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PROPOSED AMENDMENT OF THE LAWS REGARDING BRIBERY.

Considering the unusual degree of attention which the subject of electoral corruption is at present exciting throughout the Dominion, it is somewhat surprising that no definite proposition has been put forward, with a view to the suppression of one particular form of that corruption which is not mentioned in any of the existing statutes, but which is admitted to be fully as mischievous and demoralizing as any of the descriptions of bribery which have been specifically prohibited by the Dominion and Provincial Legislatures. Broadly speaking, the effect of the enactments now in force is merely to prosecute certain acts or words which are calculated to influence directly, upon improper grounds, the minds of individual voters, regarded solely as individuals. They cannot, by any permissible straining of their phraseology, be construed as covering cases in which the essence of the corruption consists in bringing an indirect influence to bear upon voters by means of acts or words which relate primarily to the affairs of the entire community of which they are members, and only in a secondary sense, and through the community, to the personal interests of the voters themselves.

The most effective and far-reaching of the methods by which this kind of indirect influence is exercised consists in expending, or promising to expend, or threatening to refrain from expending, the public money for some object in which a community is concerned. One illustration of the exercise of such influence is furnished by the campaign tactics so commonly pursued in regard to various kinds of public works in which the commercial interests of constituencies are involved. That the general popularity which the party controlling the State purse for the time being is certain to acquire by the actual commencement of such a work, or by a promise that it will be commenced in the future,

will produce some tangible results, when the members of the favoured community are casting their votes, is an event which may confidently be relied upon as long as human nature is constituted as it is. On the other hand it is no less certain that results equally gratifying to the dominant party may be looked for in any community which has been informed more or less explicitly that the consequence of the defeat of the ministerial candidate in a given election, will be either the stoppage of some work already in progress, or the indefinite postponement of one which is needed and has been asked for. That votes cast under the influence of a general popularity or a general apprehension thus produced are procured by what is really and substantially nothing more or less than bribery by wholesale, will not, it is conceived, be disputed by anyone who considers such transactions in their true light, and whose judgment is not clouded by political prejudices. It is apparent, moreover, that the exercise of such influence constitutes an especially serious danger, and an especially pernicious abuse, at a time when that development of the material resources of the country which is now proceeding with such startling rapidity will inevitably involve, as one of its incidents, a large increase in the number of occasions which call for the expenditure of the public money upon works of construction, and by consequence a corresponding increase in the number of opportunities for influencing voters in the manner above indicated.

This particular instance of that indirect bribery which operates upon individual voters by exciting the gratitude, or hopes, or fears of an entire community has been specifically adverted to for the reason that it is at once the most familiar and the most alarming. But many other descriptions of a similar kind of bribery will readily occur to everyone who possesses even a superficial acquaintance with the methods resorted to for the purpose of securing votes both in Dominion and in Provincial elections.

In a brief article like the present, it would be out of place to attempt to formulate a provision which would be appropriate

and effective for the restraint of the species of electoral corruption which the writer has been condemning. In fact until the subject has been discussed in all its bearings, it would be unprofitable to undertake such a task. All that is now aimed at is to call the attention of the legal profession, and incidentally of the public at large, to the urgent necessity for amending the present law in such a manner as to check a very serious, and, as already stated a growing evil. The most effective, if not the only, remedy for that evil would seem to be the enactment of stringent statutory provisions based upon the recognition and acceptance of the idea, that acts, forbearances, promises, or declarations, which relate to the use of public money in a given community, and which have a natural tendency to influence the minds of the voters in that community, may with as much propriety be designated bribery, and subjected to the penalties of bribery as the more familiar forms of that offence which are now proscribed.

As the Provincial and Dominion Legislatures will shortly reassemble, the time is particularly opportune for a discussion of the questions here raised.

C. B. LABATT.

LIABILITY OF BANK DIRECTORS.

A case has been recently decided in the Supreme Court of Ohio (*Mason* v. *Moore*, 73 Ohio St. 275, 4 L.R.A. N.S.), in which the liability of bank directors is considered in relation to dishonest or improper practices on the part of officers of the bank. A writer in *Case and Comment* draws attention to this judgment in view of the vigorous denunciations which generally appear in the public press and elsewhere when the wreck of a bank takes place, and punishment of the directors is demanded on the assumption that if they had done their duty in supervising the affairs of the bank, loss to the shareholders would have been avoided. The writer says: "The Courts called upon to deal with the subject in all its aspects, with the responsibilty for

doing justice to the directors as well as to all others, have spoken far more wisely and justly than most of those who have written on the subject in newspapers and periodicals, unburdened by any personal sense of responsibility in the matter. The Courts have recognized that due care on the part of the directors did not mean the same thing as a guaranty of the honesty of the cashier or other officers whom they intrusted with the affairs of the bank."

The judgment above referred to declares that while the directors are charged with the duty of reasonable supervision and the exercise of that degree of care which is exercised by ordinarily careful and prudent men acting under like circumstances, yet they are not insurers of the fidelity of the cashier and other agents whom they have appointed, and not responsible for losses resulting from their wrongful acts or omissions, if the directors themselves act in good faith and with ordinary care. The Court also holds that the directors are not bound, as a matter of law, to know all the affairs of the bank, or what its books or papers would shew; and that such knowledge cannot be imputed to them for the purpose of charging them with liability. The other cases on the subject generally sustain this doctrine, that the directors must exercise reasonable care and prudence; but the difficulty is to determine just what will constitute that. Since directors are not expected to give their whole time and attention to the business of the bank, they are entitled to commit the actual management of the business to their duly authorized officers. But they cannot be mere figureheads, and must still maintain a general supervision over the business, and have a general knowledge of the manner in which it is conducted. On the other hand, if the public should suppose that the directors of a bank exercised no function of care and watchfulness over its business few people would do business with that bank.

The judgment further says it is impossible to lay down definite rules to determine what constitutes due care. The Courts lay much stress on any facts shewing some ground of suspicion which the directors knew, or reason-

ably should have known. Any speculations of bank officers which cause comment and suspicion among business men generally are obviously sufficient to put the directors on inquiry, and require very sharp scrutiny of its management; but there are, unfortunately, too many conspicuous instances of the wrecking of banks by men whose reputation has been of the highest both in personal and business relations. It may be impossible, doubtless it is, to institute any system of checks and safeguards which will make it impossible for the ingenuity of a dishonest man to wreck a bank when he holds an important position of trust in it. There is a demand for legislation on the subject. But legislators may do serious harm by unwise enactments, and no legislation on such a subject can be safely attempted without the fullest participation and counsel of the ablest men in the banking business.

LEGAL TECHNICALITIES.

It may not be out of place to refer to the misleading remarks of a writer in the Toronto *Daily News*, who commented in strong language on the alleged misconduct of some of the judges in our land, and to state shortly the well settled rule as to how Courts should deal with matters coming before them, whether they be questions of law or of fact, or of what the writer in the article referred to is pleased to call "legal technicalities."

May we be permitted to express surprise that there should be anyone who is not familiar with the truism that it is the duty of judges to administer the laws as they find them, and that when the Legislature declares that a particular offence shall be dealt with in a particular manner, it is the duty of the judge to see that the offence is dealt with in that manner and in no other. To do otherwise would be to alter the law, which no judge has any authority to do. It is not for him to question the reason which led the Legislature to require that particular mode of procedure, still less to decide that some other mode would do equally well. This is not being bound by a "technicality." It is simply doing his recognized duty.

But it is said that "the duty of a judge is to do justice." Undoubtedly it is, and it is to enable him to do justice that laws are enacted. It is the law that gives them the power to act, that defines the crime, and the mode of dealing with it. Every civilized community makes the same distinction between the enactment and administration of the law, and nowhere are those to whom the latter is entrusted allowed to meddle with the former. Were it otherwise law would cease to exist, and the individual opinion of the judge would take its place, and chaos would reign.

Of course no one will dissent from the principles here laid down, and we have only re-stated them because there are people, from whom better things might be expected, who are heaping invectives upon judges who have acted upon them, and are complaining because a man, who, it is urged, ought to have been convicted, had escaped the punishment due to his offence. He escaped, it is said, upon a technicality which the judges, in order to do justice, should have disregarded. But it is vastly better that one guilty person should escape than that there should be uncertainty as to what the law is, with the resultant that more guilty persons should escape and possibly innocent ones punished.

In the case referred to, that of a man named Sinclair who was convicted of an offence under the election law, the full Court of the North-West Territories, consisting of five judges, unanimously held that the conviction was illegal, and quashed it accordingly. We know not, nor care not, who Sinclair was, or what his offence was, but, assuming that the judges were right in point of law, as probably they were, they were only doing their duty in acting as they did.

DAMAGES FOR NERVOUS SHOCK.

The Supreme Court of New Jersey recently held that where a person suffers physical injury, damages might also be had for the fright occasioned thereby. This is the case of *Porter* v. *Delaware L. & W. Railroad Co.*, 63 Atl. Rep. 860. The facts were as

follows:—The plaintiff was walking upon a public sidewalk, and as she passed under an overhead railway bridge of the defendant company t fell, and she claimed that something hit her on the back of the neck and that the dust from the crash got into her eyes. She also claimed for injury to her nervous system resulting from the shock. The Court said:—"The contention of the defendant is that she received no physical injury whatever, but that the condition she alleges she is suffering from is due to fright alone. If that were true of course she could not recover: *Ward* v. *West Jersey, etc., R.R. Co.*, 65 N.J. Law 383; 47 Atl. Rep. 561. But if she received physical injuries, all the resultant effects to her system, due to the accident, are recoverable. The proof by the plaintiff was that she was hit on the neck by something, and that dust from the falling debris went into her eyes. Proof of either of these physical injuries would take the case out of the rule as to non-recovery for fright alone. Accepting the finding of the jury that she thus suffered physical injury, she was entitled to damages for the results flowing therefrom. We do not think the weight of the evidence is so clearly against her having received physical injuries she alleged as to justify us in disturbing the verdict on that ground." A writer in the *Central Law Journal* thus comments:—"It is hard to understand why a person should not be allowed to recover for an injury to the nervous system resulting from fright. It frequently happens that fright alone produces physical injuries of the most serious character. After an accident which has caused great fear, many persons are thrown into agonies upon the recurrence of any sudden noises. It is quite probable the Court would conclude that the establishment of such a fact would be to establish a physical injury, and allow the recovery of damages therefor, together with damages for the fright which produced it. Such a nervous shock could not be regarded as anything but a physical injury."

One might also ask why, if in any such an action damages are recoverable for (1) merely nervous shock without physical injury, plus damages for (2) tangible physical injury, why there

should not be a recovery when there is the first without the second?

The remarks of Chief Justice Meredith, appealing to the profession to assist the Court in preventing the loss of judicial time by unnecessary adjournments, makes one think that it might be well to consider the advisability of adopting in this country the English rule under which a King's counsel must have a junior associated with him in every case. This not only helps to secure proper training for the junior Bar, but, also if the senior is prevented by another engagement from being present when the case is reached, the junior can be called on to take it, and must be prepared to do so. We do not say that this would get rid of all the difficulties, but it might be a help in that direction.

To the regret of the English Bar, Lord Justice Romer, one of the Law Justices of the Appeal has resigned, and Mr. Justice Buckley, from the Chancery Division of the High Court of Justice, takes the vacant place. The latter is succeeded by Mr. R. J. Parker, whose powerful intellect and ripe experience well qualify him for his new position. The *Law Times* says: "Many expected that the leader of the Chancery Bar would have been raised to the Appeal Bench, to which he has no mean claims, but the fates ordered otherwise. All things, however, come to him who waits. The quality of the judges of the Chancery Division at the present time is so high that any of them might with propriety have been raised to the Court of Appeal, and there are several leaders who would have worthily filled the vacancy thereby occasioned."

The old but ever new question of the abolition of capital punishment is bobbing up again in the daily press, and the arguments pro and con are being repeated with more or less convinc-

ing results, according to the mental bias of the reader. Our own opinion, that such abolition would be unwise, has more than once been expressed. We do not now intend to bore our readers with a rediscussion of the question, but merely to point a moral from China. Residents of the United States are apt to poke fun at the Orientals and to conclude that they are hopelessly behind the times in all respects, but this may be too hasty a generalization, for the effete civilization of China and the Chinese may still have some points of excellence from which we progressive Yankees may learn a little wisdom. We are led to these reflections by the statement that it is more than one hundred years since there has been a failure of a bank in China. It is related that more than nine hundred years ago, in the reign of Hi Hung, a bank failed. Hi Hung caused the failure to be rigidly investigated, and to his great indignation it was found to have been due to reckless and shady conduct on the part of the directors and the president. Hi Hung at once issued an edict that the next time a bank failed, the heads of its president and directors were to be cut off. We are further told that this edict has never been revoked, and that it has made China's bank institutions the safest and soundest in the world. We merely wish to inquire whether in the opinion of the advocates of the abolishment of capital punishment, this condition would have been attained without the drastic punishment ordered by the distinguished Hi Hung, and also whether it is not probable, by the same reasoning, that if the death penalty were to be abolished, the crime of murder would flourish to an even greater extent than it does to-day, to the lasting disgrace of our much-vaunted civilization.—*Albany Law Journal.*

REVIEW OF CURRENT ENGLISH CASES.

LANDLORD AND TENANT—CONTRACT TO SUPPLY POWER—EXCESSIVE SUPPLY CAUSING DAMAGE — LIABILITY OF LANDLORD—MEASURE OF DAMAGES.

Bentley v. *Metcalfe* (1906) 2 K.B. 548 was a somewhat peculiar case, and one of first impression. The plaintiffs were tenants of a room in the defendants' mill, and the defendants had contracted to supply the plaintiffs with the necessary power for turning a drum in the plaintiffs' premises. By some defect in the governor of the defendants' engine, which produced the power, the speed was excessive and beyond the plaintiffs' requirement. The result was that the drum revolved so fast that it burst and killed one of the plaintiffs' servants. The plaintiffs had paid compensation to the representatives of the deceased, and now claimed to recover over against the defendants the amount so paid. The jury found that the engine was defective to the defendants' knowledge. Judgment was given by Darling, J., at the trial for the plaintiffs. On the appeal the point was raised by the defendants that there was no contract express or implied that the engine should be in perfect order, and that "power" could not be regarded as a chattel, but that the contract should be regarded as a mere demise of premises of which the power was a part and in respect of the fitness of which there is no warranty by the landlord. The Court of Appeal (Collins, M.R., and Cozens-Hardy, L.J., and Barnes, P.P.D.), however, was unable to accede to this view, and held that the real nature of the bargain was the sale of a thing or subject matter called "power" to which attached an implied warranty by the seller that the thing he supplied should be reasonably fit for the purpose for which it was supplied, and that the furnishing an excessive and dangerous amount of power beyond what was requisite resulting in damage to the plaintiff was a breach.

LANDLORD AND TENANT—DISTRESS—ILLEGAL DISTRESS—TRESPASS AB INITIO—SECOND DISTRESS FOR SAME RENT.

In *Grunnell* v. *Welch* (1906) 2 K.B. 555 the Court of Appeal (Lord Alverstone, C.J., and Barnes, P.P.D., and Farwell, L.J.) have affirmed the judgment of the Divisional Court (1905) 2

K.B. 650 (noted, ante, vol. 41, p. 864). The simple point of law in question being, whether where a bailiff under a distress for rent had illegally broken open a front door and the distress was thereupon abandoned, a second distress could be validly made for the same rent. The Divisional Court held that it could, and the Court of Appeal affirm that conclusion, holding that the first distress was a trespass ab initio, and altogether void, and, therefore, was no bar to a second distress.

ESTOPPEL—PLAINTIFF ADOPTING STATUTORY REMEDY.

Neale v. *Electric and Ordinance Accessories Co.* (1906) 2 K.B. 558, was a common law action brought by a workman against his employers to recover in respect of personal injuries sustained by him in the course of his employment. At the trial the jury gave a verdict for the defendants, and counsel for the plaintiff then applied to the judge to assess compensation under the provisions of the Workmen's Compensation Act of 1897, and the judge did then accordingly assess such compensation at 3/6 per week, and gave a certificate of the amount so awarded and under the provisions of that Act in case of non-payment the plaintiff would be entitled to execution to enforce payment. The plaintiff before accepting payment of the compensation or doing anything to enforce payment, appealed from the judgment at the trial and moved for judgment in his favour, or for a new trial, but on a preliminary objection by the defendants, the Court of Appeal (Collins, M.R., and Moulton and Farwell, L.JJ.), held that the plaintiff, by taking the certificate of assessment of damages under the Workmen's Compensation Act, had elected to adopt that remedy, and had estopped himself from pursuing any further his common law remedy in respect of the injury complained of.

ORDER FINAL, OR INTERLOCUTORY.

In re Croasdell & Cammell (1906) 2 K.B. 569. The constantly recurring question whether a given order is to be deemed final, or merely interlocutory, was again under discussion. In this case, which was an arbitration proceeding, the arbitrator had made his award in the form of a special case, but a Divisional Court had set aside this award on the ground of misconduct on the part of the arbitrator, and from this order it was proposed to appeal to the Court of Appeal, and the right of appeal depended on whether the order was a final order.

The Court of Appeal (Collins, M.R., and Williams, Romer, Cozens-Hardy, Moulton, and Farwell, L.JJ.), were of the opinion that the order was merely interlocutory. The Court declined to lay down any general rule as to what orders are final and what interlocutory considering that should be done by rule of Court.

SALE OF GOODS—SALE OR RETURN—SALE FOR CASH ONLY—PASSING OF PROPERTY—"ACT ADOPTING THE TRANSACTING"—SALE OF GOODS ACT, 1903 (56 & 57 VICT. C. 71) S. 18(4).

In *Weiner* v. *Gill* (1906) 2 K.B. 574 the Court of Appeal (Lord Alverstone, C.J., and Barnes, P.P.D., and Farwell, L.J.), have affirmed the decision of Bray, J. (1905) 2 K.B. 172 (noted, ante, vol. 41, p. 717). It may be remembered that the plaintiff, a manufacturing jeweller, delivered jewellery to Huhn, a retail jeweller, on the terms of a written memorandum: "On approbation. On sale for cash only or return. Goods had on approbation to remain the property of (the plaintiff) until such goods are settled for, or charged." Huhn being informed by one Longman that he had a customer who might buy the goods entrusted then to Longman upon the terms of his paying cash therefor or returning them in a few days. Longman did neither, but fraudulently pledged the goods with the defendant from whom the plaintiff claimed to recover them. The Court of Appeal agreed with Bray, J., that the goods were not delivered to Huhn "on approval or on sale or return or other similar terms," within the meaning of the Sale of Goods Act, s. 18 (4), but that the terms of the memorandum shewed that the property was to remain in the plaintiffs until Huhn either paid for the goods or was debited by the plaintiff with the price of them, and that the delivery by Huhn to Longman was not "an adopting of the transaction" within the meaning of the Act so as to pass the property to him contrary to the express terms of the memorandum, and consequently that the property in the goods remained in the plaintiff, and he was entitled to recover them from the defendant the pledgee thereof.

TRADE UNION—BENEFITS DURING SICKNESS—INSANITY OF MEMBER—ALTERATION OF RULES AS TO BENEFITS DURING INSANITY OF MEMBER—ALTERATION OF RULES—JURISDICTION—TRADE UNION ACT, 1871 (34 AND 35 VICT. C. 31), S. 4(3)—(R.S.C. C. 131, S. 4).

Burl v. *Amalgamated Society of Dyers* (1906) 2 K.B. 583

was an action by a member of a trade union against the union to recover a sum claimed to be due for sick benefits, in which two points were raised. (1) Whether there was any jurisdiction to entertain the action, and (2) Whether the plaintiff, who was a lunatic, was bound by an alteration made in the rules of society respecting sick benefits, whilst the plaintiff was insane. On the second point the Court held that the changes made in the rules of the union relating to sick benefits having been made in accordance with the rules authorizing and regulating the alteration of the rules of the union, were binding on the plaintiff, notwithstanding his insanity, and, this being sufficient to dispose of the case, the Court refrained from deciding the first point, but inclined to the opinion that the jurisdiction of the Court was excluded by the Trade Union Act, 1871, s. 4(3), (R.S.C. c. 131, s. 4), notwithstanding the decision of the Court of Appeal in *Swaine* v. *Wilson* (1889), 24 Q.B.D. 252, which they considered was distinguishable.

LANDLORD AND TENANT—NOTICE TO QUIT—YEARLY RENT—HABENDUM "UNTIL SUCH TENANCY SHALL BE DETERMINED AS HEREINAFTER MENTIONED"—PROVISION FOR THREE MONTHS' NOTICE—EXPIRY OF NOTICE.

Lewis v. *Baker* (1906) 2 K.B. 599 is an appeal from the judgment of Jelf, J. (1905) 2 K.B. 576 (noted, ante, vol. 41, p. 832), in which the question at issue was the sufficiency of a notice to quit. The action was for ejectment by landlord against tenant. The defendant was in possession under a lease dated June 1, 1901, at a yearly rent, the habendum being "until such tenancy shall be determined as hereinafter mentioned." The lease thereafter provided for the termination of the term by either party on giving three months' notice. On May 11, 1903, the landlord gave notice to quit on August 13, 1903; the notice was not complied with and subsequently the landlord assigned the reversion to the plaintiff. It was contended on behalf of the plaintiff that the lease was for an indefinite term, terminable at any time on three months' notice, but Jelf, J., held that it was a yearly tenancy and that it was terminable only on three months, expiring with any year of the tenancy, and with this conclusion the Court of Appeal (Lord Alverstone, C.J., and Barnes, P.P.D., and Farwell, L.J.), agreed.

CONTRACT TO SUPPLY GOODS AS PURCHASER MAY REQUIRE FOR HIS BUSINESS—AGREEMENT BY PURCHASER NOT TO BUY GOODS ELSEWHERE—ASSIGNMENT OF CONTRACT—ASSIGNEE OF CONTRACT.

In *Kemp* v. *Baerselman* (1906) 2 K.B. 604 a question was raised somewhat similar to that in *Tolhurst* v. *Associated Portland Cement Manufacturers*, 1903, A.C. 514, but which the Court of Appeal held was not governed by that case owing to the existence of a stipulation on the part of the purchaser in this case, which was not present in the *Tolhurst* case. The contract in question was one made by the defendant for the supply of all the eggs which one George Kemp should require for one year in his business of a baker, and Kemp bound himself to the defendant so long as the defendant was ready to supply him not to buy eggs elsewhere, and it was this stipulation which was held to differ the case from the *Tolhurst* case. Kemp assigned his business and the benefit of the contract to a joint stock company, which carried on business on a much more extensive scale than Kemp had done. The defendant then refused to supply any more eggs, and the action was brought by Kemp and the company to recover damages for breach of the contract. Channell, J., who tried the action held that the plaintiffs were entitled to damages for refusal to deliver eggs at the place of business formerly carried on by Kemp since the transfer of the business to the company, but not for refusal to deliver eggs at another place of business carried on by the company. With this judgment both parties were dissatisfied, and both appealed therefrom to the Court of Appeal (Lord Alverstone, C.J., and Barnes, P.P.D., and Farwell, L.J.), the plaintiff relying on the *Tolhurst* case. The Court of Appeal allowed the defendant's appeal and dismissed the action on the ground that the stipulation not to trade elsewhere rendered the contract of a personal character and as such not assignable, and that by the assignment of Kemp's business the defendant was discharged from his obligation under the contract. The Court moreover seemed to think that as the contract was to supply eggs for a particular business, that on that ground also it could not be assigned, notwithstanding what was said in the *Tolhurst* case to the contrary.

HIGHWAY—DITCH ALONGSIDE OF HIGHWAY—DEDICATION.

In *Chorley* v. *Nightingale* (1906) 2 K.B. 612 the Divisional Court (Kennedy and Lawrance, JJ.), affirmed a decision of a

County Court to the effect that there is no rule of law which prevents the dedication of a ditch running alongside a highway between the travelled road and the fences on either side, as part of such highway merely because it cannot be used by the public as part of the roadway for the purpose of passage; and consequently where such a ditch was filled up and made part of the roadway, it was held not to be a widening of the highway.

DEFAMATION—LIBEL—FAIR COMMENT—MALICE—REVIEW OF BOOK —PRIVILEGED OCCASION.

Thomas v. *Bradbury* (1906) 2 K.B. 627 was an action for libel against the publishers of Punch. The libel complained of was contained in a review of a book written by the plaintiff. The review was entitled "Mangled Remains," and was a severe criticism of the work charging the writer with incompetence and conceit, etc. The defendants pleaded fair comment on a privileged occasion. At the trial it was proved that the writer of the review and the plaintiff were not on friendly terms, and it was held by the Court of Appeal (Collins, M.R., Cozens-Hardy, L.J., and Barnes, P.P.D.), that such evidence was properly admitted to shew malice, and that the jury might properly find as they did that comment, which is actuated by malice cannot be termed fair, and a verdict in favour of the plaintiff for £300 was upheld.

BANKRUPTCY — TRUSTEE — TRUSTEE'S POWER TO COMPROMISE CLAIMS—SANCTION OF COURT—OPPOSITION TO COMPROMISE —(R.S.C. c. 126, s. 33).

In re Pilling (1906) 2 K.B. 644, although a bankruptcy case, is deserving of notice as bearing on the effect of the Winding-up Act (R.S.C. c. 129) c. 33. Under the English Bankruptcy Act the trustee has ample power, with the consent of committee of inspection, to compromise all claims. In this case the trustee and committee were in favour of accepting a proposed compromise, but the bankrupt objected, and for his own protection the trustee applied to the Court for directions and authority to accept the compromise. The application was opposed by the bankrupt. Bingham, J., to whom the application was made, refused to express any opinion, holding that it was a matter for the discretion of the trustee and committee with which the Court would not interfere unless it were shewn by the party

objecting that the compromise was one which ought not to be accepted, which he held had not been done.

COMPANY—WINDING-UP—ASSETS COVERED BY DEBENTURES—UNSECURED CREDITOR—(R.S.C. c. 129, s. 8).

Re Crigglestone Coal Co. (1906) 2 Ch. 327 was an application by an unsecured creditor of an insolvent joint stock company for a winding-up order. The application was opposed by debenture holders whose debentures covered all the assets of the company, and who had obtained the appointment of a receiver to enforce their security, and also by the company which was under the control of the debenture holders, on the ground that there were no assets available for unsecured creditors. Buckley, J., granted the order and the Court of Appeal (Collins, M.R., and Romer, and Cozens-Hardy, L.JJ.), affirmed his decision on the ground that those who opposed the application had failed to shew that no possible benefit could accrue to the unsecured creditor by granting the order.

ADMINISTRATION—STATUTE OF LIMITATIONS—"PRESENT RIGHT TO RECEIVE THE SAME"—RIGHT OF ACTION AT LAW—INCAPACITY TO SUE CO-EXECUTOR AT LAW—EQUITABLE RIGHT OF ACTION—LAW OF PROPERTY AMENDMENT ACT, 1860 (23 & 24 VICT. 38), s. 13—(R.N.O. c. 72, s. 9).

In re Pardoe McLaughlin v. *Penny* (1906) 2 Ch. 340 the Court of Appeal have reversed the judgment of Kekewich, J. (1906), 1 Ch. 265 (noted, ante, p. 337).

WILL—CONSTRUCTION—GIFT TO CHILDREN AS A CLASS—SUBSTITUTIONAL GIFT TO ISSUE—"SHALL PREDECEASE ME"—ISSUE OF PARENT DEAD AT DATE OF WILL.

In re Gorringe, Gorringe v. *Gorringe* (1906) 2 Ch. 341. The Court of Appeal (Williams, Romer and Moulton, L.JJ.), have reversed the decision of Joyce, J. (1906) 1 Ch. 319 (noted, ante, p. 338), and hold that the issue of the son who was dead at the date of the will were entitled to participate in the residuary gift in favour of the issue of the testator's children "who shall predecease me." The Court, however, was not unanimous, Romer, L.J., dissenting.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] HALIFAX ELECTION CASE. [Oct. 4.

Controverted election—Commencement of trial—Extension of time.

An order fixing the time for the trial of an election petition at a date beyond the time prescribed under the Act operates as an enlargement of the time. *St. James Election Case*, 33 S.C.R. 137; *Beauharnois Election Case*, 32 S.C.R. 111, followed.

Lovett, for appellant. *Lafleur*, K.C., and *Drysdale*, K.C., for respondent.

N.S.] [Oct. 8.

QUEEN'S *v.* SHELBURNE ELECTION CASE.

Controverted election—Trial of petition—Evidence—Corrupt acts at former election—Agency—System of corruption.

A petition against the return of a member for the House of Commons at a general election in 1904, contained allegations of corrupt acts by respondent at the election in 1900, which were struck out on preliminary objections. On the trial of the petition evidence of payments by respondent of accounts in connection with the former election was offered to prove agency and a system, and was admitted on the first ground. A question as to the amount of one account so paid was objected to and rejected.

Held, that such rejection was proper; that the question was not admissible to prove agency, for agency was admitted or proved otherwise; nor as proof of a system which could not be established by evidence of an isolated corrupt act.

Held, also, that where evidence is tendered on one ground other grounds cannot be set up in a Court of Appeal.

Lovett, for appellant. *Lafleur*, K.C., and *Drysdale*, K.C., for respondent.

Que.] ST. ANN'S ELECTION CASE. [Oct. 11.

Controverted election—Personal corruption—Charge in petition —Judge's report—Adjudication—Amendment—Evidence.

On a charge of personal corruption by the respondent, if the adjudication by the trial judges does not contain a formal finding of such corruption this Court may insert it if the recitals and reasons given by the judges warrant it.

Respondent, the night before the election, took a sum of over $4,000 and divided it into several parcels of sums ranging from $250 to $1,500. He then, after midnight, visited all its committee rooms and gave to the chairman of each committee, personally and secretly, one of such parcels. His financial agent had no knowledge of this distribution, and no evidence was produced of the application of the money to legitimate objects.

Held, that the inference was irresistible that the money was intended for corruption of the electors and respondent was properly held guilty of personal corruption.

Allegations in the petition that respondent had himself given and procured, undertook to give and procure, money and value to electors and others named his agents, to induce them to favour his election and vote for him for the purpose of having such monies and value employed in corrupt practices, were sufficient to cover the offence of which the respondent was found guilty.

E. F. B. Johnston, K.C. and *Perron,* K.C., for appellant. *Bisaillon,* K.C., and *Carmich* for respondent.

EXCHEQUER COURT.

Burbidge, J.] [June 30.

CANADIAN PACIFIC RY. CO. *v.* THE KING.

Canal bridge—Agreement between Crown and company as to construction—Liability for maintenance and operation of bridge.

In 1882, the O. & Q. Ry. Co., the suppliants' predecessor in title, applied to the Minister of Railways and Canals for leave to construct a railway bridge across the Otonabee River, in the town of Peterborough, undertaking at the same time to construct

a draw in such bridge in case the Crown should at any time thereafter determine it to be necessary for the purposes of navigation. By Order in Council of 3rd October, 1882, and an agreement made in pursuance thereof on the 23rd of December, 1882, between the said company and the Crown, permission was given to the former to construct a bridge upon the said undertaking to build a swing in the bridge if the Crown considered it necessary, or in case of the carrying out of the proposed canal for the improvement of the Trent River navigation, and in that case it being considered necessary that there should in that case be a new swing bridge over the said canal, the cost of the swing and the necessary pivot pier therefor to be borne by the said company. The canal having been constructed, it became necessary to have a new swing bridge over the canal on the company's line of railway. This bridge was built, and the the suppliant company discharged the obligation to which it succeeded to pay the cost of the pivot pier and of the swing or superstructure of the bridge. The cost of the maintenance and operation of the bridge being in dispute between the parties, the petition herein was filed to determine the question of liability therefor.

Held, that in the absence of any stipulation in the agreement between the parties as to which should bear the cost of such maintenance and operation, the suppliants having built the pivot pier and swing as part of its railway and property should maintain and operate them at their own cost.

Chrysler, K.C., and *D'Arcy Scott*, for suppliant. *Newcombe*, K.C., for Crown.

Burbidge, J.] [June 30.

CANADIAN PACIFIC RY. CO. *v.* THE KING.

Construction of branch line—Subsidy—Agreement to pay—Ascertainment of amount—"Cost"—"Equipment."

By 3 Edw. VII. c. 37, s. 2, it was provided that the Governor in Council might grant the Canadian Pacific Railway Company in aid of the construction of a certain branch line, a subsidy of $3,200 per mile, where the line did not cost more on the average than $15,000 per mile, and that where such cost was exceeded, a further subsidy might be given of 50 per cent. on so much of the average cost of the mileage subsidized as was in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile. By the 1st section of the Act the expression "cost" was defined to mean the "actual, necessary and

reasonable cost," to be determined by the Governor-General in Council upon the recommendation of the Minister of Railways and Canals, and upon the report of the Chief Engineer of Government railways. The Minister of Railways and Canals under authority of the Governor-General in Council entered into a contract with the plaintiff respecting the construction of the said plaintiff respecting the construction of the said branch line and the subsidy therefor, by which it was agreed that the Crown would "in accordance with and subject to the provisions of ss. 1, 2 and 4 of the Subsidy Act pay to the company so much of the subsidies or subsidy hereinbefore set fort' or referred to, as the Governor-General in Council, having regard to the cost of work performed, shall consider the company to be entitled to in pursuance of the said Act."

Held, that inasmuch as the Act and the agreement made thereunder for the payment of subsidy left the amount thereof to be determined by the Governor-General in Council, the decision of the Governor-General in Council was not open to review by the Court.

Travers Lewis, for plaintiff. *Newcombe*, K.C., for Crown.

Burbidge, J.] McDONALD *v.* THE KING. [June 30.

Patent for invention—Crown's right to use—Compensation—Condition precedent to right of action.

Apart from statute the Crown has the power, if it sees fit to do so, to use a patented invention without the assent of the patentee and without making any compensation to him therefor.

By s. 44 of the Patent Act the Government of Canada may at any time use the patented invention, paying to the patentee such sum as the Commissioner of Patents reports to be a reasonable compensation therefor.

Held, that a report by the Commissioner is a condition precedent to any right of action for such compensation.

Latchford, K.C., for demurrer. *Newcombe*, K.C., contra.

Burbidge, J.] [Sept. 13.

McLACHLAN *v.* UNION STEAMSHIP CO.

Shipping—Appeal—Interlocutory order—Different motion on appeal—Re-hearing.

Where a motion made on appeal was a different one from

that made to the Court below, and the matter was one in which relief could still be given in the Court below, the Court on appeal refused to entertain the motion although in such cases the appeal is by way of re-hearing.

Cassidy, K.C., for appellants. *Hogg*, K.C., for respondents.

Burbidge, J.] [Sept. 13.

McLACHLAN *v.* UNION STEAMSHIP CO.

SHIP CAMOSUN.

Shipping—Counterclaim—Appeal from order striking out—Jurisdiction.

The jurisdiction which the Exchequer Court of Canada may exercise under the Colonial Courts of Admiralty Act, 1890, and the Admiralty Act, 1891, is the admiralty jurisdiction and not the general or common law jurisdiction of the High Court in England. *The Cheapside* (1904), p. 339, referred to.

In an action in rem for a claim arising upon a mortgage of a ship, the Court has no jurisdiction to entertain a counterclaim for breach of contract to build the ship in accordance with certain specifications.

Hogg, K.C., for respondents. *Cassidy*, K.C., for respondents.

Burbidge, J.] GUNN & CO. *v.* THE KING. [Oct. 1.

Intercolonial railway—Freight rates—Regular and special rate—Agent's mistake in quoting—Estoppel.

A freight agent on the Intercolonial Railway, without authority therefor and by error and mistake, quoted to a shipper a special rate for hay between a certain point on another railway and one on the Intercolonial the rate being lower than the regular tariff rate between the two places. The shipper accepted the special rate and shipped a considerable quantity of hay. Being compelled to pay freight thereon at the regular rate he filed a petition of right to recover the difference between the amount paid and that due under the special rate.

Held, that as the claim was based upon the negligence or laches of an officer or servant of the Crown, for which there was no statutory remedy, the petition must be dismissed.

Lovett, for suppliants. *Mellish*, K.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Full Court.] [June 29.

ONTARIO BANK *v.* O'REILLY.

Warehouse receipts—Partnership—Banks and banking—Bank Act—Liability of partners—Promissory notes—Negotiation—Extinguishment of debt—Securities—Release of partner—Covenant not to sue—Reservation of rights.

The defendant M. was a partner with the defendant G. in a commission and produce business carried on in the same building as a storage business in which G. was also engaged. It was alleged by the plaintiffs that the defendant F. was a partner in both businesses. The account of the commission and produce business was kept at the plaintiffs' bank. For the purpose of enabling the partnership to purchase the produce in which they dealt, the plaintiffs gave the partnership a line of credit in the form of an overdraft on their account. From time to time the plaintiffs discounted their promissory notes, the proceeds of which were placed to the credit of the account. The goods purchased by them were warehoused with the storage branch, and receipts signed in the name of "The Ottawa Cold Storage and Freezing Company" by G. were given to M. on behalf of the commission and produce business, and were from time to time indorsed over to and hypothecated with the plaintiffs as promissory notes were discounted. The transactions involved in this action were represented by ten warehouse receipts indorsed to the plaintiffs by M., with a memorandum of hypothecation signed by G. and a certificate of valuation by him, and ten promissory notes made on behalf of the commission and produce business to the order of M. and indorsed by him and G. While these notes were current, the businesses ceased, and the plaintiffs took possession, and found that there was a large discrepancy between the goods in store and the amounts specified in the warehouse receipts. Before this action, and while interpleader proceedings in relation to the goods were pending, in which the plaintiffs desired to obtain the evidence of the defendant F., their solicitors, by their instructions, wrote to F.'s solicitor a letter stating that the plaintiffs had no evidence that

F. was a member of the partnership known as "The Ottawa Cold Storage and Freezing Company," which was liable to the plaintiffs upon certain promissory notes, and that the plaintiffs had authorized the writers to undertake that the plaintiffs would not attempt to hold F. liable for the notes, or any of them, as a partner in the company.

Held, upon the evidence, 1. There was no ground for differing from the conclusions of the trial judge that the defendant F. was a partner in both branches of the business.

2. In the solicitors' letter there was a sufficient reservation of the plaintiffs' rights against the partnership and those who were undoubtedly members of it to prevent the letter from being treated as having any greater effect than a covenant not to sue; the language afforded a strong presumption that the parties were dealing with the liability of F., and not with the liability of the other two; and the surrounding circumstances, with reference to which it must be construed, led to the same conclusion; and therefore the debt as security for which the warehouse receipts were given to the plaintiffs were not extinguished, and the plaintiffs were entitled to the benefit of the securities, if otherwise valid.

3. There was a negotiation of a note and an actual advance at the time of the acquisition of each warehouse receipt; no doubt, on most occasions when a discount was effected, the account was overdrawn, but that was in the course of dealing, and the circumstance did not deprive the transaction of its character of a negotiation of the note for the proceeds were placed freely at the disposal of the customers, and the drawings on the account continued as before. *Halsted* v. *Bank of Hamilton* (1896-7), 27 O.R. 435, 24 A.R. 152, 28 S.C.R. 235, distinguished.

4. The firm by which the warehouse receipts were given was not the firm to which they were given, M. being a member of the latter and not of the former; and G., in signing the warehouse receipts on behalf of the storage business, was not giving receipts "as of his own property," within the meaning of s. 2(*d*) of the Bank Act. Since the Judicature Act, there exists no reason why if two firms have a common partner an action should not be maintained by one against the other.

5. On the evidence, the plaintiffs had shewn that the goods were not in the warehouse when possession was taken.

Judgment of MEREDITH, J., reversed.

Aylesworth, K.C., and *Glynn Osler*, for plaintiffs, appellants. *H. M. Mowat*, K.C., and *G. F. Henderson*, for defendants.

A. E. AMES & Co. *v.* CONMEE. [Oct. 1.

Broker—Purchase of shares on margin—Hypothecation by broker—Conversion—Bought note—Account.

The judgment of the majority of a Divisional Court, 41 C.L.J. 571; 10 O.L.R. 159, was affirmed on appeal.

C. Millar for defendant. *W. N. Tilley*, for plaintiffs.

ELECTION CASES.

Teetzel, J.] [Oct. 15.

RE PORT ARTHUR AND RAINY RIVER PROVINCIAL ELECTION. PRESTON *v.* KENNEDY.

Parliamentary elections—Controverted election petition—Scrutiny—Supplementary particulars—General Rules 20, 24—Invalid votes—Transfer certificates obtained without request.

The word "particulars" in Rule 24 of the General Rules respecting the trial of election petitions means particulars of "votes intended to be objected to," this being the language in Rule 20, and is not confined to further details of particulars already given.

Where for the purposes of a scrutiny the respondent had fyled and served particulars of votes objected to by him, and the scrutiny had been begun but not completed he was allowed (upon terms) to add new particulars of other votes objected to.

Semble, that the votes of persons who voted on transfer certificates obtained from the returning officer without any personal or written request were invalid.

H. M. Mowat, K.C., for respondent. *Hellmuth*, K.C., and *W. J. Elliott*, for petitioner.

HIGH COURT OF JUSTICE.

Anglin, J., Trial.] FLYNN *v.* KELLY. [June 25.

Contract—Proof of making—Telegraph—Original message—Destruction—Absence of proof—Secondary evidence—Admissibility of transcript received—Mistake—Agency of telegraph company—Failure to prove contract—Sale of goods—Refusal to accept—Non-delivery of part.

The plaintiffs, who were dealers in canned fruits in Ontario, wrote to the defendants in British Columbia a letter quoting prices of various canned goods. Proof of the loss of this letter was given, and secondary evidence of its contents received. It concluded with a request to the defendants to order by telegraph at the expense of the plaintiffs. The defendants telegraphed an order for specified quantities of goods. The message as received by the plaintiffs specified "three fifty Lombard plums," and the plaintiffs shipped 350 cases of plums, and the other goods specified, with the exception of 250 gallons of pears, which they proposed to send later. The defendants refused to accept the goods shipped, because they said they had ordered only "fifty Lombard plums," and because the pears were not sent. The defendants alleged that the telegraph company had made a mistake in the transmission of the message, but the original message as delivered by the defendants to the company at Vancouver was not proved.

Held, that assuming the mistake to be proved by proper evidence, the defendants were not responsible for it, for, even if the telegraph company were the defendants' agents, the authority of the agents was limited to the transmission of the message in the terms in which the defendants delivered it; and the document handed to the company for transmission was the original order which must be proved to establish the contract.

Henkel v. *Pape* (1870) L.R. 6 Ex. 7 and *Kinghorne* v. *Montreal Telegraph Co.* (1859) 18 U.C.R. 60 followed.

The fact of the destruction of the message delivered by the defendant to the telegraph company was not shewn, and, though secondary evidence of the contents was given by the defendants, it was inadmissible, and there was therefore no evidence that the transcript delivered to the plaintiffs was incorrect.

But the burden of proving the contract was upon the plaintiffs; and the admission of the transcript in evidence without

objection did not render its terms binding upon the defendants. It was not evidence of the order given by the defendants; it was relevant and admissible primary evidence to prove that the order had in fact been transmitted and delivered to the plaintiffs; but its admission in evidence did not excuse the plaintiffs from making proof of the order by production of the original or by proof of its destruction or loss and secondary evidence of its contents.

Moreover, although secondary evidence was given of a portion of the contents of the plaintiffs' letter quoting prices, the plaintiffs had omitted to prove what were the prices quoted, and this material element of a contract was lacking.

Held, also, that the non-delivery of the pears ordered would have justified the defendants' rejection of the other goods sent.

M. Brennan, for plaintiffs. *A. C. McMaster*, for defendants.

Mabee, J.] [June 29.

RE ALMONTE BOARD OF EDUCATION AND TOWNSHIP OF RAMSAY.

Public schools—Municipal by-law altering boundaries of school sections—Motion to quash—Forum—6 *Edw. VII. c.* 53, *s.* 29, *sub-s.* 4(*O.*).

A motion to quash a by-law of a municipality altering the boundaries of a school section, upon the ground that the by-law is invalid, must since the statute 6 Edw. VII. c. 53, s. 29, sub-s. 4 (O.), be made to the judge of the country or district Court in which the section is situate, and not to the High Court, which has jurisdiction only upon an appeal as provided by the enactment.

G. Wilkie, for the Board of Education. *W. E. Middleton*, for the township corporation.

Boyd, C.] REX *v.* FERGUSON. [Sept. 19.

Criminal law—Prosecution under Ontario Act—Application to police magistrate by Attorney-General to state case—Time.

Sec. 900 of the Criminal Code is now available for the review of all summary convictions under Ontario law, by virtue of the amendment to R.S.O. 1897, c. 90, by 1 Edw. VII. c. 13, s. 2 (O.).

An application by the Attorney-General to a magistrate to state a case in regard to a prosecution under an Ontario statute need not be made within the time limited by R.S.O. 1897, c. 90, s. 9, which applies only to appeals to the general sessions, but should be made within a reasonable time, no time being limited by s. 900, and no rules having been made under s. 533 of the Code.

J. R. Cartwright, K.C., for Attorney-General. *J. B. Davidson*, for defendant.

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Sept. 24.

LUCAS *v.* PETTIT.

Animals—Escape of bees—injury to neighbour—Negligence—Scienter—Danger from number and situation of bees—Findings of jury.

The defendant placed a large number of hives of bees upon his own land within one hundred feet of the plaintiff's land. While the plaintiff was at work with two horses upon his own land the bees attacked and stung the horses so that they died, and also stung and injured the plaintiff. In an action to recover damages for his loss and injury, the jury found, inter alia, that the bees were in ordinary flight at the time of the occurrence; that they were the defendant's bees; and that the defendant had reasonable grounds for believing that his bees were, by reason of the situation of his hives, or their numbers, dangerous to persons or horses upon the highway or elsewhere than on the defendant's premises.

Held, that the doctrine of scienter, or notice of mischievous propensities of the bees, had no application, nor could the absence of negligence, other than as found by the jury, relieve the defendant; it was his right to have on his premises a reasonable number of bees, or bees so placed as not unfairly to interfere with the rights of his neighbour, but if the number was unreasonable, or if they were so placed as to interfere with his neighbour in the fair enjoyment of his rights, then what would otherwise have been lawful became an unlawful act; the finding of the jury meant that the bees, because of their number and situation, were dangerous to the plaintiff; and the defendant was liable for the injury flowing directly from his unlawful act. Judgment of MAGEE, J., affirmed.

Lynch-Staunton, K.C., for defendant. *McBrayne*, for plaintiff.

Boyd, C., Trial.] [Oct. 1.

WILLIS *v.* BELLE EWART ICE CO.

Master and servant—Injury to third person by negligence of servant—Responsibility of master.

Action for damages for injuries sustained owing to alleged negligence of a driver of an ice wagon in the employment of the defendants, who collided in a Toronto street with a motor-bicycle on which the plaintiff was travelling. It appeared that the driver had a regular route to follow, over which he delivered ice, and that having delivered his ice he was returning in a drunken condition by a route quite outside his proper homeward course, and on the wrong side of the road, when he ran into the plaintiff.

Held, that the defendants were not liable. From the time the driver having disposed of his ice, delayed returning to the defendants' stables and drove about to enjoy himself, he had in fact discharged himself.

Arnoldi, K.C., for plaintiff. *B. H. Ardagh*, for defendants.

Falconbridge, C.J.K.B., Magee, J., Mabee, J.] [Oct. 2.

JONES *v.* NIAGARA NAVIGATION CO.

Carrier—Contract to carry passenger to United States—Act of Congress requiring payment of poll tax—Liability of carrier—Right to collect from passenger—Unlawful detention—Breach of contract.

The defendants sold the plaintiff a ticket from Toronto to Buffalo and return, by the terms of which he was entitled to travel by the defendants' line of steamers from Toronto to Lewiston, and thence to Buffalo by rail, and to return within five days over the same route. The plaintiff embarked on one of the defendants' steamers, but before reaching Lewiston he was told by an officer of the United States government that he was liable on entering the United States to pay a head tax of $2, and was directed to pay it to the purser of the boat, and at the same time

told that he would be entitled to a refund if he returned to Canada within 48 hours. He offered $2 to the purser, asking for a receipt; the purser refused to give a receipt; the plaintiff did not pay the $2, and on attempting to leave the boat at Lewiston he was stopped by the purser, who asked to see his ticket, and upon getting it retained it, and he was taken back to Toronto. The purser was acting under instructions from the defendants. An Act of the United States Congress provides that a duty of $2 shall be levied on every passenger not a citizen of the United States or of the Dominion of Canada, etc., who shall come by vessel from any foreign port to any port within the United States, and that the duty shall be paid by the owner of the vessel.

Held, that if the plaintiff were within the class of persons covered by the Act, the defendants, and not he, were liable to pay the $2, and the purser had no right to demand it from the plaintiff, and make its payment a condition of his being allowed to land, nor had he any right to retain possession of the plaintiff's ticket, and by so doing broke the defendants' contract to carry the plaintiff to Lewiston. The defendants might, by a few words printed upon their ticket, have made their contract with the plaintiff subject to the payment, if the plaintiff fell within the Act, but, in the absence of such a provision, the defendants were alone liable.

W. T. J. Lee, for plaintiff. *J. Bicknell*, K.C., for defendants.

Mulock, C.J. Ex.D., Anglin, J., Clute, J.] [Oct. 17.

CUDDAHEE *v.* TOWNSHIP OF MARA.

Ditches and Watercourses Act—Award—Reconsideration—Construction of ditch—Charge for engineer's services—Letting work—Breach of contract—Reletting.

By virtue of s. 36 of the Ditches and Watercourses Act, the township engineer, on the reconsideration of an award, may make any award which might have been made in the first instance.

In accordance with the provisions of sub-s. 2, of s. 4, of the same Act, the council by by-law fixed the charges to be made by the engineer for his services at the rate of $5 a day, and

under s. 29 the engineer certified to the clerk that he was entitled to $45 for fees and charges for his services.

Held, that his certificate established prima facie the validity of his claim for $45, and the onus was on the plaintiff, objecting to the award, to shew its incorrectness, which she had not done.

Held, also, that under sub-s. 4 of s. 28, work under an award not performed as contracted for, may be re-let.

Judgment of County Court of Ontario reversed.

Inglis Grant, for defendants, appellants. *Gunn,* K.C., for plaintiff.

Mulock, C.J. Ex. D., Magee, J., Clute, J.] [Oct. 25.

RE SINCLAIR AND TOWN OF OWEN SOUND.

Municipal corporations—Local option by-law—Voting on by electors—Town divided into wards—Elector not entitled to more than one vote—Disregard of statutory formalities not affecting result—Curative provision, s. 204—Voters not legally entitled—Qualifications—Confusion from colour of ballot papers.

Sec. 355 of the Con. Mun. Act, 1903, providing that "where a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law," does not apply to what is commonly known as a local option by-law, which, under s. 141 of the Liquor License Act, R.S.O. 1897, c. 245, must be "approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act"; and in voting on such a by-law no elector is entitled to more than one vote.

Objections based upon formalities not observed in the taking of the votes upon a local option by-law, not being such as are required by the statute, in express words, to be observed as a condition precedent to the right to pass the by-law, were held to come within the curative provisions of s. 204 of the Municipal Act, there being nothing to shew or suggest any intentional violation of the directions of the Act, nor any reason for believing that any disregard of the statutable formalities called for by the Act affected the result of the voting.

It was also objected that one hundred persons were allowed to vote who were not legally entitled to vote.

Held, that more than 75 of these persons might be duly qualified voters, for all that was shewn was that they did not possess the qualifications credited to them by the assessment roll, whereas they might be possessed of other sufficient qualifications, and in that event would be entitled to vote; but, even if all of them were disqualified, it was not shewn that their being allowed to vote was the result of any evil intent, and deduction even of one hundred votes from the majority (476) would not affect the result; and this objection was overruled.

Finally, it was objected that the voters were confused or misled by the colour of the ballot papers being similar to that used for voting upon another by-law at the same time and place. One was scarlet, the other pink. Each ballot had printed on its face a statement of its purport and effect.

Held, that no person of ordinary intelligence, exercising ordinary care, could mistake one for the other; and this objection was also overruled.

Order of MABEE, J., quashing the by-law, reversed.

F. E. Hodgins, K.C., and *J. W. Frost*, for town corporation. *Haverson*, K.C., and *W. H. Wright*, for applicant.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.] THE KING *v.* REYNOLDS. [Oct. 24.

Criminal law—Obstructing highway—Indictment insufficient.

Defendant was indicted in the following terms: "For that he on the 16th day of July, in the year 1906, and on and at diver's other days and times before that date unlawfully and injuriously did and he does yet continue to obstruct the highway the same being a public highway of the district of the municipality of East Hants by erecting fences on and across the said highway, and thereby did commit and does continue to commit a common nuisance endangering the comfort

of the public, and which common nuisance did at Tennycape aforesaid on the said 16th day of July, 1906, occasion actual injury to S. and others."

Held, that the indictment was bad as not alleging an injury to the person of anyone, and as not closing with the words "to the common nuisance, etc.," and as not describing with sufficient certainty the locality of the road and of the obstruction.

Granting that judicial notice could be taken of the fact that the municipality of East Hants was within the County of Hants the same could not be said of Tennycape where the prosecutor and others were said to have been injured.

Christie, K.C., for the Crown. *Sangster*, for defendant.

Longley, J.] LANGILLE *v.* ERNST. [Oct. 29.

Collision—Measure of damages—Loss of profits.

In an action claiming damages for collision with a vessel lying at anchor in port at night a part of the damages claimed was for loss of fishing during the season, the vessel having been laid up as a result of the accident for a period of twenty-six days.

Held, that in the absence of data to fix the sum, although it was probable that loss did result from such detention the damages must be confined to the sum actually proved as shewn by the bills.

J. A. McLean, K.C., and *Freeman*, for plaintiff. *J. A. Roberts*, for defendant.

Graham, E.J.] [Nov. 2.

MASSEY-HARRIS CO. *v.* ZWICKER.

Bills and notes—Action against guarantor—Consideration—Agency — Termination — Notice — Damages — Contract—Repugnant clause.

Plaintiffs sent to defendant two bicycles for sale on commission. The bicycles were sold by defendant to D. and E. and promissory notes taken in payment. The notes were sent to plaintiffs, but were returned to defendant who signed a printed form indorsed on the back of each note and returned them to

plaintiffs. The form of indorsement was, "For value received I guarantee the payment of the within note and hereby waive notice of non-payment thereof."

Held, that the original taking of the notes by defendant and their subsequent indorsement by him were all parts of the one transaction, and that there was consideration for the guarantee.

After the taking of the notes defendant continued to act as plaintiff's agent for several years. The notes were taken in 1900 and in November, 1902, plaintiff's manager demanded payment from defendant who discussed the matter of providing for the payment of the notes, and at his instance indulgence was given. In one case they went to the party by whom the note was given, and in the other case defendant said that if the note was not paid by a certain date he would pay it himself.

Held, that there was no laches on the part of plaintiffs, and no prejudice to defendant on account of delay.

The two notes referred to were made payable at Mahone Bay and another note for a larger amount at St. John, N.B., and in respect to one of the first mentioned notes plaintiffs failed to prove presentation for payment.

Held, that the note being made payable at a particular place plaintiffs must allege and prove presentation, and that in the absence of this they could not recover.

Defendant also acted as agent for plaintiffs in connection with the sale of farming machinery under a contract in writing which was renewed yearly, the contract being executed in duplicate and copies exchanged. There was no evidence that plaintiffs executed the contract for the year 1905, with the exception of a letter sent by them to defendant in which they said: "Our Mr. S. has advised us of the renewal with ourselves of our contract arrangement for 1905, which we have pleasure in confirming, etc."

Held, that this was sufficient evidence of the execution of the contract without the production of the contract itself, which could not be found.

By a clause in the contract for the previous year it was provided that plaintiffs could at any time, and for any cause cancel the contract. A letter was sent by them to defendant May 25, 1905, notifying defendant that plaintiffs had closed their agency at Mahone Bay and asking him to reship all goods to their warehouse at M.

Held, that this was a sufficient exercise of the right to terminate the contract.

Before the receipt of this notification defendant had sent to plaintiffs certain orders for goods which plaintiffs failed to fill and they sought to avail themselves of a clause in the contract in which it was provided, "If from any cause the company fails to furnish the agent with these goods it shall not be liable to him for damages in consequence."

Held, that this clause was void as repugnant to the obligation and that defendant was entitled to damages for loss of profits on the transactions.

Christie, K.C., for plaintiffs. *Roberts*, for defendant.

Graham, E.J.] THE KING *v.* CLARK. [Nov. 2.

Canada Temperance Act—Excessive penalty—Conviction set aside.

The Canada Temperance Act, 1904, c. 41, provides that a defendant on conviction shall be liable to a penalty for the first offence of not less than $50 or imprisonment not exceeding one month with or without hard labour. Defendant was detained in jail under a commitment which provided for imprisonment with hard labour in default of payment of the penalty.

Held, that he was entitled to his discharge, but a condition was attached that no action should be brought.

Section 872 of the Code as amended by the Act of 1900 is applicable to statutes which impose both imprisonment with hard labour and a penalty with imprisonment in default of payment or distress. In such a case it would be anomalous for a prisoner serving for the whole penalty to be imprisoned part of the time with hard labour and part of the time without. This view gives an office to the words "as part of the punishment" in the amending Act.

Power, for the applicant. *Ralston*, contra.

Graham, E.J.] RE EFFIE MAUD YOUNG. [Nov. 2.

Criminal law—Inmate of disorderly house—Imprisonment for "term of three months."

E. M. Y. was convicted by a stipendiary magistrate "for that

she on or about the 24th day of September, 1906, in the city of Sidney, was unlawfully an inmate of a disorderly house, to wit, a common bawdy house or house for the resort of prostitutes."

Held, that sub-s. (j) of s. 207 of the Code with its context constitutes an offence and that the conviction properly stated a charge under it.

A conviction for being a loose, idle or disorderly person or vagrant should specify in what the vagrancy consists. Otherwise it will be void for uncertainty. *The King* v. *McCormack*, 7 C.C.C. 135, and *The King* v. *Keeping*, 4 C.C.C. 497, referred to.

By the warrant of commitment the prisoner was committed to jail for the "term of three months or until she shall be therein delivered by due course of law."

Held, that the latter words did not vitiate the conviction as they would in a case where no term of imprisonment is specified, but must be read as a limitation on the provision fixing the term of three months.

J. B. Kenny, for application for discharge. Nem. con.

Townshend, J.] DAVISON v. HALL. [Nov. 6.

Bribery at election—Action for penalty—Evidence.

Plaintiff brought an action in the nature of debt to recover the penalty for bribery provided by Nova Scotia Election Act (R.S. 1900, c. 5, s. 91) from defendant, who was alleged to have promised to pay to two persons entitled to vote at an election money in order to induce them to vote. No direct evidence was offered on the part of plaintiff to shew that either of the parties to whom money was offered was a person entitled to vote at the election, but one of the parties swore that he did vote and among other circumstances attending his voting admitted that he was required to take and did take the oath known as the bribery oath.

Held (dubitante), that this was sufficient proof of his being a person entitled to vote at the election, and the offence being proved, that plaintiff was entitled to recover the amount fixed by the statute, $400, with costs.

J. J. Ritchie, K.C., for plaintiff. *Roscoe*, K.C., and *Daniels*, for defendant.

Province of New Brunswick.

SUPREME COURT.

Barker, J.] CITY OF SAINT JOHN *v.* BARKER. [Oct. 12.

Riparian owners—Water rights—Pollution of water—Proof of damage—Act of Legislature.

The pollution of a river by a riparian owner will be enjoined at the instance of a riparian owner lower down without proof of actual damage.

Generally speaking, one not a riparian owner is not entitled to complain of the pollution of a river, and a grant or license from a riparian owner to use the water does not entitle the grantee or licensee to complain of its pollution by another riparian owner.

Where plaintiff, though not a riparian owner, was authorized by Act to take a specified quantity of water per day from a lake for, among other purposes, the domestic use of its citizens, it was held that it was entitled to enjoin the pollution of the lake by a riparian owner, and without proof of actual damage.

C. N. Skinner, K.C. for plaintiffs. *H. A. McKeown*, K.C., for defendant.

Barker, J.] [Oct. 12.

BARNHILL *v.* HAMPTON & ST. MARTIN'S RY. CO.

Railway—Mortgage—Lien—Priorities.

By the Railway Act, 1888 (D.) a lien for working expenditure is given upon the rents and revenues of a railway company in priority to a mortgage previously made charging the company's property, including its rents and revenues. By the Railway Act, 1903 (D.), the lien is enlarged to apply to the property and assets of the company in addition to its rents and revenues.

Held, that the Act of 1903 not being retroactive a lien for

working expenditure made subsequently to the commencement of the Act could not be set up against proceeds of a sale of the railway in priority to a mortgage given while the Act of 1888 was in force.

Skinner, K.C., for plaintiff. *McAlpine*, K.C., and *Kaye*, for the Crown. *McKeown*, K.C., for Foster.

Barker, J.] JOHNSTON *v.* HAZEN. [Oct. 12.

Gift — Promissory note — Promise to maker by payee to pay— Want of consideration—Involuntary payment by payee— Action against maker.

Semble, that where the payee (deceased) on endorsing a promissory note for the accommodation of the maker promises without consideration to pay it, and the holder compels payment by the payee's estate, an action for the recovery of the amount lies by the estate against the maker.

Earle, K.C., and *Armstrong*, K.C., for plaintiff. *Currey*, K.C., for Margaret Woodford.

Barker, J.] [Oct. 19.

EASTERN TRUST CO. *v.* CUSHING SULPHITE FIBRE CO., LIMITED.

Mortgage—"Plant," meaning of.

The word "plant" in a mortgage of a mill does not include office furniture, or a horse and carriage used for occasional errand purposes in connection with the mill, or "spares" kept on hand for repairs to machinery, but held to include scows used for lightering the output of the mill from its wharf to steamers and in lightering coal for the use of the mill, and also to include axes, shovels and files and other articles complete in themselves, though at present in store.

Hazen, K.C., (*Ewing*, with him), for liquidators. *Earle*, K.C., and *Teed*, K.C., for for plaintiffs.

Province of Manitoba.

KING'S BENCH.

Macdonald, J.] [Oct. 8.

DEVITT *v.* CITY OF WINNIPEG.

Municipality—Expropriation—Prohibition — Winnipeg charter, 1902, ss. 783, 788, 789, 796—Appointment of arbitrator.

This was a motion for an order to prohibit the City of Winnipeg and Robert Young, an arbitrator appointed by it, from proceeding in the matter of a proposed arbitration for compensation for certain lots desired to be acquired by the city for a market site.

Held, that the order should go on the following grounds:—

1. Under s. 796 of the city charter, the appointment of an arbitrator must be signed in the same manner as a by-law, that is, it must be under seal and signed by the mayor or acting mayor and the clerk or acting clerk, whereas the appointment in this case, though signed by the mayor under the seal of the city, was not signed by the clerk or acting clerk. That a regularly signed by-law had been passed authorizing the mayor to appoint Robert Young as its arbitrator was not sufficient.

2. The city charter contains no sufficient provisions enabling the city to carry on arbitration proceedings to enforce the expropriation of land for a market site when the amount claimed by the land owner exceeds one thousand dollars. See ss. 783, 788, and 789.

O'Connor, for applicant. *Hunt*, for the city.

Mathers, J.] KRUGER *v.* HARWOOD. [Oct. 16.

Company—Application for shares—Withdrawal before notice of allotment—Notice of withdrawal, to whom it may be given.

Defendant was sued upon a note for $500 given to the gen-

eral agent of a company in part payment of ten shares of the stock of the company for which the defendant subscribed by signing an agreement in the stock book to take the shares within two days, defendant wrote to the general agent that he did not want the stock, and to return his note. The letter reached the general agent before notice of allotment of the shares or of the acceptance of his application reached defendant.

Held, that defendant's agreement was nothing more than an application for the shares, which was not binding on him until accepted by the company, and notice of such acceptance given to him, that the general agent was the agent of the company to receive the notice of withdrawal and that notice to him was notice to the company, and that defendant was no longer liable on his stock subscription or upon the note he had given on account of it, as it was admitted that the plaintiff had no better right to the note than the company would have had.

Wilton, for plaintiff. *Locke*, for defendant.

Dubuc, C.J.] HARVEY *v.* WIENS. [Oct. 22.

Sale of land—Cancellation of agreement of sale—Breach of contract—Damages.

The defendant entered into possession of a farm purchased from the plaintiff under an agreement by which the purchase money was to be paid in ten yearly instalments. He made default in the payment due in on 1st December, 1904, and the plaintiff in the following July cancelled the agreement by notice.

Held, that the defendant was liable in damages for the breach of his agreement and for taking away the crop of 1905 after his right to possession was gone, and that, in addition to the value of such crop, plaintiff should be allowed the cost of ploughing 35 acres of the land which had been well ploughed when defendant took possession, but had been left unploughed when defendant gave up possession. *Fraser* v. *Ryan*, 24 A.R. 444, and *Icely* v. *Green*, 6 N. & M. 467, followed.

Robson and *Coyne*, for plaintiff. *Hoskin*, for defendant.

Province of British Columbia.

SUPREME COURT.

Bole, Co. J.] REX *v.* HUGHES. [Oct. 24.

Indian—Who is—Sale of liquor to—Mens rea.

Defendant was convicted of selling liquor to an Indian contrary to the provisions of the Indian Act. It was admitted that the appellant sold gin to one Jack Nelson, who though described in the conviction as an Indian, was as a matter of fact a quarter-breed. It was contended by the prosecution that Nelson, although a breed was still an Indian within the meaning of the amendment of the Indian Act, which reads thus: "In this section the expression Indian, in addition to its ordinary signification as defined in section 2 of this Act, shall extend to and include any person, male or female, who is reputed to belong to a particular band or who follows the Indian mode of life, or any child of such person: 57 & 58 Vict. c. 32, s. 6. It was alleged that Nelson followed the Indian mode of life and lived on an Indian reservation.

Held, assuming for the sake of argument that the contention of the prosecution could be sustained (though the evidence adduced did not satisfy the Court on this point), prima facie, a quarter-breed is as much entitled to buy liquor as a white man, provided he does not come within the purview of the amendment of the Indian Act above cited. As a general rule there is a presumption, that, mens rea, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence, except in such cases as come within the exception to this general rule, there must in general be guilty knowledge on the part of the defendant or of someone whom he has put in his place to act for him or in the particular matter in order to constitute an offence: *R.* v. *Tolson*, 58 L.J.M.C. 97; *Queen* v. *Mellon*, 7 Can. Crim. Cases 79: that Nelson from his appearance was a quarter-breed apparently entitled to purchase liquor, if he thought proper to do so. That there being nothing to shew that the defendant knew or had cause to suspect that Nelson was reputed to belong to a particular band, or followed the Indian mode of life, the defendant only acted as any reasonable man could be expected to do under the circumstances.

Appeal allowed, and conviction quashed with costs.