NOTES.

CROWN'S LIABILITY FOR NEGLIGENCE OF ITS SERVANTS.—In the case of *The King* v. *Schrobounst* (decided on the 12th of the present month by the Supreme Court of Canada, on appeal from the Exchequer Court of Canada), the suppliants alleged in their petition of right that they had been run into and injured on a public street by a motor truck, the property of the Dominion Crown, and that such injury was due to the negligence of the driver of the truck, a servant of the Crown employed at the time in transporting other Crown employees to a public work. The Crown in its defence denied that it was liable in damages therefor under the provisions of subsection (c) of Sec. 20 of the Exchequer Court Act, R.S.C. 1906, Ch. 140, as amended by 7-8 Geo. V. Ch. 23 Sec. 2. The case was heard by the President of the Exchequer Court before trial on the question of law raised by the defence and he decided that in such a case as that set up by the suppliants, if established, the Crown ought to be held liable under Sec. 20 of the Exchequer Court Act as so amended. The Crown appealed with the result that the opinion of the President of the Exchequer Court was affirmed unanimously by the Supreme Court of Canada. It is useful to quote the enactments in question, and the view of the Supreme Court as to the effect of the amendment.

The provisions of subsection (c) of Sec. 20 of the Exchequer Court Act as they appear in the Revised Statutes are as follows:

"(c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment."

By an amending Act, 7-8 Geo. V. Ch. 23 Sec. 2, Subsection (c) reads as follows:—

"(c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work."

Under a series of decisions such as *Chamberlin* v. *The King*;[1] *Paul* v. *The King*;[2] *and Piggott* v. *The King*;[3] the Supreme Court of

[1] 40 Can. S. C. R. 350.
[2] 38 S. C. R. 126.
[3] 53 S. C. R. 626.

Canada had interpreted the old version of subsection (c) of Sec. 20 of the Exchequer Court Act to exclude any action where the death or injury to the person or property occurred outside the bounds of a public work, notwithstanding the same was due to the negligence of a servant or employee while acting within the scope of his duties or employment.

By the *Schrobounst* case, the earlier decisions are rendered obsolete. The Supreme Cout has decided that the words "upon any public work" in subsection (c) as it now stands qualify "not necessarily the presence but the employment of the negligent servant or officer of the Crown." In delivering the opinion of the Supreme Court, Mignault, J., said: "The driver of the motor truck was employed upon the public work in question; and this is sufficient to maintain the right of action by the persons injured. If it had been intended to restrict the application of the subsection to the case in which the person causing the injury was at the time physically present 'upon any public work' these latter words would more properly have been inserted immediately after the word 'while,' where their significance would have been unmistakable. The construction placed on the words 'on any public work' in *Piggott's* case, and other cases decided on the subsection as it stood prior to 1917, proceeded upon and was necessitated by their collocation with the words 'person or property'."

Thus the theory that the King can do no wrong is once more disregarded, and civil rights enlarged at the expense of the prerogative.

C. M.

* * *

"PERSON INTERESTED" IN PATENT IMPEACHMENT CASES.—Under the provisions of Section 23 of the Exchequer Court Act, the Exchequer Court is given jurisdiction, *inter alia,* "in all cases in which it is sought to impeach or annul any patent of invention." Under Rule 16 of the Practice and Procedure of the Exchequer Court, any action or proceeding to impeach a patent may be instituted by a statement of claim filed *by any person interested.*

In the case of *Bergeon* v. *De Kermor Electric Heating Company Limited* (Exchequer Court of Canada, May 18th, 1925) the plaintiff, who was a foreigner and a manufacturer of certain heating devices in France, sought to impeach for invalidity four Canadian patents belonging to the defendant. The case came on for trial before Audette, J., the plaintiff not being present in person. The defendant drew the attention of the Court to the fact that in respect of some seven patents relied on by the plaintiff as anticipating the defendant's

patents, it would be necessary for the defendant to have a rogatory commission issued to examine the plaintiff himself and others in France. Thereupon counsel for the plaintiff declared he would not put in any of the seven patents or offer any evidence of prior invention in relation to them. This concession was made with a view of immediately proceeding with the trial. Upon motion of the defendant's counsel an order was made giving effect to this declaration by the plaintiff and the case was proceeded with. No evidence was given on behalf of the plaintiff to show that he had any interest in any of the patents relied on in the proceedings. After taking time to consider the learned trial judge dismissed the action on the ground that the plaintiff had by his declaration at the outset of the trial abandoned all possible right of action and had therefore no *locus standi* before the Court. In other words it was held that he was not a "person interested" having a right to maintain an action by statement of claim within the meaning of the rule above referred to.

The learned Judge, after making a concise review of the remedies provided in such cases in England, Scotland, and the United States, pointed out that in Canada under the Exchequer Court Act, the rules of practice made thereunder, and the Patent Act, there were three modes of procedure open to anyone desiring to impeach a patent, namely, by Information in the name of the Attorney-General of Canada; by Statement of Claim filed by a person interested; and by Writ of *Scire Facias*. He further observed that where the plaintiff chooses to proceed by statement of claim, in such a case the interest of the person who seeks to maintain the action must be vested in him originally or by transmission from another person. If in principle the interest asserted by a person does not belong to himself alone, but is common to the public, then the right of action is exercisable only by means of a Writ of *Scire Facias*.

It would appear from the decision in this case that one may be a "person interested," within the meaning of the rule, at the time of launching his action to impeach and yet lose his quality as such to prosecute the action to judgment by some step taken by him at the trial.

C. M.

* * *

NEGLIGENCE—UNGUARDED OPEN TRAP-DOOR IN STORE—INVITEE —LIMITED INVITATION.—In allowing the appeal by the defendant in *Connor* v. *Cornell*[1] the Appellate Court of Ontario discussed the prin-

[1] 28 O.W.N. 60.

ciple of negligence from the standpoint of *invitation* as given by a proprietor of a warehouse to a customer who had entered to purchase apples. A trap-door in a part of the store twenty feet distant from where the apples were situated was open and unguarded. The proprietor (defendant), who was in another part of the warehouse at the time the customer (plaintiff) entered, asked the plaintiff what he wanted, and on being told "apples" informed him where they were, adding "I will be with you in a minute." The plaintiff approached the apples and examined them, but, observing onions in the rear of the warehouse passed, without further invitation, to the region of the onions and fell into the trap. The Court below awarded the plaintiff $1,000. The Appellate Court decided that the plaintiff could not recover because he did not indicate his intention to roam over the warehouse at large. Had he done so the defendant would have had opportunity to give warning of the danger of the trap-door, but, as he sought to purchase apples only, the defendant invited him to remain where the apples were and thereby limited the invitation, and for that reason the contention of the defendant must prevail. This decision is in accord with the judgment of the House of Lords in *Mersey Docks and Harbour Board* v. *Procter*.[2]

Another appeal in a case of negligence was that of the defendant in *Westenfelder* v. *Hobbs Manufacturing Co. Ltd.*[3] The plaintiff had entered the warehouse of the defendant company to buy a piece of glass. At the office he was given an order to be presented in the shipping room. He was not familiar with the place and entered the shipping room by a door not intended to be used by customers but which opened from an alleyway and was used for the shipping and receiving of goods. The plaintiff in leaving the shipping room intended to go out by the way he had entered, but, on arriving at the door, found a dray being loaded and stood to one side until opportunity offered to pass out. While waiting an employee arrived wheeling a crate of glass on a hand-truck. While unloading the crate it overbalanced and fell, injuring the plaintiff's foot.

At the trial the plaintiff sought to impose upon the defendants liability for negligence in leaving him to find his own way to the shipping room without adequate instructions and in not seeing that he left it by the proper exit, and, also because of the negligence of their employee in permitting the crate to fall. The jury found the defendants guilty of negligence in not properly directing the plaintiff to and from the shipping room and in not displaying a "no

[2] (1923) A.C. 253.
[3] 28 O.W.N. 57.

admittance" sign on the outside of the shipping entrance, but negatived negligence in the handling of the crate and in all other respects. The Appellate Court held that the negligence found did not justify a judgment in the plaintiff's favour. The injury to the plaintiff was not the direct result of either entering or leaving the warehouse by the goods entrance. He stood near that entrance and while there was injured, not by reason of the condition of the premises, but by reason of the toppling over of the crate. The plaintiff was an invitee and the rule as laid down in *Indermaur* v. *Dames*[4] is, that the invitee using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know, and that where there is evidence of neglect the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise and whether there was such contributing negligence in the sufferer, must be determined by the jury as a matter of fact. The true maxim is *Scienti Non Fit Injuria*. *Lucy* v. *Bawden*;[5] *Cavalier* v. *Pope*.[6] The plaintiff knew of the danger of entering and leaving in such an irregular way, and also knew of the danger of standing by while the employee unloaded his truck, therefore the accident occurred through his own negligence and he could not recover from the Company. B. B. J.

* * *

IGNORANTIA JURIS.—*Gutschenritter* v. *Ball*[1] was an action for specific performance of a contract for the purchase of land, to which the defence was raised that the plaintiffs were unable to give a good title. The agreement for sale contained a covenant by the vendors "to convey the lands to the purchaser by good and sufficient deed or transfer," but contained no words of exception or limitation, such as "subject to the conditions and reservations contained in the original grants from the Crown." The agreement also contained a covenant by the purchaser accepting the title of the vendor. In the grant from the Crown of a portion of the land there was a reservation of mines and minerals, and another portion was subject to reserved rights of navigation and fishing. These reservations constituted the defects in the title upon which the purchaser relied. Various statutes and orders in council between 1872 and the date of trial, affecting Dominion lands,

[4] (1866-7), L.R. 1 C.P. 274; L.R. 2 C.P. 311.
[5] (1914) 2 K.B. 318.
[6] (1906) A.C. 428.
[1] (1923) 3 W.W.R. 619.

had prescribed the terms of Crown grants. Up to 1883 there were no reservations of mines and minerals, but at that date the law was altered and they were excepted from the grant. Further, large areas were given to the C.P.R. and the Hudson's Bay Company which were unaffected by the statutes and orders in council mentioned.

The trial Judge found against the purchaser,[1] on the ground that the plaintiff's title was "the only title that under the law of the land can have any existence, this pursuant to public statutes, and the purchaser should not be heard to say that he is without knowledge of a public statute."

The Court of Appeal was equally divided in opinion,[2] the Chief Justice and Martin, J.A., upholding the purchaser's objection to the title, Lamont and McKay, J.J.A., contra. "It cannot, in my opinion," said the Chief Justice, "be presumed with regard to any parcel of land in this province that it was granted by the Crown with all or any of the reservations in question. . . . At no time in the history of this province has there been any general law relating to reservations of minerals other than the precious metals by the Crown, knowledge of which can be imputed to any person in relation to any particular parcel of land." Lamont, J.A., thought, however, that the purchaser "is presumed to know the general law embodied in the public statutes, and the regulations made thereunder."

In the Supreme Court an Appeal by the defendant was dismissed, and the decision of the trial Judge affirmed.[3] It was pointed out that the Saskatchewan Land Titles Act provides that any certificate of title granted under the Act shall, unless the contrary is expressly declared, be subject to "(a) any subsisting reservations or exceptions contained in the original grant of the land from the Crown," and Duff, J., delivering the judgment of the court, proceeds as follows:

"As Lord Haldane says, in *Grand Trunk Ry. Co.* v. *Robinson*[4] the law imputes to people who are subject to it the duty of knowing its principles; and purchasers of land in Saskatchewan registered under the Land Titles Act there, must have their rights determined on the footing that such purchasers act with knowledge of this provision of that enactment. Knowledge, generally, of the provisions of statutes and orders in council affecting land titles in that province must be imputed to them. That is to say, the rights of parties to dealings in lands must be determined on the footing that such knowledge exists."

Is every person presumed to know the law? The well-known Latin

[2] (1924) 2 W.W.R. 128.
[3] (1925) S.C.R. 68.
[4] (1915) A.C. 740 at p. 748.

maxim says that he is. *Ignorantia juris, quod quisque scire tenetur*—which every one is held to know—*neminem excusat.* The theory has at times been modified so as to make less serious demands upon the average consciousness. Lord Westbury drew the line at the equitable doctrine of election. "It is true, as a general rule," he said in *Spread* v. *Morgan*,[5] "that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity." Halsbury confines the scope of the principle to the contents of the statute book. "All the King's subjects must be taken to know the statute law," (Laws of England, vol. 27, p. 114). And Lord Haldane, with a still further leaning to the side of mercy, considers an acquaintance with legal "principles" sufficient; see *G.T.P.Ry. Co.* v. *Robinson, supra.*

Sir Frederick Pollock, however, bluntly declares the dictum, that everyone is presumed to know the law, to be "only a slovenly way of stating the truth that ignorance of the law is not in general an excuse."[6] Long ago exception was taken to the aphorism as expressed in its usual form. When Dunning, afterwards Lord Ashburton, arguing before Lord Mansfield in *Jones* v. *Randall*[7] asserted that "the laws of this country are clear, evident and certain: all the judges know the laws," the Chief Justice, in delivering the judgment of the court, took occasion to say: "As to the certainty of the law mentioned by Mr. Dunning, it would be very hard upon the profession if the law were so certain that everybody knew it."

In *Martindale* v. *Falkner*,[8] Maule, J., gave his view of the theory in terms which still hold good. He said: "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so"; and, referring to Lord Mansfield's remark he continued: "It was a necessary ground of the decision in that case, that a party may be ignorant of the law. The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract. There are many cases where the giving up a doubtful point of law has been held to be a good consideration for a promise to pay money. Numerous other instances might be cited to show that there may be such thing as a doubtful point of law. If there were not, there would be no need of courts of appeal, the existence of which shows that judges may be ignorant of law."

It will be seen that the carefully qualified statement quoted from

[5] (1865) 11 H.L. Cases, 588 at p. 602.
[6] Jurisprudence, p. 163.
[7] Cowper 37.
[8] (1846) 2 C.B. 706 at p. 719.

the judgment of the Supreme Court in *Gutschenritter* v. *Ball* harmonises with the explanation given by Maule, J.

"*Neminem excusat*" is the language of the maxim, but there have been occasional exceptions to its application. In the April number of the *Empire Review* Lord Birkenhead gives an instance. In *Middleton* v. *Croft*[9] a husband and wife asked for a prohibition, having been cited to appear in an ecclesiastical court on a charge of clandestine marriage. Lord Hardwicke, in pronouncing judgment, related how Coke had, in Elizabeth's reign, been married clandestinely in the presence of Lord Burghley, the Lord Chancellor, and other legal dignitaries, and they had all been absolved from excommunication on the ground that they had acted in ignorance of the law!

R. W. S.

* * *

Damages from Nervous Shock.—The right to recover damages caused by nervous shock came up in *Penman* v. *Winnipeg Electric Railway Company*,[1] and was held not to exist, following *Victorian Railways Commissioners* v. *Coultas*.[2] In that case the gate-keeper of a railway company had negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and the jury, although an actual collision with a train was avoided, nevertheless assessed damages for physical and mental injuries occasioned by fright, but the verdict was set aside and judgment entered for the defendants, the damage being considered too remote. "According to the evidence of the female plaintiff," said Sir Richard Couch, delivering the judgment of the Board, "her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper."

Sir Frederick Pollock finds this decision unsatisfactory[3] "The true question," he says, "would seem to be whether the fear in which the plaintiff was put by the defendant's wrongful or negligent conduct was such as, in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and properly lead, in the plaintiff's case, to the physical

[9] 2 Str. 1056.
[1] (1925) 1 D. L. R. 497.
[2] (1887) 13 A. C. 222.
[3] See Pollock on Torts, 9th ed. 52.

effects complained of. Fear taken alone falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects."

The decision has also been criticised by other writers and the courts of England and Ireland have refused to follow it. *In Dulieu* v. *White and Sons*[4] it was held that "damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recoverable in an action for negligence if physical injury has been caused to the plaintiff."

In *Janvier* v. *Sweeney et al.*[5] it was held that "false words and threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered are actionable."

As observed by Mathers, C.J., in the *Penman* case, the Privy Council decision is binding upon our courts in Canada however much it may have been criticised and disapproved elsewhere.

R. W. S.

* * *

INTERPRETING THE CONSTITUTION.—In a recent number of the *Journal of Comparative Legislation and International Law,* Professor A. Berriedale Keith makes some interesting observations on the Canadian Constitution as interpreted by the Privy Council. He traces the development of the principles underlying the distribution of powers between the Dominion and the provinces, especially with regard to "trade and commerce" and "property and civil rights," as worked out in a long series of decisions by the Judicial Committee. He reviews the leading cases from *Russell* v. *The Queen,*[1] *through Hodge* v. *The Queen,*[2] *Atty.-Genl. for Canada* v. *Atty.-Genl. for Alberta,*[3] *Fort Frances Pulp and Power Company* v. *Manitoba Free Press,*[4] *and Atty.-Genl. for Ontario* v. *Reciprocal Insurers,*[5] *down to Toronto Electric Commissioners* v. *Snider,*[6] and expresses regret that the Judicial Committee has more and more restricted the residuary powers of legislation of the Dominion and has not taken a broader view of the power of Parliament to regulate trade and commerce.

[4] (1901) 2 K. B. 669.
[5] (1919) 2 K. B. 316.
[1] 7 A.C. 829.
[2] 9 A.C. 117.
[3] (1916) 1 A.C. 588.
[4] (1923) A.C. 695.
[5] (1924) A.C. 328.
[6] (1925) A.C. 396.

The board had to deal with an Act of Parliament and to interpret that Act, and it may be suggested that to have held legislation such as the Lemieux Act justified under the heading "regulation of trade and commerce" would be to add a term to the language of the Act, and to assume that what was intended was "regulation of trade and commerce—and industry" which could by no means be justified. The words used in the B. N. A. Act were no doubt properly interpreted by Sir Montague Smith in *Citizens Insurance Co.* v. *Parsons*,[7] where they were held to include "political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion." Evidently regulation of trade is not regulation of industry, in the sense, for instance, of the relations between employer and employed.

Further, if the Privy Council had given as extensive a scope to the residuary powers of Parliament as has been suggested in the discussion of many of the above cases, the provinces might have been reduced to the position of a superior order of municipal corporations.

Prof. Keith concludes his review of the subject by saying: "It appears, therefore, that there is a definite lacuna in the scheme (of the B. N. A. Act) in the absence of any such power in the Dominion as is expressly conferred on the Commonwealth, which has power to legislate as to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'."

It is interesting to note that the exception thus taken to the last judgment of the Privy Council, which was pronounced by Lord Haldane, is almost precisely the same as the criticism by Lord Haldane of the opinion of Sir William Meredith in *Great West Saddlery Co.* v. *The King*. In the report of this appeal,[8] Lord Haldane says, "Such a construction (as Sir William Meredith argued for) would have left an hiatus in the British North America Act."

The lacuna which Prof. Keith finds may be bridged by restricting Dominion legislation to works and undertakings connecting one province with another or extending beyond the limits of the province, as well as the other works or undertakings mentioned in paragraph 10 of section 92 of the Act. This would leave local disputes to be dealt with under provincial law, whereas, in the case of railways, steamship lines, telephone lines, etc., extending throughout Canada, provision

[7] 7 A.C. 96 at p. 113.
[8] (1921) 2 A.C. 91 at page 115.

might be made by a general law for investigation, conciliation and arbitration.

The Privy Council has a task of great difficulty and responsibility in the interpretation of our constitutional Act, and, whatever the nature of its decisions, is sure to come in for criticism. Possibly the weightiest reflection ever made upon the manner in which its onerous duties in this respect have been performed is the remark of Bryce, when discussing the development of the American constitution under Chief Justice Marshall. In a note to chapter 33 of volume 1 of his "American Commonwealth," 2nd edition, 1891, at p. 375, he says:—"Had the Supreme Court been in those days possessed by the same spirit of strictness and literality which the Judicial Committee of the British Privy Council has recently applied to the construction of the British North America Act of 1867 (the Act which creates the constitution of the Canadian Federation), the United States Constitution would never have grown to be what it now is."

Whether or not this criticism still holds good may be a matter of debate. R. W. S.

BOOKS AND PERIODICALS.

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The Life of Sir William Osler. By Harvey Cushing. Toronto: The Oxford University Press. 1925. 2 Vols. Price $12.50.

Whether we agree or not with the sage who said that History in the large is Philosophy teaching by Examples, that part of it called Biography when read aright has for us a larger measure of instruction in the art of living than it has of sheer entertainment, although it necessarily has much of that. But there are biographies and biographies—it depends upon the character of the man whose life is laid bare. In some the tale

> "Hath neither joy, nor love, nor light,
> Nor certitude, nor peace, nor help for pain;"

in others as we read we are fain to believe that Leibnitz was not egregiously wrong when he said that this was the best of all possible worlds—because the mortal can put on so large a measure of immortality here. The biography of Sir William Osler belongs to the latter class.

When that truly great lawyer Britton Bath Osler died in 1901, his death was chronicled as "the first loss in the circle which has produced more distinguished men than any other contemporary family in the com-