payable is based upon an amendment of 31 March, 1905, to the French *loi du 9 avril*, 1898, though not in identical terms. (1)

The meaning of absolute and permanent incapacity is that the workman shall have become altogether incapable of earning a livelihood. It is not enough that it is impossible for him to continue to follow his old occupation; he must be deprived of all reasonable prospect of earning wages at any occupation whatever. In the debates in the French Senate on the law of 1898 such expressions as *une non-valeur absolue*,—*une véritable épave humaine*,—were used to denote what was meant by absolute and permanent incapacity. (2)

An earlier draft of the French Bill has defined absolute and permanent incapacity as the complete loss of sight, or reason, or of the use of two limbs, or any other incurable infirmity which renders the workman impotent. And the circular of the Garde des sceaux of 10th June, 1899, gives as a definition "it is an incapacity which renders the workman impotent and prevents him for ever from engaging in any profitable employment. It is, for example, the loss of sight." (3) According to the French and German practice complete blindness, the amputation of both arms, or the complete loss of the use of both hands,

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(1) See art. 16, as modified by the loi du 31 mars, 1905; Sachet v. 1, n. 650; Rev. Trim. 1909, p. 485, art. by M. Cabouat; Cabouat v. 1, n. 324.

(2) Sachet, v. 1, n. 526.

(3) Cabouat, v. 1, n. 324.

or cerebral hæmorrhage, followed by incurable hemiplegia, that is, paralysis of one side of the body, appear always to have been regarded as cases of absolute and permanent incapacity, while in the case of the amputation of two legs from ninety to one hundred per cent. of the maximum indemnity has been given. (1)

The amputation of one leg does not involve necessarily absolute and permanent incapacity. In a recent French case a workman of fifty years of age who was completely illiterate suffered such an amputation which made it impossible for him to continue his old occupation. The courts held that, seeing that the workman, by the help of a suitable apparatus was able to stand and walk without a crutch, and therefore remained capable of using his two arms though not for heavy work or work requiring rapid movement, he was not absolutely and permanently incapable, and the finding that his earning capacity had been diminshed by three-quarters was allowed to stand. (2)

Absolute and permanent incapacity is a question of fact depending greatly upon the age and education of the victim. In such a case as that just given the range of occupations open to the workman is very restricted, and it may very well happen that an old man who is rendered incapable of following his former occupation has no chance at all of finding another. A young and well-educated man who had met with a similar accident which cut him off from his old occupation might still have many chances of finding another employment of a different kind. (3)

Where a man is suffering already from a partial incapacity, he may become absolutely incapacitated by an accident which would not have produced that effect upon a sound man. This, however, makes no difference to his claim. (4)

(1) Sachet, v. 1, n. 539.
(2) Req., 18 janv., 1905, D., 1909. 1. 108.
(3) See infra, p. 126.
(4) Infra, p. 127.

98. Permanent and Partial Incapacity.

In this case, by article 2 (*b*), the compensation is to be "a rent equal to half the sum by which his wages have been reduced in consequence of the accident."

These words in the French version of our Act are taken, with only a slight verbal change, from the French law of 1898 (art. 3). Instead of *la réduction que l'accident aura fait subir au salaire* our article has *que l'accident fait subir*. This makes no difference in the sense.

If a workman who has been earning $15 a week loses an eye by an industrial accident and his earnings are reduced to $10 a week, he is entitled to a permanent indemnity of $2.50 a week, subject to what will be explained presently as to the meaning of the "capital of the rents."

In France this provision has been found to work in a very unsatisfactory manner, and it has led to a large and ever-increasing number of fraudulent claims.

Some of the French courts have shewn a great willingness to admit permanent incapacity of a very slight character as entitling the workman to a rent. A workman complains of a slight stiffness in a joint of a finger, or of some equally slight disability, and is allowed a small permanent rent though his earning capacity is not appreciably impaired. The facility of the courts in admitting such claims has obliged employers, in order to avoid the expense of litigation, to agree to give small indemnities to workmen, who, as a matter of fact, are able to perform the same work and earn the same wages after the accident as before it. (1)

So much dissatisfaction has been felt in France that an amendment to this section was proposed in the French Senate on the 21st December, 1908, to the effect that the indemnity for permanent and partial incapacity should be *une rente égale à la moitié de la réduction, que l'acci-*

(1) See Revue Trimestrielle de Droit Civil, 1909, p. 436.

dent aura fait subir d'une façon permanente à la capacité normale de gain de l'ouvrier. (1)

But in the most recent decisions the French courts under the influence of the *Cour de Cassation* have applied the principle embodied in this suggested amendment. (2) The *Cour de Cassation* has laid down with great precision as a rule for the lower courts that in determining the rent payable two elements only are to be considered, viz., first the wages earned by the workman before the accident and second, the wages which he might expect to earn after the accident. (3)

It is clear on the one hand that the provision of the Act that the rent is to be "equal to half the sum by which his wages have been reduced in consequence of the accident" must not be taken too literally, for otherwise an employer could escape all liability by the simple expedient of keeping the workman in his employment for a year without reducing his wages. (4)

99. Tariff of Compensation Payable for Different Kinds of Injuries.

Medical experts in Europe have prepared elaborate tables estimating at a certain percentage of the wages the compensation payable for different kinds of accidents; the loss of a right thumb, for example, may be estimated to cause reduction of the wages to the extent of from fifteen to forty-five per cent. of the maximum indemnity under the Act, and that of the little finger on the right hand to a reduction of from five to ten per cent. (5) As much as 50

(1) Rev. Trim. l. c.

(2) Besançon, 15 avr., 1908, D., 1909. 2. 353 (group of cases).

(3) Civ. 1 déc., 1908, D., 1909. 1. 229. Req., 12 avr., 1907, D., 1908. 1. 241.

(4) Nancy, 9 mars, 1900, D., 1900. 2. 230. Cass., 26 nov., 1901, D., 1901. 1. 552.

(5) See for such a tariff Sachet, v. 1, n. 539; Kaufmann, Handbuch der Unfallmedizin, under the separate injuries. Mons. Sachet is careful to point out that the tariff which he gives is merely an indication, and not intended to control the absolute discretion of the court.

per cent. reduction has been allowed for the loss of an eye. (1)

Such a priori calculations are rather misleading than otherwise and the tendency of the latest cases in France is to attach less importance to them. So where a court based its judgment awarding compensation for the loss of an eye on the ground that such an injury represented a reduction of twenty-five per cent. of the workman's wages, the Court of Cassation set aside the judgment because it appeared to be based on an a priori calculation and not the circumstances of the particular case. (2)

And in a number of cases in which the evidence of the medical experts has been that the injury had caused a permanent incapacity, but one which could not be expected to lead to a reduction of the wages of more than from two to five per cent. it has been held that no compensation was payable. It has been pointed out that employers do not, as a matter of fact, make reductions of wages on such a small scale as this. Where the doctor's estimate that the earning power of the workman has not been reduced more than five per cent. by the accident it is safe to presume that, as a matter of fact, he will continue to receive his normal rate of wages. This being so, the theoretical estimate of reduction ought to be disregarded by the court. (3)

100. Injuries Must Affect Earning Power.

The expression "by which his wages have been reduced" must be taken to mean "by which his earning power has been reduced." On the other hand we must not go to the other extreme exemplified by some of the earlier decisions of French courts of allowing a rent to a workman whose earning power has not really been diminished by the

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(1) Trib. civ. de Lyon, 26 déc., 1909, D., 1909. 2. 129.

(2) Cass., 1 déc., 1908, D., 1909. 1. 229.

(3) Besançon, 15 avr., 1908, D., 1909. 2. 353; Trib. Civ. de Lyon, 24 oct., 1905, D., 1909. 5. 75.

accident. Thus in the latest French cases it has been held that no compensation was payable to workmen who for such injuries as a wound on the nose, a slight speck (*taie*) on the cornea of one eye (*macula corneæ*), the loss of the lower third of the third finger on the left hand, or a scar on the thigh which was rather sensitive and caused the workman slight inconvenience in moving. (1)

The rule is that for injuries which do not affect the earning power no compensation is payable. So an accident which causes a serious and permanent disfigurement may not affect the earning power of the workman. But this is a question of circumstances. It may very well be that a man, and still more a woman, who suffers from a great disfigurement caused by an accident will find it more difficult to obtain employment. This is more likely to be so when the workman was in a position of some authority. (2)

In the case of a woman such an injury may seriously impair her matrimonial chances, but this is not an element which can be taken into account in claims under the Act though it would be otherwise in an action at common law. (3)

On the same principle an injury to the organs of generation would not be a ground for compensation if it did not affect the earning power. But such an injury if serious and permanent is likely to react upon the general health and spirits of the workman, and may, in that way, diminish his earning power. In French and German cases the partial or total loss of the testicles has been compensated by a rent varying from 5 to 20 per cent. of the wages. (4)

It has always to be borne in mind that an accident may diminish the earning power of one man on account

(1) Besançon, 15 avr., 1908, D., 1909. 2. 353 (group of cases).

(2) Sachet, v. 1, n. 534; Kaufmann, Handbuch der Unfallmedizin, p. 237.

(3) See Morin v. Ottawa Electric Ry. Co., 1909, 18 Ont., L. R., 209.

(4) Sachet, v. 1, n. 539, p. 319; Kaufmann, op. cit., p. 314.

of the special character of his work, which would not affect that of a workman in another occupation. To a skilled worker in a watch factory the loss of part of one finger might mean the impossibility of continuing his occupation, while to a night-watchman in a factory such an injury might make no difference to his wages.

Upon this matter the principle of the English law is the same. Pain, inconvenience, loss of beauty, and injuries which do not affect the earning power are not matters for compensation under the Workmen's Compensation Act 1906. The only circumstance to be considered is whether the accident has produced an incapacity for earning the normal rate of wages. (1)

The question how much the earning power has been reduced is emphatically one of fact. For its solution all the circumstances have to be taken into consideration. A young and intelligent workman who has received a good education, if, by reason of an accident, he is prevented from carrying on his particular work, may have no great difficulty in finding another occupation in which his injury will not seriously affect his capacity. But an old man of little education or adaptability who has never done anything but manual work, may find it impossible after the accident to turn to another kind of occupation. What is a partial incapacity for one man may be an absolute incapacity for another. (2)

In denying any action for injuries which do not cause reduction of wages, the Workmen's Compensation Acts so far from being remediable, have taken away rights of action which previously existed. Under the old law there is no doubt that a workman who had sustained a painful injury, or had to submit to the amputation of part of a finger, had no difficulty in obtaining damages, though his earning power might not have been diminished. (3)

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(1) See Beven, p. 556.

(2) Cabouat, v. 1, n. 533.

(3) See Cabouat, v. 1, n. 331.

In applying the rule now settled in France, that the sole element of consideration is the reduction of the earning power of the workman, no account is to be paid to his previous state of health or bodily condition. A slight accident to a workman with a tendency to tuberculosis, scrofula, or varicose veins, may leave him subject to a permanent incapacity though a healthy workman would have soon recovered from the injury.

Nor is any account to be paid to a mark left upon a workman by a previous injury unless it has affected his earning powers. If a man has lost one finger this may have reduced his earning power very little, or even in some circumstances, not at all. But if, by subsequent accident, he loses two more fingers of the same hand, his earning power may be greatly reduced. A man who has lost the sight of one eye and afterwards loses that of the other by an industrial accident, is as much entitled to claim compensation for absolute and permanent incapacity, if this is the effect of his total blindness, as if at the time of the second accident he had been deprived by the same blow of the sight of both eyes. It makes no difference that the previous infirmity was one for which the employer was in no way responsible. It may have been congenital, or it may have been due to an accident suffered in another employment. With such considerations the Court will have no concern. The only question is by how much have the wages or earning power of the workman been reduced in consequence of the accident. (1)

That this is a sound construction of the Act is hardly open to question, but the practical consequences which result were probably not contemplated by the legislature. Experience both in France and England goes to show that the Workmen's Compensation Acts greatly prejudice

(1) Cass., 11 nov., 1903, D., 1904. 1. 73; Cass., 24 oct., 1904, S., 1907. 1. 357; Montpellier, 3 nov., 1905, S., 1907. 2. 99; Civ., 1 déc., 1908, D., 1909. 1. 229., Req., 12 avr., 1907, D., 1908. 1. 241; note by M. Sachet to S. 1902. 4. 9; Sachet, v. 1, n. 453; Cabouat, v. 1, n. 325. See supra, p. 57.

the chances of employment of workmen whose health is unsound, or those who are subject to any partial incapacity. A man who has lost the use of one eye or one ear finds it more difficult to obtain work than formerly, because the employer knows that in his case he runs a risk of having to pay larger compensation if the workman should lose the use of his single good eye or good ear. The same applies to old men or those who have a tendency to disease. The employer has every inducement to employ as far as possible only young and robust workmen. The Poor Law Report of 1909 in England lays considerable weight upon this as one of the causes of pauperism, and quotes the following as samples of evidence typical of many other statements to the same effect, and revealing, what the Committee fear may be an increasing cause of unemployment as time goes on. "From time to time a considerable number of middle aged men have applied for assistance, who have stated that they have been unable to get work, employers giving the preference to younger men as being less likely to make any claims for compensation under the Act. These men have been mostly able-bodied, and, in my opinion, capable of doing a fair day's work."....."There are workmen who are willing to work, but who are not quite as quick, strong, or capable as others, and the manufacturers are willing to employ them, but they cannot, or will not, pay them the fixed minimum. I have known also of several cases of worthy men, with slight heart trouble or other defect, discharged since the 'Liability' Act came into force." (1)

Unless the Trade Unions allow elderly men, or men suffering from some infirmity, or tendency to disease, to be employed at less than the minimum rate of wages the Workmen's Compensation Acts intended to be remedial will be seriously prejudicial to the interests of such workmen.

(1) Poor Law Report, 1909, iv., 10, 523. See the summary by Mrs. Helen Bosanquet, p. 24.

101. Temporary Incapacity.

In this case by article 2 (*c*) the compensation is to be "equal to one-half the daily wages received at the time of the accident if the inability to work has lasted more than seven days, and beginning on the eighth day." And by article 10 the compensation in this case "is payable at the same time as the wages of the other employees, and at intervals, in no case to exceed sixteen days." In saying that the compensation is payable at the same time as the wages of the other employees it appears to be implied that it is payable also at the same place. This is expressly provided in the French *loi du* 31 *mars*, 1905, but by the general law such a payment would be made at the works of the employer if there were no stipulations to the contrary. (C. C. 1152).

102. The "Capital of the Rents."

The last paragraph of article 2 (*c*) enacts The capital of the rents, shall not, however, in any case except in the case mentioned in article 5, exceed two thousand dollars." In the French version it is *le capital des rentes*. There is no provision corresponding to this in the French or in the English Act, and its meaning is not so clear as it might be. It is plain from its position in this section, that it refers only to the rents payable for permanent incapacity, whether absolute, or partial.

The construction of this paragraph which appears to me to be the sound one is to interpret the expression "capital of the rents" as here used by reference to article 9 where the same expression is employed. That section is as follows:—"As soon as the permanent incapacity to work is ascertained, or, in case of death of the person injured, within one month from the date of the agreement between the employer and the parties interested, or, if there be no agreement, within one month from the date of the final judgment condemning him to pay the same, the employer shall pay the amount of the compensation to the person

injured or his representatives, or, as the case may be, and, at the option of the person injured or of his representatives, shall pay the capital of the rent to an insurance company designated for that purpose by order in council." It must be admitted that this article also is not free from obscurity. The main difficulty is to know whether the expression 'the amount of the compensation" means, in the case of permanent incapacity, a lump sum, or a quarterly periodical payment. It might be thought that the employer was to be entitled, on payment of a lump sum, to discharge his liability.

But the general policy of the Act is very much against any such construction. One of the main purposes of the Act appears to have been to introduce the French system of periodical payments, for which the expression "rents" is used as equivalent to the French word *rentes*, in the place of the old system of a lump sum as compensation for industrial injuries. The advantages of the new system are obvious. The experience of all countries goes to shew that the payment of a lump sum to an injured workman is a thoroughly unsatisfactory mode of compensation. A workman who has never had any considerable sum of money in his hands and has no experience of investments, can hardly be expected to know how to place his capital to advantage. In hundreds of cases sums paid in this way have been wasted in wild bursts of extravagance, or have fallen to unscrupulous adventurers, who make it their business to prey upon workmen who have received compensation money. In many cases, after a year or two, the injured workman became a burden upon his relatives or upon the community. One of the main objects aimed at by the Workmen's Compensation Acts in all countries has been to remedy this state of matters, and to relieve the community from the burden of supporting workmen whose incapacity was due to industrial accidents, and the cost of whose maintenance ought to be a charge upon the industry. The French law, it is true, has carried this principle

further than ours, because in France the compensation to relatives for the death of a workman also takes the form of a rent. In this respect our Act has followed the principle of the English Act in awarding a lump sum. But in regard to compensation for incapacity the intention of our Act is to follow the French model.

The sound construction appears to be that as soon as the permanent incapacity is ascertained the employer is to begin the quarterly payments to the person injured and that these continue as long as the workman lives. The workman's security for these payments, as will be explained later, is by no means absolute, and he has an option by exercising which he can obtain a secure rent though it may be of a smaller amount. He may demand that the rent payable to him shall be capitalized and that the capital which will produce this rent—reduced to two thousand dollars if it exceeds this sum—shall be paid to an insurance company. It is only when this option is exercised that any "capital of the rents" comes into existence. When the employer pays the compensation directly to the workman, as he is bound to do unless the workman exercises his option of asking for a deposit of the capital, there is no such thing as a "capital of the rent."

Another construction has been suggested. This is that the expression "capital of the rents" means "the total compensation payable." In this view the intention of the legislature is to fix two thousand dollars as the maximum limit of the employer's liability in respect of an accident whether it has caused death or permanent incapacity. The only case where this sum can be exceeded is when the accident was due to the inexcusable fault of the employer. Apart from that case when the employer has paid to a workman who has been permanently injured quarterly rents of which the sum total amounts to two thousand dollars, or such lower sum as shall have been fixed by the court, his liability then comes to an end. I do not think however, that this construction is tenable. The term

"capital of the rents" is quite inapt to denote the "total compensation payable" or the "sum total of the rents paid."

Moreover if a rent of, say, five dollars a week is being paid to a workman, no capital sum needs to have been ascertained which will produce this rent, any more than if he receives ten dollars a week as wages, one could say that that represented any particular capital.

This construction leads also to results so inequitable and so contrary to the policy of the Act as a remedial measure in the interests of injured workmen, that it seems impossible to accept it.

A workman whose incapacity is permanent will *ex hypothesi* be in no better position after a few years than he is at the time of the accident, and, if, contrary to expectation, there should be a diminution of the disability, provision is made by article 26 for revising the amount of the compensation. But to allow the periodical payments to stop automatically when their sum total had reached a certain maximum and that, without any consideration of the state of the workman at the time, would be repugnant to the whole policy of the Act. A workman whose incapacity was due to the industrial risk instead of being supported by the industry which created the risk, would in a few years become a charge upon his relatives or on the community.

Take the case of a workman of twenty-five years of age who is in the receipt of fifteen dollars a week as wages, and is rendered totally blind by an industrial accident. If we assume that he gets the full compensation for absolute and permanent incapacity this would amount to seven dollars and fifty cents a week. At this rate, making no allowance for interest, the employer will have paid two thousand dollars at the end of little more than five years, and upon this construction of the Act the blind workman is then to be thrown upon the street. Compensation of this kind would be a mockery.

103. Compensation for Death.

Article 3 is as follows:—"When the accident causes death, the compensation shall consist of a sum equal to four times the average yearly wages of the deceased at the time of the accident, and shall in no case, except in the case mentioned in article 5, be less than one thousand dollars or more than two thousand dollars.

"There shall further be paid a sum of not more than twenty-five dollars for medical and funeral expenses, unless the deceased was a member of an association bound to provide, and which does provide therefor.

"The compensation shall be payable as follows:

a. To the surviving consort not divorced nor separated from bed and board at the time of the death, provided the accident took place after the marriage.

b. To the legitimate children or illegitimate children acknowledged before the accident, to assist them to provide for themselves until they reach the full age of sixteen years.

c. To ascendants of whom the deceased was the only support at the time of the accident.

"If the parties do not agree upon the apportionment of the compensation, it shall be apportioned by the proper court. Nevertheless every sum paid under article 2 of this act in respect of the same accident shall be deducted from the total compensation."

This articel is to a certain extent based upon article 3 of the French law, introducing, however, the important change, that by our law a lump sum is to be paid instead of a rent as in France.

The questions whether ascendants of whom the deceased was not the only support have a claim at common law and the position of a foreign workman, or his representatives have been discussed earlier. (1)

Under this article it is the date of the accident at

(1) *Supra*, p. 41.

which all rights are acquired. An injured workman cannot, after the accident, confer any right to compensation to a wife whom he subsequently marries, nor is a child who is conceived after the accident within the scope of the Act, or an illegitimate child who is born but has not been acknowledged before the accident. (1)

A legitimate child, conceived, but not born, at the date of the accident would be entitled to compensation under the general rule of law which treats such a child as already born in questions affecting its interests, *nasciturus pro jam nato habetur quoties de commodis ejus agitur.*

An illegitimate child acknowledged before the accident is to have the same right as a legitimate child. This is reasonable, because, by our law, such a child has the right to claim maintenance from its father and mother If the act of birth of the child, inscribed in the register of Civil Status, gives the true names of the parents and the parentage has not been disputed, this will be a sufficient acknowledgment. In other cases the acknowledgment of the child must be proved, if disputed, by writing, but oral testimony is sufficient when there is a commencement of proof in writing, or when the presumptions or indications resulting from facts then ascertained are sufficiently strong to permit its admission. (C. C. 232).

An illegitimate child may be acknowledged though it is not yet born and is not born until after the death of the workman. (2) On the same principle in England it has been held that such a posthumous child, acknowledged by the workman before its birth, was a "dependant" within the meaning of the Workmen's Compensation Act, 1906. (3)

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(1) Cass., 1 août, 1906, D., 1909. 1. 108.

(2) See Cass., 13 juillet, 1886, D., 87. 1. 119.

(3) Orrell Colliery Co. v. Schofield (1909), A. C., 433 (H. L.) (1909), 1 K. B., 178.

104. Is the Right to Compensation Transmissible to the Heirs of the Representatives?

In England it has been decided by the House of Lords that if at the date of the death of a workman any person is living who is entitled to compensation under the Workmen's Compensation Act, the right to compensation which is vested in that person is transmissible to his heirs. (1)

For example, if the workman's wife survives him but dies before making any claim under the Act her heirs would be entitled to institute the action for compensation, provided the action is brought within the period of prescription.

It might appear that the principle of this decision was applicable to our law. It is a general rule to which there are very few exceptions, that all pecuniary claims are transmissible to heirs. And it is a settled principle of the French law that this is the case with rights of action for damages based upon wrongs which have occasioned pecuniary loss. (2)

The answer to the question under the present article depends upon the view which the courts will take of the nature of the right vested in the representatives.

For if the rights of the representatives have descended to them from the workman, it is reasonable that the representatives in their turn should transmit the rights to their successors.

But it seems to be clear that the right of a representative under article 3 is a right given to him directly by the Act and not one which belonged to the workman and to which he has succeeded. In this respect it resembles the right given by C. C. 1056 to the representatives of a

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(1) United Collieries Ltd. v. Simpson (1909), A. C., 383.

(2) Baudry-Lacantinerie et Barde, Obligations v. 3, n. 2884; Sourdat, v. 1, n. 56 bis; Aix, 14 juin, 1870, D., 72. 2. 97; Trib. Civ. de la Seine, 9 janv., 1879, S., 1881. 2. 21.

person whose death has been caused by fault to recover from the offender all damages occasioned by his death. (1)

That this is the character of the right of the representatives under article 3 of the present Act can hardly be doubted. It differs in many ways from the reparation to which the workman himself might have been expected to be entitled if the right had been created in his person and had vested in him before his death. The compensation payable to the representatives is a lump sum, whereas that to the workman is a rent. Illegitimate children if acknowledged before the accident have an equal claim with legitimate children, though, if the right were one which had vested in the workman, his legitimate children would have succeeded to it to the exclusion of the children who were illegitimate, or, if the workman had left illegitimate children only they would have had no rights of succession.

In France it seems to be admitted without question that the right of the representatives is a personal one and not one to which they have succeeded. The right of action, it has been said, never formed a part of the patrimony of the deceased workman; it is not a part of his succession which is transmitted to his heirs in the proportions determined by the law; it belongs individually to each of those who have suffered damage by the death and in the proportion of his loss. (2)

Upon these grounds it is sufficiently clear that the right of the representatives is one which the law gives directly to them as individuals. It does not, of course, follow that the right is not transmissible to their heirs. But it appears to me that the compensation is intended to be of the nature of an alimentary provision, and is, therefore, strictly personal to the representatives originally entitled to it. As to children it is to assist them to provide for themselves until they reach the full age of six-

(1) Robinson v. Can. Pac. Ry. (1892), A. C. 481. Miller v. Grand Trunk Ry. (1906), A. C. 187.

(2) See Cabouat, v. 1, n. 393.

teen years. As to ascendants it is only those of whom the deceased was the only support who can claim it.

It would be a strange result that if such a child or such an ascendant died without making a claim, his heirs would succeed to the right, though they might be entire strangers to the deceased workman, whereas if the workman had left a grown-up son or a parent whom he did not support these persons would have had no claim under the Act though possibly they have one at common law. (1) Not much light upon this subject is to be borrowed from the French law, because by it the compensation takes the form of "rents" and if there is a change in the number or quality of the persons entitled to these rents an application may be made for their readjustment. This may happen, for example, when one of the children entitled to a rent dies or attains the age of sixteen years, or when after the fixing of the rents a posthumous child is born, provided that such child was conceived before the accident. (2) Under our Act the compensation is payable in a lump sum, and if it has been paid, in the proportions agreed upon or determined by the Court, it does not seem possible that there should be any reapportionment.

105. Basis of Calculation of Compensation.

This subject is dealt with in articles 6, 7 and 8 Article 6 is as follows: "If the yearly wages of the workman exceed six hundred dollars no more than this sum shall be taken into account. The surplus up to one thousand dollars shall give a right only to one fourth of the compensation aforesaid. This act does not apply in cases where the yearly wages exceed one thousand dollars." This is taken, with some modifications, from art. 2 of the French law. Under our Act, it appears, that when the wages exceed one thousand dollars the Act is altogether excluded, and a claim cannot be made by reducing

(1) *Supra*, p. 41.
(2) Cabouat, v. 2, n. 861 *seq.*

it to the basis of one thousand dollars. The principle is taken from the French law of allowing a modified compensation, based on the wages above a certain amount. The basis of calculation on which an indemnity can be calculated upon this excess may, in France, be varied by the agreement of parties. But this is not so in our law. The following would be an illustration; a workman earns eight hundred dollars a year, and is rendered absolutely and permanently incapable by an accident to which the Act applies. He can claim ½ of $600 = $300 + ¼ (½ of $200) = $25. Total, $325.

106. Apprentices.

Apprentices, being paid nominal wages it would not be fair to them to make such wages the basis on which the compensation was to be reckoned. Accordingly under our Act as by the French Act "apprentices are assimilated to the workmen in the business who are paid the lowest wages." (art. 7).

The French Act says that the wages which shall form the basis for calculating the compensation payable to an apprentice are not to be inferior to those which are the lowest paid to *ouvriers valides de la même catégorie occupés dans l'entreprise*. Our Act omits these conditions, but no doubt in our law also the wages paid to workmen who, on account of some infirmity, receive less than the normal rate of wages would not be taken as the basis. But "workmen" does not necessarily mean men more than twenty-one years of age, it means those who are no longer apprentices. (1) If an apprentice is, as a matter of fact, paid wages which are greater than those of some workmen in the business, it would seem that the actual wages of the apprentice might be taken as the basis. The article is meant to be in favour of the apprentice and not prejudicial to him. (2)

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(1) Sachet, v. 1, n. 882.

(2) Cass., 12 janv., 1904, D., 1909. 1. 444.

107. Wages on which Rent is Based.

Article 8 enacts "The wages upon which the rent is based, shall be, in the case of a workman engaged in the business during the twelve months next before the accident, the actual remuneration allowed him during such time, whether in money or in kind.

"In the case of workmen employed less than twelve months before the accident, such wages shall be the actual remuneration which they have received since they were employed in the business, plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months.

"If the work is not continuous the year's wages shall be calculated both according to the remuneration received while the work went on, and according to the workman's earnings during the rest of the year."

The amount of the wages paid is a question of fact and the court has to take into account anything, either money or money's worth, which the workman receives in virtue of the contract from his employer.

If the price of tools or other articles furnished by the employer to the workman is deducted from his wages it must be added to the money which he receives in estimating his total wages. (1)

108. Gratuities or Tips.

In computing the wages it is fair to take account of gratuities when they are so usual that it may be presumed they were contemplated by the parties to the contract of employment. They do not need to be mentioned in the contract. Where such tips are habitually given, so that the employer and the workman would take account of them at the time of their contract, they can reasonably be held to be part of the remuneration allowed.

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(1) Req., 23 mars, 1908, D., 1908. 1. 392. See Pau, 27 mars, 1903, D., 1904. 2. 358.

This would certainly be so in the case of cab-drivers, waiters in Pullman cars and dining-cars, and others whose tips form a large part of their emoluments. (1)

There are decisions to the contrary, based on the view that such tips are too uncertain to be reckoned upon. (2)

But the better opinion appears to be, that, when such tips are a normal and expected thing, it is fair to take account of them. (3)

In regard to special gratuities by the employer himself similar considerations apply.

If they are quite casual and spontaneous, as when the employer gives the workman a tip for doing some bit of work of exceptional difficulty, they cannot be reckoned.

But if there is anything fixed or periodical about them they are part of the remuneration allowed. (4)

Such would be extra pay for overtime, bonuses for saving fuel or other meritorious conduct if such bonuses are part of the system, periodical presents, etc. (5)

The English Act applies to domestic servants, which ours does not, and in England it is held that where the employment is of such a nature that the habitual giving and receiving of tips is open and notorious, and sanctioned by the employer, the money thus received with his knowledge and approval, must be brought into account, in estimating the "average weekly earnings" in respect of which compensation has to be awarded. (6)

The principle has been applied in England to the case of a waiter on a dining-car, whose employer must be presumed to know what is notorious, that the waiter's remuneration consists largely of tips. (7)

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(1) Paris, 12 janv., 1901, D., 1901. 2. 253.
(2) Limoges, 17 mai, 1901, D., 1902. 2. 297.
(3) Ib., note by M. P. Dupuich; Sachet, v. 1, n. 826.
(4) Cass., 1 juill., 1908, D., 1909. 1. 192; Toulouse, 5 août, 1901, D., 1902. 2. 481; Rouen, 28 févr., 1900, D., 1900. 2. 181; Sachet, v. 2, nos. 820-828.
(5) Grenoble, 6 nov., 1907, D., 1909. 2. 177; Sachet, v. 1, n. 820.
(6) Section 13.
(7) Penn. v. Spiers & Pond (1908), 1 K. B., 766 (C. A.). See Beven, p. 393.

109. Involuntary Interruptions of the Work.

By an amendment made to article 10 of the French law of 1898 by the *loi du* 31 *mars*, 1905, it is provided that if the workman has been unable to work on account of some exceptional cause independent of his will, he is to be allowed the average wages for the period of these interruptions in estimating the year's wages, which are to form a basis for calculating the compensation. This amendment was introduced in France to remove doubts, more especially in regard to interruptions caused by strikes. (1)

But it has always been admitted in France, even before this amendment, that the workman was to be allowed average wages for other interruptions of an exceptional and involuntary character. In our Act the amending clause has not been introduced, probably because it was regarded as unnecessary. There is no doubt that our article must be understood in the sense in which the same terms have been interpreted in France before the amendment of 1905. If during the year preceding the accident the workman has been away two months owing to typhoid fever, or if the works have been closed for that period owing to the burning down of the buildings or some other exceptional reason, it would be altogether inequitable to allow nothing for the wages which he had lost during this period. When the workman has been away from work purely for his own pleasure or convenience, no wages can be allowed him for such interruptions. (2)

The case of interruptions which are periodic in certain industries is specially dealt with in in a subsequent paragraph of this article. (3)

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(1) Cabouat, v. 2, n. 558.

(2) Circ. de M. le Garde des sceaux du 10 juin, 199; Dijon, 3 juillet, 1900, D., 1902. 2. 250; Pau, 27 mars, 1903, D., 1904. 2. 358; Lorient, 29 mai, 1900, D., 1900. 2. 449; Cabouat v. 2, n. 542; Sachet, v. 1. n. 868.

(3) Infra, p. 144.

110. Workman Employed Less than Twelve Months.

When the workman has been employed less than twelve months at the time of the accident his wages are to be estimated as follows:—For the fraction of the year during which he has been in the employment his actual wages are taken, and for the fraction of the year preceding his entry into the work his wages are estimated at the average remuneration received by workmen of the same class. The object of this is to avoid difficult inquiries into the actual wages which he may have earned in the earlier part of the year, perhaps in various employments, and it may be, in places remote from one another. The fictitious wages are such as the workman would have got if he had been twelve months in the works at the time of the accident instead of a shorter period. The "time necessary to complete the twelve months" means reckoning backward and not forward. A workman who has been ten months in the employment and has received an increase of wages at that time and then meets with an accident, cannot claim that his wages ought to be reckoned on the higher scale for the other two months. He is to be allowed two months' wages on the scale paid to workmen of his class during the first two months of the year preceding the accident. (1)

111. Workman Returning to Work after a Strike.

A somewhat difficult question arises in this case. If a workman is taken back after a strike, is there a new contract of employment, or has the former contract between him and the employer merely been suspended by the strike? If there has been a new contract and the workman meets with an accident within a year of his return he will have been "employed less than twelve months" and the calculation of the wages upon which the

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(1) Civ. 13 févr., 1906, D., 1908. 1. 386; see Cabouat, v. 2, n. 575; Sachet, v. 1, n. 856.

rent is based will have to be under the second paragraph of article 8. This is the view which has been adopted in France by the *Cour de Cassation.* (1)

It is criticised by many French writers but it seems to me to give effect to the genuine intention of the parties. If the employer gives notice to the workman that unless certain conditions are agreed to there will be a lock-out commencing on a certain date, and the men refuse to accept the conditions and are locked out, it seems to me very difficult to maintain that the contract of employment has not been terminated. Negotiations take place between the employer and the workmen, and those who come back do so upon the new terms which have been arrived at. If the men go out on strike, the fact that the employer allows this to happen instead of agreeing to their demands seems sufficiently to indicate his intention to resiliate the contract. And it is a general rule in contracts in which there are reciprocal obligations, such as the contracts of lease of work that if one of the parties breaks the contract the other party may claim the dissolution of the contract if he chooses to do so. (C. C. 1065). It seems to me that two cases are possible. If the strikers have given notice to the employer of their intention to strike and have completed the term of their existing contracts, and then go out there is no breach of contract, but the former contracts have come to an end, and if the workmen are taken back again it must be under new contracts. (2)

On the other hand, if the men have gone out without notice the employer shews by not yielding to their claims that he regards the contract as at an end.

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(1) Req. 18 mars, 1902, D. 1902, 1, 323; Civ. 4 mai, 1904, D. 1904, 1, 289; Sachet, v. 1, n. 857.

(2) Denaby & Cadeby Main Collieries, Ltd. v. Yorkshire Miners, Assn. (1906), A. C. 384, explained by Buckley, L. J., in Smithies v. Nat. Assn. of Plasterers (1909), 1 K. B., at p. 335; Cf. Trib. de Toulouse, 19 mars, 1896, under Cass., 29 juin, 1897, S., 98. 1. 17; Rev. Trim., 1908, p. 616 art. by M. Wahl.

French writers of high authority maintain, however, that the true intention of the strikers is merely to suspend the operation of the contract and not to break it, but their arguments do not appear to me to be very convincing. (1)

112. Work not Continuous.

This paragraph which is copied verbatim from article 10 of the French *loi* refers specially to industries in which there is a regular dead season, or in which the work is carried on as a matter of regular custom only for a certain number of days in the week, as, for example, certain collieries in which the miners work only three days a week in summer and four in winter. It applies also to works which are open every day but only for a part of the day. (2)

But when the work itself is continuous, but the workman is employed only for a few hours of each day, only the wages which he actually earns in the industry can be taken as the basis. No account can be taken of what he may earn elsewhere in his leisure time. This paragraph refers solely to industries which have periodical seasons in which no work is done. (3)

113. Time and Place of Payment.

Compensation for temporary incapacity becomes payable on the eighth day after the accident (art. 2), and is payable thereafter so long as the incapacity lasts at the same time as the wages of the other employees, and at intervals in no case to exceed sixteen days (art. 10). As nothing is said with regard to the place of payment the general rule of C. C. 1152 will apply, and the workman will not be able to demand that the compensation shall

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(1) Esmein, note to Cass 29 juin, 1897, S. 98, 1, 17; Planiol, note to Cass 4 mai, 1904, D. 1904, 1, 287; Wahl, note to Cass. 18 mars, 1902, S., 1903. 1. 465, Pic., Rev. Trim. 1905, p. 42; Cabouat, v. 2, n. 566.

(2) Cabouat, v. 2, n. 584; Sachet, v. 1, n. 861.

(3) Cass., 5 avr., 1909, S., 1909. 1. 316; Lyon, 15 juillet, 1909, Sir. Bulletin des Sommaires, 1909. 2. 44.

be sent to him, he will need to fetch it or send for it to the works. This is so in France also with regard to compensation for temporary incapacity. (art. 3).

The rent payable in respect of permanent incapacity begins to be payable as soon as the permanent incapacity to work is ascertained, that is, either by agreement or by a judgment. (art. 9). In the case of appeal from a judgment the court may, upon petition, grant a provisional daily allowance to the person injured. (art. 23). When the rent for permanent incapacity has been fixed it is to be paid quarterly, and no provision is made for payment anywhere but at the domicile of the employer If the capital of the rent had been paid to an insurance company the conditions of payment may be prescribed by the Lieutenant Governor in Council, and one of these conditions might well be that the rent should be paid at the residence of the workman. In France the rents, paid by the employer, are payable at the residence of the workman. (art. 3 of the *loi du 9 avril*, 1898, as amended by the *loi du 31 mars*, 1905).

The compensation in the case of death is payable within one month from the date of the agreement between the employer and the parties interested, or if there be no agreement, within one month from the date of the final judgment condemning him to pay the same. (art. 9). Before judgment, or pending an appeal, the court may, upon petition, grant a provisional daily allowance to the representatives

114. Insurance Companies.

Insurance companies, willing to undertake the payment of the rents under this Act on receipt of the capital from the employer, must be authorized by an order in Council of the Lieutenant Governor. But no company that has not made a deposit with the Government of Canada or of this Province, in conformity with the laws of Canada or of this Province, of an amount deemed suffi-

cient to ensure the performance of its obligations shall be so authorized. (art. 11).

The deposit of provincial insurance companies is made with the Provincial Treasurer (R. S. Q. 5392), and that of Dominion companies with the Minister of Finance (R.S.C., c. 34, s. 12).

115. Compensation to be Inalie nable and Exempt from Seizure.

Article 12 enacts "All compensation to which this Act applies shall be unalienable and exempt from seizure, but the employer may deduct from the amount of the indemnity any sum due to him by the workman." The French law does not contain the last clause as to deduction, but provides *ces rentes sont incessibles et insaisissables.* (art. 3).

So in France it has been held that if the workman owes money to the employer, as for example, if the workman has been found liable in part of the costs, the employer cannot compensate *pro tanto* the sum due to him on this account against the indemnity which he owes to the workman. (1)

Under the provision of our article he will be entitled to do so.

There has been in France considerable difference of opinion with regard to the effect of the provision as to the inalienable and unseizable character of the rents, and it is to be regretted that our Act does not contain a more detailed explanation.

Our Act does not, as the French *loi* does, make any distinction as to this point between the permanent rents and the compensation for temporary incapacity. (2)

As regards the question of inalienability there is no great difficulty. The workman cannot assign or make

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(1) Req. 16 janv., 1905, D., 1906. 1. 69; Sachet, v. 1, n. 673.

(2) See Sachet, v. 1, n. 680.

over to another either gratuitously or onerously his right to compensation which has not yet been paid. This is possibly liable to an exception in the case of alienation to a person to whom the workman owes the duty of maintenance. This would be upon the principle, to be explained immediately, that provisions, although declared unseizable, are subject to seizure for a debt of this kind. (1)

The difficulty is in regard to the provision that the compensation is to be exempt from seizure. In France it is contended that this exemption cannot be meant to be absolute. Funds which are declared to be unseizable are of two kinds (a), salaries and wages, and (b), alimentary allowances granted by a court, and sums of money or pensions given as alimony. It is urged that the intention of the present enactment is to assimilate the compensation payable under this Act to one or other of these two classes of unseizable funds. If this be so, it is necessary first to decide to which class they are to be assimilated, as the rules of law applicable are not quite the same for both. (2) Salaries and wages are not unseizable as to their whole amount, but only as to a certain proportion.

Persons whose wages exceed a thousand dollars are altogether excluded from the benefits of this Act, so that it is unnecessary to consider any case except that of a workman whose wages do not exceed three dollars per day. By our law such wages are exempt from seizure to the extent of four-fifths, and to avoid the necessity of repeated seizures the proportion seizable may be deposited in the manner prescribed by the *loi Lacombe*. (3) Upon one view the compensation payable under this Act, being a kind of reduced wages, should be governed by the rules as to exemption from seizure which apply to wages in general.

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(1) Sachet, v. 1, n. 669.
(2) Trib. Civ. de Pont-Audemer, 5 mars, 1902, D., 1902. 2. 300.
(3) C. C. P., art. 599, n. 11; 3 Edw. VII, c. 57 (Que).

I do not think there is any foundation for this argument. The policy of the law exempting wages from seizure, except as to a small proportion of them, is to discourage the giving of credit to persons with small incomes. Wages are intended for the support of the workman and his family from day to day, and it is very undesirable that shopkeepers should allow the wage-earners to run into debt. If this applies to a workman in the receipt of full wages, it applies *a fortiori*, to one who receives a rent equal to only fifty per cent. of his wages, or a rent equal to half the sum by which his wages have been reduced in consequence of the accident. I do not think that it is permissible to qualify the provision of the Act, that compensation is to be exempt from seizure, by reading into it the words "in the proportion in which wages are so exempt" or any words to that effect. The second view suggested in France is that the compensation payable under this Act is to be assimilated to an alimentary allowance. If so, it would follow that, although exempt from seizure for ordinary debts, it might be seized for alimentary debts. (1)

But the term "alimentary debt" is itself ambiguous, it may mean either (a), a debt due to persons who have furnished the debtor with food and clothing and other things necessary for bare subsistence, or it may mean, (b) the obligation to which the debtor is by law subjected of affording support according to his means to consort, children and certain other relations who are in need. (2)

In regard to (a) the debts due to furnishers of necessaries, the same argument applies as in the case of wages, which has just been discussed, and I do not see how the term "exempt from seizure" can be qualified by interpolating "except for alimentary debts." In regard

(1) C. C. P., art. 599, n. 4. See Trib. Civ. de Pont-Audemer, 5 mars, 1902, D., 1902. 2. 300. Hamelin v. Les Commissaires du Havre, 1902, 21 S. C., 51 (Archibald, J.)

(2) C. C. arts. 165-172.

to (b), there is more difficulty. In our law there are conflicting decisions as to whether the legal debt of maintenance is an "alimentary debt," in the sense in which that term is used in the provision of the Code of Civil Procedure, which declares that alimentary allowances may be seized for alimentary debts.

The Court of Appeal has held that this does not apply to the debt of maintenance. (1)

No reasons are given for the judgment which is contrary to previous decisions, and in a subsequent case in the Superior Court it was not followed. (2)

Upon general principles it is difficult to suppose that the intention of the legislature was to make the compensation payable under this Act absolutely exempt from seizure for a debt of maintenance. The principle of exemption from seizure, allowed by the Act to apply to compensation, was so allowed in the interest of the workman's wife and children, as well as of the workman himself. The general policy of the Act is to prevent the workman's family from becoming a burden upon public or private charity. This policy will be liable to be defeated, if the workman is entitled to take the compensation, and, at the same time, to refuse to perform the duty of supporting his family. A workman in receipt of a small rent who has a wife and children to support can hardly be in a position to help to maintain others. But as regards claims for maintenance made by these other persons, he will be sufficiently protected by the provision of the Civil Code, that maintenance is only granted in proportion to the fortune of the party by whom it is due. (3)

But the duty of maintenance rests upon considerations of public policy, and I am inclined to agree with M.

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(1) Wilson v. Brisebois, 1895, 4 Q. B. 238.

(2) Crédit Foncier Franco-Canadien v. Martin, 1898, 15, S. C. 160 (Choquette, J.)

(3) C. C. 169.

Sachet that in spite of the silence of the Act the exemption from seizure cannot be intended to be so absolute as to deprive the wife and children of the workman of what is practically the only effective means of enforcing his performance of this duty. (1)

116. No Deduction Permissible from Wages.

The compensation prescribed by the Act is to be entirely at the charge of the employer and the employer shall not for this purpose deduct any part of the employee's wages, even with the consent of the latter. (art. 13).

117. Right of Action against Third Parties.

By article 14 "the person injured, or his representatives, shall continue to have, in addition to the recourse given by this Act, the right to claim compensation under the common law from the persons responsible for the accident other than the employer, his servants or agents.

"The compensation so awarded to them shall, to the extent thereof, discharge the employer from his liability, and the action against third persons responsible for the accident, may be taken by the employer at his own risk, in place of the person injured or his representatives, if he or they refuse to take such action after being put in default so to do."

This article is copied from article 7 of the French law, the only material change being the provision as to the necessity of putting the person injured or his representatives in default before the employer takes action. So for example if the accident has been caused by the fall of a building the workman will have an action at common law against to owner of the building. (2)

If the workman has sued the third party and a

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(1) See Bordeaux, 12 juillet, 1880, D., 80. 2. 232; Rennes, 26 avr., 1893, D., 94. 2. 317. Sachet, v. 1, n. 669.

(2) Nimes, 10 août, 1900, D., 1901. 2. 130.

judgment has been pronounced in the action the employer cannot sue the third party over again. (1)

The workman has no action at common law against a servant or agent of the employer by whose fault the action was caused. The right of action which he had formerly has been taken away by this article. (2) And if one employer places one of his workmen temporarily under the direction of another employer this second employer is an agent of the first and the workman has no action against him at common law. (3)

118. Employer's Liability is Limited to the Compensation under the Act.

Article 15 enacts:—"The employer shall be liable to the person injured or to his representatives mentioned in article 3 of this Act for injuries resulting from accidents caused by or in the course of the work of such person in the cases to which this Act applies, only for the compensation prescribed by this Act." The language of this article differs a little from that of the French model which reads *les ouvriers et employés désignés à l'article précédent ne peuvent se prévaloir, à raison des accidents dont ils sont victimes dans leur travail, d'aucunes dispositions autres que celles de la présente loi.* (art. 2).

It is clear that the common law action against the employer even for his personal fault, and *a fortiori* for the fault of his servants, is altogether taken away.

Under the terms of our article it would appear that a representative not mentioned in article 3 might have an action against the employer at common law. (4)

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(1) Cass., 7 juillet, 1909, Sir. Bulletin des Sommaires, 1909. 1. 85.
(2) Sachet, v. 1, n. 774.
(3) Chambres réunies, 8 janvier, 1908, D., 1908. 1. 185.
(4) Supra, p. 42.

119. Moneys Paid by an Insurance Company.

Article 16 enacts "All moneys paid by any insurance company or mutual benefit society shall be applied, to the extent thereof, on account of the sums and rents payable in virtue of this Act, if the employer proves that he has assumed the assessments or premiums demanded therefor. But the employer's liability shall continue if the company or society neglects to pay or becomes unable to pay the compensation for which it is liable."

This article refers only to the case where the employer has insured to cover his liability. In this case it is reasonable that he shall be bound to select a solvent company on pain of becoming personally liable. The article has nothing to do with the case where, at the request of the person injured or of his representatives, the employer has paid the capital of the rent to an insurance company under the terms of article 9. In that case if he pays to an authorized company he is discharged from all further liability.

120. Workmen who Usually Work Alone.

Article 17 which deals with this matter has been explained previously, in considering what "workmen" are subject to the Act. (1)

121. Medical Examination.

Article 18 enacts:—"The person injured shall be bound, if the employer requires him so to do, in writing, to submit to examination by a practising physician chosen and paid by the employer, and if he refuses to submit to such examination or opposes the same in any way, his right to compensation as well as any remedy to enforce the same shall be suspended until the examination takes place. The person injured shall, in such case, always be entitled to demand that the examination shall take place in the presence of a physician chosen by him."

(1) Supra, p. 37.

This article seems to have been borrowed from the English Workmen's Compensation Act, 1906, First Schedule. (4)

The English Act is much more explicit than ours. It provides that any workman receiving weekly payments under the Act shall, if so required by the employer, from time to time submit himself to examination by a duly qualified medical practitioner, provided and paid by the employer. If the workman refuses to submit himself to such examination or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place. The workman may be examined also by a medical practitioner selected by himself, and if after this examination or examinations the employer and the workman cannot agree as to the workman's condition or fitness for employment, the registrar of a county court may refer the matter to a medical referee whose certificate shall be conclusive evidence as to the condition of the workman and his fitness for employment. The certificate must specify, where necessary, the kind of employment for which he is fit [First Schedule (14 and 15)].

Under our article, it is not very clear whether any examination is contemplated except one to ascertain in the first instance if the compensation is due. But probably the article covers the case of subsequent examinations to ascertain if the incapacity still continues. Where the medical testimony is contradictory or inconclusive, the court may of its own accord, or upon the application of either party, order the facts to be verified by a medical expert or by three experts. But the opinion of the experts is not with us conclusive as it is in England. (1)

A workman who left the country while he was in receipt of weekly payments without intimating to his

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(1) C. C. P., arts. 392-409.

employers that he was going away, and without leaving his address, was held in Scotland to be obstructing medical examination. (1)

The questions with regard to the duty of submitting to medical treatment or to an operation have been discussed above. (2)

122. Agreements Contrary to the Act to be Null.

Article 19 enacts:—"Every agreement contrary to the provisions of this Act shall be absolutely null."

This applies to agreements at three stages, (a) before the accident, (b) after the accident and before judgment, and (c), after the judgment. As to (a) it is clear that any agreement is null by which the workman undertakes not to make a claim under the Act, or to claim only when there is fault on the part of the employer, or to take less than the legal indemnity, or that part of his wages shall be deducted to form a fund to go towards the compensation. (art. 13).

As to (b) it would seem that no agreement is binding upon the parties unless a judgment has been rendered in accordance therewith.

There are certain matters about which the parties may validly agree. They may agree as to the date at which an incapacity has shewn itself to be permanent (art. 2, a.) In the case of an accident which has caused death they may agree as to the apportionment of the compensation. (art. 3, c.) In this latter case they may also agree as to the amount of the compensation, seeing that, if there is no dispute about the average yearly wages, this is a simple question of arithmetic. (art. 9.)

But an agreement to take less than the compensation prescribed by article 2, or to take a lump sum instead of

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(1) Finnie & Son v. Duncan, 1904, 7. F. 254.
(2) Supra, p. 63.

a permanent rent, would be contrary to the Act and would not be binding on the parties. (1)

The only agreement which is binding is that arrived at by the parties after the conciliatory offices of the judge of the Superior Court, in the manner indicated by article 27, and even in that case it is only binding, if the judge, in his discretion, renders judgment in accordance with the agreement.

As to (c), it is clear that any agreement by which the compensation fixed by the judgment is surrendered or compounded for, cannot be binding upon the parties.

The French law has a provision, that after the compensation has been fixed the parties may always agree that the pension shall be suspended and replaced by any other mode of reparation, but this only holds good so long as the parties are willing to abide by it. As soon as one of the parties expresses the desire to return to the legal indemnity, the provisional agreement by which some other mode of compensation has been substituted comes to an end. (art. 21.)

The intention of the legislature was to allow opportunity to an employer to find work for his injured workmen of a kind for which the injury had not incapacitated him. For example, a workman who had lost a leg might agree to accept a position as timekeeper instead of taking his pension. (2)

By our law, without any express provision, such an agreement might be made, but it would always be merely provisional and subject to revocation by either party.

The same article of the French law also provides that if a rent fixed does not exceed one hundred francs a year, and if the person entitled thereto is not in minority, an agreement may be validly made by which he takes a capital sum in exchange for it.

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(1) See Cass., 6 janv., 1904, D., 1904. 1. 73; esp. note at p. 75; Sachet v. 2, n. 1873.

(2) See Sachet, v. 2, n. 1466; Cabouat, v. 2, n. 887.

In our law such a conversion of a small rent would be prohibited, but as we have seen, the tendency of the jurisprudence is against granting rents of trifling amount except in very clear cases. (1)

There are two other cases under the French *loi* in which the conversion of a rent into a capital sum is permissible. These are provided for in article 3 and are (a) the case of the widow in receipt of a rent for the death of her husband who is to receive a lump sum down if she marries again, and (b) the foreign workman or his representatives who cease to reside in France while entitled to a rent. Our law is different as to both points.

123. Security for Payment of Compensation.

Article 20 enacts "The claim of the person injured or of his representatives, for medical and funeral expenses, as well as for compensation allowed for temporary incapacity to work, shall be secured by privilege on the moveable and immoveable property of the employer, ranking concurrently with the claim mentioned in paragraph 9 of article 1994 of the Civil Code.

"Payment of compensation for permanent incapacity to work, or in respect of an accident followed by death, shall so long as the compensation has not been paid, or so long as the sum necessary to procure the required rent has not been paid to an insurance company or otherwise paid in virtue of this act, be secured by privilege upon moveable property of the same nature and rank, and by a privilege upon immoveable property ranking after other privileges, and after hypothecs."

The claim for medical and funeral expenses and that for compensation for temporary incapacity are placed upon the same footing as servants' wages, which are privileged claims upon all the moveable property and all the immoveables of the employer, and require no registration. (2)

(1) Supra, pp. 122, 124.

(2) C. C., 1994, n. 9; C. C., 2009, n. 9; C. C., 2084, n. 1.

The immoveables are only liable when the proceeds of the moveable property have proved insufficient to pay the privileged claims. (1)

As regards the moveable property of the employer the same privilege upon it is accorded to the claim for compensation for permanent incapacity, and to the claim of the representatives of a deceased workman for the capital sum payable by way of compensation. As regards immoveables the legislature evidently felt unwilling to create another privilege which would rank before hypothecs. It is obvious that to do so would greatly interfere with the power of employers to borrow on the security of their immoveable property. Nothing is said with regard to the necessity for registration. Without registration the claims would be preferred to simple chirographic claims. (2)

But it appears that a workman having such a claim, by registering it, will be able to secure priority over claims subsequently registered. (3)

And seeing that the right is not declared to be exempt from registration it rather seems that a registered claim would rank before a claim of earlier date which has not been registered. (4)

An employer who has paid the capital of the rent to an insurance company which satisfies the legal requirements, or who has paid to the representatives of a deceased workman the lump sum which forms the compensation for death is discharged of all further liability.

124. No Compulsory Insurance or State Guarantee.

In the matter of security to an injured workman for the continued payment of the rent to which he is entitled

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(1) C. C. 2009, n. 2.
(2) C. C., 2094.
(3) C. C., 2082.
(4) See C. C., 2130.

our law is vastly inferior to that of France or Germany, and is more comparable to the English law.

In France the employer is not bound to insure, but, if he becomes insolvent, the pension to the workman is paid by the state out of a special fund created by a tax levied upon the employers who fall within the scope of the Act. The state undertakes the payment also if an insurance company which was liable for the rent becomes insolvent. (arts. 24-26.)

In Germany employers are compelled to insure in mutual insurance associations. Separate associations are organized for each industry and their solvency is guaranteed by the state. (Gewerbe-Unfallversicherungsgesetz s. 55.)

In England if the employer becomes insolvent the workman has a preferential claim to the extent of one hundred pounds. (s. 5, subs. 3.)

125. Procedure.

By article 21:—"The Superior Court and the Circuit Court shall have jurisdiction of every action or contestation in virtue of this Act, in accordance with the jurisdiction given to them respectively, by the Code of Civil Procedure."

The Circuit Court will have jurisdiction in an action for arrears of compensation the rate of which has been already determined, provided that the arrears claimed do not exceed ninety-nine dollars and ninety-nine cents, if the Circuit Court is at the chief place of a district, or two hundred dollars if it is at another place. (1)

An action to fix the compensation for temporary incapacity if the conclusions were limited to ninety-nine dollars and ninety-nine cents or two hundred dollars respectively might also be competent. But an action to fix the rent in the case of incapacity whether absolute or partial

(1) C. C. P. arts. 54-55.

would not be competent in the Circuit Court. The Circuit Court cannot grant a pension to continue during the life of the pensioner under its general jurisdiction up to ninety-nine dollars and ninety-nine cents or two hundred dollars as the case may be. Such a judgment cannot be supported by arguing that possibly the judgment may not call for the payment of more than ninety-nine dollars and ninety-nine cents or two hundred dollars respectively. It is true that the pensioner may die, or circumstances may change, and payment in excess of the value over which the Circuit Court has jurisdiction may, as the event turns out, never be demanded.

But the Circuit Court has no jurisdiction to grant a judgment for the payment of annual instalments of which the capitalized value exceeds the jurisdiction of the court.

So where the Circuit Court gave judgment to an old woman against her son-in-law for maintenance at the rate of twenty-eight pounds a year for life, the Court of Queen's Bench held that this was in excess of the jurisdiction of the Circuit Court. (1)

And it has been held in the Circuit Court that a claim for an alimentary pension of three dollars a week was not competent in that court unless limited to a certain number of weeks so as not to exceed the jurisdiction of the court. (2)

Conversely it has been held that an action for arrears of a constituted rent was competent in the Superior Court though the amount claimed was under one hundred dollars. (3)

Nor does it appear that the competence of the Circuit Court of the County can be supported by the jurisdiction given to it over suits:—"Which relate to any immoveable

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(1) Smith v. Patton, 1863, 14, L. C. R. 323.
(2) Marcotte v. Lachapelle, 1897, 1 P. R., 128 (Champagne, J.)
(3) Regina v. Coté, 1898, 1 P. R. 176 (LaRue, J.).

rights, to annual rents or such like matters whereby rights in future may be bound." (1)

This jurisdiction does not exist at all when the Circuit Court is at the chief place of a judicial district.

Where the jurisdiction exists the term "such like matters whereby rights in future may be bound" must be interpreted to mean rights over immoveables and not merely personal rights. According to the settled jurisprudence of the Supreme Court, this is the meaning of "annual rents and other matters or things where rights in future might be bound." The cases upon this subject will be explained in commenting upon the next article which refers to appeals.

If this construction of the expression just cited from the Supreme Court Act (R. S. C., c. 139, s. 46 b.), is a sound one it applies *a fortiori* to the words of the Code of Civil Procedure where we have "annual rents or *such like* matters."

Several cases relating to personal claims whereby rights in future might be bound which had been instituted in the Circuit Court of the County have been brought by evocation to the Superior Court. (2)

126. Review and Appeal.

By article 22:—'Review and appeal of or from judgments susceptible thereof, shall be taken within fifteen days from the rendering of such judgment, and if not so taken the right thereto shall lapse. Such appeals shall have precedence."

There will be no appeal in any case under the Act to the Supreme Court of Canada except where the full sum of two thousand dollars has been awarded as compensation for an accident causing death. (3) By restrict-

(1) C. C. P., art. 55, n. 2.

(2) C. C. P., art. 49; Nicolle v. Bourgoin, 1898, 1 P. R., 526 (Mathieu, J.); Roach v. Duggan, 1902, 4 P. R. 289 (Mathieu, J.); Deschamps v. Deschamps, 1899, 2 P. R., 390 (Bélanger, J.).

(3) R. S. C., c. 139, s. 46, c.

ing the claim to nineteen hundred and ninety-nine dollars and ninety-nine cents appeal to the Supreme Court may be prevented.

In actions relating to a rent for incapacity there can be no appeal to the Supreme Court. In such a case the matter in controversy does not relate to any "annual rents and other matters or things where rights in future might be bound." (Supreme Court Act, R. S. C., c. 139, s. 46 b.)

The term "annual rents" as here used means ground rents (*rentes foncières*) and not an annuity or any other like charges or obligations. (1) An action claiming the right to an annuity is not appealable. The *debitum in præsenti* is the criterion of the jurisdiction of the Supreme Court, and the Court has no jurisdiction on the ground that the controversy relates to future rights when these rights are merely personal.

The meaning of the expression in the Supreme Court Act "annual rents and other matters and things where rights in future might be bound" was thus explained by Sir Henry Strong, C.J., in giving the opinion of the Supreme Court. "The other matters or things referred to must, on the ordinary rule of construction, *noscitur a sociis* be construed to mean matters and things *ejusdem generis* with those specifically mentioned. These are titles to lands and tenements and annual rents. We must therefore interpret the words 'other matters and things' as meaning rights of property analogous to title to lands and annual rents and not personal rights, however important." (2)

This rule of construction is settled by a uniform jurisprudence of the Supreme Court and has been applied to annuities of various kinds. Thus, in one case, by a judgment of separation from bed and board, a husband

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(1) Rodier v. Lapierre, 1892, 21 S. C. R. 69.
(2) O'Dell v. Gregory, 1895, 24 S. C. R., 661.

had been ordered to pay by way of maintenance an annuity of fifteen hundred dollars to his wife for her life time. Upon the death of the husband an action was brought by the widow against his heirs claiming that they were liable for the continuance of this alimentary allowance. The action was dismissed and the Supreme Court held that this judgment was not appealable. (1)

On the same principle a claim by a daughter against the executors of her father relating to the payment of instalments of an allowance under the father's will was held not to be a claim affecting future rights in the sense of the Supreme Court Act. (2)

Nor has the Supreme Court jurisdiction in questions relating to annuities upon the ground that the total amount of the payments in the future may be expected to exceed two thousand dollars. In a recent case the action related to the right to the first instalment of a life pension. Affidavits were produced to the effect that, according to actuarial tables taking the plaintiff's average expectation of life as the basis of calculation, the cost of an annuity equal to the pension would be over seven thousand dollars. The Supreme Court held it had no jurisdiction. The value was a contingent one depending on the life of the plaintiff and had not the certainty required to give jurisdiction. The annuity might be extinguished at any time by the death of the creditor and the jurisdiction of the Court could not be based upon a mere possibility. (3)

127. Provisional Allowance.

By article 23:—"The court or judge may upon petition, at any stage of the case, whether before judgment or while an appeal is pending, grant a provisional daily allowance to the person injured or to his representatives."

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(1) Winteler v. Davidson, 1903, 34 S. C. R. 274.

(2) Rodier v. Lapierre, 1892, 21 S. C. R. 69.

(3) Lapointe v. Montreal Police Benevolent Society, 1904, 35 S. C. R. 5. See also Raphael v. MacLaren, 1897, 27 S. C. R., at p. 328; Carrier v. Sirois, 1905, 36 S. C. R. 221.

128. Proceedings to be Summary and without a Jury.

Article 24 enacts:—"There shall be no trial by jury in any action taken in virtue of this Act, but the proceedings shall be summary and shall be subject to the provisions of the Code of Civil Procedure respecting such matters."

These articles do not seem to call for any comment.

The special procedure in summary matters is given in articles 1150-1162 of the Code of Civil Procedure.

129. Prescription.

By article 25:—"The action to recover any compensation to which this act applies shall, as against all persons, be subject to a prescription of one year."

The corresponding article of the French law of 1898 is *l'action en indemnité prévue par la présente loi se prescrit par un an à dater du jour de l'accident.*

In France the article has been amended by the *loi du 22 mars*, 1902, under which the action is to be prescribed in one year, dating from the day of the accident, "or from the closing of the inquiry by the justice of the peace or from the cessation of payment of the temporary compensation."

The provision of the law of 1898 which our law has copied gave rise in France to considerable difficulty, more particularly in regard to the time from which the prescription was intended to run. It was, therefore, found expedient to make this more explicit. Under the French procedure all industrial accidents which occasion an incapacity for work must be notified within forty-eight hours by the employer to the mayor of the commune. Within four days after the accident, if the victim has not recommenced his work, the employer must deposit with the mayor a medical certificate as to the condition of the workman.

Within twenty-four hours after the deposit of this certificate it is the duty of the mayor to forward the documents to the *juge de paix* of the district. (*canton*) When

according to the medical certificate the injury appears likely to cause the death or permanent incapacity for work, absolute or partial, of the workman, or when the victim has died, the *juge de paix* must within twenty-four hours proceed to hold an inquiry in order to ascertain the cause, nature and circumstances of the accident, the persons injured, the nature of the injuries, the representatives who may be entitled to indemnity and the wages of the persons injured. The justice of the peace is to go to the person injured if he is not in a position to attend the inquiry. Under this excellent system where the inquiry into the essential facts must be held within a very short time after the accident, it is reasonable to take the date of the closing of this inquiry as that at which the prescription shall commence. In the occasional cases in which an accident has appeared at the time to be so trifling that it was not thought necessary to make any declaration of it or to hold an inquiry, the date of the accident is still the time at which the prescription begins to run. Under our Act, which does not provide for any such prompt investigation, prescription begins from the day of the accident. The intention of the article clearly is to exclude any claim to compensation whether for death or for incapacity, permanent or temporary, which is not made within a year of the accident. As the article has no special provisions on the subject the ordinary rules of the law of prescription must be applied.

Prescription is reckoned by days and not by hours; it is acquired when the last day of the term has expired; the day on which it commenced is not counted. (1)

Thus if the accident has happened on the first of January, 1910, the right of action will exist until the end of the day of the first of January, 1911. But article 8 of the Code of Civil Procedure which says that "if the

(1) C. C. 2240.

day on which anything ought to be done is or becomes a non-juridical day, such thing may be done with like effect on the next following juridical day" applies only to matters of procedure and not to matters of prescription. In matters of prescription the right is prescribed after the expiration of the last day of the term, whether such day be non-juridical or not. (1)

130. Interruption of Prescription.

The prescription of the right of action under the Act may be interrupted according to the general rules of law. There is no doubt that the ordinary interruptions of prescription are applicable to the short prescriptions as well as to the long ones. (2)

Such interruptions may be by a judicial demand in proper form served upon the person whose prescription it is sought to hinder, or by a seizure, set-off, intervention or opposition, which is considered as equivalent to a judicial demand.

In order to interrupt prescription by a judicial demand it is necessary that the action should be actually served within the year from the date of the accident. The issue of the writ within the year is not enough to keep the right of action alive. (3)

But the petition for authorization served upon the employer under article 27 would probably be considered as a judicial demand. This is a preliminary step prescribed by the law which is compulsory upon the workman, and it would not be just that, during the delay which is caused by the measures taken by the judge to bring the parties to an amicable agreement, prescription should be running against the workman. (4)

(1) Dechêne v. City of Montreal, 1892, 1 Q. B. 206.

(2) Walker v. Sweet, 21 L. C. J. 29 (Q. B.); see Cass., 26 oct., 1896, D., 97. 1. 5.

(3) Dupuis v. Can. Pac. Ry., 1897, 12 S. C. 193 (Doherty, J.).

(4) See Cabouat, v. 2, n. 930; Sachet, v. 2, n. 1299; Cass., 16 avr., 1904, D., 1905. 1. 113.

It has been held that the service of a petition for leave to proceed in *forma pauperis* does not constitute a judicial demand within the meaning of C. C. 224 (1)

But such a petition stands in a different position from the petition under article 27. It is a request for exceptional facilities which the court has full discretion to grant or to refuse according to facts established in support of it. The petition under article 27 is the first step in the ordinary procedure, and the judge is bound to grant it though he may, before doing so, attempt methods of conciliation.

Even when prescription has not been pleaded, the Court is bound under article 2267 of the Civil Code to dismiss an action which has not been served within the year. The right of action is absolutely extinguished. (2)

It may be interrupted also by the person, in whose favour it has been running, renouncing the benefit of a period elapsed, and by any acknowledgment which the debtor makes of the right of the person against whom the prescription runs. (3)

When the interruption proceeds from a cause such as an acknowledgment of the debt, which consists of a single definite act, a new period of prescription begins to run immediately from the date of the interruption. Where there is a seizure or an action the prescription is interrupted so long as the proceedings last. (4)

The interruption by acknowledgment of the debt may be made by an acknowledgment either express or implied. What conduct on the part of the employer will be considered as amounting to an admission of his liability is a question of circumstances. There is no doubt that an acknowledgment by the employer of his liability reserving

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(1) Dupuis v. Can. Pac. Ry., ut supra.
(2) Dupuis v. Can. Pac. Ry., ut supra.
(3) C. C., 2227.
(4) Cabouat, v. 2, n. 950; Sachet, v. 2, n. 1317.

the question of the amount of compensation, would interrupt the prescription, or a letter from the employer admitting the workman's right to a rent if the incapacity should turn out to be permanent. (1)

And the payment of temporary compensation by the employer appears to me to amount to an acknowledgment of his liability, and so long as it continues to be paid there will be an interruption of prescription of a claim for a permanent rent. (2)

But in France before the amendment of the law there was much controversy upon this point. (3)

By the amendment to the article in the French law this is expressly stated. Under our Act there is no express provision, but the amendment in France was, as it seems to me, merely declaratory.

In many cases it is impossible at first to determine whether the incapacity is going to be permanent or merely temporary. As long as the employer pays to the workman the compensation to which he is entitled by law for temporary incapacity, he is making an admission that the injury was caused by an industrial accident which happened to the workman while in his employment. The prescription will be interrupted so long as the employer is by implication making these admissions. Attentions rendered by the employer to an injured workman, such as sending him medical assistance or food or presents of money do not necessarily imply admission of his liability. It may rather appear that they were prompted merely by feelings of humanity. (4)

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(1) Caen, 6 fév., 1901, D., 1901. 2. 493; Grenoble. 24 avr., 1901, D. 1901, 2, 496.

(2) Sachet, v. 2, n. 1273.

(3) See Cabouat, v. 2, n. 944.

(4) Cabouat, v. 2, n. 945.

131. Suspension of Prescription.

It is a general rule that prescription does not run against a person when it is absolutely impossible in law or in fact for him to take action. Nor does prescription run, as a general rule, against minors or insane persons whether they have tutors or curators or not. But by article 2269 of the Civil Code "Prescriptions which the law fixes at less than thirty years, other than those in favour of subsequent purchasers of immoveables with title and in good faith, and that in case of recission of contracts mentioned in article 2258 run against minors, idiots, madmen and insane persons, whether or not they have tutors or curators, saving their recourse against the latter." And by article 2262 of the Civil Code actions of damages for bodily injuries prescribe in one year, and therefore fall within the terms of article 2269. It is clear, therefore, that by our law the prescription of such actions runs against minors and other incapable persons. It seems pretty clear that the intention of article 25 of the present Act is to allow the action thereunder to be governed by the same rules as the action for bodily injuries at common law. In France there has been much controversy upon the question if the right of action for compensation was suspended during the minority or interdiction of the workman. The French texts are much less clear upon the point than ours, because article 2278 of the French Code refers to certain short prescriptions only. It does not apply in France to actions for damages for bodily injury which, by the French law, are, in principle, subject only to the thirty years' prescription, though in practice the right of action would, in many cases, be held to have been lost by acquiescence, if no claim had been made within a reasonable time. (1)

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(1) See Sourdat, Responsabilité, 5th ed., v. 1, n. 636

But in spite of the fact that the French Code is less clear than ours, the *Cour de Cassation* has held that the prescription of the action by the workman is not suspended by his minority or interdiction. (1) The ground of this decision in France is that the general policy of the Act, in fixing a short period of prescription, was to limit the liability of the employer to cases which were brought within so short a time after the accident as to make the connection between the injury and the accident capable of verification. M. Cabouat though with some hesitation, agrees in this view. There are judgments by several Courts of Appeal in the opposite sense. (2) And this latter view has the support of M. Sachet, who argues that this ground of suspension of prescription is created by the law as a protection for minors and other incapables, that in cases of accidents to young workmen such protection is eminently desirable, and that the shorter the period of prescription, the more necessary it is to protect incapable persons against being deprived of their rights. For the reasons above stated, I do not think this argument would be sound under our law.

132. Suspension on the Ground of Impossibility of Action.

There may be cases in which it is impossible for the plaintiff to take action, not on account of his minority or mental incapacity, but for some other reason such as, for example, that in consequence of a war the law courts are closed. (3)

This case is not covered by the terms of article 2269 of the Civil Code which has been cited above, and there is no doubt that the prescription of the action under this Act might, like other rights of action, be suspended by an impossibility of this kind. (4)

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(1) Cass., 8 déc., 1903, D., 1904. 1. 161.

(2) Paris, 27 juillet, 1901, S., 1902. 2. 64; Cabouat, v. 2, n. 956.

(3) Cass., 17 août, 1874, D. 75. 1, 209; Merlin, Rep. v. Prescription, sect. 1, n. 7.

(4) See City of Montreal v. Cantin, 1904, 35 S. C. R. 223, 1906, 15 K. B. 103 (P. C.)

133. Revision of Amount of Compensation.

By article 26:—"A demand to revise the amount of the compensation, based on the alleged aggravation or diminution of the disability of the person injured, may be taken during the four years next after the date of the agreement of the parties as to such compensation, or next after that of the final judgment. Such demand shall be in the form of an action at law."

This article differs to some extent from article 19 of the French law upon which it is modelled. That article reads *la demande en revision de l'indemnité fondée sur une aggravation ou une atténuation de l'infirmité de la victime ou son décès par suite des conséquences de l'accident est ouverte pendant trois ans à dater de l'accord intervenu entre les parties ou de la décision définitive.*

It will be seen that by the French article one ground of revision is the death of a workman to whom an annuity has previously been granted as compensation for incapacity. The omission of any provision for this case in our article might be supposed to indicate the intention to alter the French law on this point. But the result of such a construction of our article would lead to results so inequitable that it is impossible to accept it.

Take the case of a workman who has sustained a severe injury which renders him absolutely and permanently incapable of further work. He receives an annuity of fifty per cent. of his yearly wages and dies six months after the accident. It cannot be the intention of the legislature that the employer who has paid perhaps a hundred and twenty dollars shall have no further liability. It is true that in such a case, by article 9 the workman had the option of calling on the employer to pay the capital of the rent to an insurance company. But he may have preferred to take the permanent rent from the employer in ignorance of the fact that he had received some internal injury from the accident which was certain to cause death

within a short time. The consequences of severe accidents cannot be predicted even by medical experts, and it constantly happens that a man who has good prospects of recovery dies in consequence of some unforeseen complication. If his death is in the end really caused by the accident his representatives ought not to be deprived of their right to compensation because he was not killed on the spot. Article 3 seems to have this case in view when it provides that sums paid by way of compensation for incapacity are to be deducted from the compensation for the death. I am inclined to think, therefore, that in article 26 the words "aggravation of the disability of the person injured" must include his death.

The demand for revision is quite different from an appeal, and cannot be employed as an indirect method of reopening questions which have been decided by the original judgment. If, for example, it was decided that the injury from which the workman suffers was not caused by an industrial accident, and this judgment has been confirmed on appeal, or no appeal has been taken within the delays prescribed by the Act, this finding has become final and cannot be reconsidered upon a demand for revision. (1)

The demand for revision must be based upon a change in the condition of the workman which has supervened since the amount of the compensation was fixed. An incapacity which was at first considered to be temporary may have become permanent, or a partial and permanent incapacity may have become more serious than it was at first. Inasmuch as the claim is based upon a change of circumstances there may be several actions of revision within the four years, and the rejection of one claim is no

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(1) Req., 25 mars, 1908, D., 1908. 1. 385; Bordeaux, 31 juillet, 1902, D., 1904. 2. 108.

bar to another, for the condition may have altered in the interval of time between the two claims. (1)

It is an aggravation or diminution of the disability which is the foundation of the claim, and, therefore, it cannot be based upon a change in the condition of the workman which does not affect the degree of his incapacity. For example, if the workman was so injured by the accident as to be found entitled to compensation for absolute and permanent incapacity, there cannot be any subsequent aggravation short of his death. His condition may have changed for the worse but his disability cannot have become greater than it was. This is the view taken in France where the words are "an aggravation or an attenuation of the *infirmity*." In our law it is still clearer as the word "disability" employed in the English version may be used to explain the term "infirmity" in the French version.

Conversely if the demand is by the employer it is not enough to prove that there is an improvement in the condition of the workman if his incapacity remains the same. (2)

The onus of proving all the essential facts lies upon the plaintiff. If the demand is by the workman he must prove that there has been an aggravation which has increased his incapacity and that this aggravation is due to the orignal injury. (3)

The aggravation must not be due to wrong treatment of himself, or to wilful and unreasonable refusal to follow the treatment prescribed. (4)

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(1) Req., 9 janv., 1906, D., 1906. 1. 181; Civ. 6 nov., 1906, D., 1907. 1. 463; Lyon, 21 mai, 1901, D., 1904. 2. 97.

(2) Sachet, v. 2, n. 1361; Cabouat, v. 2, n. 817.

(3) Civ. 18 juillet, 1905, and 19 fév., 1908, D., 1908. 1. 241; Req. 25 mars, 1908, D., 1908. 1. 385.

(4) Aix, 17 janv., 1903, D., 1904. 2. 111; Sachet, v. 1, n. 460. As to refusal to submit to operation, see supra, p. 63.

But the workman's claim is not the less valid by reason of the fact that his state of health or the peculiarities of his constitution predispose him to the aggravation.

Tuberculosis which was more or less latent may have been brought out by the accident or an injury may have more serious results for him owing to a previous condition of varicose veins. It is sufficient, however, if he can prove that the aggravated symptoms from which he suffered are causally related to the accident. (1)

But it must not appear that they were not due to the accident at all but to a prior disease. (2)

One of the latest decisions of the *Chambre des Requêtes* is difficult to reconcile with these principles. The trial court had awarded compensation to a workman for permanent and partial incapacity caused by the accident, but had held that certain cerebral symptoms from which he suffered were not due to the accident at all but to a prior disease, namely, arterial sclerosis. These cerebral troubles subsequently became aggravated and rendered the workman absolutely incapable of work. In an action for revision of the compensation the medical testimony was to the effect that the accident had accelerated the development of these troubles. Compensation for absolute incapacity was then awarded and the judgment was sustained by the *Chambre des Requêtes*. It seems impossible to resist the criticism of the learned annotator on this case that this was, in effect, reopening a question which had been finally decided in the original action. If there was ground for revision here, by parity of reasoning that remedy would be available when the court had held that the injury was not related to the accident at all. The case must be regarded as of doubtful authority. (3)

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(1) Civ., 1 déc., 1908, D., 1909. 1. 229.

(2) Req., 25 mars, 1908, D., 1908. 1. 358; Sachet, v. 2, n. 1362; Cabouat, v. 2, n. 807.

(3) Req., 25 mars, 1908, D., 1908. 1. 385.

134. Previous Authorization Necessary.

By article 27:—"Before having recourse to the provisions of this Act, the workman must be authorized thereto by a judge of the Superior Court upon petition served upon the employer.

"The judge shall grant such petition without the hearing of evidence or the taking of affidavits, but may before granting the same use such means as he may think useful to bring about an understanding between the parties. If they agree, he may render judgment in accordance with such agreement, upon the petition, and such judgment shall have the same effect as a final judgment of a competent court."

135. Commencement of Act.

By article 28:—"This Act shall come into force on the first day of January, 1910, and shall not apply to pending cases nor to accidents which have happened before it came into force."

These articles do not require any comment.

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