

Sup. Ct.]

NOTES OF CANADIAN CASES.

[Sup. Ct.]

104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage either in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle as they are directed to do by said statute, whether such damage arises from actual collision or, as in the case here, by a horse being brought near the crossing and taking fright at the appearance or noise of the train.

The jury in answer to the question, "If the plaintiff had known that the train was coming would they have stopped their horse further from the railway than they did?" said "yes."

Held, that though this was not very definite, yet taken with the evidence on which the jury acted, and as the question was not objected to by counsel at the time it was put by the judge, it was sufficient.

Appeal dismissed with costs.

Bethune, Q.C., for appellants.

Bordly, for respondents.

Ontario.]

BOTHWELL ELECTION PETITION.

HAWKINS V. SMITH.

Ballot—Scrutiny—Irregularities by Deputy Returning Officers—Numbering and initialing ballot papers—Effect of—The Dominion Elections Act, 1874, sec. 80.

In a polling division there was no statement of votes either signed or unsigned in the ballot box, and the deputy returning officer had endorsed on each ballot paper the number of the voter on the voters' list. These votes were not included either in the count before the returning officer, the re-summing up of the votes by the learned Judge of the County Court, nor in the recount before the judge who tried the election petition.

Held (affirming the decision of the Court below), that these ballots were properly rejected. Certain ballot papers were objected to as having been imperfectly marked with a cross, or with more than one cross, or with an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper, and a line dividing the paper in the middle.

Held (affirming the rulings of the learned Judge at the trial), that these ballots were valid.

Per RITCHIE, C.J.—Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, it should be counted, unless, from the peculiarity of the mark made, it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary, a clear intent not to mark with a cross as the law directs, as for instance by making a straight line or a circle, then such non-compliance with the law renders the ballot null.

Division I., Sombra.—During the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer initialed and numbered about twelve of the ballot papers, but finding he was wrong at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took the ballots out of the box and obliterated the marks he had put upon them.

Held (GWYNNE, J., dissenting), that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, they should be held good, and that said irregularities came within the provisions of sec. 80 of the Dominion Elections Act, 1874; *Jenkins v. Brecken, Queen's County Election*, 7 Can. S.C.R., 247, followed.

Per HENRY, J.—On the trial of an election petition ballots numbered by the deputy returning officer, as in the present case, should be held bad; but it did not lie in the mouth of the present appellant, who had acted upon the return of the returning officer and taken his seat, to claim that the proceedings were irregular and say that the election was void.

Hector Cameron, Q.C., for the appellant.

Lash, Q.C., for the respondents.