DIARY FOR JUNE.

1. Tues..Paper day, C. P. New Trial day, Q. B. Last day for Notice of Trial in County Court.
2. Wed..New Trial day, C. P. Open day, Q. B.
3. Thur..Open days.
4. Frid...New Trial day, Q. B. Open day, C. P.
5. Sat....Open days. Last day to give Notice for Call.
6. SUN..*2nd Sunday after Trinity* C. S. Patterson appointed a Justice of the Court of Error and Appeal, 1874.
8. Tues..County Court Sittings and General Sessions. (Ex. York) Last day for J. P.'s to return Convictions.
13. SUN..*3rd Sunday after Trinity.*
15. Tues..Magna Charter signed 1215.
18. Frid...Battle of Waterloo.
20. SUN..*4th Sunday after Trinity.* Accession of Queen Victoria, 1837. 39th Vict. begins.
21. Mond..Longest day.
23. Wed..Hudson Bay Company's territory transferred to Canada, 1870.
25. Frid..Lord Dufferin landed at Quebec, 1872.
27. SUN..*5th Sunday after Trinity.*

CONTENTS.

THE

Canada Law Journal.

Toronto, June, 1875.

Judge Boyd, the secretary of the annual meeting of the County Judges for Ontario, informs us that the next meeting of that body will take place in this city, at Osgoode Hall, on Tuesday 22nd of June next.

We notice that the *Law Times* republishes in full our report of the *Cornwall Election case*, decided by the Chancellor of Ontario. The Election Acts in England and Canada are so similar that we may expect to see any carefully considered case in this country quoted there, not of course as an "authority," but as of some weight, for the reputation of the bench in Ontario is very high with those of the profession in England who are familiar with our decisions.

The death of Mr. Baron Pigott is announced in the English papers as having taken place on the 28th April. The immediate cause of his death was bronchitis, but he had not been well since he fell from his horse some time since. The following notice of the late learned judge is from the *Law Journal*:—

"The Hon. Sir Gillery Pigott was born in 1813, and was called to the bar in 1839; he joined the Oxford Circuit, and had a fair practice as a junior. In 1856 he was created a serjeant-at-law. He was M.P. for Reading, and a Liberal in politics. He was raised to the bench in 1863. During his judicial career of just twelve years, the deceased judge discharged his duties with zeal and ability. The death of an able and painstaking judge is a public loss. The profession unfeignedly regret the decease of a judge whose high character, kindness, and courtesy made him an esteemed favourite both of the bench and the bar."

ATTACKS ON THE BENCH.

We quite agree with our namesake in England as to the Orton debate, when it says, "The agitation must not be kept up by abusing the judges. If hereafter judges are calumniated, the Government will be bound to prosecute the offenders." The *Law Times* refers to the same matter, and deplores the fact that the most pernicious practice of attacking judges in their judicial character in the columns of the daily press is on the increase, and it refers as well to the press of America as of Great Britain. The writer says:—

"Whilst on the one hand we would be far from desiring to see any conduct on the part of the press which showed a disposition to sacrifice independence of spirit to a mean subserviency to office, we must not forget, on the other hand, that something is due to the difficulties of a judge's position, and that reckless criticism may produce the most lamentable results. There would be no difficulty in painting in the blackest colours what must be the consequences of this practice. They are so obvious that they will occur to any one who considers how necessary it is that the purity of our legal administration should be above suspicion. This phenomenon, apparently, is not peculiar to England. The legal press of America, or at least some sections of it, are crying out under an infliction of the same evil. * * * Whatever may be the causes of the increase of this mischievous practice, it is to be hoped that public feeling may never be led astray by the operation of these causes, and that the criticism in at least some daily papers may be of a more healthy character."

We echo the last sentiment. A leading daily paper in this country has gone at least to the extreme limit in this matter during the past month, even if it has not overstepped the line. The lay press ought to be even more careful in this matter in Canada than in England, for the evil would manifestly spread faster and be more dangerous here than there.

SUCCESSIVE OR ALTERNATIVE APPEALS.

In connection with the establishment of a Supreme Court for Canada, many interesting questions present themselves for discussion. The *personnel* of that Court is a matter of no small moment. Upon that will chiefly depend its efficiency and success. It is of the last importance that the public confidence in its decisions should be of such a kind as to make its judgments practically and satisfactorily final. As Quebec has stipulated for and obtained the right to nominate two of the judges, and as one will doubtless be chosen from the two larger maritime Provinces, and as Ontario may for this purpose be held to include the Provinces west of her, she should obtain a representation of three judges on that bench. Of these, we think it is fitting, considering the *status* of Ontario in the Dominion, that one should be the head of the Court. The Government have indeed recognized the propriety of such a selection from the fact that the offer of that high dignity has been made to the Honourable Edward Blake. His great talents and learning would have rendered such an appointment eminently suitable; but we trust that his having declined the proffered honour will not lead to any other result than that a representative of this Province will be raised to the occupancy of that seat. As for the other judges, we think that the powers who appoint may well bear in mind Lord Bacon's observations on a like subject, and instead of bringing forward new men unused to judicial life, that they should prefer the judges of other courts who "have approved themselves fit and deserving; it would be a good encouragement for them, and for others by their example." The English custom of "once a puisne always a puisne" lays down a sound principle, though it is somewhat difficult

in this country practically to follow it out. If, however, the principle of promotion is to be adopted, we are willing to stake our reputation on the statement that of all the available men now on the Canadian Bench, the one who would inspire the public with the greatest confidence in the new Court, and popularize its decisions, would be the present Chief Justice of Ontario.

We do not here refer to the learned and accomplished Chief Justice of our Court of Error and Appeal. His great learning and experience, his courteous dignity and keen intellect would have added lustre to the high position; but we can well imagine that he may soon hope to be relieved from judicial labour, so that he may enjoy for the rest of his life that repose which long years of ceaseless work have so well earned.

Without, however, further discussing the *personnel* of the Court, as to which we may hereafter advert, we propose to say a word or two on the changes in procedure which will be necessitated by the establishment of this Court. The Legislature has laid down an important principle in the Act constituting the Court, whereby the right of election as to the *forum* of appeal is given to the suitor; and having made his choice, he is restricted to that as his only court of final appeal. The principle is that of abolishing successive appeals, and rendering the appellate courts, courts of alternative appeal. The litigant having the judgment of the highest provincial courts against him, is obliged to elect whether he will carry his appeal to Ottawa or to England—to the Supreme Court or to the Judicial Committee of the Privy Council.

There are weighty arguments against the course which was taken by the Legislature on this branch of the subject, and many eminent men are entirely opposed to the principle involved, and the constitutionality of the clause in question has been doubted, but there are, nevertheless, some practical advantages which are very apparent, and this at least may safely be said, that such a change, restricting the right to litigate, might beneficially be extended to other courts in the Provinces. For instance, where is the wisdom or benefit of forcing (as is now done by statute) a suitor in Chancery, after having the solemn judgment of one judge, to re-hear before three, as a condition to being allowed to take his case to the Court of Error and Appeal for Ontario? The principle of alternative appeals might be introduced here, or perhaps better to abolish re-hearing altogether as a condition precedent to the appealing of any cause.

It is only of late years that protracted litigation has been recognized as an evil. Though the maxim existed: "*interest reipublicæ ut sit finis litium*," yet the courts were tenacious of their jurisdiction. They were astute in getting rid of agreements to refer matters to arbitration, on the ground that parties could not oust the courts of their jurisdiction. But so completely have affairs been reversed, that we find Lord Justice James using the following remarkable language in *Willesford* v. *Watson*, L. R. 8 Ch. Ap. 481: "With regard to one argument pressed upon us, that we ought not to send the matter to arbitration, because the arbitrator would decide without appeal, I can easily conceive that two sensible men may possibly have had that in their view, and that they would prefer even running the chance of the arbitrators making a mistake to having every matter brought into a court of law, or into the Court of Chancery, to be heard before a Vice-Chancellor, with an appeal to this Court, and then perhaps an ultimate appeal to the Lords. I can conceive that sensible men may prefer an arbitrator even to being at liberty to carry one another through litigious proceedings in three successive courts."

The Legislature, in the act in question, has evinced a desire to prevent that which is, speaking generally, a great grievance, *i.e.* the multiplication of successive appeals on the same subject-matter. Suitors should be compelled to elect between an appeal to the highest court in this Province, and an appeal to the highest court of the Dominion. This would result in no injustice. The Supreme Court should be so constituted that its moral weight and authority should be unquestionably greater than that of the highest provincial courts. But we very much doubt whether a court composed of only two judges from Ontario, and four from the other Provinces, would command the same confidence with the people of Ontario (until at least the Supreme Court had established a reputation on its merits) which a strong Court of Error and Appeal, such as we always hope to see in this Province, would.

It is evident that our whole legal system is now in a state of transition. The present practice of trying a common law case on circuit, then going before the full Court in term, then appealing to the Court of Error and Appeal, with the right afterwards to go to the Supreme Court or Privy Council, involves overmuch litigation. We conceive that it would be well that after a case has been determined by the judge of first instance, the party dissatisfied should have the right to insist upon having his appeal heard, without any intermediate litigation, before the highest court, the practice of which will enable it to dispose of the appeal. All this points, if carried out to its legitimate conclusion, to a reorganization of our courts, to the formation, in fact, of a Court of Appeal for Ontario which shall combine not only the highest talent, but the greatest judicial experience that is available, rather than to the present system, where there are three courts presided over by three sets of judges, and an extra set of judges who, in addition to certain appellate jurisdiction, are to "lend a hand" in the work of the general judicial work; and who, leaving out the debateable question of talent, certainly have not had the greatest judicial experience.

CONTEMPT OF COURT.

The Court of Common Pleas, whilst holding in *Ex parte Lees* (24 C. P. 214) that the inferior courts are not wholly free from the control of the higher courts in the exercise of the power of punishing for contempt, declined to interfere with the action of the judge of the County Court in this instance. It will be remembered that the appeal to the Common Pleas in this case arose out of an unfortunate disagreement between the judge of a County Court and a barrister, who was charged with disrespect to the bench, and fined $100 for his alleged contumacy. From the affidavits filed, it is not easy to determine that the offence of the learned counsel was such as to merit so severe a retribution, but as the gravamen of the accusation was the tone and manner in which certain words of no particular malevolence in themselves were uttered, it was of course difficult to transfer to paper the full iniquity of the offence.

The decision of the superior court would seem to admit that any inferior magistrate, even a justice of the peace, has a power of punishment for contempt which may be most vexatiously exercised, for unless it is quite clear that there was no ground whatever for supposing a contempt, the court above will not interfere. Judges are only men, and are as liable to loss of temper as their brethren at the bar, and it is not heresy to say that some of them are occasionally rather aggravating, and make it difficult for those who practise before them to preserve a reverential

demeanour. It is not comforting to think that a manifestation of impatience, or the utterance of words, innocent in themselves, in a tone capable of more than one construction, may be visited with summary and severe punishment in the discretion of an inferior magistrate. It would seem desirable that a power of reviewing all the circumstances, weighing the gravity of the misconduct complained of, and controlling the discretion of the judge in the extent of the penalty inflicted, should be vested in a tribunal of appeal, the members of which might be expected to take a dispassionate view of the whole situation; though the tone and manner are such important elements that it would be difficult to arrive at a proper knowledge without observing them. As far as we can understand the decision in *Ex parte Lees*, a state of affairs in which counsel aggrieved in this respect could obtain redress would be very exceptional. The power of the inferior magistrate to visit any appearance of disrespect with a heavy penalty seems to be practically unlimited.

We have said what has occurred to us on this point without any regard to the merits of the case before us, and without suggesting for a moment that the decision was not perfectly right. It is to the general principle that our remarks are directed, and considering the infirmities of human nature, to which judges, with other men, are subject, we think the general principle is unsatisfactory. Judges occasionally mistake the earnestness of argument for disrespect to themselves and their office, and sometimes receive deserved rebukes from counsel for their suspicions. Such a rebuke was administered by an Irish barrister named Hoare to a judge foolishly nervous about his dignity. "The judge was small and peevish: Mr. Hoare strong and solemn. The former had been powerfully resisted by the uncompromising sternness of the latter. At length the judge charged him with a design to bring the King's commission into contempt. 'No, my Lord,' said Mr. Hoare. 'I have read in a book that when a peasant during the troubles of Charles the First found the crown in a bush, he showed it all marks of reverence; but I will go a step further, for though I should find the King's commission even upon a *bramble*, still I shall respect it.'"

SELECTIONS.

DR. KENEALY AND THE ORTON DEBATE.

Both the debate and the division on the resolution proposed by Dr. Kenealy will, we trust, speedily put an end to a most discreditable agitation. Mr. Disraeli described the English as "the most enthusiastic people in the world," and expressed regret that they "should have their fine and noble sympathies enlisted in such a case; should be influenced by such misrepresentations; and be directed to such mischievous ends." The character of a people may be seen in the character of its heroes, and it would be a national disgrace if the convict Orton were a popular favourite, even to the degree to which Jack Sheppard and Jonathan Wild were favourites. When under cross-examination in the Common Pleas Orton admitted conduct that shows him to be a scoundrel of such a mean and despicable sort that the genius of a Dickens, a Lytton, or an Ainsworth, could not make him the attractive hero of a romance. In no act of his life is there any honesty or bravery. Take his own account of his career, and the conclusion is, that a worse villain never got into the witness box. There he stood from day to day, confessing that he was an unscrupulous liar and a coarse debauchee. Such a scoundrel is not a national hero, and we are persuaded that Dr. Kenealy has not nearly so many supporters as he imagines. We desire to be just even to the deluded Ortonites, and we willingly believe that their fault is want of thought; that they have ac-

cepted the statement as to Orton being an unfortunate nobleman languishing in prison without considering the facts. Four judges, two juries, the law officers of two Governments, two home secretaries and the press, have unreservedly pronounced the claimant to be a vile impostor, and it is somewhat surprising that any person should have believed that all the authorities were wrong and Dr. Kenealy right. Now the House of Commons has, with unprecedented unanimity, endorsed the verdict of the judges, juries, law officers, home secretaries and the press, and those who henceforth believe in Dr. Kenealy's assertion as to the convict Orton must be crass boobies. We are glad that Mr. Whalley insisted on a division. It might have been asserted that there were a dozen or a half a dozen members of the House who had some doubt upon the question. But the division of 433 to 1 is conclusive. If Dr. Kenealy has the effrontery to assert that the 433 members of the House who voted against his motion are either fools or rogues—are either too stupid to form a correct opinion, or are the corrupt tools of Mr. Whalley's Jesuits, and he gets a little mob to believe him—it will be melancholy to reflect that there are so many idiots at large.

In one respect Dr. Kenealy's speech surprised us. We knew, as everybody knew, that he could not adduce a tittle of evidence to justify his infamous calumnies about the judges, and notably about the Lord Chief Justice, but we expected that he would have made some altogether novel statements, however ludicrous and unfounded they might be. What he said about the judges does not call for a reply, and he did not attempt to support his charge of corruption. Therefore, it appears that Dr. Kenealy has not even the poor excuse that he has been self-deceived, but he has been going about the country, and in the columns of a newspaper associated with his name has been calumniating the judges without having any fictions to sustain his charges. One of Dr. Kenealy's charges against the Lord Chief Ju tice must have amazed the House. According to the member for Stoke, the following dialogue took place during Dr. Kenealy's address to the jury :—

"The Lord Chief Justice: If you had a large sum of money in your possession, and a robber took ten shillings from you, and asked if that was all you had, would you not answer 'Yes!'

"Dr. Kenealy: No, my Lord, I would not. (Laughter.)

"The Lord Chief Justice: Then you don't agree with Dr. Johnson, who was one of the greatest moralists that ever lived, and who said, 'There are occasions when people have no right to expect the truth from you.'

"Dr. Kenealy: I repudiate such language with horror, and I am sorry to say that Dr. Johnson should have committed himself to it.

"The Lord Chief Justice: I am not. It simply means this: every rule, however sacred, may have exceptions.

"Dr. Kenealy: I don't think there can be any exceptions in a question of truth.

"The Lord Chief Justice: I don't believe it."

If thieves read the Parliamentary Intelligence they must necessarily admire Dr. Kenealy. How much better the labour of the burglar would be rewarded if he had to plunder people of the Dr. Kenealy persuasion. A servant awakened by a burglar would inform the midnight visitor about the plate, money and jewels of her master. Another of Dr. Kenealy's charges was yet more extraordinary. On June 19, 1871, the Lord Chief Justice dined with Mr. Milbank, M.P., and Mrs. Milbank asked the Chief a question about the trial in the Common Pleas, and the reply was, "I cannot give any opinion, as I may have to try it." The lady said to the Lord Chief Justice that Lord Rivers believed so firmly in the claimant that she believed he would never give him up even if he were found guilty. The Lord Chief Justice then said—and the House might readily see in a laughing and joking way, and the Lord Chief Justice did not know Lord Rivers at the time—"Present my compliments to Lord Rivers, and tell him that in that case he will probably have to accompany his friend to penal servitude." This jest was twisted into an assertion that the learned judge had said that he would send Orton to penal servitude if he tried him. The perversion is not the worst part of the incident. The infamy is that any use should be made in public of any part of a private dinner conversation. Lord Rivers, writing to Dr. Kenealy, says: "I certainly had a right to expect that the usage among gentlemen and men of honour would not have been departed from by you, and that a private communication, especially where a lady was concerned, would have been considered sacred;

instead of which there has hardly been a platform in the kingdom or an issue of your newspaper in which there has not been a direct violation of the promise made to you by me." We must add that, in our opinion, a judge, or any other gentleman, has a right to expect that what he says at a friend's dinner table will not be made public. We presume the Chief Justice has faithful domestic servants; but what a treasure a discharged scullery maid would have been to the Ortonites! How she could have been made to say and swear "As how she 'ad heerd the judge say, times out of mind, as how he would kick that there felon only he can't abear as his boot should touch such a villain." Equal in absurdity was the story that the Lord Chief Justice had told Sir Robert Peel that the claimant would be sent into penal servitude—a story which the right honourable baronet has contradicted in the House in his grandest style.

The charges against the judges excite a mingled feeling of indignation and merriment. But by far the greater part of Dr. Kenealy's speech was a plea for a new trial of *Regina* v. *Castro* by a Royal Commission. Considering the years the claimant had to get up his case, the length of the trial, and the mass of evidence, it is remarkable that Dr. Kenealy could not say more in favour of a new trial. An advocate can always find some points that favour his client, but Dr. Kenealy's points were few and generally weak. The reply of Mr. Bright was excellent. The right honourable gentleman said:—

> Nothing was more clearly proved than that the defendant knew almost nothing of his life till he was sixteen years of age. He did not remember the names of his tutors—excepting one. He did not remember that he had ever had more than one tutor. I venture to say there is no man in this House could not tell a good many things about his tutors—some of them not of a very agreeable character, perhaps. Look at our own experience. We have all had a long life by the time we were sixteen years of age, and every one of us could write a volume of the incidents of our young life, from the age of five or six up to sixteen. In this case there was no memory. It was all a blank. There were no persons who could give the information. The memory could not be cultivated. The whole thing was a forgetfulness which could not have come from conspiracy, but must have come of the fact that the person was assuming to be something which he was not. When it is asked, "Do you think that a mother can forget her own son?" I answer, "Do you think that a young man, who lives almost entirely with his mother till he is four-and-twenty, when he gets to thirty-five or forty can be totally ignorant of his mother's name?" But, more than that, do you think that a young man who up to four-and-twenty has spoken ordinarily and perfectly the French language, and can scarcely speak English so as to be fairly well understood, can at the age of thirty-five or forty not only be unable to speak the French language, but can be ignorant of the pronunciation or meaning of a single word in it? He knows so little of it that he is advised not to attempt even to speak it. Now, I should like to ask any one, whatever may be the opinion he now has of the case, whether these facts—the absolute ignorance of all that happened till the age of sixteen, the total forgetfulness of the mother's name, and the similar forgetfulness of the language spoken till the age of four-and-twenty, and, in addition to this, the multitude of contradictions in which the statements made were involved, for it is notorious that everything which he said while in Australia about his enlistment or engagement in the army was directly and flatly contradicted in every particular by that which he said about his military life when he came to England—I should like to ask any man whether these facts are not conclusive against the claim which was set up.

This is a reply to the arguments of Dr. Kenealy. The Lord Chief Justice, in summing up, adopted a method that enabled the jury to arrive at a certain conclusion. He presented the real Tichborne and the Claimant as depicted in the evidence—the inner man and not the outer man—and no one in his senses could suppose that the claimant is Tichborne.

It is to be hoped that we have now heard the last of the case. At all events, the agitation must not be kept up by calumniating the judges. The calumnies do not hurt the judges, but it is injurious to the public welfare to allow ignorant and stupid people to be told that the judges are corrupt. If hereafter the judges are calumniated, the Government will be bound to prosecute the offenders. —*Law Journal.*

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

(Reported by Henry O'Brien, Esq., Barrister-at-Law.)

COURT OF ERROR AND APPEAL.

West Elgin Election Petition.

Cascaden v. Munroe.

Controverted Elections (Ontario)—Particulars.

The petition in this case stated that Mr. Munroe was returned by a majority of ten votes; that persons not qualified to vote had voted for him; that good votes for his opponent (Mr. Hodgins) were tendered and rejected; that ballots improperly marked were received and counted for Munroe; and that Munroe and his agents were guilty of corrupt practices.

Held, on a summons asking for particulars (1) of the persons not qualified to vote, and the grounds of disqualification, (2) of the votes tendered for Hodgins, (3) of the counterfoils and ballots for Hodgins improperly rejected, (4) of the counterfoils and ballots for Munroe improperly received, and the names of the voters so rejected or received, (5) of the corrupt practices by respondent and his agents—that particulars should not be ordered as asked in the first, third and fourth clauses of the summons. As to the fifth clause, the order followed that in *Beal* v. *Smith*, L. R. 4 C. P. 145.

[April 17, 1875.—Draper, C. J., E. & A.]

Hodgins, Q.C., showed cause, and had no objection to the usual order as to corrupt practices, but as to information respecting the ballots the petitioner could not give any, and besides, the cases of *Stowe* v. *Jolliffe*, L. R. 9 C. P. 446, *Macartney* v. *Corry*, 21 W. R. 627, showed that ballots could only be inspected under a special order.

J. B. Read, *contra*. If the petitioner does not give the information asked as to the ballots, he should be precluded from relief on that branch of his case.

Draper, C. J., E. & A. I have in this case to dispose of a summons which asks for a variety of particulars, and, in order to dispose of the application, I shall take the subjects in the order in which they are raised in the petition and summons, premising that the petitioner (John Cascaden) seeks to avoid the election and return of Malcolm G. Munroe, and to have it declared that the unsuccessful candidate (Thomas Hodgins) was duly elected and ought to have been returned.

1. The case is clearly within the seventh general rule, which provides that the party complaining of and the party defending the election and the return shall, within a given time, deliver to the Clerk of the Election Court, and also at the address, if any, given by the petitioner and the respondent (as the case may be), a list of the votes intended to be objected to, and of the heads of objection to each such vote. I see no reason for a special order in this case, or for varying from the terms of this rule. So far, I discharge the summons.

2. Particulars are asked for as to parties, alleged in the petition to have had good votes, who intended to vote for the unsuccessful candidate, whose votes were tendered and improperly rejected. I think the respondent is entitled to their names, address, abode, and addition; and I order accordingly.

3 & 4. Full particulars are asked of the number on the counterfoil of those ballots marked, or so marked as to indicate votes for the said Thomas Hodgins, improperly rejected and not counted for him at the said election; and the number on the counterfoil of those ballots which were void and should have been rejected by reason of their wanting the signature or initials of the deputy returning officers and the name of such returning officer; and of the number on the counterfoil of those parties voting for more candidates than one, and as having a writing or mark by which the voters could be identified; and as unmarked or void for uncertainty, or otherwise void under the provisions of the Ballot Act; and specific reasons for those otherwise void; and the names, address, abode and addition of the parties using such ballots, and which ballots were improperly accepted and counted for the said Malcolm G. Munroe, as mentioned in the fourth clause of the petition.

I am bound to assume that the returning officer has done his duty, and therefore has, under the 20th section of the Ballot Act, returned to the Clerk of the Crown in Chancery his return and all the documents and papers enumerated in that section, among which are the counterfoils. It would be useless to make an order on the petitioner to furnish information which I have no reason to suppose he possesses. The same reason appears to me to apply to every item, or nearly so, in this branch of the summons. A reference to *Stowe* v. *Jolliffe*, L. R. 9 C. P. 446, which was mentioned by Mr. Hodgins, would have probably prevented this part of the summons, which part I also discharge.

5. It is further asked that an order should issue for such particulars of (*a*) corrupt practices charged, (*b*) of bribery, (*c*) of treating, and (*d*) of the nature of the undue influence, and of the parties practising the same, all which are referred to in the sixth clause of the petition;

and of the names, abodes and addition of parties who before, at, and during the return, offered to corrupt and bribe, or give, or procure advantage to the electors to induce them to vote for the respondent, or to refrain from voting for the unsuccessful candidate, and the names, &c., of the persons sought to be corrupted, and the specific nature of such corruption, bribing and advantages referred to in the seventh paragraph of the petition.

There was a very similar application in the case of *Beal* v. *Smith*, L. R 4 C. P. 145, in which Willes, J., after consultation with Martin, B., and Blackburn, J., ordered that the petitioners should, three days before the day appointed for trial, leave with the master and also give the respondent and his agent particulars in writing of all persons alleged to have been bribed, of all persons alleged to have been treated, and of all persons alleged to have been unduly influenced; and that no evidence should be given by the petitioners of any objection not specified in such particulars, except by leave of a Judge, upon such terms (if any) as to amendment, postponement and payment of costs as might be ordered. That order was affirmed on application to the Court of Common Pleas for the fuller particulars which Willes, J. had refused to order. I shall make a similar order on this branch of the summons, except that I shall, following the usual practice here, make the term fourteen days instead of three, and will, in the same manner, dispose of the application as to the matters charged in the eighth, ninth and tenth paragraphs of the petition.

Order accordingly.

SOUTH OXFORD ELECTION PETITION.

BENJAMIN HOPKINS, v. ADAM OLIVER.

Agent *of respondent cannot be made party to petition* - 34 *Vict., cap.* 3, *sec.* 49—"*Person other than the candidate.*"

The petition, besides charging the respondent with various corrupt acts, charged an agent of his of similar acts, and claimed that the agent was subject to the same disqualifications and penalties as a candidate. The prayer of the petition asked that this agent might be made a party to the petition, and that he might be subjected to such disqualifications and penalties.

Held, 1.—That there is no authority in the Election Acts or elsewhere, for making an agent of a candidate a defendant in a petition on a charge of personal misconduct on his part.

2.—There is no authority given to the Election Court or the Judges, to subject a person "other than a candidate" to such disqualifications.

3.—The Judges' report to the Speaker as to those persons "other than the candidate," who have been proved guilty of corrupt practices, is not conclusive, so as to bring them within 34 Vict. cap. 3, sec. 49, and so liable to penal consequences.

[Chambers—April 10, 1875. DRAPER, C.J., E. & A.]

This petition, in paragraph 3, charged that Adam Oliver was by himself, and others on his behalf, guilty of bribery, treating and undue influence, which are corrupt practices, and (paragraph 4), of procuring divers persons knowingly to personate and assume to vote at the election in the names of other persons who were voters, and (paragraph 5) providing drink and entertainment at his (respondent's) expense at meetings of electors, and (paragraph 6) of keeping open divers hotels, taverns and shops where spirituous and fermented liquors were ordinarily sold, and of selling and giving such liquors to divers persons corruptly to influence them. Other general charges were also made.

The 17th paragraph stated that Peter Johnson Brown was an agent for Oliver, before, during, at and subsequent to the election, in furthering the same, and was guilty by himself of each and all of the said corrupt practices; and petitioner submits that the vote of Brown for the said Oliver was therefore null and void, and he (qu? who) thereby became incapable of being elected to and of sitting in the Legislative Assembly, and of being registered as a voter and of voting at any election, and of holding any office at the nomination of the Crown, or the Lt.-Governor, or any municipal officer.

The second paragraph of the prayer of the petitioner, asked that Brown should be made a party to this proceeding in respect of the said charges so made against him, to the end that he might have an opportunity of being heard, and that his said vote might be declared null and void, and he declared incapable in the several particulars hereinbefore mentioned.

The petition contained no *direct* allegation that Brown voted at this election, though it was submitted that the vote of Brown for the respondent was null and void. But the decision of the learned Judge was in no way based on this omission.

A summons having been granted to set aside the 17th paragraph of the petition and 2nd paragraph of prayer.

Osler shewed cause.

Hoyles supported the summons.

The arguments appear in the judgment of

DRAPER, C.J., E. & A. I presume Mr. Hoyles represented the respondent, and therefore that

the summons is to be treated as issued on his application. He rested principally on the absence of any authority given by the statute to make an elector, not having been a candidate, a party called upon to answer a petition filed and prosecuted to avoid the election of the candidate actually returned. He also objected to the 17th paragraph, that, as against him, it was a mere statement of evidence, and was contrary to the spirit of the 6th general rule made in the Court of Queen's Bench and adopted in this Court.

On the other hand, Mr. Osler urged that by making the accused elector a party, it gave him the opportunity of being heard in his own defence, and of rebutting the charges before the Judge who would try the issues on the petition, on which trial the inquiry would be pertinent to the charge of corrupt practices. He also put in an affidavit to shew that the charge was not wantonly made, and invited particular attention to the fact, that the petition alleged that Brown was an agent for the respondent as well as an elector.

The Act, 24 Vict. c. 23, makes no provision for this particular matter, though it does provide (s. 27) that two or more candidates may be made respondents to the same petition; and (s. 28) recognizes that more than one petition may be presented against the same election and return. But there is no analogy between those provisions and this case. The contest to which they relate is for the seat in the House—whereas as to Brown he is to be made a party only that he may be liable to penalties.

I fear great inconvenience would arise, if the agents of a successful candidate could be made defendants to an accusation of personal misconduct in an election, upon a petition, the leading object of which was to unseat the sitting member. The Legislature have not, at least directly, provided for it—none of the general rules meet it—and this omission seems to me to require the exercise of Legislative power in order to supply it. It would be an addition to the powers which the statute gives, not a matter of procedure merely in the exercise of powers given.

The allegation in the 17th paragraph—unless as a proceeding against Brown—would infringe on the spirit if not the letter of the 6th general rule, because under a general charge of corrupt practices, specific details need not, I apprehend, be given until an order for particulars is made; but the rule does not preclude the statement of such evidence, it renders it unnecessary, and so far was no doubt designed to discourage such a practice. If Brown is properly made a party, I think he would have a right to such an order under this rule. I have looked at the Imperial Statute 31-32 Vict. c. 125, from the 45th section of which this of ours seems to have been copied, but that Act refers to preceding statutes in force in England, under which proceedings might be instituted.

Under our statute (34 Vict. c. 3, s. 16) the Judge is required to *determine* whether the member whose election or return is complained of, or any and what other person was thereby returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker, appending thereto a copy of his notes of the evidence; and upon such certificate being given, *such determination shall be final to all intents and purposes.*

But the Judge is (s. 17), when a corrupt practice is charged, in addition to this certificate, at the same time to *report* in writing to the Speaker, among other things, "the names of any persons who have been proved at the trial to have been guilty of any corrupt practices."

The case of *Stevens* v. *Tillett*, L. R. 6, C. P. 147, which was not referred to on the argument, points out very clearly the distinctions between a "determination" and a "report," and our own statute so closely resembles the English Act 31-32 Vict. c. 125, that this decision is applicable in many particulars to the present case. It is the Judge's duty to report, but it is not said his report is to be final. The 49th section of our statute enacts that "any person other than a candidate found guilty of any corrupt practice in any proceeding in which he has had an opportunity of being heard," shall incur certain penal consequences. Now, if the Legislature had intended that the Judge who tried the issues raised upon the election petition and relating to the validity of the election and return, should at the same time hear and determine a charge of corrupt practices against one who had, as an elector or agent, taken part in the election, it is, I think, reasonable to expect that they would have distinctly said so. It is obvious that the Act was framed upon the English statute. The 49th section of our Act is substantially, though not in every detail, a copy of the 45th sec. of the English statute, which, however, by section 15, gives a certain effect to the report of the Judge as respects persons guilty of corrupt practices for the purpose of the prosecution of such persons, referring to another English statute, (26 Vict. c. 29); but that portion of the Judge's report does not affect the disqualification; it

is the foundation of another proceeding. It does not seem to have occurred to the framers of our Act that it was necessary to provide for some "proceeding in which, after notice of the charge," the person inculpated by the Judge's report may have an "opportunity of being heard;" and while making use of section 45, they did not remember or refer to section 16 of the English statute, and thus, as appears to me, the mode of subjecting a party to the penal consequences of the 49th section has not been provided. It may be as well, however, to invite attention to the fact that our enactment applies to persons guilty of any corrupt practices. The English Act (section 45) extends only to those found guilty of bribery.

In my opinion the power of adjudging a person "other than a candidate" guilty of corrupt practices so as to subject him to the disqualification enumerated, is not conferred either upon the Election Court or the Judges on the rota, and that the Judges' report of "the names of any persons who have been proved at the trial to have been guilty of any corrupt practice" is not final and conclusive, so as to bring such persons within the operation of the 49th section as found guilty, and therefore subject to the penal consequence.

I think, therefore, an order should issue to strike out the 17th paragraph, and the concluding paragraph of the prayer of the petition.

I understand the application is made on behalf of the respondent, and not of Brown. If it were on behalf of the latter, I should give him his costs, as no objection was made to his being heard. If of the respondent, the point being new, I will give no costs.

QUEEN'S BENCH.

NORTH VICTORIA ELECTION PETITION.

HECTOR CAMERON v. JAMES MACLENNAN.

Dominion Election—Mode of marking ballots—Votes tendered but rejected, not being on copies of voters' lists—Adding same—Agency—Treating.

Mode of marking ballot papers, and as to where the mark or cross may be placed, and various irregular modes of making the marks considered.

The names of certain voters who were entitled to vote at the election appeared on the last revised assessment roll, and should have appeared on the copies of voters' lists, as furnished to deputy returning officers, but were omitted from such lists. They tendered their votes to the deputy returning officer and many of them stated they desired to vote for the petitioner. *Semble*, that these votes must be counted for the petitioner, if it were clear that they tendered their votes and intended to vote for him.

Held, that the evidence set out below did not constitute Peters an agent for the petitioner so as to make the latter responsible for his acts.

Quære, whether the giving by an agent of a free dinner to a number of voters who have come a long distance in severe winter weather, the evidence not showing a corrupt intent on the part of the agent, is a "corrupt act."

[Lindsay, April 13-16.—Toronto, May 4, 1875.—*Wilson*, J.]

This cause was tried before his Lordship, Mr Justice Wilson, at Lindsay, on the 13th, 14th, 15th and 16th of April last, and the final argument was concluded before him on the 24th day of the same month.

The respondent was declared elected by a majority of three votes. The petitioner (the unsuccessful candidate) asked for a scrutiny in his petition, and on the scrutiny claimed a small majority. The respondent sought largely to reduce this by showing that one Peters, alleged to be an agent of the respondent, paid for dinners given to forty electors on the polling day. The evidence on this point is so fully stated in the judgment of the learned judge that it is not here repeated.

The points to be determined were :—

1. Whether, on an inspection of the ballot papers which were rejected by the deputy returning officers at the polls, and accordingly as it might seem proper they should be allowed or disallowed, the majority of the whole poll was in favour of the petitioner or the respondent.

2. Whether electors whose names are on the original list from which the copies for taking the polls were made; but whether names were by some mistake or otherwise left out of these copies, and who had good votes, and were entitled to vote at the said election, and who claimed to vote, and desired the deputy returning officers to allow them to vote, but who were refused by the deputy returning officers to be furnished with ballot papers for the purpose of voting, and whose tender of votes was refused, could now, in any case, or under any circumstances, be added to the poll of either party.

3. Whether William Peters was the agent of the petitioner to render the petitioner answerable for the acts and consequences of the acts of Peters in procuring and paying for forty dinners for the petitioner's supporters and voters on the polling day, near to the polling place of the

Carden poll at the election, and in taking to the same place a small quantity of whiskey for the use of the voters of the petitioner.

4. Whether, if William Peters was to be considered the agent of the petitioner, the acts of Peters were acts of treating, or bribery and corruption within the meaning of the statute. If Peters were the agent of the petitioner, and if the act of Peters as to the dinners was treating within the provisions of the statute, then such a number of votes must be taken from the poll of the petitioner that the sitting member would be left greatly in the majority, notwithstanding all other additions which the petitioner could make to his poll, and he would be entitled to retain his seat.

The following was the argument on the two last points :

Maclennan, Q.C. (the respondent).

The majority in my favour is said to be only three, and supposing that the result of the scrutiny is against me by a few votes, it is clear the election was wholly void, because as many as fifteen or sixteen persons who were duly qualified to vote, and who had endeavoured to vote, had been deprived of the power of voting, and had been prevented from voting by the omission of their names from the copies of the voters' lists furnished to the deputies. If these men had voted, the result might have been different. It could not be said how they would have voted, because until the ballot is marked a man may change his mind, and he may vote, and the ballot act is for the purpose of enabling him, if he think fit, to vote contrary to his expressed intention. The votes cannot now be added, and the result is the disfranchisement of a sufficient number of electors to turn the scale. To hold otherwise would be to put the election in the power of the Returning Officer or the Clerk of the Peace: See Wordsworth on Elections, 27 ; Heywood's Cases, 511.

Peters' act was illegal, and a misdemeanour under sections 87 and 90 of the Election Act, and was a corrupt practice which affected Mr. Cameron under section 94. There was no doubt as to the facts. Peters furnished dinners at the polling place for 40 electors at his own expense, and the only question was whether that had been done *corruptly*. The judges in England had decided that corruptly meant "with the motive or intention of affecting the election, not necessarily going as far as bribery" : *Launceston case*, 30 L. T. N. S., 831. No other motive could be imagined here. The time, the place, all the circumstances favoured the corrupt motive. Peters admitted that many of the electors were strangers to him. He was an active partizan, had done all he could for Mr. Cameron in the election, was chairman of an election meeting called by Mr. Cameron at this very polling place, had spoken there, drove Mr. Cameron home to his hotel afterwards, and on the way discussed the propriety of those very dinners. The discussion was renewed on a subsequent occasion, when, on Mr. Cameron saying that he (Mr. Cameron) could be no party to it, Peters proposed to do it at his own expense. Mr. Cameron told him he could not prevent him, but did not want him to do it, and would rather he did not do it. All this clearly showed that both Mr. Cameron and Peters considered it a matter relating to the election, and the doing or not doing of which might affect it favourably or otherwise. On the election day Peters was on the ground early and distributed his dinner tickets through a friend who knew the electors. It is not only clear the motive was to affect the election, but it must have done so in fact. There were in all 112 voters polled there—49 for Cameron and 63 for Maclennan. It is plain that the distribution of these tickets must have tended to make Mr. Cameron popular, and to create a favourable impression towards him. Besides, Peters carried there several bottles of liquor which were consumed among the electors, and there is evidence of canvassing at least one voter over a glass of whiskey. The corrupt character of the act is therefore plain and the agency of Peters is equally clear. His presiding and speaking at the election meeting called by Mr. Cameron, and at which he was present, would alone be sufficient to establish the agency, *per* Justice Keogh, *Galway (County) case*, 2 O. & H. 54, 1872. But here there were other circumstances of the strongest kind, especially the repeated discussion with the candidate of the expediency and propriety of the very act complained of as an election move. It was in fact a counsel taken between them as to a means of promoting the election. The result of the decisions on the subject of agency is, that an agent is a person exerting himself in the election with the knowledge and approval of the candidate, and the result is that Peters was an agent for whose acts, to the extent of disqualifying him from taking the seat, Mr. Cameron was responsible.

The act of Mr. Peters has, however, another very important bearing under section 73; a vote must be taken from Mr. Cameron for every one of the party who got his dinner free of charge by means of the tickets issued by Peters. This section provides that one vote must be struck off

for every elector proved to have been treated. The proof is clear that the dinners were intended for voters. Care was taken to carry this intention into effect. The issue the of tickets made every man's dinner secure long before the time for procuring it. The tickets were all used, and all returned by Mr. Ashby to Peters. The conclusion is that 40 voters dined free. The thing is as bad as if 40 sums of money instead of 40 tickets had been distributed. It is not necessary to prove in detail that the 40 ticket-holders actually voted—that is the fair inference—the only inference that can be drawn from the evidence. There were 49 votes here for Cameron. The tickets were sufficient for nearly 80 per cent. of them. If it were a question before a jury the evidence would be clearly sufficient to warrant the conclusion contended for. This test was actually applied in the *Boston case* 31 L. T. N. S. 331, 2 O. & H. 161, L. R. 9 C. P. 610. If the forty votes are taken off, then the respondent is entitled to retain the seat, being put in a majority of 37, and the votes left off the lists are not numerous enough to affect the election.

Cameron, Q.C. (the petitioner) *and Osler.*

It is not open to the respondent to make use of the first point in his argument. The fourth clause of the list of objections that had been delivered to the petitioner by respondent had set forth that divers persons—whose names were Brown and Jackson—were ready to vote at the said election, and had intended to vote for the respondent; but their names were omitted from the certified copy of the voters' list; and now when the petitioner had succeeded in proving that twelve or thirteen names had been omitted from the voters' list, that they had tendered their vote for him, and had expressed their intention and desire to vote for him, the respondent endeavoured to take the benefit of those errors made against the petitioner, and maintained that the whole election was void. This was a most absurd and unjust argument; for he had shown that if these errors had not been made in the lists, his majority would have been greater than the ballots gave him. There is nothing in the Act to show that an elector may not state aloud in the polling place, after or before an election, or in court, how he would vote, or had voted. The Ontario Act is more strict, but the 77th section was the only one in the Dominion Act. [Wilson, J.—Supposing he should show the ballot?] The question is whether that would make his ballot bad or not. He may tell any one he likes. He is not to show his ticket; that is all.

Peters' act was not done with a corrupt intent. It devolved upon respondent to show that it was so done, but this had not been shown; on the contrary, all the circumstances showed that the alleged treating which appeared to have been done on a single occasion was done without any corrupt intent, and in such a way as to lead to the inference that it was not intended to influence votes: as to this see the definition of the word "corruptly" as given in the *Launceston case*, 30 L. T. N. S. 831. Peters was not an agent for whose acts Mr. Cameron was responsible, and the case is distinguishable from the *Boston case* relied upon by Mr. Maclennan. As to the taking off the 40 votes, that cannot be done. There was no proof that any of the persons who had voted had been bribed or in any way corrupted by being given the dinner, which was almost an act of charity under the peculiar circumstances of the weather, and the distance the voters had come. It depended on the question of agency and of corruption, and the case failed in those particulars.

Wilson, J. As to the first question relating to the ballots, the facts showed that the respondent was returned as the member-elect by a majority of three votes, and that there were thirty-nine rejected ballots. Two of that number, both parties agreed, were rightly rejected. The rejected ballots upon which evidence was given were the remaining thirty-seven. These thirty-seven rejected ballots may be classified as follows:

(1). Those which were marked with a cross in the division or compartment of the ballot paper on which the candidate's name is put; and to the right hand of, that is *after*, the candidate's name.

For Cameron, Nos. 1, 2, 3, 8, 16, 37..... 6
For Maclennan 0

(2.) Those marked on the same compartment to the left hand of—that is, *before*—the candidate's name.

For Cameron, No. 14..... 1
For Maclennan 0

(3.) Those marked on the same compartment above or before the candidate's name.

For Cameron, Nos. 4, 5 2
For Maclennan..... 0

(4.) Those marked with a mere line, vertical, horizontal, or diagonal; and whether the line is in the compartment where the name is, or in the column to the right of it.

For Cameron, Nos. 9, 11, 17, 18, 20, 34..... 6
For Maclennan, No. 27..... 1

(5.) Those marked with a cross to the left

hand side—that is in front—of the candidate's name in the left column.

For Cameron, Nos. 12, 13..... 2
For Maclennan, Nos. 21, 25, 26, 30..... 4

(6.) Those marked, not with a proper cross, but having some addition to it as strokes which make the cross look like an X, or having lines along the top and bottom of the cross, or a line across the centre of it, or an additional stroke on one arm of the cross, or the form being somewhat like an anchor.

For Cameron, Nos. 6, 7, 19..... 3
For Maclennan, Nos. 23, 24, 29..... 3

(7.) Those marked with a proper cross, but having some additional mark by which it was said the voter could be identified.

For Cameron, No. 4..... 1
For Maclennan, Nos. 28, 32, 33..... 3

(8.) Those having no cross, but the candidate's name being written in full or in part, or some letters or initials put in *place* of the cross.

For Cameron, Nos. 35, 36..... 2
For Maclennan, No. 22..... 1

(9.) One which is marked by a number of lines.

For Cameron..... 0
For Maclennan, No. 31..... 1

Making so far of the ballots accounted for:—

For Cameron..... 23
For Maclennan..... 13
36

(10.) There is one, No. 15, which has a cross for each candidate. Making a total of 37; accounting for the whole number of rejected ballots.

I held at the trial, and I am of the same opinion still, that class No. 1, which is composed of crosses to the right hand side of the candidate's name, contains good votes, for within the very words of the statute they are "on the right hand side, opposite the name of the candidate;" and that they are in the compartment where the candidates name is printed, and not in the column to the right of it, which was manifestly intended as the place of the cross, is of no consequence, for the statute does not say the cross should be put in the column on the right hand of the name, but merely on the right of the name, and opposite it. The two cases referred to at the trial, the *Athlone case*, 2 O. & H., 186, and the *Wigtown case*, 2 O. & H., 215, are directly in favour of this view. There is in reality, however, no decision required on the point. The statute has been literally complied with.

Then I also was of opinion at the trial, and I am so still, that the slightly ill-formed crosses contained in class six should not be rejected. It would be too rigid a construction of the statute to apply to it which would exclude a vote and disfranchise the voter because he made a cross with small lines at the ends of the cross, or put a line across the centre of it, or upon one of the limbs of it, or because, in his hurry or confusion, or awkwardness with the pencil, he did not draw two straight lines, but curved one of them so much as to look somewhat like the blades of an anchor, when it is manifest he intended, so far as it is possible to judge, to vote honestly, and to leave or make no mark by which, contrary to the provisions of the statute, he could be identified.

Under the first class the petitioner is entitled to have six of the ballots added to his poll, which would overbalance the majority of the respondent and give the petitioner the majority of three in his favour. Under the sixth class, if the three votes under that class be added to each of the parties it will leave their relative numbers the same. And in my opinion they must either all be added or all rejected. But I think they must be added to the poll of each of the parties—three to each of them. That disposes of twelve of the ballots.

If I join classes two, three and five together, and treat them all as if they were ballots, crossed to the left of the name, that would give the petitioner five as against four, or an additional majority of one. It is not material to determine what should be done with these votes, because they do not affect the actual majority under my former ruling. If I were obliged to express an opinion one way or other, I should be disposed to count these votes, although they were not put on the right hand of the candidate's name, but to the left of it. For I am of opinion the Act is not to be read as a declaration that if the cross be not put to the right of the name the ballot should be void. A marking to the left instead of the right of the name is not a cause for which the deputy returning officer is authorized to reject the ballots under sec. 55. The instructions to the voter are that he shall mark the cross with a pencil, but it has been decided that marking it with ink is a good vote. These instructions, too, do not require the voter to put the mark on the right of the candidate's name, as the instructions in the English Act do, but merely to put it opposite the name of the candidate. There are many cases in which a strict compliance with the statute, or its literal observance has not been required. In the *Athlone case* the crosses to the

left were not decided upon. In the *Wigtown case* the majority of the Court thought they were bad.

The fourth class, consisting only of each a single straight line, I do not allow, because there is a fair ground of argument that the elector not having completed his cross did not mean to complete it, and purposely left his will undetermined. In the *Wigtown case* the single lines were not allowed. If they were allowed here, there would be added five to the petitioner's majority; but so long as the majority exists without that kind of ballot it is of no great consequence.

The seventh class is one I have had some difficulty in dealing with. No. 28, in which the voter besides putting the cross for the respondent, has written the respondent's name in full, is certainly bad; for by that writing the voter may be identified, and it is for that cause that the eighth class has been disallowed. That will leave still three ballots of the seventh class, one of which, No. 4, is for the petitioner, and Nos. 32 and 33 are for the respondent. As a matter of fact, I do not think the marks in addition to the cross which are on these papers were put there by the voter in order that he might be identified. But I cannot say it may not have been for such a purpose. The marks in addition to the cross should not have been there. I feel it safer to reject all three. If they were added to the poll it would still leave the petitioner a majority of two. So long, therefore, as that majority stands it is not of any serious consequence what is done with these three votes.

Classes 8, 9, and 10 are rejected for reasons which are sufficiently apparent.

The result of the consideration of this first question is that the majority of votes on the poll is in favour of the petitioner.

As to the second question the petitioner contended he was entitled to add to his poll the votes of eighteen persons whose names were stated in a list put in at the trial, because their names were on the last revised assessment roll for the municipality in which they respectively resided, that is upon the original or proper voters' lists, but were omitted from the copies of the lists which were made for the purpose of this election; and they tendered their votes which were refused by the deputy returning officers; and who also refused to furnish such voters with ballots because their names were not upon the copy of the roll which was furnished to them for the purpose of taking the poll. The respondent admitted that thirteen of the eighteen voters were persons whose names were on the original list, and were entitled to vote at that election; and as to other two of them, he left them to be judged of by the evidence. The evidence shows that they were also entitled to vote. I think the whole eighteen were entitled to vote at the election. Eight of them said to the deputy returning officer they desired to vote for the petitioner, and they tendered their votes for him. Four others made affidavits of their right to vote, and that they wished to vote for the petitioner; and they gave their affidavits to the deputy returning officer at the poll. The other six tendered their votes, but they did not say for whom they offered them. The respondent alleges that two other persons than those named by the petitioner were entitled to vote, and tendered their votes, but that their votes were rejected because their names were not on the copy of the roll; and that they would have voted for him. The petitioner admits these two persons were entitled to vote. The petitioner alleged that all those he had named, would, if they had been allowed to vote, have voted for him. And the respondent alleges that the two he has named would, if they had been allowed to vote, have voted for him. The petitioner claims he is entitled to have, under any circumstances, the eight votes of these persons, who had votes, and who tendered them to the deputy returning officer at the poll, and who tendered them for him, the petitioner, added to his poll. And that he is also entitled to have the votes of those four persons who made affidavits, and gave their affidavits to the deputy returning officers, because they tendered their votes, and they say in the affidavits they intended to vote for the petitioner. The petitioner contends also that in strictness he is entitled to claim the remaining six votes as well, because he has shown by evidence given at the trial, that they declared at the poll that they then intended to vote for him, although not to the returning officer. The petitioner at the same time admits that these eighteen names are not any of them of consequence to him, so long as he has a majority independently of them; and so long as the two omitted names for the respondent are not added to his poll.

The respondent asserts that none of these eighteen votes claimed by the petitioner can be added to the poll, because the new provision as to voting has altered the whole of the former procedure. That the present purpose of the statute is to secure secrecy of voting to carry into effect the general scheme of legislation

on the subject. The law provides that only one elector at a time is to be introduced into the compartment where he fills up his voting paper. He is then to put it into the envelope supplied to him for that purpose, and close it and give it to the deputy returning officer. He is not allowed to take his ballot paper out of the polling station, and all officers, clerks, and agents at the polling place are to maintain secrecy as to the voting in a great many particulars, the observance of which is secured by the penalty of fine or imprisonment, and besides that no voter shall, in any legal proceeding to question the election or return, be required to state for whom he has voted. And it was argued that there is no other method whatsoever of giving a vote or declaring an intention to vote than by means of the ballot paper. That a verbal statement by the elector to the deputy returning officer of the person for whom he wished to vote was of no avail, for that is not now the mode of voting. And it was said that the voter may alter his mind up to the last moment of his completing the ballot paper. And therefore the most formal tender of his vote in any other manner than by a ballot paper is altogether void. For these reasons the respondent contended no votes could now be added to the poll of either party which were not in the form of ballot papers. However grievous the wrong may be which was done to the elector or to the candidate, it was argued that there is no such remedy as the one now claimed by the petitioner, and if there is a remedy it must be the one which the petitioner has himself set out in his petition as the alternative if he fail in getting relief in any other way, viz.: by avoiding the election altogether, in order that they may be another and a better poll taken. And that in case the majority is against him, the petitioner cannot claim the seat so long as these votes so wrongly excluded from the poll, no matter for whom, or how, they were intended to have been given, are numerous enough, as they certainly are, to influence the result of the election.

The petitioner asserts that there must still be, as there was heretofore, a method of getting the benefit of the votes which were plainly tendered for or can be shown by evidence to have been intended for him. But that under any circumstances the respondent cannot make use of the petitioner's rejected votes, in his (the respondent's) favour, for the purpose of setting aside the election; and that the petitioner's rejected votes cannot influence the election in reality so long as he still keeps the majority by other votes.

By the English Reform Act, 2 & 3, W. 4, c. 45, sec. 59, persons omitted from the register by the revising barrister were permitted to tender their votes at the election, stating for whom they tendered their votes, and the returning officer had to enter in the poll book the votes so tendered, distinguishing them from the votes which he admitted in the ordinary course. There was no such clause in the Irish Act, yet it was decided that where the revising barrister had rejected a name, the person might tender his vote at the poll, and the committee, notwithstanding the want of such a clause in the statute, might afterwards add it if it were one which was properly receivable; *Coleraine case*, P. & K. 503. It is said that a select committee would add the name of a person to the poll in favour of the candidate for whom he tendered his vote at the election, although the statute made no provision in favour of such a person who had been left off the register, and that such power was exercised under the original common law authority of the House of Commons. Warren's Election Law (1857), 359, referring to *Dawson's case, Southampton*, 2 P. & K. 226. *Gaunt's case, Droitwich*, K. & O. 57. *George's case, New Windsor*, K. & O. 163. *Seller's case Lyme Regis*, B. & Aust. 499. In the *Warrington case*, 1 O. & H. 42-46, (1869), Mr. Price, for the petitioner, handed in a list of the persons whose names he claimed should be added to the poll. Martin, B., asked if there was any precedent for adding votes to the poll, when voters had done their utmost to record their votes, and by the mistake of the poll clerk their names were omitted. Mr. Price answered, "I can find no precedent for that." Martin, B., (to Mr. Quain) "I believe you do not dispute that if a vote has been duly tendered it may be added to the poll." Mr. Quain, "Not if in your Lordship's opinion it has been duly tendered." Martin, B., "That is a mere matter of fact for me." As to what should be done to constitute a tender of the vote, the elector must state at the time he desires to vote, the candidate's name for whom he offers to vote: *Gloucestershire case*, 30, in 2 Peck. 155. Where it was disputed whether the voters actually named the candidate at the time, the committee held the tender of the votes good because the poll clerk said he had no doubt they offered themselves on behalf of the petitioner, and the circumstances under which the voters appeared before the returning officer may amount to a tender independent of any positive declaration: *Harwich case*, 1 Peck. 396. So although the voter was not asked nor said for

whom he voted, yet it appearing under circumstances before the returning officer, that it could not be mistaken for whom he meant to vote, his vote will be added to the poll: 2 Peck. 167 n. The tender of a vote must be to the proper officer: *Warrington case*, 1 O. & H., pp. 45, 46. In none of these cases was the tender of vote made under the system of voting by ballot.

In all of the cases now before me on this trial for adjudication, the deputy returning officer refused to give the persons in question ballot papers to vote upon. By the statute no person is entitled to know the candidate for whom any voter at such polling place is about to vote, or had voted: sec. 72, sub-sec. 2, "Nor shall any person communicate at any time to any person any information obtained at a polling place; or to the candidate for whom any voter at such polling place is about to vote, or has voted:" sub-sec. 3.

If the elector must first tender his vote for a candidate to the deputy returning officer, before he can properly claim a ballot paper, in a case such as those under consideration, that is, where the elector's name is on the original roll, but not on the copy, and where but for that defect he would be unquestionably a good voter to the knowledge of the deputy returning officer, then the rule of secrecy is broken, and the officer becomes aware of the candidate the elector is about to vote for. If the deputy returning officer can demand or must have made to him a good tender, as under the old law, by having the name of the candidate for whom the elector is about to vote, declared to him before he can be called upon to furnish the ballot paper, he may apply that rule in every case to persons whose names are on the copy of the list, and entitled to vote, as well as to those whose names are not on the copy, but who are entitled to vote. And yet, unless such a tender of the vote for a particular candidate be then made to the officer, how can a vote for any particular candidate be afterwards entered for him? Assuming there is the power to do so, there is a difficulty certainly in the way. Sub-sec. 3, above referred to, shows, however, that knowledge of the way the elector intends to vote may come to the officer in some way or other, for he is forbidden to communicate that information to any person. Here, as a fact, there are eight persons who told the officer for whom they desired to vote—that is, for the petitioner; and he got four affidavits from other electors stating for whom they proposed to vote; and there is reason to believe that in the other cases mentioned by Leary the agent of the petitioner at Eldon Station, No. 4, the votes that the returning officer there rejected, he knew were for the petitioner, because Leary was the petitioner's agent there, and he pressed the deputy returning officer to take the votes and keep the ballots separate from the others. So that if any are added to the petitioner—all of them should be added according to the rule and practice before referred to in such cases.

The principal question, however, is can any of them be added under the present law. It is plain, if it cannot be done that the election is in effect placed absolutely and irrevocably, while the law remains as it is, in the power of an unscrupulous deputy returning officer. It rests with him to seat whom he likes, and exclude from Parliament whom he likes, and to disfranchise also whom he likes. A pecuniary recovery had against him for his misconduct is no recompense. The result of the election is not to be nullified if the result can be plainly and satisfactorily made out by such an examination as a committee of the House could always, by its common law powers, apply to the case.

I have referred to the exercise of these common law powers in cases which had not been provided for, and I have referred to a case at law where the election Judge added on votes and disposed of others according as he thought they had been regularly tendered or not, although the statute under which he acted made no mention of any such power. The same course was pursued in this country before the voting by ballot was introduced. The Judge may, under the 73rd and 94th sections, strike votes off in cases of bribery, treating, or undue influence. The deputy returning officer may reject ballot paper in five cases: sec. 55—(1.) When they are not similar to those supplied by him, (2) or are contained in any envelope different from that supplied by him. (3.) All those by which votes have been given for more candidates than are to be elected. (4.) All those contained in the same envelope when such envelope contains more than one. (5.) And all those upon which there is any writing or mark by which the voter can be identified. He can reject them, perhaps, in some other cases, although they are not specified; but, whether he can or not, are illegal votes to stand when it is plainly proved they have been given? If a woman, or a minor, or an alien vote, who are all incompetent—are their votes to stand? If there be plain rank personation, both of the living and the dead; or there be no such property as that voted upon, or if the Judge

who are disqualified from voting do vote—are these votes to stand? Is there no redress but a new election, where the same thing may happen again? If these votes can be struck off, what is there to prevent proper votes from being added on? Nothing that I see but the manner of giving the vote now being by a ballot paper in place of its being *viva voce* as formerly; and the purpose of the new Act being to secure secrecy on grounds of public policy, whereas the voting was openly given before. The manner of voting by a paper should not, if it be possible to avoid it, be held in any manner to lead to a disfranchisement because the deputy returning officer has wantonly or ignorantly refused to deliver ballots to those who are entitled to have them and to use them. To say that the vote cannot be allowed, either by the House of Commons or by the Courts or Judges, acting for and representing the House of Commons, because it has not been given by ballot paper, and that the deputy returning officer can wilfully, vexatiously, or ignorantly refuse to furnish the ballots, is not only to make him master of the election, but is to make the wrongful act on his part, the justification for not being able to remedy the mischief and injury he has caused. The whole powers and policy of the law, and the rights and privileges of the House of Commons to control these elections, and to grant relief against mistake or misconduct cannot have been surrendered; nor the rights and interest of the candidates and the electors given up, because the House assented to have these controverted elections tried by a different tribunal than that of their own committee; or as it is expressed, because they thought it was "'expedient' to make better provision for the trial of election petitions, and the decision of matters connected with controverted elections of members of the House of Commons of Canada." The Court is to exercise the like "power, jurisdiction and authority with reference to an election petition, and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction." The English Act, 31 & 32 Vict., c. 125, passed in July, 1868, was one under which the *Warrington case* was tried before Martin, B., and from which our first Controverted Election Act was taken, and there is no greater power given by it than was given by our Act of 1873 to the Judge to add on votes, and yet it was done in that case, and the right to do so was not disputed.

The only change in the law since then is that the voting is by ballot. But for the reason before given, I do not look upon that as an invincible reason against the exercise of the power of adding on or rejecting votes, if the fact of how the vote was then tendered can, notwithstanding the difficulties in the way of acquiring such information, be made as apparent to the Judge under the new system as it could have been under the former system. Here, from the express declaration to or in the hearing of the deputy returning officer by some of the electors, by naming the candidate for whom they desired to be allowed to vote, and claimed to have the right to vote for the particular candidate they wished to vote for, and for whom they tendered their votes, is placed beyond a doubt, and there is sufficient evidence in my mind, to lead to the conclusion that in most, if not in all, of the other cases in question, the deputy returning officer knew distinctly, from the circumstances accompanying the claim to vote, as by the affidavits given to him and the particular agent who was pressing the reception of the votes, that such person intended and desired to vote for a particular candidate, although the name of the candidate was not mentioned at the time.

If it became necessary to settle this election that I should determine the right made to add on these votes, or such of them as may be held to have been duly tendered for a particular candidate under the former law, I should have been obliged to have decided the matter one way or the other, and I should have determined it in that manner which is most consistent with the old law, and in that manner which would have saved the disfranchisement of electors, and which would have spared the necessity of a new election, merely to discover the sense of the riding as to which of the candidates had the majority, when that fact was made quite apparent to me by the evidence which I had already before me; and I should have reported the matter fully to the House of Commons with my reasons for so acting and deciding. It would have been my duty to try the election petition and any matter put in issue by it. There is the power to add on or strike off votes given by ballot, although the Act does not in terms say so. I am doing so in this very case according to the ballots, and I think I have the power to deal with such votes which were duly tendered, as at the old law, when a ballot was duly requested by the voter, and was wrongly rejected by the officer. It is true secrecy is not preserved in such a case. But if it is necessary to preserve the right of voting, and if that can be done only by divulging, from necessity, for whom

the elector intended to vote, I should say the necessity justified the declaration he was forced to make, and there is nothing in the Act which prevents an elector from saying, if he choose to say, for whom he intends to vote. It is true the only mode of voting is by ballot, and that the elector may change his mind up to the moment of putting his cross on the paper. But I am dealing with cases in which the electors have been refused the ballot papers and have had their votes rejected. And if the question is at last reduced to this, whether any person can be said to have had a right to vote to whom the deputy returning officer has refused to give a ballot paper, I have no hesitation in answering that in the affirmative. Were it otherwise there would be an end of election by the people, and it would follow that because the officer had wrongfully refused to give a ballot paper to a good voter, the voter had not a vote in fact or in law. It is true the election may be avoided if these rejected votes would have affected the result of the election; but that is no proper remedy to the voter, and a new election is a serious matter, and is surely not to be resorted to but in the last extremity, and only if no other adequate remedy can be found, and it must be borne in mind that the new election does not determine who should have been returned at the former election, for there may be a different voters' list, death and other circumstances may have changed the constituency, and the opinions of the electors may have since been altered. But in my opinion there is another and a better remedy. I have expressed my opinion on it at large because it is an important matter, although in my opinion I am not obliged to act upon the votes which were so rejected, and I do not act upon them. These votes would add to the petitioner's majority. But the majority he has without these votes is sufficient for the purposes of this election: unless that result can be impeached upon the charge of bribery and treating, which has been made against him, and if it can be sustained then it is still of no consequence whether the votes last referred to be added to the first named majority of three or not, because a greater number of votes than all the classes in the petitioner's favour combined will have to be struck from his poll.

This brings me to the next question—the one as to the alleged agency of William Peters. So much stress and reliance have been placed upon this part of the case that I shall be obliged to state precisely what the evidence was, which it is said constitutes the bribery and treating by Peters, and the alleged agency of Peters for the petitioner. I shall first of all state what, according to my opinion from the decided cases, it is required as necessary to establish the fact of agency by any person on behalf of a candidate.

In the *Hereford case*, 21 L. T. N. S. 119, Blackburn, J., said: "In the common law a man is not responsible for the act of his agent except when it is done directly according to an authority which is given to him. In parliamentary law it is otherwise. A candidate who has really meant that his agent should not commit a corrupt act is nevertheless responsible to the extent of losing his seat if the agent does commit a corrupt act, and for that difference in the law, established by parliamentary committees formerly, and now recognized by statute, it seems to me there are two principal motives, I will not say they are the only ones, but they are two principal motives. It would not be possible to unseat a person for corrupt practices, if he were permitted by the means of persons who acted for him or who brought him forward, either one or the other, to obtain the benefit of their aid, if he were not to be also responsible to the extent of losing his seat for the corrupt practices that were done by them for his benefit. That is one of the great reasons for which, as a matter of public policy, it was thought necessary in order that it might check corrupt practices, to establish that principle. Another, and a very considerable reason no doubt, was that in all elections where extensive corrupt practices, bribery and the like prevailed, great care was always taken that the candidate should be ignorant about it. * * * And from the loose morality which formerly did prevail at elections, and which I do not say is completely got rid of, candidates did think themselves bound in honour to pay, and did pay. * * * And the question very much was, was that agent, when doing the thing, in such a position that there would be that claim on the candidate, according to the false morality of parliamentary election matters, to recoup him for what he had done! Now those are two reasons for the parliamentry law differing from the common law. They were not the only ones, but they do give two very good guides and assistances, and I apprehend that in a case where corrupt practices are shown, which the candidates themselves are not cognizant of, you must bear these two principal reasons in mind, and then, exercising what may be called common sense, you must see—does the particular corrupt act come within the rule as an act done by an agent? if it does not, then, though the person may have been

canvassing the town, or speaking on one side or the other, still we could not say that the candidate should be unseated on that account. Every bit of canvassing and acting for a candidate is evidence to show agency—but the result cannot depend on any precise rule that I could define." p. 120. The acts in question in the case just referred to were one Harrison, who had a number of workmen in his employment, gave a breakfast to them on the morning of the poll; he expected about 40, but about 70 came; he told the men that they could bring their friends with them. He ordered a break and three omnibuses on the polling day and drove some to the poll, remaining on the box while they went into the polling booth. He was a Liberal. There were several Conservative voters among his guests. He swore the breakfast was not given to influence the voters. He was not on the Liberal committee. He attended the committee room once or twice to make inquiries. He received a book from the clerk of the Liberal committee containing the names of his men who were voters. He accompanied Mr. Bosley (an acknowledged agent of the candidate) once or twice when he was canvassing. He received letters from the Liberal candidate thanking him for the services he had rendered at the election. He said he acted only as a volunteer. He took three sets of voters to the poll and afterwards drove them to his house. His house was clear by one o'clock. Bodenham, an agent of the candidates, asked Harrison to canvass two named voters, which he did. The invitation to breakfast was to everybody, and to everybody's friends; it was to the whole town, and everybody that liked to come was to come. Edwards, the committee clerk, invited people there and brought them up. So did Williams, Rowlands, Lloyd, and probably others who were committee men did the like. The Judge then said, "I do not say that any one of these things would satisfy me that Harrison was an agent. Taking simply the fact that he gave this breakfast, or merely that he had gone with Mr. Bosley to canvass, I do not say that that would satisfy me, though it goes strongly to prove it; nor would the fact that Bosley had spoken of him afterwards as having done such good service; nor yet do I say that the fact that Williams, a committee man, brought people to the breakfast would satisfy me; nor yet that Edwards, who had been employed about those railway men to some extent, brought people up to the breakfast; nor yet that Lloyd was there; nor yet that Davis was there. No one of these things, by itself, satisfies me that Harrison's breakfast was one for which the party are to be considered responsible; yet, taking them altogether, a number of little pieces of evidence, do produce an effect on my mind which leads me to say that, according to the usual rules in parliamentary matters, that this, which is certainly an act of corruption, is so closely brought home to the agents and persons in authority as to constitute them accessories to it, and for which the candidates ought to be responsible. I cannot come to any other conclusion than that this act is one which avoids the election."

There is one other case to which I shall refer for the language of the Judge—the *Taunton case*, 30 L. T. N. S. 125. Grove, J., said: "I am of opinion that to establish agency for which the candidate would be responsible he must be proved to have by himself, or by his authorized agent, employed the persons whose conduct is impugned to act in his behalf, or have, to some extent, put himself in their hands, or to have made common cause with them. All these, or either of these, for the purpose of promoting his election. Mere non-interference with parties who, feeling an interest in the success of the candidate, is not sufficient in my judgment to saddle the candidate with any unlawful acts of which the tribunal is satisfied he or his authorized agent is ignorant."

In the *Westbury case*, 20 L. T. N. S. 24, Willes, J., said: "If I find a person's name on a committee from the beginning, that he attended meetings of it, that he also canvassed, that his canvass was recognized, I must require considerable argument to satisfy me that he was not an agent within the meaning of the Act." In the same case, 1 O. & H. 48, it is also said, that authority to canvass certain workmen would not be an authority to canvass beyond those workmen. With respect to anything done as to voters other than those workmen, it might very well be said that was no agency, but within the scope of the authority to act as agent, there was quite as strong a responsibility on the part of the candidate, as there would be in the case of a general authority to canvass.

In the *Penryn case*, C. & D. 61, one Sewell, on the authority of resolutions passed at a meeting in the borough, went to London and brought down the sitting member as a candidate. The two attended a meeting together, going there in company. Sewell was appointed chairman by the company present. It was a meeting of the sitting member's friends. Sewell accompanied the member generally on his canvass, and he

attended on the hustings. During the poll Sewell introduced a voter, saying he, Sewell, had brought him down as a candidate, and Sewell was not called on to contradict these facts. *Held*, that agency was established.

Speaking prominently on the hustings in support of a candidate, and canvassing on his behalf, coupled with offers of money, constitute a man an agent to the extent of proving corrupt practices: *Lancaster case*, 14 L. T. N. S. 276.

The parliamentary practice of holding candidates civilly responsible for the acts of their agents, although the agents have exceeded the limits of their power, rests on a better and more satisfactory basis than is commonly ascribed to it. It is this:—It is a well known rule of law and of equity that a person cannot take the advantage of an act procured by and founded on the fraud of another, although it is committed by that other as his agent without his knowledge, without being liable to lose that which he has gained by such means, or to be in some other respect liable for the fraud: *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Udell* v. *Atherton*, 7 H. & N. 172, as explained in L. R. 2 Ex. 265; *New Brunswick R. R. Co.*, v. *Connybeare*, 9 H. L. 714. It would be manifestly unjust to the public that a candidate should secure his election by the corruption, or other improper means of his agent; and while taking the benefit of the acts done, repudiate the exercise of those powers which the other as his general agent had used for his benefit, and in his business and interest, although the agent was not authorized to do these specific acts. The public can have no relief in such a case, and it is the public which is most concerned, but by the invalidation of everything which has been wrongfully accomplished by such means.

The agency which I must determine to exist or not is this: Did the candidate authorize the person whose conduct is impugned to act in his behalf? Or, did the candidate to some extent put himself in the other's hands, or make common cause with him in the election, and for the purpose of promoting it? And the means by which I must determine it, are by the evidence which was given before me tested by the rules and instances so copiously given in the different election reports, and sufficiently referred to in the cases which I have before mentioned.

The person said to have been the petitioner's agent is William Peters. It is better I should consider and dispose of this part of the case before determining whether the act charged against Peters was an act done corruptly or not, because that matter would possibly require more consideration than the one of agency; and if it should appear there was no agency, it will become unnecessary to consider the nature of the act done by Peters in any way. As to the alleged agency, Peters said in effect, that he was an innkeeper on the Victoria Road, and kept the inn there before and at the time of the last election. There was a meeting at Ashby's house, in the township of Carden, before the election. It was Cameron's meeting. Witness thinks he was chairman of the meeting. He took Cameron's side at the election and at the meeting. He opened the meeting. He said Cameron was there canvassing for the election. Did not know who moved he should be chairman. He put up some notices in his house of that meeting, and he sent some by Ashby or by some of the neighbours. The notices were sent to witness to be distributed. Cameron put up at witness' inn several times when he was in that part. Cameron came from Ashby's meeting in witness' cutter, and put up at witness' inn that night. There was no understanding that witness should be at the meeting. He was at the place of polling on election day. He never asked a man that day to vote on one side or the other. The following is in his own words. "Two or three days before the election I asked Ashby if he was going to get up dinners for the voters. He said he was not. He had done it before, and people did not pay him, and he was a poor man and could not do it for nothing. I told him he had better get up the dinners on account of the voters having to come so far to vote, and no place for them to get dinner. He said he could not unless some one would guarantee to pay for it, that at a former time he had given dinner to about eighty and some one went round with a hat and gathered up $4.50, and that was all he got. I told him if he would get up the dinners I would guarantee and see him paid for forty dinners. I asked what he would charge apiece, and he said twenty-five cents. I said I would give him twenty cents apiece. It was enough, as I had to pay it out of my own pocket. He would not agree to it for less than twenty-five cents. I told him to get up the dinners. I paid for the 40 dinners. * * * * I spoke to Cameron about making such an arrangement before speaking to Ashby. He said he could not do it unless Maclennan and he agreed to do it; that he durst not do it; we could not interfere in it; that the law would not allow it. I said the law must be very strict if it would not allow a man to get his dinner. I asked him if it would hurt the election if I paid for the dinners out of my own pocket. He said he did not

know ; he said he could not do anything about it unless with Maclennan's consent. I don't recollect if I told him I would give the dinners. Cameron and I did not speak of the way it was to be done. He did not seem to approve of it, in case it should interfere with his election. * * * I made an arrangement with Ashby that I was to pay for forty of Mr. Cameron's voters. * * * I took no steps to get my money back. I took three bottles of whiskey that day from my place to Ashby's—other people did so too. I left the whiskey in care of Mr. Malally, the father of Mrs. Connors, at Mr. S. Connors' house. I think I gave a treat as well to some of Maclennan's friends as to Cameron's. I refused to give James Sample his bitters because he had not voted. I said to go and vote, I would not treat him till after that in case it should be said I had bribed him. He did not get his bitters. In cross-examination he said—I do not recollect I ever canvassed any voter ; there was no tavern nearer Ashby's than my place, a distance of five miles. I heard the people say they had to come twenty or twenty-five miles to vote there Cameron had his own team at Ashby's the night of the meeting. I asked him to ride with me, and he did so ; it was by chance he rode with me. Cameron told me a candidate could not provide dinners for voters for the purpose of influencing their votes directly or indirectly ; that there was no way of his getting round it only with Maclennan's consent. I never applied to Mr. Cameron for payment of the $10, and never expected it. I never got from him any money but the ordinary tavern bills while he stopped at my house. I did not know if the persons I gave some of the tickets for dinner to had votes or not ; or whether they were for Maclennan or not. I kept cautious as I was giving dinner not to ask any man for his vote, in case Maclennan got a claw on me. I was not a voter."

The petitioner was examined on his own behalf. He said it was while driving with Peters from Ashby's meeting that Peters first spoke to him of the dinners. Peters said some arrangement should be made for dinners for those who came a long way to vote. He asked me if I could make any such arrangement. I said I could not, directly or indirectly ; the law was very strict, and I would not jeopardise the election by anything of the kind. I was sorry for the people, and I would see Maclennan and speak to him, and we might come to some arrangement about it. When I saw Maclennan it escaped my memory. Some days after that Peters spoke to me again of the dinners. I said I had forgotten to speak of it to Maclennan, that I could make no arrangement, or be a party to it in any way. He asked me if there was any harm in his paying for the dinners out of his own pocket if he chose to do so. I said I could not prevent him if he chose to do it ; but I did not want him to do it as exceptions might be taken to it ; that if done by an agent it was the same as if done by myself ; and although he was not my agent I would rather he would not do it. I never spoke to Ashby on the subject nor he to me. I did not hear or know of Peters giving dinners on that day, and I was at the poll there from about two p.m. till after the poll closed. I was in the polling room nearly all the time."

That is all the evidence material on this part of the case. Is there upon this statement any evidence of the petitioner having appointed Peters his agent, or of his allowing or authorizing him to act on his behalf ? Is there any evidence that the petitioner to some extent put himself in the hands of Peters for the purpose of the election ? I think I must say that a perusal of the evidence shows there is not a particle of evidence to sustain the assertion that Peters was the agent of the petitioner. The fact of presiding by chance, as it were, at the petitioner's meeting at Ashby's, at which the petitioner was present, and at which Peters was present just as any one of the neighbours in that part upon both sides was present, and of his opening the meeting by speaking a few words in favour of the petitioner, are circumstances not to be wholly disregarded in trying the question of agency or no agency, but they are utterly insufficient of themselves to show that the petitioner had thereby to any extent put himself in the hands of such a person to represent him as a general agent. So also the receiving of some bills by Peters, and his putting some of them up for the intended meeting and some of them up in his own house, and forwarding others for distribution are of no weight whatever alone to show anything like agency on his part. It was not shown the petitioner knew of the bills being so sent to and in turn sent off by Peters, and if he had known it such acts would have had force only by what they could add to other matters, but they would have been of no significance whatever of themselves. Nor do they, with the addition of the fact of the chairmanship and of the short address of Peters, amount to anything requiring any serious consideration. They do not show

that the petitioner put himself in Peters' hands or suffered Peters to act for and represent him.

If an agency could be made out of these materials, it would, under the law, already severe enough in that respect, be quite intolerable. It would exclude the commonest acts of kindness and hospitality between neighbours. It would ostracise the candidate by keeping him estranged from the electors, who should have every opportunity of becoming acquainted with him. It would prevent association at a time when combination was especially useful, and it would well-nigh stop social intercourse altogether. I entertain no doubt that the acts to which I have alluded are not, and cannot be deemed, sufficient to establish agency for any purpose or to any extent, and thinking so, it is right I should plainly say so.

Then, did the conversation between the two as to the dinner constitute Peters the agent of the petitioner? It was not contended by the respondent that the first conversation was sufficient to establish the character of agent or agency. No doubt it did not do so, but repelled it altogether. The second conversation, it was contended, did, of course in connection with all the other circumstances, and by the force and effect of their addition and accumulation, create Peters the agent of the petitioner for the purpose of providing for the dinners which were given and paid for by him. It is so contended, because the petitioner said among other things when he was asked by Peters if there was any harm in Peters paying for the dinner out of his own pocket if he chose to do so, and he, the petitioner, answered that he could not prevent him if he chose to do it, but he did not want him to do it, and he would rather Peters would not do it; and it was argued by the respondent that the petitioner was bound to have given a positive denial to Peters. That the petitioner should have told him he must not do it, or that the petitioner could not allow him to do it, and that he should not have used such language as that he the petitioner could not prevent him and did not want him to do it, and he would rather it was not done. But can it be said if such language even as that is used, and the speaker really means what he said, and is not covertly affording an approval of the act he is assuming and pretending to condemn—and I have not the least reason for thinking the petitioner did not really mean what he said, that agency has been established—that the petitioner had put himself into the hands of Peters for that purpose? The language of Mr. Justice Grove, already quoted, is, "Mere non-interference with parties who, feeling an interest in the success of the candidate, is not sufficient in my judgment to saddle the candidate with any unlawful acts of which the tribunal is satisfied he or his authorized agent is ignorant." But the petitioner said more, far more, than the respondent has, on his argument addressed to me, assumed he did say. The petitioner plainly disclaimed having anything of the kind done, or recognizing it if it were done. In my opinion the petitioner repudiated all connection with the business of the dinners, and Peters perfectly understood he did so, and that he was doing so.

While the numerical majority is on the side of the petitioner I must consider him to be the person who is rightfully entitled to the seat until that right is displaced, and I must look upon the charge which is made against him as if it were in effect made against the sitting member. In the language of Martin, B., in the *Warrington case*, 1 O. & H., at p. 44. "I adhere to what Mr. Justice Willes said at Lichfield, that a Judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside." I refer also to what was said by the same Judge in the *Wigan case*, 1 O. & H., p. 192. "If I am satisfied that the candidates honestly intended to comply with the law, and meant to obey it, and that they themselves did no act contrary to the law and *bona fide* intended that no person employed in the election should do any act contrary to the law, I will not unseat such persons upon the supposed act of an agent unless the act is established to my entire satisfaction."

I apply the same language to this case, and I add that I will not unseat the sitting member or prevent the person who has the numerical majority from having the seat upon the supposed act of an agent unless the agency is established to my entire satisfaction, and in this case that has not been done; on the contrary, the fact of agency has been disproved, disclaimed, and repudiated in the most explicit and emphatic manner, and it is well that it is so, for it is the only act that has been mentioned as having been done throughout this election of the nature attributed to it, and no doubt if there had been any acts of a more serious, or even of the like nature, they would not have lain concealed, considering the strong personal interests which enter into contests in this constituency, where the majorities in several of the late elections have been only three or four for the successful candidate.

I must say this election contrasts most

favourably, for all parties, with some of those which have been held in other places, and which have not been creditable to the parties concerned, and which must sorely have tried the faith of those who believe in the excellency of popular representation when they find those who were supposed the honest and actual choice of those who were supposed to be the free and independent electors of a constituency holding their seats by the mere force of money or undue influence, not by an election, but by a contract of sale and purchase which was as bad on the side of the purchased as on that of the purchasers. From all that and anything approaching it in any respect, this election and the candidates stand unquestionably free.

I have already said that, if the charge of agency were not maintained, and in my opinion it has not, it would be unnecessary to consider whether the giving of dinners by Peters was or was not bribery, or treating within the meaning of the Act. The point was argued before me very fully by the respective parties, and many cases were cited as applicable to it. I am not sure what opinion I should have formed with respect to it. It is not improbable, if the agency had been established, that although the electors had come from ten to twenty-five miles to the poll, and there was no inn nearer than five miles to it I should have held it to have been a violation of the statute. I must, of course, have been satisfied that it was corruptly done; that is, done for the purpose of influencing the election either by voting or not voting, before I could have found the offence to have been committed, and it is not so perfectly plain that a free dinner, given by a candidate to a hungry voter, who has travelled twenty miles in a Canadian winter day in January, to the poll, is necessarily and as a mere consequence a corrupt act. I do not know any law which would prevent a candidate from giving a voter in such a season and on such an emergency a bit of bread and cheese for himself, or a lock of hay and a drink of water for his horses. These are matters of degree, the manner in which, and the number, perhaps, to whom these services were rendered, and the more or less need there was for the act must all be considered. Such questions are difficult to deal with, because of the almost inevitable tendency they have to operate upon the voter, and the difficulty there is in discovering the true motive for the candidate's liberality at such a time, and the danger there is in permitting any such thing to be done when the gain is so immediate and it is so very likely to be the leading cause for so much activity and kindness. It is sufficient to say that I have not made up my mind on that part of the case, and I am glad it is not necessary I should do so. My leaning, however, at present is more against the rightfulness and lawfulness of that transaction than in support of it.

I have given this case a careful consideration, and determining this matter of agency as I do, I must decide that the petitioner having the majority of votes in his favour, upon an inspection of the ballot papers only, is the person who was duly elected for the North Riding of the County of Victoria, at the last election for the Dominion Parliament, held for the said North Riding, and that he should have been returned as the person so duly elected, and that the election and return of the respondent for the said riding at the time aforesaid were and are void.

I must award the general costs of the cause and proceedings to the petitioner to be paid by the respondent, with the exception of the costs relating to that part of the petition which applies to the voters whose names were not upon the copies of lists furnished to the deputy returning officers, but who were entitled to vote, and should have been admitted to vote at the said election, because I have not judicially determined that part of the petition, and with the exception of the cost of the scrutiny of the ballots, because such rejected ballots were not the fault of either party, but of the deputy returning officers. The parties must each bear his own costs with respect to these last mentioned matters.*

REVIEWS.

Commentaries on Equity Jurisprudence, Founded on Story. By Thomas Wardlaw Taylor, M.A., Master in Chancery. Toronto: Willing & Williamson. 1875. pp. 564.

Mr. Taylor's original intention was, as he tells us in his preface, to prepare an edition of Story's Equity Jurisprudence adapted to the system of equity administered in this Province. This intention could not conveniently be carried out, owing to the omissions, additions, and alterations that were found to be neces-

* The respondent appealed from this decision. The petitioner, however, objected to an irregularity in the service of the notice of appeal The case was argued this Term and stands for judgment. - *Rep.*

sary. What we have now, in fact, is a condensation of what is practically important in Story, with references to the more recent English cases, and a full discussion of cognate subjects arising in the statutes and decisions of this Province.

Mr. Taylor, when acting as Judges' Secretary, Referee in Chambers, and since then as Master in Chancery, established for himself a high reputation. As a writer he is already known by an edition of the Chancery statutes and orders and a valuable little treatise on the investigation of titles to estates in fee simple, a second edition of which was recently called for. The work before us will largely increase his reputation. It will moreover practically supersede in this country the ponderous volumes of Story as a book of reference, and doubtless take its place in the curriculum of the law school.

The study of Equity jurisprudence is at present of more moment to the student and to the practitioner than ever before. The time is coming by slow degrees when the lawyer must be familiar with both branches—Law and Equity. We doubt much if he will be a better lawyer for it. He will, unless some other "division of labour" comes to the rescue, know a little of everything, and a good deal less of any one thing in particular. Instead of the bar being divided into those who practise exclusively in either law or equity, we shall probably have the line drawn more sharply between barristers and attorneys or solicitors. Some men will devote themselves more especially to real property, others to personal property, others to insolvency cases, others to conveyancing, &c. But all must be more familiar with the doctrines of Equity affecting that particular branch which they may select.

There is a manifest and great advantage to the lawyer in this country in having the standard legal works of England and the United States reproduced here, when accompanied by full references to our statutes and decisions; and when, in addition, there is a lucid exposition of that wherein, if at all, they differ, and the reasons for such difference, the value of such editions is vastly increased. We think we may safely say that Mr. Taylor has done his duty well in both respects, shewing a thorough mastery of the subject. We are indebted to him for a valuable addition to the law library, and trust it is not the last we shall have from his industrious and careful pen.

Wrongs and Rights of a Traveller—by Boat, by Stage, by Rail. By a Barrister-at-Law, of Osgoode Hall. Toronto: R. Carswell. 1875.

"Books are fatal; they are the curse of the human race," is the verdict of that eminent artist, Mr. Gaston Phœbus. In these days we have almost universally abandoned the true Aryan principle of never reading. When we have nothing else to do, we must be reading. Among Englishmen of a few years ago the art of conversation flourished vigorously, but it is apparent to any observer that in this respect we have greatly degenerated. Observe a number of men who have been casually thrown together in a railway carriage. Even if they are lawyers, naturally the most talkative of mortals, after a few remarks, a jest or two, each quietly sinks back into his seat and begins to gaze, with frequent yawns, at the woods and hills pirouetting past, as they moved of old to the music of Amphion's fiddle. At such moments the traveller longs for something to occupy his vacant mind. Everyone cannot suck happiness from a stale orange, or from the equally unwholesome literature vended by the news agent, who is one of the nuisances of modern travel, and Major Pinkerton's last romance of the detective force is soon thrown down in disgust.

In the book whose title heads this notice we have an admirable solace for the suffering traveller. He will find in it far more amusement than in such rail road literature as "Claude Melnotte," "The Midnight Shriek; or, the Washerwoman of the Pyrences," "Sunshine and Shadow of New York," &c., &c., and will at the same time receive information which every traveller in these days of frequent accidents should be possessed of. If he is in a saturnine mood under the irritation of the infant's wail preceding from the next seat, he can speculate, for the mother's benefit, on the exact amount which, in the event of the injury or slaughter of the innocent by a lucky accident, might be recovered from the company. In New

York it appears a mother recovered $1300 for the death of a daughter seven years old; and in another case a child two years old received $1800 by way of compensation for the loss of a leg and hand.

We fear that the class of literature which is found to sell best on the cars is steadily deteriorating, and that any effort to arrest its decline would meet with failure. But though our hopes of any amelioration of the evil we have referred to, by the substitution of rational for irrational literature, are small, we would be wanting in our duty if we did not recommend to book agents, railway companies and the travelling public as a seasonable and appropriate companion for the traveller. In the little work now before us, the reader will, we venture to say, find much that is interesting and amusing, and more that is instructive, than in the popular railroad books. The traveller who is carried along in his Pullman car at the rate of 35 miles an hour, must of necessity find his interests engrossed by the analyses of the circumstances under which the railway company will be liable to indemnify him for the loss of his legs in the event of a sudden smash up. He will feel increased respect for his extremities when he finds that an individual got $24,700 for the loss a leg from a railway company.

A perusal of this book would enable those unfortunates whose final destiny appears to be to furnish victims for accidents, to select those modes of exhibiting their peculiar propensity which are remunerative. For instance, you are told that if you stick your elbow out of the window of a railway carriage and it is broken by a passing train, you will recover nothing. A passenger has no business to make an improper use of a window, the object of which is to let light and air *in*, not heads and elbows *out*, and if he does so he must bear the penalty of his own rashness. It is much better to tumble through a hole in the wharf before going on board a vessel, or to put yourself in the way of falling rigging. If you break a limb in this way your sufferings will be alleviated by the reflection that the company will have to pay for it. The indiscreet mother will be comforted with the assurance that if an infant is inconsiderate enough to be born on shipboard, no fare can be charged for it. It appears to be less expensive to be born on ship than to die, for the full fare is still chargeable in the latter case.

The book speaks of the wrongs and rights of travellers by boat, by stage, and by rail. Statistics show that the latter mode of travelling is relatively the least dangerous; it is, moreover, preferred by the philosophical to an accident in the water. As the reflective negro said: "When you're blowed up on de cars, thar you are! but when you are blowed up on de steamer, whar is you?"

Tickets, baggage, insurance, riding, driving, in short every method of locomotion, and the rights and liabilities, the precautions and remedies incident thereto, are discussed by the author of the work before us in a lively and entertaining way. Frequent references are made to the decided cases; and, in fact, the persons of the story discourse, for the most part, in the very language of the judges who have declared the law applicable to the particular subject of discussion. We cannot do better than give a specimen selected at random to show the author's method:

"Look here, old fellow," said Tom, "your horse seems pretty skittish to-day: let us settle the law as to our mutual liability for damages before we run into anything. Who will have to pay? you don't seem very much accustomed to driving."

"Never mind that. The law is clear; as you are merely a passenger in my sleigh, you are not responsible for any misconduct of which I may be guilty while driving—you have nothing to do with the concern.* Even if I had only borrowed the turn-out, and kindly let you take the ribbons, I still would be the party responsible for negligence."†

"That's satisfactory," returned my friend. "But would it not be different if we had both hired the horse and cutter?"

"Quite correct, Mr. T. J.: your store of legal lore is rapidly accumulating. In the case you put, both of us would be equally answerable for any accident arising from the misconduct of either whilst it was under our joint care, ‡ and if we had hired the horses to draw my sleigh and had likewise obtained the services of a driver, then we would not be liable for the negligence or carelessness of that driver." §

* *Davey* v. *Chamberlain*, 4 Esp., 229.
† *Wheatley* v. *Patrick*. 2 M. & W., 650.
‡ *Davey* v. *Chamberlain*, 4 Esp., 229.
§ *Laugher* v. *Forister*, 5 B. & C., 547; *Quarman* v. *Burnett*, 6 M. & W., 499.

"Look out, you had better keep on your own side of the road," said Jones.

"Never mind; I can go on either side, I'll only have to keep my eye a little wider open to avoid collisions; * besides there is plenty of room for any person to pass, so he would have only himself to blame in case of accidents." †

"A person approaching you might think there was not sufficient space."

"If an accident happens it will be a matter of evidence whether I have left ample room or not; ‡ so you can look about you and see."

"But suppose some fiery steed was to run into yours?" urged Thomas.

"My being on the wrong side would not prevent my recovering against a negligent driver, as long as there is room for him to pass without inconvenience. § Whoa, old fellow," I cried, just as I was on the point of running over a philosopher who was walking slowly over a crossing gazing up at the azure vault of heaven. "What a stupid donkey; it is as much his business to be watchful and cautious that he does not get under my sleigh, as it is mine that my sleigh does not get over him!"

The author's plan, it will be seen, is autobiographic. The accidents incident to travel are represented as happening to the writer or his wife, or as coming under their observation. The difficulty of this plan is that the reader's interest in the heroes is apt to weaken his attention to the instruction which it is the object of the book to convey. This danger the author has carefully avoided. We are glad to find copious references to American decisions, which on this branch of the law are of great value, owing to the physical similarity of the two countries. The professional reader might perhaps prefer a treatise written in the plan usually considered in keeping with the grave dignity of the law; it would no doubt ensure a more scientific treatment of the subject. But—shall we say fortunately?—we are not all of the opinion of the famous scholar who thought that "life would be endurable were it not for its amusements," nor are we all as enthusiastic as the learned serjeant who refused to speak of contingent remainders lest he should be tempted to indulge in too long a disquisition on that fascinating theme. We feel sure that lawyers at any rate will be glad to have the bitter pill of the law disguised with sweets of any sort, and to be spared the wry faces which it would be too likely to produce when administered in a less attractive form.

We have only to notice one defect which is unfortunately not uncommon in the books of a legal character which originate with our native lawyers; we mean a want of attention to accuracy of expression. In a book of this kind, it is perhaps less important than in a law book pure and simple; but it will be well when our legal writers become convinced that careful English does not detract from the general merits of a legal work.

The name of the author is not given to the public, but we guarantee his law, so far as such a rash thing can be done. The book itself bears internal evidence of his being most industrious. We wish his somewhat novel publication every success.

* *Pluckwell* v. *Wilson*, 5 C. & P., 375.
† *Chaplin* v. *Hawes*, 3 C. & P., 554.
‡ *Wordsworth* v. *Willan*, 5 Esp., 273.
§ *Clay* v. *Wood*, 5 Esp., 44.

CORRESPONDENCE.

Fusion—Reforms in the Court of Chancery.

To the Editor of the Law Journal.

Sir,—It is now two years since the "Act for the better administration of justice in Ontario" became law. This Act was, on the whole, received by the profession in good part, and an earnest desire was felt that it should carry out the intention for which it was passed. It was too crude in its terms to effect a complete change, but it may be considered as only a "trial act," and probably it was better to see how fusion would take before too great alterations were made. It has long been and still is felt that the administration of justice is too unwieldy and complicated, and that forms and ceremonies are thrown around it which accompany no other profession and no other business. The tendency of the age is to render everything as easy and expeditious as possible, and at the same time inexpensive.

I will endeavour to point out in this and subsequent letters that some changes

are still needed, and particularly in the administration of what is generally known as "Equity."

We all know that the Court of Chancery became a byword, and for no other reason than that its proceedings were complicated, slow and expensive. To a great extent these objections have been removed; but, "give a dog a bad name," &c. I think I may with safety and justice say that there has been a great desire on the part of the judges and the profession to remove the ban under which the Court of Chancery has lain, and changes have been made from time to time which have resulted in lessening expenses and expediting proceedings. Still I think there is room for improvement; and I propose to show in this letter and at some future time how certain changes could be made which would simplify and expedite suits.

To those who are familiar with the proceedings attendant upon a Chancery suit, it must often have occurred that they are tedious and needlessly expensive, especially so in the administration of estates, than which no greater source of litigation exists. Now the suitors, creditors and beneficiaries are tossed from the court to the Master, and from the Master back to the court. There are motions, references, appeals, cross-appeals, hearings on further directions, reports general, and reports of special circumstances in endless variety, to the confusion of the suitor and, in many instances, the absorption of the estate in fees and costs. And not only is this the case with administration suits, but the same red tape clogs suits of a kindred nature, such as those which relate to partnership and trust accounts, and the like.

That some remedy is needed is apparent, and to me it appears that the proper move to make in that direction is to let the proceedings be conducted from beginning to end by the same judge. The principle, I contend, is a true one, that he before whom the cause is first heard should conduct that cause to its termination. What is the absurd and expensive way now resorted to? Take, for instance, the common administration suit. A creditor or beneficiary interested in the estate of a deceased person desires to realise. He serves a notice of motion, returnable before the referee in chambers, who hears it, if not objected to. Should the motion be opposed, then he is ousted of jurisdiction, and the motion stands a week to come before a judge. The matter is then probably enlarged, to enable parties to put in affidavits or cross-examine deponents, &c., after which it is again brought before a judge. The chances are three to one that it will not be the same judge as on the former occasion, up to which time the matter has been brought under the notice of three judicial personages, to say nothing of a probable cross-examination upon affidavits in the interval before a Master or a special examiner. The judge then grants or refuses the application. Should the order be made, it is then sent to a Master who hitherto has had nothing to do with the matter. He then proceeds to take the accounts, adjudicates upon creditors' claims, &c., &c., and at the expiration of six months or more makes his report, which in many cases is appealed from, and now and again both parties are displeased, which gives rise to a delightful cross-appeal, to hear which necessitates two or more copies of the evidence, accounts, &c., being taken in the Master's office. The appeal is then brought on, probably before a third judge, who, to arrive at a decision upon a question of probably a hundred dollars or less, has to wade through a mass of depositions and accounts. The appeal is probably allowed, and then sent back to the Master, who makes a second report; and after an interval of two or more months, the cause is then heard on further directions before a judge, and the chances are against it's being the same judge who heard the appeal. Then a decree is made, directing the lands to be sold and the estate to be realised, the shares of the parties to be ascertained, and what is left of the estate after the payment of costs to be distributed amongst the parties entitled, to do which necessitates a further report of the Master. So that you will see, sir, in a common administration suit it is necessary, apart from solicitors, &c., before it is brought to an end, that five or six functionaries, judicial and otherwise, should have a finger in the pie, to say nothing of a registrar, who has to settle the decrees and orders.

Now why should not this glaring absurdity be removed? I think the evil could be cured by the adoption of my

suggestion, viz.: By providing that the enquiries from the beginning to the end shall be conducted before the same judge, who could hear the motion (and nip many of the suits now needlessly instituted in the bud), and with the assistance of one or more clerks, determine upon the rights of parties, hear the evidence in support of creditors' claims, and by one order settle the rights of the parties and distribute the fund, and thus save months and dollars. The judge, with the assistance referred to, could settle the order, advertise for creditors, &c., and thus cut off appeals, cross-appeals, hearings on further directions, subsequent reports, &c., &c.; and moreover, such a procedure, I contend, would be an immense saving both of time and labour to the judges and profession. If the suit from its inception to conclusion were conducted before the same judge, he would be familiar with its details; and he would, without the expense and trouble now necessary, from his being familiar with the proceedings, be able at once, without a recital of former steps, to determine the question raised.

To the bewildered suitor it must appear inexplicable, why, to wind up an ordinary estate, it should require the intervention of so many officials, be attended with such great expense, and take so many months.

To the effectual working of the system proposed, of course other changes are necessary, to which I will refer in a subsequent letter. Some of these have been touched upon in an able letter which recently appeared in a city daily paper.

A good deal more may be said also upon other subjects requiring the attention of the profession and legislators, such as the question of the assimilation of pleadings to the effectual working of fusion; the propriety of permitting parties to go at once to appeal instead of being compelled to re-hear; as to the propriety of making the county court judges in the smaller counties Masters; of having chambers held as heretofore by the judges, &c.; but these I will reserve for a future number of your journal. I am, Sir,

Yours, &c.,

Reform.

May 26, 1875.

FLOTSAM AND JETSAM.

A fire broke out in the Advocate's Library at Edinburgh recently, and before the flames were got under, about a thousand volumes, principally geographical and historical, were destroyed. The fire is thought to have originated from a furnace used for heating water.

They propose to introduce a little more ceremony into the New York Court of Appeals. The *Albany Law Journal* says:—"The members of the Bar practicing in the Court of Appeals have adopted a resolution, that on the entrance of the Judges the fact shall be announced by the crier, and the lawyers present shall rise and remain standing until the Judges are seated. This is intended as a mark of respect to the Judges and of veneration for justice. This is an excellent step, and commends itself to all who desire to invest the administration of justice in this country with due dignity. The Judges of the Supreme Court of the United States are announced by the crier, and the lawyers, officers, and spectators rise and remain standing until the Judges are seated. The Judges of this Court also wear robes of black silk while discharging their duties. It would not be unbecoming for the Judges of the Court of Appeals to adopt a similar custom in regard to their habiliments. There is, of course, a prejudice in this country against anything approaching the pomp and ceremony of foreign tribunals. But there is no place in the world where ceremonial dignity should be observed more than in the halls of justice; and this irrespective of country or form of government."

The Law and the Lawyers.—Mr. Justice Denman attained the object of his highest ambition when he was raised to the Bench, but having thus far succeeded he seems disposed to over-estimate his own importance, and to strain the law to preserve what he imagines to be the offended dignity of justice. Only a little while since he was heard to invoke the name of the Almighty in an Assize Court, for the purpose of expressing his astonishment that a lout in the gallery should titter at some evidence not altogether decent. He has now called into operation the censorial powers of the member for Londonderry, by committing a person for twelve months for contempt of court under circumstances which certainly justified judicial condemnation, but which were not so extraordinary as to require the severe exercise of arbitrary power, and if there were many Judges on the bench of Mr. Justice Denman's disposition, we should say that judicial power in this

direction could not be too soon placed within well-defined limits. Such an incident, however, being extremely rare, we are less concerned for the result of Mr. Lewis's coming motion on the subject.—*Law Times.*

A Long Imprisonment.—There is a pauper debtor named Kelly, in the county gaol of Roscommon, whose incarceration dates from 23rd June, 1853. This man costs the county £53 a year for his support. Very shortly he will have completed twenty-one years' confinement, at a cost to the ratepayers of £1,166. At the late assizes, one of the Board of Superintendence brought the matter before the grand jury, and a representation was made of the fact to Judge O'Brien, who asked for the production of the warrant under which the man was detained, but it was found that this was not explanatory of the cause, and the Governor of the gaol informed His Lordship he believed is was for contempt of Court, for non-payment of costs in the Court of Probate. As the order of the Court, which was asked for, could not be produced, His Lordship requested the Crown Solicitor to inquire into the matter. The man by this time may have become reconciled to his quarters, but the cesspayers complain of the expence.

A striking illustration of the fallibility of the Court of Exchequer Chamber is afforded by a case which was before the House of Lords on the 9th inst. The case also shows that the Judges of the intermediate court of appeal are disinclined to learn, or to apply, the doctrines of equity, however plain or however controlling they may be. A person who held certain shares in the Shropshire Union Railway Company, as trustee of the company, in breach of the trust, transferred them to one Robson, on whose death his executrix applied to have the shares transferred into her name. The company refused, on the ground that the shares were their property. On application to the Court of Queen's Bench on a *mandamus*, and on a special case being stated, that Court decided in favour of the company. The executrix appealed, and the Court of Exchequer Chamber unanimously reversed the decision of the Court of Queen's Bench. This unanimous court of appeal has now had the satisfaction of learning from Lord Cairns that the case was very simple, and could hardly admit of argument. His Lordship said, and with most admirable candour, "unless the whole of the well-known system of trusts in this country was to be held applicable only to the case of infants, married women, and persons with limited interests, the decision of the Court of Exchequer Chamber could not be upheld."—*Law Times.*

The following are the examples of the attacks of English newspapers on English judges :—The *Morning Post* says : "Mr. Justice Denman will have rendernd an immense service to the nation if the result of the recent committal of Craddock for contempt of court should be that a similar act is rendered impossible for the future." The *Times* says : "We do not say that Mr. Justice Denman was not acting at Hertford within his powers, but we do unhesitatingly say this : 'That the case proves that such powers ought not to be vested in any Judge.'" The *Pall Mall Gazette* says : "We trust that the discussion in parliament will induce the Judges to set bounds for themselves to the authority which they at present exercise with respect to contempt of court. Arbitrary authority of any kind is a dangerous possession, and is apt to grow by invisible accretions in the hands of its possessors ; it is only by the jealous supervision of those for whose ultimate benefit it is conferred, and by the wise self-restraint of those who wield it, that it can be prevented from degenerating into a scandal, if not into an absolute instrument of oppression." The *Morning Advertiser*, commenting on the same case, remarks, "that it hopes to see it made the pivot of re-action, and Sir Alexander Cockburn's pleasant theory and practice of contempt stamped with all the reprobation it merits at the hands of a free people."

Judicial Arrears.—A Parliamentary return ordered on the motion of Sir Sydney Waterlow, shows that in the legal year ending with the Long Vacation of 1874, there were 416 causes tried at Guildhall before judges of the Superior Courts, and there were as many as 786 causes made "remanets." Of Queen's Bench causes there were only 115 tried and 554 remanets. In the same year there were 838 causes tried at Westminster, and 447 remanets ; in the Queen's Bench 236 tried and 270 remanets. In the return from the Court of Exchequer it is stated how many of the causes were made remanets "by consent," viz., 28 of the 59 remanets in London, and 22 of 121 at at Westminster.

Respect for the Bench.—The members of the State of New York practising in the Court of Appeals have resolved, at a meeting specially held for the purpose, that "as a mark of respect to the Chief Justice and associate Justices of this Court, and as an indication of the veneration at all times due to justice, the crier of this

Court be requested, from this time forth, to announce the entrance to the Court-room of the Chief Justice and his associates; and that the members of the bar present rise and remain standing until the Chief Justice and his associates are seated." To us in England such a resolution as this appears very strange. Not only in the Superior Courts of Law and Equity, but in all County Courts and Courts of Quarter Sessions, the members of the legal profession and the public rise at the entrance of the judge or judges of the Court, and remain standing until every member of the bench is seated. We should have supposed that so goodly a custom as this, which has existed "from time whereof the memory of man runneth not to the contrary," would have been transplanted to America with the Common Law. But, as our brethren of New York have only just adopted the usuage, we must content ourselves with the remark that this act on their part is "better late than never."—*Law Journal.*

The Judges at St. Paul's.—On the 18th April, being the first Sunday in Easter Term some of Her Majesty's judges, in accordance with an ancient custom, attended in state the afternoon service at St. Paul's Cathedral. The Lord Mayor, accompanied by the Lady Mayoress, and attended by the Sword and Mace Bearers, and the City Marshal, went from the Mansion House to the Cathedral in his carriage, drawn by four horses, to meet their lordships. There were also present, with that view, Mr. Alderman and Sheriff Ellis, Mr. Sheriff Shaw, Mr. Alderman Finnis, Alderman Sir William Rose, Alderman Sir Thomas Dakin, Mr. Alderman M'Arthur, M.P., Mr. Alderman Figgins, the Common Serjeant (Sir Thos. Chambers, M.P.), the Town Clerk, the Under-sheriffs, and the City Controller. All the civic dignitaries wore their distinctive robes of office, and each carried a bouquet. A large number of the Common Council in their mazarine gowns likewise attended the service. The Judges present were the Lord Chief Baron, Mr. Justice Brett, Mr. Justice Archibald, Mr. Justice Denman, Mr. Justice Field, and Mr. Justice Huddleston, and with them came Mr. Serjeant Robinson and Mr. Serjeant Cox.—*Law Journal.*

That the compounding a felony is illegal may be taken to be established law; but it has been said to be not so plain what the compounding of felony is. Lord Hale, however, appears to have entertained no doubt about the matter. He says (P. C., p. 546), "As to retaking of goods stolen: If A. steals the goods of B., and B. take his goods of A. again to the intent to favour him or maintain him, this is unlawful, and punishable by fine and imprisonment." "And so," he adds in a note, "seems that practice of advertising a reward for bringing goods stolen and no questions asked, which I have heard Lord Chancellor Macclesfield declare to be highly criminal, as being a sort of compounding of felony, for, the goods by that means returning to the right owner, a stop is put to the inquiry and prosecution of the felon, and thereby great encouragement is given to the commission of such offences." And again, at p. 618, "A. hath his goods stolen by B.; if A. receives his goods again upon agreement not to prosecute or to prosecute faintly, this is theft bote, punishable by imprisonment and ransom." A statement of the law which is not affected by the recent case of *Wells* v. *Abraham* (26 L. T. Rep. N. S. 432), in which the Court of Queen's Bench, while affirming the rule, "perhaps coeval with the law of England," that the omission to prosecute suspends the right to sue, refused to set aside a verdict for the plaintiff in trover upon the application of the defendant, on the ground that the facts alleged established a felony in the defendant, and that the plaintiff had since the trial instituted criminal proceedings, the court taking a different view of *Dawkes* v. *Coveneigh* (Style 346) from that taken by Lord Hale. "If a man," says Hale, "feloniously steal goods, and before prosecution by indictment the party robbed brings trover, it lies not; for so felonies should be healed."—*Law Times.*

Swallowing a Writ.—In Manning and Bray's "History of Surrey" we find the following strange story, with a voucher for its truth. In Newington church is buried Mr. Sergeant Davy, who died in 1780. He was originally a chemist at Exeter; and a sheriff's officer coming to serve on him a process from the Court of Common Pleas, he civilly asked him to drink; while the man was drinking Davy contrived to heat a poker, and then told the bailiff that if he did not eat the writ, which was of sheepskin and as good as mutton, he should swallow the poker! The man preferred the parchment; but the Court of Common Pleas, not then accustomed to Mr. Davy's jokes, sent for him to Westminster Hall, and for contempt of their process committed him to the Fleet Prison. From this circumstance, and some unfortunate man he met there, he acquired a taste for the law; on his discharge he applied himself to the study of it in earnest, was called to the bar, made a sergeant, and was for a long time in good practice.—*Irish Law Times.*

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Hilary Term, 38th Victoria.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law, (the names are given in the order in which the Candidates entered the Society, and not in the order of merit):

G. Morrice Rogers.
Warren Burton.
Colin G. Snider.
George B. Gordon.
John Bruce.
Louis W. P. Coulter.
Charles Gamon, under special Act.
W. Darby Pollard, " "

The following gentlemen received Certificates of Fitness:

Haughton Lennox.
J. D. Matheson.
J. T. Lennox.
W. H. Ferguson.
Francis Rye.
John G. Robinson.
F. E. P. Pepler.
T. Caswell.
Alexander Ferguson.
Warren Burton.
David Ormiston.
J. C. Judd.

And the following gentlemen were admitted into the Society as Students of the Laws:

Graduates.

William Malloy.
George F. Shipley.
Eugene Lewis Chamberlain.
——— Nicholls.

Junior Class.

James Haverson.
J. R. Kerr.
Thomas Stewart.
Michael J. Gorman.
Charles Edward Hewson.
John Cowan.
James Alexander Williamson.
J. Panman Ross.
Henry S. Lemon.
Hugh Blair.
Peter V. Georgen.
Frederick Wm. Gearing.
Daniel Byarde Dingman.
Christopher Wm. Thompson.
Reginald D Pollard.
Peter Stewart Ross.

The following are the days fixed by the general orders or the various examinations:

Preliminary Examinations—Second Tuesday before Term. Intermediate Examinations—Tuesday and Wednesday next before Term. Examination for Certificate of Fitness—Thursday before Term. Examination for Call to the Bar—Friday and Saturday before Term.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3; Virgil. Æneid, Book 6; Cæsar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic: Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams. Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1*st year.*—Stephen's Blackstone, Vol. i., Stephen on Pleading, Williams on Personal Property, Griffith's Instatutes of Equity, C. S. U. S. c. 12. C. S. U. C. c. 43.

2*nd year.*—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity the Registry Acts.

3*rd year.*—Real Property Statutes relating to Ontario. Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4*th year.*—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.