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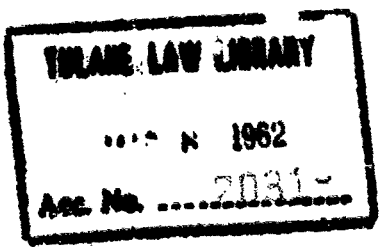

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PROPOSED AMENDMENTS TO THE ELECTION LAW.

"We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror."

—*Measure for Measure.*

The existing law for the suppression of corrupt practices at federal elections requires considerable alteration in order to make it effective. Mr. Charlton brought forward a bill in the House of Commons two years ago containing provisions enlarging the scope of the present law and subsequently a special Committee of the House was appointed to consider the whole subject. The Committee was in favor of adopting some of the provisions of the proposed measure, but owing to the great volume of other business before parliament no further progress was made towards amending the law.

The amendments proposed were commendable in declaring as corrupt practices certain improper actions which were not covered by the present statute, but the most serious defect in the present law is left untouched by any of them.

In the opinion of the present writer the main cause for the unsatisfactory operation of the Controverted Elections Act is that enforcement of its leading provisions is largely in the hands of parties who may be and often are as guilty as those against whom proceedings are instituted. The statute as manipulated by the agents of petitioners and respondents conceals rather than reveals the crimes it was framed to punish. A vigorous and uncompromising enforcement of the law cannot be secured when one whose duty it is to prosecute and furnish evidence is in pari delicto and likely to be embarrassed by counter-proceedings. The natural consequence is that soon after election petitions are filed by each party there are the usual dip-

lomatic overtures and ultimately all investigation is rendered abortive. Each having sinned, it is deemed expedient by each to condone the offence of the other and thus the very object for which the law is intended is defeated. The law is actually so manipulated as to be a clever device for frustrating justice, inasmuch as when the curtain is rising and the corruptionists are about to be exposed to public view the whole performance is ended by the joint action of both parties to the farce.

The fundamental weakness of the present law is that it is liable to be treated as if the only parties concerned were like parties to an ordinary civil suit, in which the public had no special interest. If, the prosecution of any person for committing an offence against the Canadian Criminal Code were dependent upon the action of some one guilty of the same offence it would soon be discovered that the Code was a failure and the reason for the failure would be quite plain. For example, take sec. 154 of the Code, the object of which is to prevent the bribing of any juryman. A person violating that section is guilty of an indictable offence and liable to two years imprisonment, but the value of such a provision would be destroyed if its enforcement against A.B., who, as an agent of the plaintiff had been guilty of bribing a juryman, were left in the hands of C. D., the defendant whose agent also had been guilty of bribing another juryman. Our Customs law is vigorously enforced, and smugglers are promptly punished because there is a department and staff whose special duty is to enforce the law and prosecute all violators, and our Inland Revenue law is effectively enforced for the same reason. But if the prosecution of A. B. and his employees for smuggling depended practically upon the action of C. D. and his agents, many of whom had also been guilty of smuggling, it is to be feared that there would be at some convenient period a sudden and permanent abandonment of all proceedings. The reason why there are comparatively few violations of the Customs Act or Inland Revenue Act in Canada is that persons who might otherwise contemplate a breach of the provisions of either Act know that these laws are sternly enforced and cannot be violated with impunity. Our Corrupt Practices Act is the only law in Canada

based on the curious expectation that it will be enforced by persons who have just broken it.

The present writer, when acting as official stenographer about sixteen years ago, attended a large number of trials in connection with election petitions and gradually became convinced that the great defect in the law was in affording so many opportunities to prevent instead of to aid a full investigation, and soon afterwards he called public attention to it in articles published in some of the daily newspapers. Referring to the defect in question as it then appeared to him, he wrote as follows:—

"One of the weaknesses of the present law is that after an election petition has been presented containing a large number of allegations of flagrant violations of the law, the respondent may avoid a full investigation by a simple admission that a technical violation of the law has been committed and upon such admission the respondent is unseated and the whole proceedings are forthwith terminated, and, as a result of this 'investigation' thus legally stifled, the corrupt practices of the voters escape exposure and punishment. How can voters be expected to fear laws against bribery when investigation and punishment for their violation can be so easily avoided? One of the primary objects of the law was that corrupt practices at elections should be fully investigated and punished, but by this easy method of terminating the whole proceedings a capital illustration is given of 'how *not* to do it.' Parliament should remedy this defect and should prevent the making of any arrangement between parties by which in consideration of the petition against Mr. Blank, M.P., being 'dropped' the petition against Mr. Dash, M.P., who is on the other side of politics, would also be abandoned. This practice of trading off petitions is a most reprehensible one. The power to stop a judicial investigation involving serious charges against many voters should not be in the hands of the wire-pullers of any political party."

In 1897 the writer repeated this statement in a public criticism of the law.

Although various amendments have been made to the law since that time there has been no remedy for the defect thus

criticised. The same criticism applies to the provincial statutes dealing with Controverted Elections. A few months ago Mr. Justice Osler referred in severe terms to the entire proceedings in connection with an election proceeding in an Ontario court. Speaking of the petition and cross-petition, he said that they, "had been dismissed at a so-called trial. The court cannot avoid taking notice of the manner in which this has been done nor the fact that notwithstanding the gravity of the charges alleged by each party against his opponent and his agents no particulars of corrupt practices were delivered on either side, nor any evidence offered in support of the charges. The only course left open to the trial judges under such circumstances was to dismiss the petition and cross-petition. This having been done, if we may take notice of what has been publicly announced, the sitting member resigned. The whole of the proceedings on both sides were so manifestly a sham and a use of the forms of the court for some purpose other than the real trial of the charges, that contempt of court is not predicable of anything reflecting upon the parties to them, 'in scena, non in foro res agitur,'—and whether the play is damned or applauded is no concern of a court of justice."

It will be suggested perhaps that, without any material alteration in the present law, an adequate remedy could be found for the defect in question by an amendment which would provide that the making of an agreement to withdraw a petition in consideration of any payment or of the withdrawal of another petition shall amount to a misdemeanour punishable with imprisonment. Such a provision exists in the Imperial Corrupt Practices Act, 1883, but while an amendment of that character if adopted in Canada would be some improvement upon our present law, it would not afford a complete remedy. There would still be crooked paths by which the guilty would escape. The petition and counter-petition could die of "neglect," but the actual cause which led to the neglect while it might be suspected could not be legally established. The overtures would be conducted in such an indirect and diplomatic way that the proceedings would stop "of their own motion,"—to use an Hibernicism. The parties to the corrupt withdrawal of the

petitions would not confess their wrongdoing and it would be rather difficult to furnish legal evidence as to the real cause of the inertia.

It sometimes happens however that trading in petitions is not practicable and the petitioner in such cases proceeds to trial. Surely, then, nothing can occur to check a full investigation and exposure of all corrupt acts? Unfortunately, the proceedings are still in the hands of the parties and the investigation may be stopped by the making of certain admissions relating to a few violations of the Act technically sufficient to unseat the respondent, and this result having been accomplished all further exposure is generally avoided. The petitioner having secured the main object of the petition does not wish to incur the risk of costs in pressing for further inquiry and thus the whole matter ends.

Reference has been made to cases where petitions are actually filed, but there have been scores of cases where evidence was obtainable which would shew bribery in various constituencies and amply justify the filing of a petition and yet no petition was ever filed. The law requires the deposit of $1,000 in connection with the proceedings by petition and sometimes there may be difficulty in procuring this sum in certain constituencies. Again, the defeated candidate and his friends may feel that while bribery was indulged in by the agents of his opponent, his own agents in some instances were also guilty. Moreover, if the successful candidate is a supporter of the party which wins at a general election there would be very little purpose in unseating him because he would again be nominated, except in the very rare case of personal disqualification, and would be almost certain to be elected by a larger majority than at the general elections,—it being considered by many of the electorate, as one writer humorously puts it, "contrary to the genius of our institutions" to vote against a government in a bye-election following upon the general elections. In many instances, therefore, there is not sufficient incentive to induce the defeated candidate or his friends to deposit $1,000 and undertake the trouble and annoyance of carrying a petition to a successful termination. The result is, therefore, that

there is no petition and consequently no investigation. In regard to the recent general elections, it now appears that there have been very few petitions filed. I have no personal knowledge of any corruption in any recent contest, but it would not be a fair assumption that there was very little corruption merely because very few petitions are filed.

As a final illustration of this defect in the Act, the writer has been credibly informed that in at least one instance since the Act was passed the two rival candidates themselves in one election agreed that each should be at liberty to spend as much as he pleased, and that there should be no subsequent petition and there was none. Both candidates being wealthy the opportunities for corruption were immeasurable and the contest turned upon the skilful spending of the respective corruption funds.

In view of the foregoing facts it must be obvious that agents intending to indulge in corrupt practices have very little to fear, as the risk of exposure and punishment is comparatively trifling. Let us suppose the case of an agent who takes money to a district generally regarded as corrupt. What risk does he run of detection and punishment? In the first place he feels that there is a chance that his purchase of votes if carried on skilfully will never be known; secondly, he has reason to think that there is an agent of the other candidate in the same district similarly equipped; thirdly, he has reason to believe there will be no petition if his candidate is successful; fourthly, he knows that, if by any chance a petition is presented, there will be the usual opportunity for a counter-petition and a safe "trade;" finally, he knows that an investigation can be stifled by certain admissions which would not concern him. Is it any wonder then that agents in the heat of an election will run the risk—such a very little risk—in order to secure large returns? They do it because they feel that they can do it safely. And they will continue to do it until a law is passed that will make them realize that they cannot escape. So soon as there is such a law vigorously enforced many of the corruptionists will abandon their corrupt practices, and the few reckless ones who might still violate the law would cease violations as soon as there

were a few men sent to prison. It was only when some "respectable" men were imprisoned in England twenty years ago that the general public began to realize that it was a crime to bribe, and there are many people in Canada who do not yet fully realize that fact. A drastic measure vigorously enforced has great value as an educative agency. In some districts in Canada there are men who are conscientious in professional or commercial matters, and if it were suggested to them that they should aid in a movement to deprive a neighbour of the slightest portion of his property they would suffer from an attack of moral goose-flesh, but they do not scruple to furnish improper aid to injure the same neighbour by committing an electoral crime. They will juggle with their consciences in their efforts to excuse shifting of the moral standard in an election campaign. There is a stupendous amount of hypocrisy displayed in connection with an election. Here and there a man is to be met so pitiably pharisaical as to claim that corrupt practices are confined to the ranks of his opponents. Who does not know also that interesting type of citizen prone to publicly deplore in thunder-tones the corruption practised by "the other side," but without a word of public condemnation for the corrupt practices of his own party? Again, there are other citizens who are prepared to admit privately and confidentially that their own side is also guilty, but the subdued tones in which they admit the guilt of their own party are in striking contrast to the noisy and violent condemnation of the guilt of their opponents. They will, however, go so far as to speak in whispered condemnation of the guilt even of their own political party and thus they effect a compromise with their consciences,—a compromise resembling that of the lady in reduced circumstances who had to sell muffins for her livelihood, and who compromised with her gentility by calling them in a very low tone of voice.

There are other citizens who are patterns of rectitude in private life but manifest an extraordinary obliquity of moral sense when participating in a political campaign. They wink at political corruption although they would not tolerate any other form of wrong-doing. Political partisanship affects their moral vision. They look at the question in the manner Captain

Absolute in "The Rivals" complained that Lydia Languish looked at him,—"When her love-eye was fixed on me, t'other, her eye of duty, was finely obliqued."

To another class, publicity in regard to their connection with political corruption would be in itself a severe punishment. They do not object to being dishonest, but they would object to being exposed.

Another class devoutly believe in the doctrine which Macaulay tells us at one time prevailed in England even among upright and honorable politicians that it was shameful to receive bribes, but that it was necessary to distribute them.

Both political parties being admittedly guilty, no useful purpose can be served by discussing the degrees of frailty attaching to each of them. The first proposition which this article insists upon is that corrupt practices will never be suppressed or even materially checked in Canada under the present law. The law to be effective should be simple and summary in its provisions and swift and severe in its enforcement, whereas the present law in its indirectness and circumlocution suggests the method of the tailor at Laputa who undertook to measure Gulliver by sextant or quadrant and co-sines, with the result that the suit was a misfit because of an error in the calculation. The erroneous calculation which makes our election law misfit, is in entrusting its practical enforcement under election petitions to parties who often have selfish or corrupt motives for preventing the beginning of any proceedings and for checking an investigation when once begun.

It is true that there are provisions in our statute permitting prosecutions for corrupt practices, even outside of an election petition, but these provisions are never invoked unless the corrupt practice is of a most flagrant and easily established character. The very common offence of bribery is rarely made the subject of special prosecutions for the reasons already stated that retaliatory actions would follow immediately.

But even if the law is amended at this session of the new parliament by simplifying some of its provisions and making other portions more stringent, there still remains the difficulty,—How can any guarantee be given that after such a law is enacted

it will at all times be impartially and uncompromisingly enforced? That indeed is the real problem. With the vast majority of Canadians, however, desiring the enforcement of such a law, it ought not to be impossible to provide effective machinery for its enforcement. There should be established for the express purpose of supervising the enforcement of such a law a department with a special staff of officials and, most important of all, directed not by a Government or any of its Ministers, but by a resolute and independent chief or "General Superintendent of Elections" who could not be removed from office except by a two-thirds vote of the House of Commons, and whose energy and determination in enforcing the law would soon make him a terror to the whole chain of corruptionists,—not only to the man at the end of the chain who pays out the bribe-money or distributes the liquor to the voter, but to the "respectable" Committee which hands it over to such men and the other "respectable" Committee which collects it, and also those others who may be at the beginning of the chain,—the corporations, bonus-hunters, and others whose liberal contributions sometimes go beyond proper limits and should in any event be disclosed to the public.

It is true that there is no such provision in the British statute on this subject, but it must be remembered in comparing the British and Canadian law that owing to the special conditions prevailing in Canada there will always be more intimate relations here between the Executive and members of the House of Commons on the one hand and contractors and promoters on the other. Corporations and others having close relations with a Government should be compelled to publish a sworn statement of their campaign contributions.

Instances have been alleged of corporations contributing generously to the campaign fund of leading men who were candidates of one political party in certain constituencies and also contributing with lofty impartiality equally large sums in various other constituencies to assist other candidates who were of the opposite political party, the purpose of the investments being to secure grateful and influential friends at Ottawa in any event. While on this point touching publication of contri-

butions, it should be noted that the present law requiring publication of the expenses of the candidates only results in the publication of the legitimate expenses of the election. But if all campaign committees were compelled to publish or to furnish to the "General Superintendent of Elections" for his guidance a complete statement sworn to by the Chairman and Treasurer of the Committee, and shewing all money received and expended by the Committee, the information would be of great value to the Superintendent.

No "deals" or "swaps" could be possible under such a man who should conduct his department with an unswerving recognition of the simple truth that the best way to investigate is to investigate. He would know that if he did his duty honestly and fearlessly he could never be dismissed from office. Mr. Borden, the leader of the opposition, in the course of a debate in the House of Commons asked the Government to consider the advisability of appointing an official who would be as independent as the Auditor-General, and it seems clear to any one who studies the question that only in this way can corrupt practices be suppressed. Even if the present machinery of the law were sufficient (as it may be) to deal with certain offences such as the outrageous ballot box crime recently exposed in one province it would still be necessary to have some qualified and directly responsible official and staff entrusted with the duty of eradicating the other and more common forms of corrupt practices and their root-cause bribery. The stern enforcement of a drastic law by such an official would give the people a more enlarged understanding of crimes against the ballot and an abhorrence of them. He should be given power not only to prosecute the elector who accepts a bribe, but to hunt out with even greater zeal the canvasser who holds out the temptation, and finally should be empowered to trace corruption to its source just as the Superintendent of a Board of Health would be expected to search for and destroy the germ of some malignant disease.

Some of the recommendations made by the Special Committee of the House of Commons would, if adopted, be of peculiar value to such an official and his staff in aiding them

in enforcing the law. One of the best proposals favored by the Committee originated with Mr. Charlton. The proposed amendment as recommended by the Committee was as follows:—

"A person offending against any provision of the next preceding section shall be a competent witness against any other person so offending and may be compelled to attend and testify on any trial, hearing, proceeding or investigation. provided that if such person has answered truly all questions which he is required by the court to answer he shall be entitled to receive a certificate of indemnity from the court which may be in the form F. F. and the testimony so given shall not thereafter be used in any prosecution or proceeding, civil or criminal, against him.

2. A person testifying and obtaining a certificate of indemnity shall not thereafter be liable to any action, indictment, prosecution or punishment for the offence with reference to which his testimony was given and may plead said certificate of indemnity accordingly in bar of such action, indictment or prosecution."

As was stated by the gentleman who introduced this amendment, under such a law the briber would be completely at the mercy of the person bribed, who, under another amendment, as an inducement to him to confess would be entitled to the penalty of $500 to be recovered against the briber.

Of course, the objection at once suggests itself that such a provision would result in blackmail. But that objection applies to all laws where prosecutions may be instituted by private persons and yet, with proper safe-guards in respect to weight of evidence, such provisions are considered satisfactory, and indeed in many cases necessary for the proper enforcement of the law. In fact the proposed amendment is now a part of the Penal Code of the State of New York which deals with corrupt practices at elections, and, in order to ascertain how its operation is regarded there, the writer communicated with a friend who is a leading lawyer in New York, Mr. G. W. Schurman, brother of President Schurman of Cornell University. Mr. Schurman, who was formerly Assistant District Attorney in New York and is native of Canada, informed the writer that

the provision in question was found most useful and satisfactory in its operation.

At the risk of making this article too long, I wish to make some comments upon some other amendments which have been proposed. The present law is not logical in permitting a man who owns a carriage to use or loan it on election day for the purpose of conveying voters and yet preventing a man who does not own a carriage from hiring one for the same purpose. The object of the prohibition was to prevent a "hiring" which would be a cover for a bribe. The Special Committee proposed the following section as an improvement upon the present law:

"Provided, however, that nothing in this section shall be held to make it illegal for any candidate or other person to hire bona fide and for any purpose and for the ordinary and reasonable price any horse or vehicle, etc., belonging to any regular cabman or liveryman."

This provision is sufficient to meet the cases of hiring in cities and towns, but there should be a clause added which would also legalize the hiring of teams in rural districts where indeed the necessity of hiring is more imperative. The objection raised to extending the provision to rural districts is that every farmer's rig in the country would be "hired," but so long as the hirer is restricted to paying a fair and reasonable price which could be fixed in the amendment itself there would not be the great opportunity for bribery which seems to be feared. The necessity of hiring teams in the rural districts especially in stormy weather to drive to the polls electors living a long distance from the polls is always recognized by both parties and the existing provision of the law is often ignored.

The following amendment should become law:—

"Any Minister of the Crown or Agent of the Government during an election campaign or for three weeks before it who makes a promise of Government appropriation or aid to any constituency which promise is calculated to influence the result of the election in that constituency shall be deemed guilty of a corrupt practice, and where a Government during the progress of on election campaign or at any time within———— months of the dissolution of the House sends engineers for the

purpose of surveying public works for which no appropriation has been made, this shall, where such survey influences the result of the election, be deemed a corrupt practice."

I wish to suggest the propriety of enacting a provision prohibiting any candidate from giving or promising a subscription to anything during a campaign or within one month previous to it, which gift or promise is calculated to influence the result of the election. This would not only prevent a peculiar form of corruption which is displayed in the form of large donations to societies and clubs in whose welfare a sudden and intense interest is sometimes taken by a candidate, but would also protect a candidate from being the prey of all organizations desiring to secure a practical and substantial proof of his interest in their success. Such an amendment would have a deterrent and salutary influence in curbing the generosity of the candidate and the importunities of the societies.

It might be supposed that the writer believes that corruption is widespread in Canada and infects almost every district in our country. On the contrary I have reason to believe that there are many communities where the briber would find it impossible to carry on effective work. But a few corrupt districts may often determine the result of the contest and the infection if not suppressed is certain to spread. One gratifying consideration in connection with the movement for a reform is that in some constituencies efforts have been made from time to time by both political parties to stop the evil. Such efforts whenever made have met with sincere support from the bulk of the electorate irrespective of party.

The present writer was once Secretary of a political Association for a large constituency in one of the Maritime Provinces, and shortly after the general elections of 1891 a bye-election became necessary in this constituency. Some correspondence took place between the two political Associations relative to the propriety of endeavouring to carry on a campaign free from corruption. The correspondence resulted in a formal written agreement being executed by committees representing the two Associations pledging the signers and their associations to use every effort to prevent violation of the law. The agree-

ment thus made was loyally adhered to by both sides. Circulars were sent throughout the constituency notifying the rural voters and others of the terms of the agreement and it met with the hearty approval of the vast majority of the electorate in the constituency. In one or two districts there was some murmuring and I remember getting a letter from a colored voter in one district indignantly remonstrating against such unprecedented action. In words in which indignation overpowered orthography he wrote that "such purceedings was rediklus and farsikul and aint no lection at all." It is only fair to the complainant to state that his pathetic remonstrance was not against the effort to stop buying votes with money, but rather against the discontinuance of what he euphemistically called "refreshmunts." In justice to him it should also be stated that on subsequent enquiry I found that notwithstanding his remonstrance he afterwards voted and without any stimulus although it was only just before the closing of the polls that his vote was recorded.

Throughout the constituency a clean election was held and the experiment was considered by all parties as satisfactory. I cannot offer any explanation as to why it was not formally continued in later contests, but it is possible that mutual distrust prevented its repetition. The incident is mentioned as affording some proof of the fact that the majority of people desire clean contests and would actively support a strong measure compelling the abandonment of corrupt methods. Doubtless, however, all parties would have more confidence in a drastic law ensuring an honest election than in an agreement made with each other, or than in any resolutions which might be adopted by each party.

A majority of the Special Committee of the House of Commons also approved of what is sometimes although not accurately described as a compulsory voting system.

If the adoption of such a principle would greatly aid in the suppression of corrupt practices it ought to be adopted. One obvious difficulty in the practical working of such a system would arise in connection with the provision exempting from disfranchisement those citizens who had a lawful "excuse,"

such as sickness, conscientious scruples, absence from the district, etc. At every election in Canada there would be hundreds of electors with sound reasons for not having voted at a particular election. It would not be right to disfranchise them. How is it practicable to legislate so that all such men should retain the franchise while the corrupt men who fail to vote shall lose the franchise? The solution the Committee suggested, providing that that those not voting at the election could have their names retained on the list on satisfying a judge that they had a fair excuse for abstention, would not meet the difficulty. It would be rather oppressive to require that such a voter should go to the expense and trouble of travelling—in some instances many miles—before he could appear before a judge and again enjoy the franchise of which he was deprived through no fault of his own. Moreover such a provision would really not materially reduce the list of voters who are bought "not to vote." There would be many opportunities for evasion under such a provision, and a voter who was unscrupulous enough to be bribed and wanted to keep his vote "in the market" could easily discover that he came under one of the exemptions and did not vote because he was "sick," or his wife was sick or his children were sick, or he was absent from home on "business" or some equally ingenious excuse which could not be easily controverted and which, therefore, might enable him to retain his vote. What would be done in the case of man who might truthfully declare that he had conscientious objections to voting for any of the condidates nominated? But apart altogether from the difficulty of framing a workable provision protecting the honest absentee and punishing the corrupt one, there is another view as to the uselessness of adopting "compulsory voting" which, although I have never heard it expressed, must occur to any one who reflects upon the practical operation of such a measure. The advocates of the measure contend that its adoption would prevent that form of bribery by which a man is paid to stay away from the polls on election day. Now that is all it could accomplish even if effectively enforced. But that form of bribery is tried to a comparatively trifling extent in Canada, and if the proposed law were enacted and the elector did not have a sudden

"illness" it would only be necessary for the briber to change the conditions of the bribe which would then be on some such condition as that the voter should mark his ballot in a particular way so as to spoil it, and yet make it obvious that he carried out his promise. In short a great amount of labor and trouble would be involved under the proposed system in this effort to deal with a very small percentage of the bribable or corruptible element of voters who would merely shift their methods if such a law were passed.

It is worthy of consideration, however, whether some forms of personal canvassing at present legal, should not be declared corrupt practices. The object of the Ballot Act was to secure to the elector freedom from intimidation and to enable him to give an independent vote, but the effect of personal canvassing is in many instances to interfere with the freedom of the elector and to produce undue influence and deception. If A. B. an employer of labor goes to his workmen and says privately to each of them "I want you to vote for my friend C. D.—will you oblige me by doing so?" What answer will the workman give who had previously decided to vote for another candidate whom he conscientiously believed to be the better man? If a workman refuses to accede to the "request" of his employer he may lose his employment, although of course no threat is made; and, if on the other hand he promises to do as his employer wishes while privately still intending to carry out his original decision, he is guilty of hypocrisy. If, finally, he is induced by means of this objectionable personal canvassing to abandon his honest choice, he is surrendering his freedom as an elector. There is often an insidious and impalpable intimidation about such practice which of course does not find expression in words but is nevertheless a wrongful interference with the independence of the workman and a violation of the spirit of the Ballot Act and in many cases is really coercive, in fact, though not in law. Some workmen in such cases feel themselves under "duress" and the desired promise is extorted from them. Personal canvassing of employees by employers when thus attempted should be considered as a corrupt practice, as it is the seed of continual injustice. If an employer desires the votes

of his workmen for a particular candidate he ought not to canvass them individually, but should have recourse to the method adopted by some employers of calling their workmen together and publicly addressing them in legitimate arguments on behalf of the favorite candidate or sending them a circular setting forth reasons why they should support him.

Another equally objectionable form of personal canvassing is undertaken sometimes by candidates supporting a Government in constituencies where there is a large number of employees of the Government. These candidates procure a list of such employees and subject each of these men to a personal canvass that is as distasteful to the men as it ought to be to the candidate, inasmuch as the solicitation of promises under such conditions is not consistent with the free and unbiassed exercise of the franchise. Some candidates feel compelled to do it because it has always been the practice followed by their predecessors and its sudden abandonment might be misconstrued. The law should prohibit it.

Notwithstanding what may be written or said on this subject there will be many who will say that corrupt practice can never be suppressed, and will quote the politician in the Western part of the United States who said that purity in politics is an iridescent dream. It may be that even after the enactment and enforcement of a drastic measure there will be occasional violations of its provisions, just as even to-day there may perhaps exist in a few isolated sections in Canada some illicit stills in spite of the energy and watchfulness of the Inland Revenue Department, but with an effectively enforced law against corrupt practices the instances of its violation would in the course of a few years become as rare as the existence of illicit stills. Doubtless there would be sporadic cases of corrupt practices in spite of the most severe law, inasmuch as the total cure of any evil is beyond the reach of the parliamentary prescription, but the evil of corrupt practices can be so lessened as to be of comparatively trifling extent. Instead of accepting the cynical view of the Western politician, the sentiment of Charles Sumner should be the basis of the movement for reform on this subject. —"Politics is morality applied to public affairs." It is often

said in regard to any proposed reform that "public opinion is not ripe for it." But no one in Canada can honestly raise that objection to a reform in our election laws. There is to-day an active, earnest opinion in favour of such a reform and, therefore, with public opinion to uphold the law and competent officials to enforce it, there should be no fear of the success of a reform which will receive an active support not only of that large and constantly growing class of Canadians who have emancipated themselves from unreflecting political prejudice, but also the vast majority of all Canadians.

A drastic measure would aid in giving what is needed in many parts of Canada,—a better sense of the sacredness of the suffrage, and a desire to avoid all contact with men whose interest lies in the perpetuation of corrupt practices. But further delay in the legislation needed would be almost equivalent to connivance with future corruptionists, for if a determined effort is not made soon by parliament to secure a radical reform in the law and ensure its effective enforcement the stream of corruption will steadily increase until the day may come when in many constituencies and particularly where honest electors are divided into two nearly equal parties the result will turn upon the votes of the small corrupt residue, which means of course that the longest purse will win. If that day should ever come it can then be truly said, to alter slightly the words of Lacassagne: "Our country has the political criminals it deserves."

W. B. WALLACE.

Halifax, N.S.

The criminal statistics of the United Kingdom show that crime there is decidedly on the increase. It is said that during the forty years, up to 1900, there had been a decrease, but since then a steady increase. The total number of persons tried for indictable offences was 58,444 in 1903, the total for 1902 was 57,068, and the average for 1899-1903, 55,018.

THE SENTENCING OF CRIMINALS.

One of the most perplexing things that comes within the sphere of a Judge's duties is the determination of what sentence should be passed on those who are found guilty before him. Knowing this, we should be cautious in criticising sentences which, on the one hand strike one as being severe, or, on the other, as inadequate. Where it is the first offence, the difficulty is necessarily enhanced. Punishment, as it is called (though the expression is not a happy one), should be corrective rather than punitive so far as the prisoner is concerned, and deterrent as regards others. And, again, it is neither desirable to add to the criminal class by sending the young to mix with old offenders, nor is it wise, either, to let a criminal, guilty of a grave offence, go out on suspended sentence, or to be awarded such a lenient one as to lead other possible criminals to think so lightly of the crime as in effect to invite them to commit a similar one.

We are led to these reflections by the incidents connected with a case tried at the recent General Sessions of the City of Toronto. A medical student of about twenty-one years of age, residing in the same house as a fellow-student, opened a letter addressed to the latter, abstracted therefrom two postal notes payable to his friend, took them to the post office, forged his friend's name, and pocketed the proceeds. The moral fibre of this young man may be further indicated by the fact that in addition to these three crimes, to which he pleaded guilty, he subsequently lent his victim five dollars, presumably part of the stolen money, and the same not being returned as promised, he dunned his friend industriously therefor. Many of those who were present in Court at the time this case was tried were not a little surprised when the learned Judge let the prisoner go on suspended sentence. His Honour did indeed administer to him a very severe lecture, winding up with a warning that if ever he came before him again he would be most severely dealt with, but after all this threat was not so very terrible, as one could easily imagine a young man beginning life in this way drifting off to some place where his record would be unknown. Whether he should appear again before the Judge is however not of present

importance; but what is important to consider is—was this mode of dealing with the case on the part of the learned Judge the most desirable for the general welfare of the community? We doubt it.

If the rule were laid down that every offender who pleads guilty to his first offence should be let go on suspended sentence, we should have very little to say. But, was the case above referred to one for the exercise of such clemency? And here it may be noted that the prisoner was, when the crimes were committed, seeking to enter a profession which most particularly demands the strictest sense of honour and integrity.

There is not in this country (as there ought to be) a place where the reclamation of criminals is the special object of attainment, or where it is possible to put such a desirable effort into practice. Our present prison system is lamentably deficient in this most important matter, and especially so in view of the fact that many offenders against the law are criminals by reason of their previous environment, or possibly as a result of heredity. The Judge had, of course, to deal with a case under the existing condition of things; but, crediting him with a most laudable desire for the future welfare of this young man, we venture to think that his treatment of the case would, on the whole, be likely to do more harm than good.

It is often said that severe sentences are not deterrent in their effect, and the fact is cited that hanging for theft, etc., was not deterrent, but rather the reverse. This, however, shews a misunderstanding of the situation. It is quite true that such barbarous sentences were not efficacious, but the simple reason for that was that the public sentiment of that day was opposed to the law as then administered, and consequently it became largely a dead letter. Juries would not convict for a comparatively light offence when the result would be death to the culprit. So far as the deterrent effect was concerned, dread of the death penalty was, in the mind of a possible criminal, counterbalanced by the probability of an acquittal.

When bicycles came into use, the stealing of them became common. The Police Magistrate of the City of Toronto promptly inflicted very severe sentences on those found guilty before him.

The result was that this kind of theft immediately became unpopular. In England the crime of garotting almost ceased as a result of the very stern justice administered. In these and other cases severity worked most beneficially.

We do not forget that very wide powers have been conferred by the Parliament of Canada upon a judge by sec. 971 of the Criminal Code, added in 1901, which provides for the release upon probation of good conduct of any offender not previously convicted, upon the conditions referred to in the said section. The great difficulty in all such cases is the exercise of a wise discretion in view both of the possible reclamation of the offender, and of the protection of society.

A pernicious practice prevails in regard to the nomenclature of cases in appeal. It has been and still is usual for cases which go to the Supreme Court or to his Majesty in his Privy Council to make, in many cases, an entire change of the title of the cause. So that reports of the same case appear in one Court as *A.* v. *B.* and in another as *B.* v. *A.* This causes confusion. This confusion is worse confounded when, as occasionally happens, an entirely new set of names appears; and the result is that "its own mother wouldn't know it." If the judges of the Supreme Court and the Judicial Committee of the Privy Council would kindly take this matter into consideration and remedy it, they would confer a great favour upon the profession. One thing is clear, that all reports of a case should follow the original title. But if it be thought desirable, in connection with an appeal to the Supreme Court or to the Judicial Committee, that, in addition to the name of the case below, it should appear who are the appellants and respondents, we would suggest that such information should be given by way of addition. This is a matter which has been the subject of protest over and over again; its practical inconvenience is felt daily, and yet no effort is made by those in authority to meet the difficulty. Perhaps it is because no concrete remedy has been suggested. For that reason, in addition to our protest, we venture to suggest a very simple way of obviating the inconvenience and confusion resulting from the present

practice. To accomplish this a short Rule of Court would be required which might be as follows:—"In all appeals to the Supreme Court of Canada or to His Majesty in His Privy Council the original short title of the action or matter shall appear before the names of the parties appellant and respondent: *e.g.*, "*Brown* v. *Jones*.. *A.B.*, appellant; *C.D.*, respondent."

The subject of homicides from a quasi legal standpoint has recently come to the front on this side of the Atlantic. And firstly the record of criminal carelessness on the part of so-called "hunters" claims attention. Not a week passed during the deer hunting season, both in Canada and the northern parts of Michigan and Wisconsin, without some man having been shot in mistake for a wild animal; some idiotic or excited biped at the wrong end of a rifle seeming to think it sport to blaze away at any moving object within range; the result being the death or wounding of a human being. We have no statistics about this in Canada, but in Michigan and Wisconsin it is said that there was one human life sacrificed for every sixty-five deer that were killed during the season there. Various remedies have been suggested. There should be some legislative enactment that these so-called "accidents" should be classed under the head of manslaughter, and punishable accordingly. Such criminal carelessness really takes the act out of the realm of accidents. Something of this sort has already been done in one of the Western States.

The conundrums which testators propound for the benefit of lawyers are often curious. The other day a will was before the Irish Court of King's Bench, whereby a testator had bequeathed property to his several sons, and then provided that if any of them died his share should go to the "next eldest brother." Three judges composed the Court, and they each guessed differently. One said it meant that the share was to go upwards, another said it was to go downwards and the third said it was uncertain which way it was to go. How the judges who favoured

the downward devolution would dispose of the youngest brother's share in case of his death, or how the judges who favoured the upward devolution would dispose of the eldest son's share in case of his death, does not appear. It is not surprising however to learn that when the supposed to be deceased brother heard what a mess the judges were making of the matter, he decided to turn up alive, which he accordingly did,—thus putting a truly Irish end to the law suit.

We supposed we had got rid for good and all of our ancient friend the 32 Henry VIII., c. 9, the Act "Agenst maintenaunce and embracery and byeing of titles," when it was repealed in 1902, together with s. 211 of the Assessment Act (R.S.O., c. 224), by 2 Edw. VII., c. 1, Sched., but it would seem that the Legislature of Ontario is like an inconstant damsel, and has changed its mind, or perhaps chooses to emulate the thimble-rigger with his phrase, "Now you see it, and now you don't;" for having made the pea (we mean the statute) disappear, we lift the thimble (we beg pardon, the last volume of the statutes), and behold there it is again as lively as ever, viz., s. 175 of the new Assessment Act.

Lord Hobhouse, who recently died at the age of eighty-five, was for many years a distinguished member of the Judicial Committee of the Privy Council. Prior to his taking his seat at that Board he had been for nine years the legal member of the Governor-General's Council in India, and had there acquired a knowledge of Hindoo law which proved of great advantage to him as a member of the Privy Council. He filled many important offices, and was noted as a careful, painstaking lawyer, and, as the Lord Chancellor has said,—"He has firmly, courageously and most courteously and kindly done his duty, and his best epitaph will be found in the universal respect and affection with which he was regarded."

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] [Oct. 3, 1904.

VICTORIA-MONTREAL FIRE INS. CO. *v.* HOME INS. CO.

Fire insurance—Contract of re-insurance—Trade custom—Conditions—"Rider" to policy—Limitation of actions—Commencement of prescription.

A contract of re-insurance consisted of a blank form of policy of fire insurance in ordinary use, with a "rider" attached setting forth the conditions of re-insurance. The policy contained a clause providing that no action should be maintainable thereon unless commenced within twelve months next after the fire. The "rider" provided that the re-insurance should be subject to the same risks, conditions, valuations, privileges, mode of settlement, etc., as the original policy, and that loss, if any, should be payable ten days after presentation of proofs of payment by the company so re-insured.

Held, reversing the judgment appealed from, GIROUARD and NESBITT, JJ., dissenting, that there was no incongruity between the limitation of twelve months in the form of the main policy and the condition in the rider-agreement as to claims for re-insurance and, consequently, that the action for recovery of the amount of the re-insurance was prescribed by the conventional limitation of twelve months from the date of the fire occasioning the loss. Appeal allowed with costs.

J. E. Martin, K.C., and *Howard*, for appellants. *Lafleur*, K.C., and *Macdougall*, for respondents.

B.C.] GIEGERICH *v.* FLEUTOT. [Nov. 21, 1904.

Title to land—Champerty.

In *Briggs* v. *Newswander*, 32 S.C.R. 405, the plaintiff was held entitled to a conveyance from defendants of a quarter interest in certain mineral claims. In that action Newswander et al. were only nominal defendants, the real interest in the claims being in F. After the judgment was given, plaintiff conveyed nine-tenths of his interest to G., the expressed consideration being moneys advanced and an undertaking by G. to pay the costs of that action and another brought by Briggs, and by a subsequent

deed, which recited the proceedings in the action and the deed of the nine-tenths, he conveyed to G. the remaining one-tenth of his interest, the consideration of that deed being $500 payable by instalment. Briggs afterwards assigned the above-mentioned judgment and his interest in the claims to F. In an action by G. against F. for a declaration that he was entitled to the quarter interest,

Held, affirming the judgment in appeal (10 B.C. Rep. 309) that the transfer to G. of the nine-tenths was champertous and the Court would not interfere to assist one claiming under a title so acquired.

Held, also, that the transfer of one-tenth was valid, being for good consideration and severable from the remainder of the interest. Appeal dismissed with costs.

Taylor, K.C., for appellant. *R. M. McDonald,* for respondent.

Ont.] G.T.R. Co. *v.* BIRKETT. [Dec. 1, 1904.

Negligence—Railway company—Proximate cause—Imprudence of person injured.

A railway train was approaching a station in London, and the conductor jumped off before it reached it, intending to cross a track between his train and the station contrary to the rule prohibiting employees to get off a train in motion. A light engine was at the time coming towards him on the track he wished to cross, which struck and killed him. The light engine was moving reversely and showed a red light at the end nearest the conductor which would indicate that it was either stationary or going away from him. In an action by the conductor's widow she was nonsuited at the trial and a new trial was granted by the Court of Appeal.

Held, reversing the judgment of the Court of Appeal, DAVIES and KILLAM, JJ., dissenting, that as the light engine had been allowed to pass a semaphore beyond the station on the assumption, which was justified, that it would pass before the train came to a stop at the station, and as, if the deceased had not, contrary to rule, left the train while in motion, he could not have come into contact with said engine, the plaintiff was not entitled to recover.

Held, per DAVIES and KILLAM, JJ., dissenting, that the act of the deceased in getting off the train when he did was not the proximate cause of the accident and plaintiff was entitled to have the opinion of the jury as to whether or not deceased was misled by the red light. Appeal allowed with costs.

Walter Cassels, K.C., for appellants. *J. S. Robertson,* for respondent.

EXCHEQUER COURT.

Burbidge, J.] [April 5, 1904.

INDIANA MANUFACTURING CO *v.* SMITH.

Patent for invention—Infringement—Assignor and assignee—Estoppel—Fair construction.

Where the original owner of a patent had assigned the same, and was subsequently proceeded against by the assignee for the infringement of the patent so assigned, the former was held to be estopped from denying the validity of the patent, but, inasmuch as he was in no worse position than any independent member of the public who admitted the validity of the patent, he was allowed to show that on a fair construction of the patent he had not infringed.

Hogg, K.C., for plaintiff. *Masten* and *Stanton*, for defendants.

Burbidge, J.] [May 25, 1904.

VERMONT STEAMSHIP CO. *v.* THE "ABBY PALMER."

Salvage—Gen. Rules 159 & 162 Exchequer practice—Remission of case to local judge to take further evidence.

This was an appeal from the British Columbia Admiralty District. Under Rules 159 and 162 of the General Rules and Orders regulating the practice and procedure in the Exchequer Court, the Court, in entertaining an appeal from a Local Judge in Admiralty in a salvage case, may direct that further evidence be taken before the local judge in order to dispose of an issue raised on the appeal. In such a case the appeal is by way of rehearing.

J. Travers Lewis, for appellants. *Robinson*, K.C., and *Eberts*, K.C., for respondent.

Burbidge J.] HARRIS *v.* THE KING. [June 13, 1904.

Railway—Public work—Death arising from negligence—Defective engine—Dangerous crossing—Undue speed—"Train of cars"—Discretion of minister or subordinate officer as to precautionary measures against accident.

The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level-crossing over the Intercolonial Railway tracks in the City of Halifax. The evidence showed that the crossing was a dangerous one, and that no special provision has been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed or shunted over this crossing in a

direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy and the steam and smoke from the engines did not lift quickly, but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over toward the track on which the engine and tender was running and obscured them from the view of anyone who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the speed of six miles an hour.

Held, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway, both in using a defective engine as above described and in maintaining too high a rate of speed under the circumstances.

2. An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of Government Railway Act, R.S.C. c. 38. *Hollinger* v. *Canadian Pacific Railway Company,* 21 O.R. 705, not followed.

3. Where the Minister of Railways or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ [illegible]ghman or to set up gates at any level crossing over the Intercol[illegible] Railway, it is not for the Court to say that the minister or the [illegible] was guilty of negligence because the facts shew that the crossing in question was a very dangerous one.

Harris, K.C., and *Ritchie,* K.C., for suppliants. *Mellish,* K.C., for respondent.

Burbidge, J.] RE BOUCHARD AND THE KING. [Nov. 7, 1904.

Customs Act — Infraction — Smuggling — Preventive Officer — Salary — Share of condemnation money.

The suppliant had been empowered to act as a preventive officer of customs by the Chief Inspector of the Department of Customs. The appointment was verbal, but a shorthand writer's note of what took place between the Chief Inspector and the suppliant at the time of the latter's appointment shewed the following stipulation to have been made and agreed to as regards

the suppliant's remuneration: "Your remuneration will be the usual share allotted to seizing officers; and if you have informers an award to your informers, and you must depend wholly upon these seizures." Certain regulations in force at the time provided that in case of condemnation and sale of goods or chattels seized for smuggling certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively.

Held, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the Court could not interfere with the Minister's discretion.

C. deGuise, K.C., for suppliant. *R. Roy*, K.C., and *P. Corriveau*, for respondent.

Burbidge J.] PAUL *v.* THE KING. [Nov. 7, 1904.

Shipping — Collision — King's ship — Negligence—Liability — Public work.

Where a collision occurs between a ship belonging to a subject and one belonging to the King, in such a case the King's ship is not liable to arrest for damages, and in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board of the ship.

In this case the steamship Prefontaine, belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug "Champlain," and which the latter was towing from the dredge "Lady Minto," then working in the Contrecœur Channel of the River St. Lawrence. The dredge, steam tug and scow were the property of His Majesty.

Held, that the facts did not disclose a case of negligence by the officers or servants of the Crown on a public work for which the Crown would be liable under 50 & 51 Vict., c. 16, s. 16(*c*).

Gouin, K.C., for suppliant. *Decarie*, for the respondent.

Province of Ontario.

ELECTION CASES.

Boyd, C., Teetzel, J.] [Nov. 3, 1904.

NORTH NORFOLK PROVINCIAL ELECTION.

Parliamentary elections—Controverted election petition—Excessive number of charges—Particulars—Costs—Witness fees—Failure of charges—Uninvestigated charges.

At the trial of a controverted election petition sixteen witnesses were examined for the petitioner generally, and with

special reference to six charges, which were investigated. The total number of charges in the particulars of record was 685, and application was made at the trial to add eight or ten more. Upon one case of bribery being proved, or perhaps two, the respondent admitted responsibility for the corrupt act of an agent, and did not claim the protection of the saving clause of the statute. Thereupon the Court declared the seat vacated, and no further evidence was given. Two charges were proved; all the others taken up failed. It was said that 225 witnesses were subpœnaed and paid in all $530.

Held, that the number of charges was excessive. The practice of heaping up particulars should not be encouraged.

No costs were allowed of the charges which failed, nor of witnesses subpœnaed for the supplemental charges.

The petitioner was allowed as against the respondent a reasonably approximate apportionment of the outlay for witness fees in respect of the charges not taken up, fixed at $230.

Bradford, for petitioner. *Watson*, K.C., for respondent.

NORTH SIMCOE DOMINION ELECTION.

Recount—63 & 64 Vict. c. 12, D.R.O. initialling ballot—Omission of stamp on ballot papers—Omission to detach counterfoil before ballot deposited—D.R.O. putting voter's number on ballot paper instead of on counterfoil—Identifying voter—Scrutineers not taking objections at polling—Irregular crosses.

Held: 1. The following omissions do not invalidate ballots:—(1) The omission by a D.R.O. to place his initials on the ballot paper or using a rubber stamp of his name instead of his initials. (2) The omission of the stamp required by s. 41(*e*) on the ballot paper. (3) The omitting to detach counterfoil before ballot deposited.

2. Section 80 requires that any ballot "upon which there is any writing or mark by which the voter could be identified" is to be rejected. A deputy returning officer put a voter's number (as it appeared on the poll book) on the ballot itself, instead of on the counterfoil. This did not invalidate the vote.

3. All that a Judge can consider on a recount is whether the number on the ballot paper is per se a mark by which the voter could be identified, the Judge being limited to the examination of the ballots, and having no power to look at the poll book or voters' list.

4. *Semble*, that a mark, to be destructive to a ballot, must be made by the voter himself.

The *Bothwell Case*, 8 S.C.R. 676, distinguished.

[Barrie, Nov. 12, 1904.—Ardagh, Co.J

This was a recount on behalf of J. A. Currie, the defeated candidate, before the County Judge of the County of Simcoe. The majority of the successful candidate, Leighton McCarthy, was 42. The facts and the objections raised appear in the judgment.

H. S. Osler, K.C., *R. A. Grant* and *Frank Ford*, for Mr. McCarthy. *Strathy*, K.C., *Haughton Lennox* and *W. A. Boys*, for Mr. Currie.

The following cases, among others, were cited: *Jenkins* v. *Breckin*, 7 S.C.R. 265; *Bothwell Election*, 8 S.C.R. 676; *Monck Election*, Hod. El. Cases 725; *Muskoka and Parry Sound Election*, 18 C.L.J. 304; *Woodward* v. *Sarsons*, L.R. 10 C.P. 773.

ARDAGH, Co.J.:—The chief objections raised on behalf of Mr. Currie were:—

1. The omission, in several divisions, by the deputy returning officers, to put their initials on the backs of the ballots, as required by s. 70 of the Election Act; and, in one case, the use of a rubber stamp with his name, instead of his initials.

2. The omission, in some divisions, of the stamp required to be placed on the ballot papers by s. 41(*e*).

3. The omission by a deputy returning officer to detach the counterfoils before depositing the ballots in the box.

4. The putting the voter's number (on the poll book) on the back of the ballot, instead of on the counterfoil, as directed in s. 70.

As to the first and second objections, I am of opinion that the statute on these points is directory only, and relying upon the decisions in the *Monck Case*, and *Jenkins* v. *Breckin* (supra), I overrule these objections. As to the third objection, although there is more to be said against it than the first two, I cannot say that it is such an infringement of the secrecy of the ballot as to lead me to reject all these ballots, and therefore I will not interfere with the action of the deputy in counting them.

Before going further it may be well to say that all the ballots now objected to were allowed by the deputy returning officers and no objection was made by anyone against them. We now come to the fourth objection, the most serious of all, and it refers to an act of commission by the deputies, and not, as in the other three cases, to an act of omission.

The *Bothwell Case* (supra), was cited by counsel for the defeated candidate, and, at first, I was inclined to think it was one I must follow, but after a careful consideration of it, I have come to a contrary conclusion.

In entering on this enquiry—a recount of the ballots—I am

strongly of the opinion that I am only acting ministerially, and have no power to hear or look at any evidence except what is afforded by an inspection of the ballots themselves. In this opinion I am confirmed by the exhaustive judgment of my predecessor, Judge (now Senator) Gowan, in *Muskoka and Parry Sound Election Case.* I would refer also to the remarks of the late Moss, C.J., in the *Russell Case,* Hodg. 519. There the same point came up, and in the judgment this language is used: "It is at least a grave question, and the inclination of my own opinion is to answer it in the negative. as to whether the learned Judge could entertain, could listen to such evidence" (shewing how the numbers came to be placed on the ballot papers) "upon an application which pointed merely to a recount, and, while discharging the duties of a ministerial office, acting under the clauses relating to recounting." In *Jenkins* v. *Breckin* (supra), GWYNNE, J., says: ". . . without evidence, as to his (the County Judge) taking which no provision is made," etc.

There are two questions I have now to consider.

1. Am I bound, or have I the right, to look at the poll book on this recount?

2. If I have not, then is the fact that there is a number on the ballot sufficient, without evidence dehors the ballot itself, to warrant me in rejecting it?

Lest it be said that in my desire to carry out the spirit of the Act I am overriding the letter, I will consider these two questions in connection with an examination of the *Bothwell Case.* In that case there were two states of facts to be considered: In the *Dawn* division, the D.R.O. had endorsed on each ballot paper the number of the voter on the poll-book, and all these he rejected at the count. In the *Sombra* division, the D.R.O. had done the same thing on some of the ballots, but at the close of the poll he took them out of the box, obliterated the numbers on the back, and then included them in his count as accepted ballots. In both cases the Court refused to reverse the action of the D.R.O.

The head note in the case, as to the *Dawn* division, is in the words used by Galt, J., in his judgment. It reads: "These votes were not included either in the count before the returning officers, the re-summing up of the votes by the learned Judge of the County Court, nor in the recount before the Judge (Galt) who tried the election petition."

Now, this way of putting it is a little misleading, it seems to me. It was not a case of recount before the County Judge, but only a "final addition" of the votes, in which he had nothing to do with the ballots themselves. Neither had the returning officer anything to do with these ballots, his duty also

being merely to chec.. the addition of the votes from the statements by the deputies as to the result of the poll.

With the action of the D.R.O. in rejecting these ballots, no one quarrels, nor, of course, with the judgment afterwards affirming it. When the recount came on before Galt, J. (the only recount that took place), he took what all must admit was the only course open to him, when he found by the poll book, which, as well as all other papers found in the ballot box, were produced before him, that the numbers on the poll-book corresponded with those on the rejected ballots, and he held that the D.R.O. was right in rejecting them. Would it have been reasonable on the judge's part to reverse the D.R.O., even if he did not see the poll-book; would it not have been the contrary, if, without seeing what the D.R.O. had seen, he did not assume that officer had done his duty as laid down by the statute, and as afterwards he solemnly swore to. And here I may say that while accepting the possibility of the D.R.O. having examined the poll book, I must not be understood to assent to the proposition that he was right in so doing. Indeed, I feel inclined to think that he had not, any more than I, such a right, as doing so tended to invade the secrecy of the ballot. In the *Bothwell Case* he appears to have done so (in the Dawn division), or perhaps he was only assumed to have done it. Besides, the *Bothwell Case* not being one following a recount, there is this distinction between the Dawn division and the present case, that in the former the D.R.O. rejected the numbered ballots in the latter he accepted them. If our D.R.O. counted these ballots after he had the means of testing whether by them those who cast them could be identified, we must come to the conclusion that if identification was shewn, that he not only disobeyed the plain directions of the statute, but also perjured himself afterwards. (See form X in Schedule to the Act.)

Let us now look at the case of the Sombra division above referred to. There the D.R.O., seeing that the numbers he had placed on the ballots identified the voters, carefully erased those numbers in an "earnest effort to preserve the secrecy of the ballot." Now, I think it must occur to every one that the Court was *most astute* in finding out a way to uphold votes properly and honestly cast, and thus carry out the will of the electorate, when it held that the D.R.O. had power, by his action, to turn into a good one a bad ballot—for such it was when it came out of the box, and as such the D.R.O. was directed by the statute to reject it. Of course some means must be devised to get round the plain dereliction of the D.R.O., and so the "secrecy of the

ballot was preserved," was brought in as an excuse (if it wanted one) for a most righteous decision.

It may occur to one, though, that the Court, in stating that the secrecy of the ballot was preserved, did not fully consider how very possible it was that in and about the erasure of those numbers, either the D.R.O. or one of the scrutineers—as a fact, all three of them—the identity of the voter could be discovered. In that case considerable manipulation of the ballot was necessary, while in our case the face of the ballot was turned up promptly and remained so while it was being counted.

The report (at p. 692) says: "the principal question upon which the appeal in this case was decided was as to the validity of the votes in . . . Sombra." So that we now have a decision of the Supreme Court that when the Act says the D.R.O. is to reject all ballots, "upon which there is any writing or mark by which the voter could be identified," you may add "unless," etc. (as the case may be).

In conformity with this is the language of Strong, C.J., in his judgment when he says: "by assenting to the grounds upon which the judgment proceeds, I do not mean to preclude myself from the right to consider in any future case on which the question may arise whether any mark put on a ballot by mistake and in good faith by a deputy returning officer is to be held a ground for rejecting the ballot." The judgment, in my opinion, only decided that ballots invalidated by numbers being placed on them were not always necessarily bad—that ballots deprived of marks of identification were good—but not that all ballots so numbered were bad. It was not necessary to decide that point, and the judgment did not decide it as I gather from the remarks I have quoted from the judgment of Strong, J. I am aware that one or two of the other judges have expressed themselves as against the validity of such ballots, but in view of the fact that these views were not necessary for a decision of the case, may they not be treated as obiter dicta?

The first question that I set out to consider, I have answered in the negative, and now I come to the second, viz: If I have not the right or power to examine the poll book on this recount, is the fact that there is a number on the ballot sufficient, without evidence dehors the ballot itself, to warrant me in rejecting it?

No evidence was offered before me, nor, if it had been, would I have received it, as to how these numbers came to be on the ballots, though it seemed to be taken for granted by both sides that they were the figures of the D.R.O. Without evidence shewing that these numbers corresponded, in each case, with the voter's number on the poll book, how can I say that this number

was a "writing or mark by which the voter *could be* identified." And here it may be important to examine these words "could be," and, if possible, arrive at their meaning.

If the words were "might be identified," then it is open to argument, that, in the absence of anything to shew whether they corresponded or not, they might lead to identification. But if, as a matter of fact, they did not correspond, how "*could*" the voter be identified? If they did correspond, then the voter "could be identified"; if they did not correspond, then the voter could not be identified. If I were now to act upon the suggestion that these numbers corresponded, or undertake to assume it, and therefore reject the ballot, and it should turn out that they did not correspond, I would have disfranchised the voter, without good cause.

It may be said that I am refining in so saying, and that it is most probable that these numbers do correspond; but to this I reply that I am not going to assume anything, however probable, if the result is to give effect to what, after all, I consider technical objections, and disfranchise voters against whom there is not a breath of suspicion. If there is any assuming to be done, I would prefer to assume that the numbers did not correspond, to quote the maxim "Omnia presufuntur rite esse acta," rather than to assume, as I have said before, that the D.R.O. perjured himself twice, both before and after the election.

In the Provincial Act the words are "can be identified"; but I do not think there is much difference between that and "could be." The use of the word "can" presupposes that it is possible to prove the identification by a comparison of the numbers, and the word "could" is only a sort of subjunctive future for "could do" so and so if you tried, another assertion of a fact.

I am referred to a judgment by my brother Snider, of Hamilton, in the late Wentworth recount, as one with which I ought to agree. As I have only a newspaper report of it offered me, I do not care to examine it. It seems admitted, however, that the Judge had the means of identification of the voters before him, as he states that the numbers on the ballots corresponded with those on the poll book. That being so, I may say that I do not see how he could have arrived at a different conclusion. How he came to arrive at the knowledge he had is none of my business, nor do I care to enquire.

I would, however, qualify what I have said by saying that I have always had some doubts as to what sort of "writing or mark" is intended by the Act. If it is one that may be made by some person other than the voter (the D.R.O. is the only other person that has the opportunity of doing this), then a D.R.O.

has it in his power to put the poll book number on the ballot of every voter who he knows is or supposes to be opposed to his candidate (for he has, like everyone else, his favorite), and so disfranchise him.

I am aware that some of the Supreme Court Judges say that it makes no difference who puts the mark on the ballot, yet the remarks of Blake, V.C. (a Judge whose opinion is entitled to the greatest weight), commend themselves to me. In the *Monck Case*, supra, he says: "I think the mark must contain in itself a means of identification of the voter in order to vitiate the ballot. There must be something in the mark itself, such as the initials, or some mark known as being one the voter is in the habit of using."

If, then, it is said that a mark put on by anyone other than the voter, by which he could be identified, is to invalidate the ballot, the object aimed at must be to preserve the secrecy of the ballot; but if the mark must be put on by the voter himself, then the prevention of bribery and corruption is sought.

It seems strange that while deputy returning officers are supposed to be familiar with the very few duties required of them, and while they had on either side a scrutineer for the very purpose of seeing that the voting was properly carried out, these irregularities should have occurred. Ballots were allowed by them all to pass without objection; and as there seems to have been nothing unfair or fraudulent in the proceedings, and ballots for both candidates having been so numbered, it would not, I think, be proper for me now to declare all these ballots invalid, unless I feel myself compelled to do so, especially as no objection was made to them by anyone during the voting.

I feel it is my duty, sitting in the capacity I do, to see that, as far as I can aid to that end, the will of the electorate is respected, and that the candidate who has had the greatest number of honest votes, should be permitted to represent the constituency in Parliament.

The very able and exhaustive arguments that were used by counsel on both sides shew that the question now before me is a most important one, and I have therefore endeavored to give it the best consideration my ability permits.

It may be inferred from what I have said that only upon a scrutiny can the information necessary to test the validity of these ballots be obtained. As, however, it appeared from what took place before me, that the result would not be affected, even if my views, as expressed, are not correct, and that the ballots in question should be disallowed, a scrutiny under an election petition would avail nothing.

The result, then, is that the count of the deputy returning

officer is confirmed. I have disallowed a vote cast for each candidate, marked, one with a cross made with a blue, and the other with a red lead pencil, as by these the voters who marked them could certainly be identified. I have also disallowed one of Mr. McCarthy's ballots, thus reducing his majority by one.

WENTWORTH DOMINION ELECTION.

Recount—Dominion Election Act, 1900, c. 12, s. 10, sub-s. 2; 63 & 64 Vict. c. 12, s. 152—Secrecy of voting—D.R.O. putting voter's number on ballot paper—Identification.

Held following *Bothwell Case*, 8 S.C.R. 676, that no ballot which is numbered by a D.R.O. with the number of the voter on the poll book can be counted.

Secrecy of voting is the first purpose and underlying principle of the election law.

[Hamilton, Nov. 21, 1904—Snider, Co.J.

This was a recount on behalf of E. D. Smith, the defeated candidate before the County Judge of the County of Wentworth. The majority of the successful candidate, W. A. Sealy, was twenty-five. The facts and the objections raised appear in the judgment.

Lynch-Staunton, K.C., *Duff* and *Gwyn*, for E. D. Smith. *R. A. Grant, Stanton* and *Lawrason*, for W. A. Sealy.

The following authorities were cited:—*East York Case*, 32 C.L.J. 481; *North Bruce Case*, Jan. 26, 1901 (not reported); *Bothwell Case*, 8 S.C.R. 676; *East Hastings Case*, Hod. El. Cases 746; *Russell Case*, Hod. El. Cases 519.

SNIDER, Co.J.:—In one polling division, No. 23, the deputy returning officer put on the back of each ballot paper given by him to the voters, the numbers given to the voter in the poll book. It does not appear whether or not he also put this identifying number on the counterfoils—the only place where he should have put it. There is no suggestion or appearance of fraudulent conduct or intent in so doing.

I am now asked to reject all the ballots cast at this polling division on the ground that these numbers are "marks by which the voter could be identified," in every case, not only by the D.R.O., or any other officer having, or any other person who could get hold of both poll book and the ballot, but also by any candidate or agent or elector present in the polling booth who wished to notice during the day and at night when counting the ballots to remember the number given in the poll book to any one or more of the voters in whom he might be interested.

Mr. Grant, while admitting that by these numbers any or all of the voters can be identified, argues that, as it is the act of the

D.R.O. which brings this about, and is in no sense the act of the voter, it would be contrary to the spirit of all the more recent decisions to allow the act of an election officer to disfranchise this whole polling division. He relies on s. 152 of the Dominion Election Act of 1900; *East York Case* and *North Bruce Case*, supra, and the remarks of the Chancellor and Mr. Justice Street therein.

I have examined and considered these cases. The judges who tried them have more or less modified in single cases the strict application of sub-s. of s. 80, which enacts that in counting the ballots the deputy returning officer shall reject "all ballots upon which there is any writing or mark by which the voter could be identified." But I find no direct decision in them on the point at issue before me, and they are not Supreme Court judgments.

The *Bothwell Case*, supra, was the authority principally relied upon by counsel for Mr. Smith. At that election a D.R.O. did exactly the same thing as a D.R.O. has done in this election, that is, he put the voter's identifying number on each ballot. The Dominion Election Act in force at that time is the same as the present Dominion Election Act, in so far as it applies to this matter.

The instructions given the D.R.O. as to the preparation of the ballot and counterfoil for voters are the same now as then. On a recount before the County Court Judge in the *Bothwell Case*, all the ballots cast at polling division 3 in Dawn were rejected. On a scrutiny of votes, Mr. Justice Galt confirmed the decision of the County Court Judge, saying, "when the different parcels were opened each of the votes must have been rejected, the deputy returning officer having endorsed on each ballot paper the number of the voter on the voters' list, so that there could be no difficulty whatever in ascertaining how each elector had voted." On an appeal from this judgment to the Supreme Court this judgment was confirmed, and all the ballots were rejected. Mr. Justice Gwynne, in his judgment says, "now it cannot be questioned that a voter could be identified by his number on the voters' list being on his ballot. Whether in point of fact he was or was not so identfied at the time of the counting is a matter of no importance in the eye of the law. The statute in effect declares that a mark by which a voter could be identified is sufficient to avoid the ballot on which such mark is. Neither does the statute make any difference as to the person by whom such mark may be put upon the ballot. By whomsoever it was put upon it. the statute equally avoids the ballot and prescribes imperatively that it shall not be counted." Further on in his judg-

ment he says: "There is nothing in the evidence which justifies us in imputing to the D.R.O. anything but an error in judgment," but this the Court held made no difference. Mr. Justice Henry said "under these circumstances I am justified in arriving at the conclusion that when a ballot paper has been numbered it is a ballot paper which should not be counted, because the returning officer would always be able by referring to his notes to ascertain for whom the voter has voted, and he can communicate his knowledge to his friends, and thereby secrecy is done away with."

This judgment has not been reversed by any subsequent judgment of the Supreme Court that I have been referred to or can find. It is a construction of the same statutory enactment on the same state of facts as exist in the case before me, and I cannot distinguish it in any important respect.

The judgment recognizes that the securing of secrecy is the first purpose and underlying principle of the election law, and to exclude the possibility of violating it, Parliament has laid down directions which make no distinction between mistakes and misconduct, and no distinction between the act of an officer and the act of a voter.

Mr. Justice Strong, in the *Haldimand Election Case,* Elec. Cases, Vol. I., p. 547, says: "It is no answer to say that secrecy is imposed for the benefit of the voter and that therefore he can waive it. I hold secrecy to be imposed as an absolute rule of public policy."

Even more significant than the fact that the Supreme Court judgment in the *Bothwell Case* has not been reversed, is the fact that Parliament not only has not since its delivery so amended the Act as to make an exception of marks put on by a deputy returning officer by mistake, but has, by the revised and consolidated Dominion Election Act of 1900, re-enacted exactly the same words without exception or limitation. When the intention of Parliament is so clearly apparent the Judge's duty to follow it is not open to question. See also *East Hastings Case* and *Russel Case,* supra, where MOSS, C., and BLAKE, V.C., say that but for the Ontario Statute amendment, 42 Vict. c. 4, s. 18, ballots numbered by D.R.O. must have been rejected. There is no similar amendment to the Dominion Act.

In any case I consider it my judicial duty to follow the judgment in the *Bothwell Case* in which so many eminent judges of our highest Court concur. I therefore reject all the ballots cast at polling division No. 23, on the ground that each one has on it a writing or mark by which the voter could certainly be identified. Of these rejected ballots, 47 were marked for Mr. Sealy

and 22 for Mr. Smith. The result of this is to give to E. D. Smith a majority of 10 votes in the whole electoral district of Wentworth.

Macbeth, Co.J.] LONDON DOMINION ELECTION. [Nov. 14, 1904.

Recount—Irregularity in ballots caused by act of D.R.O.

This was a recount on behalf of the defeated candidate at the recent Dominion election held before the County Judge of Middlesex. It appeared that three ballots had been given out and deposited without having thereon the official stamp of the returning officer, and from five others the D.R.O. had omitted to remove the counterfoils.

Held, on an objection taken to the votes represented by these ballots, that the irregularities being the act of the official in charge, they must be counted. *Re South Grenville*, 14 C.L.J. 322; *Re Muskoka*, 18 C.L.J. 304; *Re Brockville*, ib., 324; and *Re Digby*, 23 C.L.J. 171, followed.

Judd, J. P. Moore and *R. A. Bayly*, for applicant. *Gibbons*, K.C., *Jeffery*, K.C., and *J. E. Jeffery*, contra.

COURT OF APPEAL.

Full Court.] [Sept. 19, 1904.

DEYO *v.* KINGSTON & PEMBROKE R.W. CO.

Railway—Overhead bridge—Headway space—Brakesman on top of car killed—Contributory negligence.

Contributory negligence may be a defence even to an action founded on a breach of a statutory duty.

A brakesman standing on top of a car passing under a bridge was killed by striking the bridge.

Held, that as the evidence shewed that he was where he was contrary to the rules of the company and warning received he was guilty of contributory negligence and the defendants were not liable although it was shewn that there was not a clear headway space of seven feet between the top of the car and the bottom of the lower beam of the bridge as provided for by sec. 192 of the Railway Act, 51 Vict., c. [illegible]3(D).

Hellmuth, K.C., and *Nickle*, for the appeal. *D. M. McIntyre*, contra.

From Falconbridge, C.J.K.B.] [Sept. 19, 1904.

SIPLE *v.* BLOW.

Way—Right of, over part of farm connecting two parts—User—Right to place gates at the termini.

Plaintiff being the owner of a part of a farm which was subject to a right of way connecting two other portions of the

farm, reserved by a former owner of the whole farm, for the use and benefit of himself, his heirs and assigns as a lane or roadway 33 feet wide across, so long as needed or required in passing to and from the other lands now owned by (the grantor), brought his action for a declaration of his right to place gates at the termini of the right of way.

Held, that he was so entitled.

Judgment of FALCONBRIDGE, C.J.K.B., reversed. OSLER and MACLENNAN, JJ.A., dissenting.

Douglas, K.C., and *G. F. Mahon*, for appeal. *Armour*, K.C., and *J. W. Mahon*, contra.

Garrow, J.A.] [Oct. 26, 1904.

RANDALL *v.* OTTAWA ELECTRIC CO.

Leave to appeal from judgment at trial with jury direct to Court of Appeal.

On an application under s. 76(*a*) of 4 Ed. VII. c. 11(O.), for leave to appeal to the Court of Appeal direct from a judgment at the trial before a judge and jury in a case not only of sufficient importance and difficulty in addition to the amount of the judgment ($2,500) to justify and appeal, it was objected that the section did not apply to the case of a trial with a jury but only to trials by a judge without a jury.

Held, that the plain object of the section was to avoid a double appeal: that it should receive a liberal construction: and that the judgment at or following upon the trial where the issues of fact are tried by a jury is the "judgment order or decision" of the judge within the meaning of the section and leave to appeal was granted.

H. E. Rose, for motion. *Mowat*, K.C., contra.

From Britton, J.] MYERS *v.* RUPORT. [Nov. 14, 1904.

Limitation of actions—Title to undivided half of lot—Possession as against co-tenant in common—Husband and wife—Married Women's Property Act, 1872—Declaration of title—Rights of true owner.

On and after March 1, 1872, the defendants and one A. were the owners as tenants in common of a lot containing 50 acres, and A. alone was in possession. He died March 30, 1872, having by his will devised his undivided half to his wife for life. The remainder descended to his father. After A.'s death his widow continued in possession of the whole lot. On March 4, 1873, she intermarried with the plaintiff, and they continued in sole possession until December 24, 1887, when they conveyed the south half of the lot to the defendant, who entered into possession thereof.

The plaintiff and his wife continued in possession of the north half till the death of the wife, without issue, on the 3rd March, 1903, and after that the plaintiff remained in possession. A.'s father died in 1885, having devised his undivided estate in remainder in the whole lot to the defendant. The plaintiff sought a declaration that he was seized in fee simple of an undivided half of the north half, namely, the defendant's original undivided half, by virtue of possession for more than the statutory period.

Held, MACLENNAN and MACLAREN, JJ.A., dissenting, that, as against the defendant, the possession was that of the plaintiff's wife, not of the plaintiff, and, if that possession ripened into a title, it was gained by the wife and during her lifetime. At the time of the marriage she was in sole possession, and as against the defendant's undivided half the Statute of Limitations had begun to run in her favour; the interest in real estate which she thus had was secured to her on her marriage by s. 1 of the Married Women's Property Act, 1872, free from any estate or claim of the plaintiff.

Semble, although the plaintiff was not entitled to a declaration of title, that he could not be dispossessed by the defendant.

Judgment of BRITTON, J., reversed.

Aylesworth, K.C., for appellants. *Maclennan,* K.C., for respondent.

From Meredith, C.J.C.P.] [Nov. 14, 1904.

FARMERS' LOAN AND SAVINGS CO. *v.* PATCHETT.

Principal and surety—Assignment of mortgage—Covenant of assignor for payment—Discharge of part of land mortgaged —Release of assignor.

The judgment of MEREDITH, C.J.C.P. (6 O.L.R. 255), was affirmed, the Court being divided.

OSLER and GARROW, JJ.A., were in favour of allowing the appeal; and MACLENNAN and MACLAREN, JJ.A., of dismissing it.

Douglas, K.C., for plaintiffs, appellants. *W. H. Irving,* for defendant Coleman, respondent.

HIGH COURT OF JUSTICE.

Meredith, C.J.C.P., Street, J., Anglin, J.] [May 25, 1904.

GALLINGER *v.* TORONTO RAILWAY CO.

Nonsuit—Accident by street car—Crossing track—Negligence.

Plaintiff in returning home at two o'clock in the morning on a west-bound car on the north track of a street in a city alighted from the car and proceeded to cross the north and south tracks

on said street in front of an approaching east-bound car on the south track, then about one hundred feet away. There was evidence that it was going at the rate of eight to ten miles an hour; that there was a bright electric light near by; that the plaintiff, if careful, could have seen the approaching car; and although the motorman did not apply the brakes or sound the gong before the plaintiff was struck, it was

Held, that a nonsuit was properly directed.

B. N. Davis, for plaintiff. *James W. Bain*, for defendants.

NOTE:—Application was subsequently made to the Court of Appeal for leave to appeal, but it was refused.

Britton, J.] IN RE MAYBEE. [Nov. 21, 1904.

Will—Construction—Void devise of life estate—Acceleration of Remainder.

A testatrix bequeathed to her adopted daughter "the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease, without heirs," she directed that "whatever may remain of my real and personal estate shall go to my nephew for his sole use and disposal." The adopted daughter was one of the witnesses to the will.

Held, following *Aplin* v. *Stone*, [1904] 1 Ch. 543, that the will must be construed before the effect of the devisee being a witness could be considered; that on the true construction of the will the decease of the adopted daughter before the testatrix was the event contemplated; that "without heirs" meant without children lawfully begotten; and that there was no direct gift to heirs or children.

Held, further, that the gift to the adopted daughter being void, the gift to the nephew took effect at once.

J. W. Gordon, for executors. *A. R. Clute*, for nephew.

Street, J.] IN RE MCDOUGALL. [Nov. 24, 1904.

Will—Construction—Bequest to wife—Limited power of disposal—Summary application—Rule 938.

A will was as follows: "I bequeath to my wife all that I possess, with full power to dispose of part or the whole as she and the children may think wisest and best at any time."

Held, that the widow took the absolute ownership of the real and personal estate of the testator, and that the children took no interest under the will.

The question whether the widow could sell without the consent of the children was not a question which could be determined upon a summary application under Rule 938.

W. H. Blake, K.C., for widow. *Harcourt*, for infant children.

Province of Manitoba.

KING'S BENCH.

Richards, J.] WILLIAMS *v.* HESPELER. [Nov. 5, 1904.

Contract—Reformation of contract—Specific performance—Mutual mistake—Unilateral mistake—Damages.

Defendant, being the owner of lots Nos. 1 to 34 inclusive in a certain sub-division, sold lots 26, 27 and 28 to plaintiff for $400, and, after being paid in full, conveyed them to the plaintiff. Plaintiff, supposing the lots so bought to be those which were really 27, 28 and 29, took possession of them and made valuable improvements on lot 29. Later defendant sold and conveyed lot 29 to another party, who had it located by a surveyor, when plaintiff first discovered that the lot on which his improvements had been made was 29 instead of 28, as he had supposed. In this action plaintiff asked to have it declared that the intention of both parties had been to sell him lots 27, 28 and 29, and to have the sale agreement rectified accordingly, and for specific performance of the agreement so rectified, or, in the alternative, damages. The evidence did not, in the opinion of the Judge, establish the plaintiff's contention that there had been a mutual mistake, and it was clear that defendant had not been guilty of any fraud or misrepresentation.

Held, 1. As defendant had sold and conveyed lot 29, it was impossible, even if there had been a mutual mistake, to rectify the sale agreement or grant specific performance of it.

2. Plaintiff would not be entitled to damages, even if there was a mutual mistake. To give him damages would be to compel one innocent party to pay for the loss caused to the other by the mistake of both.

3. To entitle a plaintiff to damages in a case of his own mistake, he must show fraud on the defendant's part: *May* v. *Platt* (1900), 1 Ch. 616; Fry on Specific Performance, 4th ed., p. 345.

4. In an action to rectify an instrument on the ground of mutual mistake, the evidence of the real contract and of the intention to embody it in the writing must be of the clearest and most satisfactory character, and it is not sufficient, as in most civil issues, to find the weight of evidence on the one side. *Sylvester* v. *Porter*, 11 M.R. 105, followed.

Bonnar and *Petts*, for plaintiff. *Campbell*, Atty.-Gen., and *Hoskin*, for the defendant.

Dubuc, C.J.] CUMMING *v.* CUMMING. [Oct. 24,1904.

Dominion Lands Act—Agreement to assign interest in homestead made before issue of patent.

Under s. 42 of the Dominion Lands Act, R.S.C., c. 54, as re-enacted by s. 5 of 60 & 61 Vict. (D.), c. 29, an agreement made by a homesteader, before issue of the patent and before procuring a certificate of recommendation for patent from the local agent, to assign and transfer an interest in the homesteaded land to another person, though made in good faith and for an adequate consideration, is absolutely null and void and cannot be enforced at the suit of such other person.

Since the decision of *Aubert* v. *Maze*, 2 B. & P. 321, there has been no distinction between malum prohibitum and malum in se as to anything forbidden by statute. *Cannon* v. *Bryce*, 3 B. & Ald. 179, and *Wetherell* v. *Jones*, 3 B. & Ad. 221, followed. *Abell* v. *McLaren*, 13 M.R. 463, not followed on this point.

Wilson and *Machray*, for plaintiff. *Daly*, K.C., and *Crichton*, for defendant.

Province of British Columbia.

SUPREME COURT.

Court of Criminal Appeal.] [June 21.

REX *v.* WONG ON.

Criminal law—Judge's charge to jury—Murder—Manslaughter Definitions of—Failure to instruct jury as to—Failure to object to charge—New trial—Rebuttal evidence in discretion of Judge.

It is the duty of the Judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and any other offence of which it is open to the jury to convict the accused.

Failure to so instruct the jury is good cause for granting a new trial and the fact that counsel for the accused took no exception to the Judge's charge is immaterial.

After the case for the Crown and defence was closed the Crown called a witness in rebuttal whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses and which tended to weaken the *alibi* set up by the accused:—

Held, that to allow the evidence was entirely in the discretion of the Judge and there was no legal prejudice to the accused

as he was allowed an opportunity to cross-examine and meet the evidence.

NOTE.—This case was noted ante, Vol. 39, p. 791. As a change is made in the head note published in the B.C. Reports, we give it again in the revised form.

Full Court.] BREMNER *v.* NICHOL. [Nov. 11, 1904.

County Court Act, s. 94—Speedy judgment—Affidavit leading to.

Appeal from an order of FORIN, Co.J., granting speedy judgment.

The materials used in support of a motion for speedy judgment in a County Court action in which the plaintiff sued on an account stated were an affidavit of the plaintiff verifying his cause of action and an affidavit of plaintiff's solicitor verifying defendant's signature to the account and stating that he believed the plaintiff had a good cause of action and that the defendant had no defence.

Held, that the materials were sufficient to support a judgment for plaintiff.

Quære, whether an affidavit of plaintiff, verifying his cause of action and an affidavit of his solicitor stating that defendant had no defence, would be sufficient under s. 94 of the County Courts Act to support a speedy judgment.

Appeal dismissed.

W. A. Macdonald, K.C., for appellant. *Sir Charles Hibbert Tupper*, K.C., contra.

Full Court.] DOCKSTEADER *v.* CLARK. [Nov. 22, 1904.

Mining law—Location—Approximate compass bearing—No. 1 post on occupied ground.

Held, that the location of a mineral claim is not invalid merely because the No. 1 post is placed on the ground of an existing valid claim if the facts bring the locator within the benefit of s.-s. (*g*) of s. 16 of the Mineral Act as amended in 1898.

The direction of the location line was stated in the affidavit of location as being south-easterly, when, as a fact, it was south 52° 50″ west.

Held, that the discrepancy was of a character calculated to mislead. Appeal from judgment of IRVING, J., dismissed, MARTIN, J., dissenting.

Davis, K.C., and *W. A. Macdonald*, K.C., for appellant. *S. S. Taylor*, K.C., for respondent.

North-West Territories.

SUPREME COURT.

Scott, J.] RUMLEY v. SAXAUR. [Sept. 29, 1904.

Attachment of debts—Requirements of affidavit for order.

The Rule of Court as to the nature of the information to be given before a garnishing order could be granted, required that the applicant should "swear positively to the indebtedness of the judgment debtor." An order was granted on an affidavit which stated that the deponent had no personal knowledge of the indebtedness, but that his belief as to its existence was founded on letters and circumstances.

Held, that the order was improperly issued and must be set aside.

Wallbridge, for the application. *Newell*, contra.

Book Review.

The Law of Banking, by Heber Hart, LL.D. (Lond.), Barrister at Law. London: Stevens & Sons, Ltd., 119-120 Chancery Lane, Law Publishers, 1904.

The author in his preface says:—"I have endeavoured to present a comprehensive statement of the living law of banking arranged in a natural and convenient form." An examination of his book shows that he has been successful in his endeavour. He has given us an up-to-date and valuable treatise on an important subject.

It is manifest that the law of banking necessarily includes in a large measure the law as to bills and notes. Our Bills of Exchange Act, 1890, is based upon the Imperial Bills of Exchange Act of 1882, and these are codifications of the law affecting negotiable instruments. It will be seen, therefore, how useful a good English book on banking which deals also with the law as to bills and notes must be in this country.

Mr. Hart has done his work excellently well. He is concise and accurate in expression, and the work in its arrangement is both logical and lucid, and the ordinary sequence of events in the relations of "bankers with customers" has been adopted as the guiding principle of classification, with good results. The work, with its full index consists of over 1,000, pages, so that it

will readily be seen that the discussion of the subjects treated of is exhaustive. The table of contents gives the following leading divisions: 1. Bankers and Banks; 2. The Account; 3. The Customer's cheques; 4. Acceptance; 5. Collection; 6. Banker's documents of credit; 7. Incidental services; 8. Advances. Each of these is carefully divided into appropriate sub-heads; so that, even without the aid of an index, it is easy to find such information as is given on any required subject.

Courts and Practice.

JUDICIAL APPOINTMENTS.

PROVINCE OF QUEBEC.

Richard Stanislas Cooke, K.C., to be a puisne Judge of the Superior Court, in the room of Odilon Desmarais, deceased.

Matthew Hutchinson, K.C., to be a Puisne Judge of the Superior Court, in room of Hon. William White, resigned.

RULES OF COURT.

HIGH COURT—ONTARIO.

Regulations passed at a meeting of the Judges of the High Court, held on 17th December, 1904.

1. When a Judge at a trial reserves judgment in any case (elsewhere than at Toronto), the Clerk of the Court shall forthwith forward the record and exhibits to the Central Office.

2. All local officers of the Court, when sending papers or exhibits to the Central Office shall indorse on the wrapper enclosing such papers or exhibits the short style of cause; the title of the officer sending them, and the purpose for which they are sent—e.g., "*Jones* v. *Smith*. From Local Registrar at Brantford, for appeal to Divisional Court" or "For Mr. Justice Magee," or as may be.

3. When a case is required to be set down for a Divisional Court, Weekly Court, or Chambers, the officer shall require that the party desiring the case to be set down to indorse on the notice of motion the name of the office in which the action or proceeding was commenced, and the officer shall not set down any case without such indorsement, unless otherwise ordered by the Court or a Judge.

These regulations are to take effect from and after the 31st day of December, 1904.

ELECTION CASES—ONTARIO.

At a meeting of the Judges of the High Court, held on Saturday, 17th December, 1904, the following rule was passed:—

The Clerk of the Court shall, on receipt of the deposit made with him on the filing of an election petition, forthwith pay the amount deposited into Court, with the privity of the Accountant, to the credit of the matter of the petition, for which payment no fee shall be payable.

Flotsam and Jetsam.

The story runs that once at a dinner-party a footman upset some scalding soup over a bishop's apron: whereupon the prelate mildly exclaimed: "Will some layman kindly use the appropriate expression?" This was quite becoming in a bishop, to whom all "swearing and ribaldry" is utterly denied, but an ordinary vicar has, it would seem, greater latitude. An occasional lapse into strong language—under considerable provocation—though certainly reprehensible, does not in the opinion of the Judicial Committee of the Privy Council, constitute an "immoral habit" or render him "habitually guilty of swearing and ribaldry" under s. 2 of the Clergy Discipline Act, 1892: *Moore* v. *Bishop of Oxford*, [1904] A.C. 283, 73 L.J.C.P. 43. Clergymen are but mortal; but a clergyman must draw the line at collecting alms under false and fraudulent pretences. This is an "immoral act": *Fitzmaurice* v. *Hesketh*, [1904] A.C. 266, 73 L.J.P.C. 53.—*Law Quarterly*.

THE LIVING AGE: Boston, U.S.—The *Living Age* in its initial number for 1905 is well up to the standard of culture, breadth and timeliness maintained by that admirable eclectic for more than sixty years. Sidney Low's article on "President Roosevelt's Opportunities" is reprinted from *The Nineteenth Century and After*, and "The Voyage of the Baltic Fleet," by a distinguished writer on naval affairs, from *The National Review;* Sir Oliver Lodge's address on "Religion, Science and Miracle" is taken from *The Contemporary;* from *Blackwood's* comes the fourth in the brilliant series on "Boy," dealing with "The Choice of a Public School," from *Macmillan's*, a description of "The Heart of Old Japan."